

# **Merit System Protection Board Annual Report FY2010**

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

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**FY 2010**  
**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 2010 were:

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

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

The duties of the Merit System Protection Board are contained in: 1) Article 4, *Merit System and Conflicts of Interest*, Section 404, Duties of the Merit System Protection Board, of the Charter of Montgomery County; 2) Chapter 33, Article II, *Merit System*, of the Montgomery County Code; and 3) Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, and July 27, 2010).

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, October 21, 2008, and November 3, 2009) 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 Form to be completed within ten (10) working days.

In accordance with Chapter 21-7 of the Montgomery County Code, a volunteer firefighter or rescuer aggrieved by an adverse final action of the Fire Chief or a local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire and rescue activities, may appeal the action to the Board within 30 days after receiving a final notice of disciplinary action unless another law or regulation requires that an appeal be filed sooner.

After receipt of the Appeal Form, 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 2010.

# **DISMISSAL**

## **CASE NO. 09-11**

### **FINAL 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 the Montgomery County, Maryland, then-Interim Fire Chief to dismiss Appellant, effective March 31, 2009.

### **FINDINGS OF FACT**

This appeal involves the decision of then-Interim Fire Chief,<sup>1</sup> Montgomery County Fire and Rescue Service (MCFRS), to dismiss Appellant. At the time of the events germane to this case, Appellant was an Assistant Chief in MCFRS. Assistant Chief is the third highest rank in MCFRS.<sup>2</sup>

The charges in the dismissal action stem from the events surrounding Appellant's participation in the MCFRS Honor Guard at FedEx Field, which occurred on November 30, 2008. Appellant, who was then the Officer-in-Charge of the MCFRS Honor Guard, had previously received a request for the Honor Guard to participate in a Washington Redskins pre-game ceremony at FedEx Field on November 30, 2008. Hearing Transcript for August 1, 2009 (H.T. II) at 135; County Exhibit (C. Ex.) 5 at 130, 177.<sup>3</sup> On November 29, 2008, Appellant picked up the Honor Guard vehicle (an unmarked Ford Expedition), containing the equipment needed for the event at FedEx Field and drove it to Appellant's home. C. Ex. 5 at 131. On November 30, Appellant drove the Honor Guard vehicle to the Park-n-Ride in College Park to pick up three<sup>4</sup> of the four other Honor Guard personnel. H.T. II at 147. Appellant had placed a cooler in the vehicle. *Id.* at 148. At the Park-n-Ride, one of the Honor Guard members, Captain A, loaded a cooler containing beer into the Honor Guard vehicle. H.T. I at 143, 173.

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<sup>1</sup> The Interim Fire Chief was subsequently appointed as Fire Chief in April 2009. Hearing Transcript for July 22, 2009 (H.T. I) at 356.

<sup>2</sup> The command structure of MCFRS management is as follows: Fire Chief; Division Chiefs; Assistant Chiefs; and Battalion Chiefs.

<sup>3</sup> C. Ex. 5 is the report of the investigation conducted for MCFRS by the Firm. Appellant had challenged the legality of the investigation in Appellant's Motion to Rescind. Because the Board found in its Decision on Appellant's Motion to Rescind (issued the same day as this Final Decision) that the investigation was legal, it cites to the investigation, which consists largely of verbatim transcripts of taped employee interviews, where appropriate.

<sup>4</sup> The three members picked up by Appellant were: Captain A; Firefighter B; and Firefighter C. H.T. I at 142-43. The fourth member of the Honor Guard, Firefighter D, drove separately to FedEx Field. C. Ex. 5 at 131.



After leaving the Park-n-Ride, Appellant and the other three Honor Guard members went to a restaurant for breakfast. H.T. I at 144; H.T. II at 147. Then they went to a grocery store to pick up sandwiches and snacks. Id. The sandwiches were placed in the second cooler, which Appellant had brought with Appellant. H.T. I at 164, 173. The Honor Guard arrived around 10:00 a.m. in the morning at FedEx Field. Id. at 144; C. Ex. 5 at 131-32. They then met up with Firefighter D, the other Honor Guard member for the event. C. Ex. 5 at 131. The Honor Guard proceeded to unload its equipment from the Honor Guard vehicle and took it to an assigned dressing room in the stadium. Id. at 131-32. At approximately 12:45 p.m., the Honor Guard, in uniform, presented the colors at FedEx Field. Id. at 162. The Honor Guard then proceeded back to the dressing room, changed into civilian clothes, received tickets for the game, and returned the equipment to the Honor Guard vehicle. Id. at 132.

At this point, the beer in Captain A's cooler was passed out. H.T. I at 148-49, 175-76, 193. Estimates were that 1-2 beers were consumed by each of the members of the Honor Guard, including Appellant,<sup>5</sup> before they returned to the stadium to watch the game. H.T. I at 176, 193. Once inside the stadium, the testimony reflects that the members bought rounds of beer for each other. H.T. I at 178, 179, 195, 196. Several rounds were consumed. Id. at 179, 196. At some point, the members, except for Firefighter D who had departed, decided to go to a restaurant in the stadium and order some food. Id. at 152, 180, 199. Again, beer was also ordered. Id. Finally, approximately around 6:00-6:30 p.m., the four individuals returned to the Honor Guard vehicle, where they ate the sandwiches purchased that morning and some consumed more beer.<sup>6</sup> H.T. I at 154, 180-81. According to Appellant, Appellant consumed Appellant's last beer at 6:30 p.m.<sup>7</sup> H.T. II at 34. Appellant testified that Appellant had eight beers that day, no larger than 12 ounces each. Id. at 35.

Appellant then drove the three remaining Honor Guard participants back to the Park-n-Ride, along with Captain A's cooler. H.T. I at 156. According to Captain A, some beer still remained in Captain A's cooler when Appellant drove the Honor Guard and the cooler back to the Park-n-Ride. H.T. I at 156, 168; see also C. Ex. 5 at 20. After dropping the others off, Appellant proceeded to drive home to Damascus, MD. H.T. II at 35.

While on I-270, going north, Appellant began to merge from the local lanes to the main lanes. H.T. II at 155; C. Ex. 5 at 134. At approximately 8:01 p.m., Appellant collided with three

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<sup>5</sup> Appellant testified that Appellant had two beers from the cooler before reentering the stadium. H.T. II at 151.

<sup>6</sup> Appellant testified Appellant did not consume any beer when Appellant returned to the Honor Guard vehicle at the end of the game. H.T. II at 154. Rather, according to Appellant, Appellant had Appellant's last beer in the restaurant. Id. at 34-35. However, Firefighter B testified that Firefighter B saw Appellant consume a beer in the parking lot after they left the stadium at approximately 7:00-7:30 p.m. H.T. I at 181, 185; C. Ex. 5 at 28.

<sup>7</sup> During Appellant's investigatory interview, Appellant first claimed Appellant had Appellant's last beer at 5:00 p.m. C. Ex. 5 at 135, 145, 146. Appellant subsequently claimed that Appellant had Appellant's last beer at 6:00 p.m. C. Ex. 5 at 147. However, during the hearing, Appellant stated that Appellant had Appellant's last beer at 6:30 p.m.

vehicles (a Honda, a Montgomery County Police (MCP) car, and a BMW) on the main lanes of I-270. C. Ex. 5 at 134; C. Ex. 5 at 172. According to MCP Officer E, Appellant's Honor Guard vehicle was airborne at the time it hit Officer E's vehicle. H.T. I at 251; C. Ex. 5 at 43. All four vehicles sustained damage. C. Ex. 5 at 173-76.

The driver of the Honda, Mr. F, approached Appellant's vehicle after the collision. H.T. I at 29. He tapped on Appellant's window and Appellant opened the door. Id. Mr. F asked if Appellant hit him and Appellant replied that Appellant had hit something. Id. Appellant then came out of the Honor Guard vehicle and almost fell over. Id. at 29, 31. Mr. F grabbed Appellant and held Appellant for a second so Appellant would not fall. Id. Mr. F testified that he smelled alcohol on Appellant's breath. Id. at 30-31, 33, 35-36. Mr. F also testified that Appellant was slurring Appellant's words and had to repeat everything two or three times before Mr. F could understand what Appellant was saying. Id. at 35. Mr. F subsequently informed one of the officers at the scene that he believed Appellant was intoxicated and asked that the Police Officer give Appellant a breathalyzer test. Id. at 36; see also C. Ex. 5 at 51, 58.

Mr. F noticed at the time he grabbed Appellant to prevent Appellant from falling that Appellant was wearing a jacket that had an emblem on it.<sup>8</sup> Id. at 29. Mr. F asked Appellant if Appellant was a Police Officer and Appellant replied that Appellant was a Firefighter. Id. Officer E subsequently asked Appellant whether Appellant was okay and who Appellant was, but Appellant failed to respond.<sup>9</sup> C. Ex. 5 at 45; H.T. I at 253.

Mr. F went back to his vehicle to get his information and Appellant came up to him and said "let me give you a card. Let's just take care of this out of, you know, let's not get the police involved." H.T. I at 30. Mr. F refused to do so and got in his vehicle. Id.

Appellant contacted Assistant Chief (A/C) G, who lives near Appellant, at 8:24 p.m. and asked A/C G whether A/C G could give Appellant a ride home. C. Ex. 6 (phone records for Appellant); H.T. II at 40; C. Ex. 5 at 136. According to Appellant, Appellant contacted A/C G because Appellant's head was spinning and Appellant needed a logical thinker at the time to pull it together for Appellant. C. Ex. 5 at 149. A/C G, who was off-duty, agreed to help Appellant. Id. at 102-03.

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<sup>8</sup> Officer E testified that Appellant had a Fire and Rescue jacket on. Specifically, Officer E saw the Fire and Rescue emblem. H.T. I at 253, 257; C. Ex. 5 at 45. Appellant, while acknowledging that Appellant wore a fleece pullover with the Fire and Rescue emblem on it, asserts that it was underneath Appellant's rain jacket all day and not visible. H.T. II at 149, 153, 176, 181-82.

<sup>9</sup> Appellant's version of events differs considerably. According to Appellant, Appellant "immediately hopped out and started checking on the welfare of everybody. Make sure there weren't any injuries." C. Ex. 5 at 135. As discussed in greater detail infra, because of the factual dispute as to what occurred at the scene of the collision, the Board has made credibility determinations with regard to the witnesses. The Board found Mr. F to be credible; it did not find Appellant's testimony credible.

Prior to arriving at the scene of the collision, A/C G had several other discussions with Appellant. C. Ex. 6 (phone records for Appellant and A/C G). During one of the discussions, Appellant told A/C G that Appellant had “f . . ked up.”<sup>10</sup> C. Ex. 5 at 152, 153. During this conversation, A/C G learned that Appellant had been driving a County vehicle. Id.; C. Ex. 5 at 104. Upon learning this, A/C G, who did not know whether Appellant had called the Duty Operations Chief (DOC),<sup>11</sup> C. Ex. 5 at 104, decided to call DOC H. Id. at 104-05.

A/C G contacted DOC H at approximately 8:58 p.m. (and again at 9:12 p.m.). C. Ex. 6 (phone records for DOC H and A/C G). According to DOC H, A/C G informed DOC H that Appellant had been involved in an accident, that four vehicles, including a County Police Officer’s vehicle were involved, and that Appellant had been drinking and had stopped drinking at half-time.<sup>12</sup> H.T. I at 214, 216, 217; C. Ex. 5 at 78. A/C G also informed DOC H that Appellant had taken a field sobriety test so MCFRS just needed somebody to investigate the accident. C. Ex. 5 at 78. A/C G then offered to do the accident investigation. C. Ex. 5 at 77-78; H.T. I at 218. DOC H told A/C G that was not a good idea as it might look as if there was a cover-up, especially given the fact that alcohol was involved. H.T. I at 218.

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<sup>10</sup> Appellant recalled telling A/C G that Appellant “screwed up.” C. Ex. 5 at 138, 139.

<sup>11</sup> Again, Appellant’s version of events differs. Appellant recalled having conversations with A/C G, during which Appellant “made sure that [A/C/ G] understood that I was in the Honor Guard vehicle and clearly had in excess of \$2,500 worth of damage and that we’ve got to make the appropriate notifications. A/C G said A/C G would take care of it. A/C G did get a hold of [DOC H].” C. Ex. 5 at 136. During the hearing, Appellant testified that Appellant didn’t contact the Duty Operation Officer because Appellant “had Assistant Chief G take care of that for me.” H.T. II at 38.

<sup>12</sup> A/C G did not recall having a specific conversation with DOC H about alcohol. According to A/C G, A/C G did not learn about Appellant’s drinking at the game until A/C G arrived at the scene of the collision. C. Ex. 5 at 108, 109. A/C G indicated A/C G may have told DOC H that Appellant sounded “a little off” but does not recall mentioning alcohol specifically. Id. at 109. However, A/C G did testify: “I could tell that there was something wrong when Appellant talked to me on the phone. At least, maybe not initially, but the more Appellant started calling me and talking to me the more I could tell that there just wasn’t something right . . . . So anyway, and I’m thinking to myself I know Appellant and Appellant probably had had a beer or two you know at the Redskins game . . . . In my mind that’s what I’m thinking. I didn’t really have that conversation with Appellant and I don’t know that I had that conversation with DOC H, although I may have. I may have said something to DOC H about you know I’m concerned because Appellant is in the Honor Guard vehicle coming from the Redskins game. I may have had that conversation.” Id. at 115-16.

As A/C G was not called as a witness at the hearing, the Board is unable to ascertain A/C G’s credibility. However, the Board had the chance to assess DOC H’s demeanor during the hearing and finds DOC H to be credible. Moreover, Appellant testified during the Firm investigation that when Appellant called A/C G about Appellant’s collision, Appellant told A/C G that Appellant had screwed up and that Appellant had been drinking. C. Ex. 5 at 138.

A/C G had a second conversation with DOC H, who told A/C G that they needed “to make sure we do this by the book.” C. Ex. 5 at 78, 105. DOC H then suggested Battalion Chief (B/C) I do the investigation. Id.; H.T. I at 219. A/C G indicated A/C G did not want B/C I to do the investigation. C. Ex. 5 at 78; H.T. I at 219. DOC H then suggested the Safety Officer, Captain (Capt.) J, do the investigation. C. Ex. 5 at 78; H.T. I at 220.

DOC H subsequently notified the Interim Fire Chief, Division Chief K (who was Appellant’s supervisor, H.T. II at 50) and Assistant Chief L about Appellant’s collision. H.T. I at 220-21.

DOC H realized that because of the four vehicles involved in the crash, the \$2,500 threshold for ordering a post-accident test pursuant to MCFRS policy would be reached. H.T. I at 222. When DOC H spoke with Capt. J, Capt. J expressed reluctance about taking Appellant, who was a higher ranking officer, for post-accident testing. Id. Accordingly, DOC H decided to send Battalion Chief (B/C) M to take Appellant to the Fire Rescue Occupational Medical Service (FROMS) for the testing. Id. DOC H contacted B/C M about escorting Appellant to FROMS. Id.; C. Ex. 5 at 93.

B/C M contacted a 24-hour number to arrange for personnel from CMA Services<sup>13</sup> to come to FROMS to do the testing. C. Ex. 5 at 93. B/C M arranged to meet with CMA Services’ personnel at 10:30 p.m.<sup>14</sup> at FROMS. Id. at 24. DOC H instructed both Capt. J and B/C M to contact DOC H immediately if anyone tried to influence either of them to do things differently than they believed was correct. H.T. I at 222-23.

In the meantime, A/C G arrived at the scene at approximately 8:45-9:00 p.m. and was told by a Police Officer that Appellant was going to be charged with failure to avoid a collision. C. Ex. 5 at 107, 108, 155. A/C G was also informed that there had been an implication of possible alcohol so the police had done a field sobriety test on Appellant, who had checked out fine.<sup>15</sup> Id. at 108. A/C G spoke with Appellant and asked how many beers Appellant had actually had. C. Ex. 5 at 110. Appellant responded that Appellant had had four to five beers and had stopped drinking at half-time.<sup>16</sup> Id. A/C G told Appellant to get inside A/C G’s vehicle and they discussed the fact that there would be ramifications as a County vehicle was involved. Id.

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<sup>13</sup> The County contracts with CMA Services to perform drug and alcohol collection services. H.T. I at 39, 55.

<sup>14</sup> According to the CMA technician, the appointment was for 10:25 p.m. H.T. I at 87.

<sup>15</sup> According to Appellant’s version of events, one of the Police Officers at the scene, a Sergeant, came up to Appellant and asked Appellant if Appellant had been drinking. Appellant testified that Appellant responded: “Absolutely. I had beer during the game. I was coming from the game.” C. Ex. 5 at 142.

<sup>16</sup> This account differs markedly from Appellant’s testimony at hearing. Appellant indicated Appellant had eight beers and consumed the last one at approximately 6:30 p.m. H.T. II at 35.

According to A/C G, Appellant asked: “Is there any other way we can do this?” Id. A/C G indicated they needed to do it by the book and Appellant agreed. Id.

At some point, Appellant was given a citation for failing to avoid a collision. C. Ex. 5 at 41. According to Appellant, the Police Officer told Appellant the Police Officer had to give Appellant the citation.<sup>17</sup> Id. Appellant responded, “I understand. You know, I made a mistake. . . I’m clearly at fault here. I take full responsibility.” Id.

Capt. J arrived at the scene at approximately 9:19 p.m. and began Capt. J’s investigation. H.T. I at 280. Capt. J got into the car with A/C G and Appellant and had a brief discussion with them. Id. Capt. J asked Appellant about the collision and Appellant indicated Appellant couldn’t remember much about the collision. Id. at 281. Capt. J had asked the County Police Officer whether there was anything else that needed to be done or could Appellant leave. Id. at 282. The Police Officer indicated Appellant was free to leave. Id. Capt. J told both A/C G and Appellant that the Police Officer was done and recommended they get off the highway, as the weather was really bad. Id. at 282-83. A/C G and Appellant had just heard from Battalion Chief M, who had been designated to take Appellant to FROMS for testing. Id. at 283. Because B/C M was on B/C M’s way to the scene, A/C G and Appellant indicated to Capt. J they would wait for B/C M to arrive. Id.

Capt. J went back to Capt. J’s County car to finish up Capt. J’s investigation and approximately ten minutes later B/C M arrived. H.T. I at 284. B/C M pulled up next to Capt. J’s window, looked at Capt. J, who flagged B/C M to pull past the collision.<sup>18</sup> Id. B/C M then got out of B/C M’s car and entered A/C G’s car. Id. B/C M asked Appellant what had happened. C. Ex. 5 at 95. Appellant informed B/C M Appellant had been at the Redskins game, done the Honor Guard presentation, and had a couple of beers. C. Ex. 5 at 95, 98, 99.

DOC H spoke with Capt. J again after DOC H arrived at the scene and confirmed that there was at least \$2,500 in damages based on the collision. C. Ex. 5 at 80. At some point, DOC H had a discussion with the Interim Fire Chief about the collision. H.T. I at 357. The Interim Fire Chief directed DOC H to go to the scene of the collision. Id. DOC H attempted to go to the

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<sup>17</sup> According to Appellant, the Police Officer who issued the citation stated:

Look sir I’ve got to do this. It’s a generic moving violation under the circumstances. . . .If you do not want to pay and go to court, I wasn’t planning on being there.

C. Ex. 5 at 141.

<sup>18</sup> B/C M’s version of events differs from Capt. J’s. According to B/C M, when B/C M arrived at the scene of the collision, B/C M never saw Capt. J. H.T. I at 302. The Board had the opportunity to observe both B/C M and Capt. J and finds that Capt. J is the more credible witness, as B/C M appeared evasive and did not make eye contact with the Board members as B/C M testified. Also, A/C G testified that Capt. J was at the scene when B/C M arrived. C. Ex. 5 at 157.

scene but was unable to do so as the police had blocked the entrance from the local lanes of I-270 to the express lanes and the accident scene was on the express lanes. H.T. I at 224. DOC H saw A/C G's vehicle, B/C M's vehicle, two police cars and a tow truck loading the Honor Guard vehicle when DOC H passed the accident scene the first time at about 9:25 p.m. H.T. I at 224-25. DOC H turned around and tried again to get to the accident scene at about 9:35 p.m. but was unsuccessful Id. at 224-26.

DOC H then contacted A/C G to ascertain how much longer they would be at the scene and told A/C G DOC H would meet them at FROMS. H.T. I at 227; C. Ex. 5 at 81. A/C G told DOC H that they were waiting for the police to finish up the paperwork and they would meet DOC H at FROMS. Id. DOC H recalled A/C G telling DOC H that Appellant had quit drinking at half-time and was nervous about having the accident. C. Ex. 5 at 81. DOC H became convinced that A/C G and Appellant were stalling to put more time between the accident and the testing at FROMS. Id. at 82.

B/C M waited with Appellant and A/C G for the Honor Guard vehicle to be towed. H.T. I at 303. Approximately twenty minutes later, the Honor Guard vehicle was towed. Id. While waiting for the vehicle to be towed, Appellant told B/C M that Appellant needed to use the bathroom.<sup>19</sup> Id. at 305-06. B/C M suggested that they stop at the 7-11 on Shady Grove Road. Id. at 305. A/C G left the scene before B/C M and Appellant and met them at the 7-11. C. Ex. 5 at 96-97; H.T. I at 305. B/C M remained in his car while Appellant and A/C G went inside the 7-11. C. Ex. 5 at 96; H.T. I at 305. A/C G bought water for both of Appellant and A/C G. C. Ex. 5 at 122. When Appellant returned to B/C M's car, Appellant had a bottle of water. H.T. I at 306.

Appellant and B/C M arrived at FROMS at 10:50 p.m. H.T. I at 90, 228. DOC H was already there, waiting for them. Id. at 228. Appellant signed a consent form and then underwent a breathalyzer test and provided a urine sample.<sup>20</sup> Id. at 93-94; C. Ex. 20. The CMA technician, Ms. N, who performed the breathalyzer test, could smell alcohol on Appellant, and testified Appellant was off balance (i.e., not steady on Appellant's feet) and that Appellant's speech was slurred.<sup>21</sup> H.T. I at 94, 99.

The result of Appellant's first breath alcohol test (BAT) was a reading of .141. C. Ex. 14. Because the reading was greater than .02, protocol required that Appellant be given a second test. H.T. I at 53. The breathalyzer testing machine automatically locks for fifteen minutes between tests. Id. at 80, 95. Appellant was not permitted to eat or drink anything until Appellant was

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<sup>19</sup> According to Appellant, Appellant told B/C M that Appellant was thirsty and needed to use the bathroom. C. Ex. 5 at 143. A/C G offered to get Appellant a bottle of water. Id.

<sup>20</sup> The County collects a urine sample to test for drugs. H.T. I at 262, 264. The lab that the County uses tests the sample for both drugs and alcohol and reports back on both. See C. Ex. 1 to County's Response to Appellant's Motion to Rescind. However, it is the County's practice to disregard the results from the urine test regarding alcohol. Id.

<sup>21</sup> DOC H also testified that Appellant smelled like alcohol when Appellant arrived at FROMS and looked as if "Appellant was trying to hold Appellant's self together." H.T. I at 228.

retested. Id. at 80. After fifteen minutes had elapsed, Appellant was retested and a reading of .143 resulted. Id. at 51-52. By definition, these readings indicated that Appellant was under the influence of alcohol. The breathalyzer machine printed out the results of the tests. Id. at 51; C. Ex. 14. After the machine printed out the results, the County has the technician transcribe the results onto the Step 3 part of the Alcohol Testing Form (Non-DOT).<sup>22</sup> H.T. I at 50-51.

Appellant also gave a urine sample at FROMS. H.T. I at 41. The urine sample was tested for drugs and came back negative. See C. Ex. 1 to County's Response to Appellant's Motion to Rescind. The lab that does the urine testing for the County also tests for alcohol. Id. This test came back positive. Appellant Ex. 3. However, as the County disregards the urine test for alcohol, it never notified MCFRS of the positive results of the test. See C. Ex. 1 to County's Response to Appellant's Motion to Rescind.

The next morning, the Interim Fire Chief called a meeting to discuss the collision involving Appellant. H.T. I at 322. At that point in time, MCFRS did not have an Internal Affairs Officer as he had left County employment. H.T. I at 122, 322, 359-60. The Interim Fire Chief reviewed the alternatives available for conducting an investigation. Id. at 360. The Internal Affairs office had a Battalion Chief, who was at a lower rank than the Assistant Chief involved in the collision. Id. The Interim Fire Chief indicated that it was not a good practice to have a lower ranking officer investigate a higher ranking official. Id.; see also H.T. I at 122. Also, the Interim Fire Chief testified that the Interim Fire Chief did not believe the Fire Department should be investigating itself with this high profile case and given that a high level Fire Department official was involved. H.T. I at 360. The decision was made to contract out the investigation to the Firm, which had done work for MCFRS in the past. H.T. I at 322, 361. The Interim Fire Chief testified that the Interim Fire Chief wanted an outside investigator to make sure the Interim Fire Chief had all the facts and information so as to enable the Interim Fire Chief to make "an informed" decision on any potential disciplinary action. H.T. I at 358-59.

The Firm conducted the investigation from December 16-23, 2008,<sup>23</sup> and provided it to MCFRS on January 16, 2009. C. Ex. 5. The Interim Fire Chief reviewed the investigative report several times. H.T. I at 361. The Interim Fire Chief then had discussions with Assistant Chief L, of Administrative Services,<sup>24</sup> id. at 334, regarding taking disciplinary action against Appellant. Id. at 333. Sometime prior to the Statement of Charges being prepared, the Interim Fire Chief informed A/C L that the Interim Fire Chief wanted to dismiss Appellant. Id. at 333-34. On February 9, 2009, Appellant received the Statement of Charges, containing eleven charges and

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<sup>22</sup> In the instant case, the CMA technician made an error in the transcription. H.T. I at 58-59. She indicated that the reading at 22:53 was ".143". Id. at 58; C. Ex. 14. In fact, the reading at 22:53 was ".141". C. Ex. 14. The subsequent reading at 23:10 was ".143". Id.

<sup>23</sup> The Firm's investigation consisted of a series of fourteen interviews that were tape recorded and then transcribed, as well as a timeline. C. Ex. 5; Appellant Ex. 31 (Claim Outside of Contract Letter at 2).

<sup>24</sup> Part of A/C L's duties in Administrative Services is to oversee the drafting of a Statement of Charges. H.T. I at 334.

proposing Appellant's dismissal. C. Ex. 1.

On March 6, 2009, Appellant responded to the Statement of Charges, denying most of the charges, asserting Appellant was not on duty during the events in question, and alleging that the results of the BAT were inaccurate. C. Ex. 2. In addition, Appellant requested Appellant be allowed to enter into a Memorandum of Understanding, like other Firefighters, and that no disciplinary action be taken against him. Id.

On March 24, 2009, Appellant received a Notice of Disciplinary Action – Dismissal, dismissing Appellant from employment effective March 31, 2009. C. Ex. 3.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### County:

- Appellant failed to get permission from the Fire Chief for the Honor Guard to participate in the pre-game ceremony at FedEx Field.
- Appellant transported alcohol in a County vehicle in violation of County and MCFRS policy.
- Appellant was on duty on November 30, 2008.
- Appellant was under the influence of alcohol, in violation of MCFRS policy, when Appellant drove the Honor Guard vehicle after the conclusion of the game.
- Appellant had the odor of alcohol on Appellant's breath, in violation of MCFRS policy, when Appellant drove the Honor Guard vehicle after the conclusion of the game.
- Appellant, in violation of MCFRS policy, drove a County vehicle within four hours of consuming alcohol.
- Maryland law only permits testing for an individual's alcohol concentration by blood or breath; it does not permit testing urine to determine alcohol concentration.
- Appellant's BAT results were accurate.
- Appellant failed to contact Appellant's supervisor or the Emergency Communications Center (ECC) as required by MCFRS policy after Appellant's collision.
- Appellant lied during the Firm's investigation when Appellant asserted that Appellant only drank 6-8 beers before the collision.

#### Appellant:<sup>25</sup>

- As participation by the Honor Guard in the Redskins game was a reoccurring event for several years, Appellant did not need specific permission from the Fire Chief for the Honor Guard to participate. Nevertheless, the prior Fire Chief agreed to the Honor

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<sup>25</sup> Many of Appellant's arguments regarding the validity of Appellant's discipline are discussed in the Board's Decision on Appellant's Motion to Rescind. As the Board addressed these arguments in its Decision on Appellant's Motion to Rescind, these arguments are not repeated in this Final Decision.



- Guard's participation in February 2008.
- At no time while Appellant was transporting Capt. A's cooler to the stadium was Appellant aware that the cooler contained alcohol. When Appellant drove the Honor Guard and the cooler back to the Park-n-Ride, Appellant did not know whether there were any beers remaining in the cooler.
- Appellant was not on duty when Appellant was returning from the stadium. Appellant was only on duty when the Honor Guard presented the colors at the game.
- The results of the BAT test were inaccurate.
- Assistant Chief G contacted the Duty Operations Chief H, on Appellant's behalf after Appellant's collision.
- There was no need to contact ECC as a Police Officer at the scene contacted ECC.
- Appellant did not lie during the Firm's investigation.

### **APPLICABLE LAWS AND REGULATION**

**Title 10 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland**, which states in applicable part:

**§ 10-307. Chemical test for alcohol, drug or controlled dangerous substance content - Results of analysis and presumptions.**

(a) *In general.*-

(1) In any criminal, juvenile, or civil proceeding in which a person is alleged to have committed an act that would constitute a violation of Title 2, Subtitle 5, § 2-209, or § 3-211 of the Criminal Law Article, or with driving or attempting to drive a vehicle in violation of § 16-113, § 16-813, or § 21-902 of the Transportation Article, the amount of alcohol in the person's breath or blood shown by analysis as provided in this subtitle is admissible in evidence and has the effect set forth in subsections (b) through (g) of this section.

(g) *Under the influence of alcohol per se.*- If at the time of testing a person has an alcohol concentration of 0.08 or more, as determined by an analysis of the person's blood or breath, the person shall be considered under the influence of alcohol per se as defined in § 11.174.1 of the Transportation Article.

**Montgomery County Code, Chapter 21, Fire and Rescue Services, Section 21-3, Fire Chief Division Chiefs**, which states in applicable part:

(e) The Fire Chief must appoint an Internal Affairs Officer, after considering any recommendation by the Commission. The Officer must assist the Chief in monitoring compliance with County laws, regulations, policies, and procedures and investigate matters assigned by the Chief.

**Montgomery County Personnel Regulations (MCPR), Section 33, Disciplinary Actions** (as amended December 11, 2007, and October 21, 2008), which states in applicable part:

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

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

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

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

**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;
- (1) uses, possesses, sells, or transfers alcohol or an illegal drug to another person while on duty, on County government property, or in a County vehicle unless the employee's County employment requires such conduct;

**33-6. Disciplinary process.**

- (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; . . .
  - (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 Fire and Rescue Commission, Executive Regulation No. 22-00 AM, Code of Ethics and On-Duty Personal Conduct, effective date 04/09/02**, which states in applicable part:

**Sec. 3. Definitions.**

**k. On-Duty Personnel.**

1. For purposes of this regulation, MCFRS personnel are “on-duty” when they:
  - A. are involved with the assigned service, business, activity, or work of MCFRS;
  - B. work during scheduled hours;
  - C. act or represent MCFRS in an official capacity; or
  - D. provide direct emergency care or services to the public.
2. In addition, consistent with the Fire and Rescue Commission’s authority under County Code Sections 21-2(d)(3) and 21-19, the standards of conduct in the regulation apply to any MCFRS personnel who:
  - A. are present at, on, or in any MCFRS premises, apparatus, or vehicle; . . .

**Sec. 4. Policy.** It is the policy of the Fire and Rescue Commission to ensure that all **on-duty personnel** maintain an exemplary standard of personal integrity and ethical conduct in their relationships with each other and with the public at all times. **On-duty personnel** must conduct themselves in a professional manner that is beyond reproach.

- c. **Personal Conduct.** **On-duty personnel** must behave in a professional manner that reflects favorably on the **Montgomery County Fire and Rescue Service** at all times. They must not commit any act that constitutes **conduct unbecoming** a member of the fire and rescue service.
5. **On-duty personnel** must not possess, be under the influence of, or

consume an alcoholic beverage while on duty. In addition, **personnel** must not consume an alcoholic beverage within four hours before going on duty.

A. All **on-duty personnel** must not operate a **LFRD** or County vehicle while under the influence of, or within four hours after consuming any alcoholic beverage.

13. **MCFRS personnel** must not make any false or misleading statements during the course of an investigation, or in order to initiate an investigation.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 102, Honor Guard, dated 09/25/92**, which states in applicable part:

Policy

3.0 The Department will maintain a permanent Honor Guard to participate in ceremonial details, funerals for Montgomery County Fire and Rescue personnel and represent the Department as authorized by the Director.

3.4 The Honor Guard will be utilized at the direction of the Director, or in the Director's absence, the First Deputy Chief.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 502, Code of Conduct, dated 05/06/96**, which states in applicable part:

CODE OF PERSONAL CONDUCT

5.4 Employees will not consume or be under the influence of any alcoholic beverage or have alcohol on the breath while on duty or while wearing any part of the uniform with the DFRS insignia. All employees are prohibited from operating a County or Corporation vehicle while under the influence of alcoholic beverages or with the odor of alcohol on the breath.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 503, Disciplinary Action Procedures, dated 04/25/95**, which states in applicable part:

PROCEDURE

5.6 The Director will issue the statement of charges.

5.7 The employee responds in person or in writing to the charges within designated time limits:

- 5.8 The Director reviews employee's response to the charges, and determines appropriate action.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 529, Internal Affairs, dated 09/0 9/97, which states in applicable part:**

POLICY

- 4.1 Incidents investigated by the Internal Affairs Section may include but are not limited to:
- a. Those actions of an employee which appear to be in violation of law, Department policy and procedure or other statute which could result in suspension, demotion, or dismissal.

...

- 4.10 Employees are required to truthfully and promptly answer questions concerning performance of duty, adherence to Department procedures, or suspected misconduct.

RESPONSIBILITY

...

- 5.6 Director - The Director will have full and final authority and responsibility over all matters relating to the Internal Affairs Section.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 602, Assignment and Use of DFRS Administrative and Support Vehicles, dated 01/09/98, which states in applicable part:**

POLICY

- 4.14 All occupants must wear seat belts when the vehicle is in motion. Vehicle operators of any County-owned vehicle must stop and assist any citizen who requests or appears in need of assistance.
- 4.16 All employees are prohibited from operating a County-owned vehicle while under the influence of alcoholic beverages or with the odor of alcohol on the breath or after having ingested any substance that may impair their ability to operate the vehicle.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 605, Vehicle Accident Investigation and Reporting, dated 03/11/92, which states in applicable part:**

## RESPONSIBILITIES

- 5.0 DFRS employees who drive and operate vehicles owned, loaned or leased to Montgomery County or the fire and rescue Corporations are responsible for:
- a. reporting all accidents and incidents to their immediate supervisor by the most expeditious means available;
  - b. reporting accidents and incidents to ECC and requesting emergency assistance as appropriate. Request, through ECC, the Police Department, the Duty Officer, and the DFRS Duty Chief; . . .

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 809, Substance Abuse Testing and Rehabilitation, dated 05/08/94**, which states in applicable part:

## DEFINITIONS

- 3.16 Post-Accident Testing - Substance abuse screening required when an employee is the operator of a vehicle involved in an accident resulting in personal injury or at least \$2,500 in property damage.

## POLICY

- 4.0 The impairment of an employee due to drug abuse constitutes a danger to the employee, fellow employees, and the general public. As a result, the following policy, while safeguarding the employee's fundamental rights to privacy will be instituted and administered by the County for the purpose of preventing drug and alcohol abuse and rehabilitating employees who are affected by drugs and alcohol. Nothing in this policy shall be construed to limit management's authority to properly discipline employees.

- 4.21 Reasons for Testing.
- a. Reasonable Suspicion. The evidentiary standard which must be met before a "for cause" drug test is required of an employee in a public safety position. In order to meet this standard, the Director or designee must determine, based on specific objective facts and reasonable inferences drawn from these facts, that there is a reasonable basis to suspect that a test would show that the employee has drugs/alcohol in his/her body.
  - b. Accidents:
    2. An employee who is the operator of a County or Corporation-owned vehicle that is involved in a property damage accident

resulting in at least \$2,500 damage must be tested immediately after the police authority having jurisdiction over the accident authorize that the operator may leave the scene.

## PROCEDURE

### 6.0 When reasonable suspicion exists that an employee may be abusing drugs:

- i. If the confirmatory test is positive the employee will be placed on approved leave and will be allowed to use available sick leave, annual leave, compensatory leave, or leave without pay, pending conclusion of the matter.
- j. After confirmation of the test result, the employee must be provided within 30 calendar days of specimen collection with:
  1. a copy of the laboratory test indicating the test result;
  2. a copy of the Department's written policy on Substance Abuse Testing and Rehabilitation, #809;
  3. If applicable, written notice of the Department's intent to take disciplinary action, terminate employment, or change conditions of continued employment; and
  4. notice of the right to request independent testing of the same sample by a different certified laboratory.
- k. The Director or designee will be notified by the Employee Medical Examiner, in writing, of a confirmed positive or negative result as indicated on the consent form.
- l. An employee may specify another laboratory for confirmatory testing of a positive specimen at his/her own expense. Upon request, OMS will provide the employee with a current list of certified laboratories.

### 6.1 Follow up Procedure of Confirmed Positive Test Results.

- b. If feasible, the Employee Medical Examiner will inform the employee of a confirmed positive test result prior to notifying the Director, Department of Fire and Rescue Services or designee. The employee will have the opportunity to discuss the test results with the Employee Medical Examiner.
- d. If the employee has a confirmed positive drug test result, the Employee Medical Examiner will advise the individual of counseling and

rehabilitation resources.

- h. Within 30 days of the test, the Department must provide the employee with copies of this procedure; notice of intent to take action; and notice of the right to have an independent test of the same sample.

### ISSUES

1. Has the County proven its charges by a preponderance of the evidence?
2. Based on the charges sustained, is the penalty of dismissal excessive?

### ANALYSIS AND CONCLUSIONS

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

##### A. The Board's Standards For Determining Credibility

Because the testimony of various witnesses conflict with the testimony of other witnesses, the Board had to make credibility determinations with regard to the witnesses. 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)).

B. Applying The Board’s Credibility Standards In The Instant Case, Appellant’s Testimony Lacks Credence.

The Board had ample opportunity to directly observe the demeanor of Appellant during Appellant’s testimony. The Board finds that Appellant was evasive and less than forthcoming during Appellant’s testimony and that Appellant’s testimony was inconsistent with testimony Appellant had previously given in this matter.<sup>26</sup> The Board also finds that Appellant was defensive and Appellant’s testimony was self-serving.

For example, Appellant’s discussion of when Appellant actually stopped drinking at the FedEx Field changed over the course of time. A/C G testified during the Firm’s investigation that A/C G specifically asked Appellant when Appellant had Appellant’s last beer and Appellant told A/C G that Appellant stopped drinking at half-time.<sup>27</sup> C. Ex. 5 at 110, 122. Obviously believing Appellant was telling the truth, A/C G related this version of events to DOC H. C. Ex. 5 at 78, 81. Appellant first testified during the Firm’s investigation on December 16, 2008 that Appellant had Appellant’s last drink at conclusion of game.<sup>28</sup> C. Ex. 5 at 144. Appellant then changed Appellant’s mind during the Firm’s investigation, opining Appellant stopped at 5:00 p.m. Id. at 145. After being told by the Firm’s investigator that Appellant’s version of when Appellant stopped drinking and how much Appellant had drunk did not add up, Appellant stated: “Maybe my mind was hopeful it was 5 o’clock . . . .” C. Ex. 5 at 146. Appellant concluded Appellant’s investigatory interview with the Firm by guessing that Appellant drank until 6:00 p.m. Id. at 147. Nevertheless, during the hearing in this matter, Appellant testified that Appellant consumed Appellant’s last beer at 6:30 p.m., some two hours after the conclusion of the game. H.T. II at 34. Firefighter B testified that Appellant had Appellant’s last beer at 7:00 p.m. H.T. I at 181, 185.

Similarly, Appellant’s version of how many beers Appellant had evolved over the course of time. A/C G testified that A/C G expressly asked Appellant how many beers Appellant had and Appellant told A/C G only 4-5 beers. C. Ex. 5 at 110, 122. During the Firm’s investigation, when told by the investigator that Appellant’s drinking only 5 beers wouldn’t “wash with the math”, given the fact that Appellant tested .14, C. Ex. 5 at 145, Appellant then guessed that

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<sup>26</sup> As previously noted, Appellant gave testimony during the Firm’s investigation into Appellant’s collision. While Appellant sought to claim that the Firm’s investigation was illegal, the Board, in denying Appellant’s Motion to Rescind, concluded otherwise.

<sup>27</sup> It would appear that half-time occurred around 3:00 p.m. See Timeline, C. Ex. 5 at 162.

<sup>28</sup> The game concluded at 4:10 p.m. See Timeline, C. Ex. 5 at 162.

perhaps Appellant drank 6-8 beers. C. Ex. 5 at 147.

Appellant was adamant during the hearing that Appellant had no beer to drink in the parking lot after game, claiming the last beer Appellant consumed was in the restaurant. H.T. II at 34-35, 154. However, Firefighter B testified that Appellant had Appellant's last beer in the parking lot after leaving the restaurant. H.T. I at 181, 185.

Appellant's testimony was also self-serving and at times defensive. When asked why Appellant didn't call DOC H the night of the collision, Appellant stated: "I had Assistant Chief G take care of that for me." H.T. II at 38. When asked why Appellant didn't take care of making the contact with DOC H, Appellant asserted that A/C G told Appellant that A/C G would take care of it for Appellant. Id. This testimony flies in the face of the testimony given by A/C G during the Firm's investigation, when A/C G testified that A/C G contacted DOC H because A/C G "did not know whether Appellant had called DOC H or not." C. Ex. 5 at 104. DOC H testified that A/C G told DOC H that A/C G "didn't know Appellant hadn't called." Id. at 85. The County's attorney during the hearing pointed out to Appellant the requirement of DFRS Policy No. 605 for an employee involved in a collision to contact the Emergency Communications Center (ECC) and the Duty Operations Chief. H.T. II at 39. Appellant acknowledged that the policy indicated that but then argued that it didn't specifically indicate Appellant was responsible as long as Appellant got it done. Id. This assertion simply does not square with the specific wording of the policy.<sup>29</sup>

Appellant self-servingly testified that immediately after the collision, Appellant jumped out of Appellant's vehicle to check for injuries. C. Ex. 5 at 135. Appellant did not recall seeing the driver of the Honda, Mr. F. Id. at 136. However, at the hearing, after listening to Mr. F's testimony, Appellant changed Appellant's story. H.T. II at 36. Appellant explicitly recalled having a conversation with Mr. F, referencing the damage to the vehicles and an independent investigation by the Fire Department. Id. at 157-58.

As previously noted, Mr. F testified that when he went back to his vehicle to get his information after assisting Appellant, Appellant came up to him and said "let me give you a card. Let's just take care of this out of, you know, let's not get the police involved." H.T. I at 30. Appellant at the hearing emphatically denied any recollection of having told Mr. F that they could take care of the accident without the involvement of the police. H.T. II at 158. The Board, having observed both Appellant and Mr. F, finds that Mr. F was credible and Appellant was not.

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<sup>29</sup> Specifically, DFRS Policy No. 605 states:

DFRS employees who drive and operate vehicles owned, loaned or leased to Montgomery County or the fire and rescue Corporations are responsible for:

- b. reporting accidents and incidents to ECC and requesting emergency assistance as appropriate. Request, through ECC, the Police Department, the Duty Officer, and the DFRS Duty Chief; . . .

C. Ex. 11 at 3.

There is simply no motive for Mr. F making up a story about Appellant attempting to try and deal with the accident just between the two of them. Moreover, Appellant's behavior is consistent with A/C G's testimony that when A/C G spoke to Appellant about the ramifications of the collision, Appellant asked: "[I]s there any other way we can do this?" C. Ex. 5 at 110.

Appellant repeatedly testified that Appellant wore a fleece pullover, with a Fire and Rescue emblem, under Appellant's hooded rain jacket so that the emblem was not visible. H.T. II at 149, 153, 182. In sharp contrast, Mr. F testified credibly that when he reached out to prevent Appellant from falling when Appellant got out of Appellant's vehicle, Mr. F saw a jacket with an emblem on it. H.T. I at 29. Mr. F then asked Appellant if Appellant was a Police Officer and Appellant replied Appellant was a Firefighter. Id. Officer E likewise credibly testified that Officer E saw Appellant had on a Fire and Rescue jacket. H.T. I at 253, 257; see also C. Ex. 5 at 45, 47.

Accordingly, based on Appellant's demeanor, behavior, and inconsistent testimony, the Board concludes that Appellant was not a credible witness.

### **The Board Concludes That Appellant Was "On Duty" When Appellant Was Driving The Honor Guard Vehicle Before And After The Game.**

MCFRS Regulation No. 22-00 AM states that MCFRS personnel are on duty when they are involved with the assigned service or activity of MCFRS and act or represent MCFRS in an official capacity. C. Ex. 9, Section 3.k.1.A.&.C. DFRS Policy No. 102, governing the Honor Guard, states that the Department will maintain a permanent Honor Guard, which represents the Department. C. Ex. 7, Section 3.0. Thus, clearly the Honor Guard is a sanctioned activity of MCFRS. Therefore, consistent with MCFRS Regulation No. 22-00 AM, Appellant was on duty when Appellant participated in the Honor Guard.

The Board finds, contrary to the argument put forward by Appellant, H.T. II at 142, that participation in the Honor Guard is more than just the mere act of presenting colors at the game. As Appellant acknowledged during the hearing, Appellant was assigned a vehicle in connection with Appellant's Honor Guard activities.<sup>30</sup> Id. Assistant Chief O testified that the vehicle is specifically used by the Honor Guard for Honor Guard details or activities. Id. at 10-11. As the Fire Chief testified, Appellant, as the Officer-in-Charge of the Honor Guard on November 30, 2008, having driven the Honor Guard vehicle to the stadium, was responsible for returning it. H.T. I at 367. The Fire Chief indicated the Honor Guard vehicle may not be used for personal use; it is approved for County functions.<sup>31</sup> Id. at 392. The Board therefore finds that Appellant's

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<sup>30</sup> According to Appellant, the Honor Guard vehicle has the following equipment: a series of flags for when the Honor Guard does the presentation of colors; harnesses that are used to carry the flags; maps; flares; and a tool box. H.T. II at 144. The vehicle contains "everything associated with what we do." Id.

<sup>31</sup> The Fire Chief, as well as A/C O, testified that Appellant was also considered on duty when Appellant was in the Honor Guard vehicle as Appellant had a duty to act and come to the aid of an individual that is possibly injured. H.T. I at 366-67, 392-93; H.T. II at 11-12. See also

participation in Appellant's Honor Guard duties extended to transporting the Honor Guard's equipment and personnel to and from the game in the Honor Guard vehicle. Accordingly, the Board concludes that Appellant was on duty both going to and coming from FedEx Field in the Honor Guard vehicle.

**The Board Finds That The Totality Of Evidence Demonstrates That Appellant Was Under The Influence Of Alcohol At The Time Of Appellant's Collision.**

A. The Results Of The Breathalyzer Tests Administered To Appellant Were Accurate.

The record of evidence in this case demonstrates that on November 30, 2009, at 22:53, Appellant's BAT indicated a blood alcohol level of .141. C. Ex. 14; H.T. I at 51-52. Appellant's second BAT test at 23:10 indicated a blood alcohol level of .143. Id.

Appellant has strenuously argued throughout the course of the proceedings in this case that the results of the BAT administered to Appellant are inaccurate on their face. Appellant bases Appellant's contention on the fact that in the Step 3 part of the Alcohol Testing Form (Non-DOT), the BAT screening test information written in indicates at 22:53 Appellant's testing result was .143, when in fact the printout on the form shows it was .141 at 22:53. C. Ex. 2 at 8; C. Ex. 14; H.T. II at 145; Appellant Ex. 6.

During the hearing, Dr. P, head of CMA Services, testified credibly that the official test results from Appellant's BAT are the ones printed by the BAT testing machine on the right side of the Alcohol Testing Form (Non-DOT). H.T. I at 51. As Dr. P explained, the County has asked that CMA transcribe the results of the test into the space in Step 3. Id. at 50-51. The form on its face indicates that "[f]or BREATH DEVICE write in space below **only if** testing device is not designed to print." C. Ex. 14 (emphasis added). As the testing device did in fact print the results on the right side of the form, there was no need for any information in this area of the form. H.T. I at 60-61. Thus, Dr. P credibly testified that the mistake made was simply a transcription error not a fatal flaw. Id. at 59.

The County established that the technician who administered the test, Ms. N, was trained to administer the test. H.T. I at 85; C. Ex. 15. The County also established that the BAT machine had routine calibration checks, with the last calibration check before Appellant's test occurring on November 25, 2009. H.T. I at 44-45; C. Exs. 18, 26, 27.

Accordingly, based on the record of evidence in this case, the Board finds that the

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C. Ex. 10, Section 4.14. Appellant asserted that the Honor Guard vehicle couldn't be used as an operational vehicle to respond to an emergency and did not have the appropriate equipment on board to do so. H.T. II at 143-44. However, the Fire Chief testified that the vehicle did have emergency lighting, emergency audible signaling devices, and a computer automated dispatch system. H.T. I at 366. Thus, the Honor Guard vehicle could be of great use if it was present at the scene of an emergency, particularly if the area where the emergency occurred was a remote one.

results of the breathalyzer tests administered to Appellant were accurate.

B. Whether Maryland Law Permits The County To Administer A Breathalyzer Test Is Beyond The Purview Of The Board's Expertise.

As noted in the Board's Decision on Appellant's Motion to Rescind issued on the same day as this Final Decision, Appellant argued for the first time during the hearing that § 17-214 of the Health-General Article of the Annotated Code of Maryland does not permit breath alcohol testing. H.T. II at 59. In support of this argument, Appellant provided an unsigned memorandum purportedly written by Robert N. McDonald, who is the Chief Counsel for Opinions and Advice within the State Attorney General's office. Appellant Attachment (Attach.) 28.<sup>32</sup>

Significantly, the County submitted nothing at the hearing in response to Appellant's argument.<sup>33</sup> It had previously submitted a letter of advice from an Assistant Attorney General in the Attorney General's office as an exhibit to its Response to Appellant's Motion to Rescind. The County offered the advice letter in support of its argument that § 17-214 is only intended to regulate specimens sent out for testing and does not impact breath testing, which is performed in-house. County's Response at 8; C. Ex. 5 to County's Response.

Based on the reasons outlined in the Board's Decision on Appellant's Motion to Rescind, the Board was unwilling to conclude that § 17-214 of the Health-General Article of the Annotated Code of Maryland proscribes breath testing based solely on Appellant's submission. The Board further determined that the issue of whether § 17-214 of the Health-General Article of the Annotated Code of Maryland permits breath alcohol testing was beyond the purview of the Board's expertise. More importantly, the Board determined that the issue of whether § 17-214 permits breath testing had no relevance to this case, as the Board would not rely on the breathalyzer test results to uphold Appellant's dismissal.

C. Even Discounting The Breathalyzer Test Administered To Appellant, There Is Sufficient Evidence In The Record To Conclude Appellant Was Under The Influence Of Alcohol At The Time Of The Collision On November 30, 2008.

Appellant testified thusly during the Firm's investigation about Appellant's consumption of alcohol:

It's clear I consumed too much. It's clear that I made a critical error in judgment.

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<sup>32</sup> Appellant differentiated Appellant's exhibits by marking those exhibits to Appellant's Motion to Rescind as "Appellant Attachment \_\_\_" and Appellant's exhibits introduced during the hearing as "Appellant Exhibit \_\_\_."

<sup>33</sup> The Board recognizes that the County's counsel was caught off-guard by this last minute argument by Appellant's counsel. See H.T. II at 70 (noting that the County's counsel has not had a chance to read Appellant Attach. 28). Had counsel asked, the Board would have granted the County's counsel an opportunity to review the memorandum and additional time to do research and provide argument to the Board concerning its validity.

I'm comfortable with the sequence of events that occurred after the accident leading up to the point at which I did test positive.

C. Ex. 5 at 151. When questioned during Appellant's investigatory interview about whether Appellant sought to delay Appellant's breathalyzer test on the night of November 30, 2008, Appellant testified: "I could have probably went to bed for three or four hours and still blown it." Id. at 149.

Consistent with Appellant's admission that Appellant drank too much on November 30, 2009, is the testimony of Mr. F that Appellant almost fell as Appellant exited the Honor Guard vehicle after the collision. H.T. I at 29, 31. Mr. F reported that he smelled alcohol on Appellant's breath, id. at 31, 33, 35-36, and that Appellant's speech was slurred and Appellant had to repeat everything two to three times. Id. at 35. Concerned about this, Mr. F suggested to a Police Officer at the scene that Appellant be given a breathalyzer test. H.T. I at 36; see also C. Ex. 5 at 51, 58. Similarly, DOC H testified credibly that Appellant smelled like alcohol upon Appellant's arrival at FROMS, and Appellant looked as if "Appellant was trying to hold Appellant's self together." H.T. I at 228. Moreover, the CMA technician, Ms. N, who performed the breathalyzer test could smell alcohol on Appellant, and testified Appellant was off balance (i.e., not steady on Appellant's feet) and that Appellant's speech was slurred. H.T. I at 94, 99.

Finally, there was Appellant's own witness, Appellant's clinical psychologist, Dr. Q, who testified credibly about Appellant's report to Dr. Q of how much alcohol Appellant had consumed on November 30, 2008. Dr. Q testified that he was familiar with the rate of metabolism with respect to alcohol. H.T. II at 119. Dr. Q indicated that Appellant told Dr. Q that Appellant had consumed six to eight 16 ounce beers. Id. at 119-20. Given his experience in the field, Dr. Q testified that, using the information provided to him by Appellant, he did a time line and made a computation regarding Appellant's alcohol content. Id. at 120. Dr. Q concluded Appellant had an alcohol content of right around .139.<sup>34</sup> Id. Dr. Q pointed out that his calculation was within the ballpark of the results of Appellant's breathalyzer test, id., and therefore stated confidently that he believed Appellant made a reasonable declaration of how many beers Appellant had. Id. As Dr. Q was treating Appellant for Appellant's alcohol problem at the time he made this calculation, Dr. Q would have been in the best position to be aware of any factors which would have affected Appellant's metabolism of alcohol.

As the County noted in its Response to Appellant's Motion to Rescind, Maryland law establishes that a score on a breathalyzer test above .08 indicates that the test subject is "under the influence of alcohol per se." County Response at 3 (citing to Annotated Code of Maryland, Courts and Judicial Proceedings Article, § 10-307(g)). Thus, based on Appellant's own witness' testimony, Appellant provided Dr. Q with information confirming that Appellant was indeed under the influence of alcohol at the time of the collision.

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<sup>34</sup> Dr. Q testified that it is difficult to pinpoint exactly the alcohol content because everyone has a different rate of metabolism. Thus, to pinpoint exactly to a decimal point, out to the third decimal point is impossible. H.T. II at 121.

Given the credible testimony of Mr. F, DOC H, and Ms. N as to their observation of Appellant's state on November 30, 2009, Appellant's own acknowledgement that Appellant consumed too much alcohol and would have blown the breathalyzer test had it been administered three hours later, along with Dr. Q's testimony that Appellant's blood alcohol content was .139, the Board finds that Appellant was under the influence of alcohol at the time of Appellant's collision on November 30, 2008.

### **The County Failed To Prove The First Charge By A Preponderance Of The Evidence.**

The first charge in the Statement of Charges (SOC) alleges Appellant violated Department of Fire and Rescue Services (DFRS) policy, which requires that the Honor Guard be used at the direction of the Director, or in the Director's absence, the Deputy Fire Chief. According to the charge, Appellant never notified or received permission from the Fire Chief for the Honor Guard's participation in the Redskins' pre-game ceremony on November 30, 2008.

A/C O, Executive Officer to the Fire Chief, testified that A/C O has served in A/C O's position since January 2005, first as Executive Officer for the previous Fire Chief and then as Executive Officer for the current Fire Chief. H.T. II at 5-6. A/C O testified that to A/C O's knowledge neither Fire Chief approved the request from the Redskins in 2008 for the Honor Guard to participate in opening ceremonies at FedEx Field. *Id.* at 8-10. The Fire Chief also testified that the Fire Chief never approved the Honor Guard's participation in the Redskins' pre-game ceremony. H.T. I at 363.

Appellant testified that Appellant met annually with the Fire Chief to discuss Honor Guard matters. H.T. II at 137. According to Appellant, in February 2008 Appellant met with the then-Fire Chief to discuss various Honor Guard activities, including the Guard's annual participation in a Redskins game. *Id.* at 138-39. Appellant stated that the Fire Chief indicated the Fire Chief's approval for the Honor Guard to participate at the Redskins game. *Id.* at 138. Appellant claimed that A/C O would not have known about the approval as A/C O wasn't at the meeting. *Id.* at 140.

Capt. R, who served as the operational team leader of the Honor Guard under the direction of Appellant, testified that there were occasions when prior approval of the Fire Chief was not sought for the Honor Guard to do an event. H.T. II at 76. Specifically, Capt. R indicated that an event which regularly occurred each year, such as the Redskins game, did not need preapproval from the Fire Chief. *Id.* at 76-77, 78.

While the Board has found that Appellant was not credible in Appellant's testimony, the Board finds that Capt. R was credible. Moreover, as Appellant claimed that the prior Fire Chief gave Appellant permission, the only way the County could have disproved this contention was by calling the former Fire Chief to the stand. This they did not do. Accordingly, the Board concludes that the County failed to prove this charge by a preponderance of the evidence.

### **The County Failed To Prove The Second Charge By A Preponderance Of The Evidence.**

The second charge of the SOC relies on Section 33-5(1) of the MCPR which provides for

discipline against an employee who “uses, possesses, sells, or transfers alcohol . . . to another person while on duty, on County government property, or in a County vehicle.” This charge has two specifications:

- a) Appellant, as the operator of the County vehicle, knowingly transported alcohol in the vehicle; and
- b) Appellant operated the vehicle while under the influence of alcohol.

In order to prove the first specification of this charge, the County not only had to prove that Appellant transported alcohol in the Honor Guard vehicle, but also that Appellant did so “knowingly.” Based on the testimony elicited at the hearing, the Board concludes that Appellant did not “knowingly” transport alcohol in the County Honor Guard vehicle.<sup>35</sup> The County relies on the testimony of Capt. A, who indicated that although Capt. A never told anyone that Capt. A had beer in Capt. A’s cooler, H.T. I at 164-65, “everybody knew what was in [the cooler].” *Id.* at 166. However, this testimony by Capt. A only goes to the knowledge of the Honor Guard team at the point they returned from the stadium after the presentation of colors to stow their gear. *Id.* at 165-66. According to Capt. A, Capt. A “hadn’t advertised that it was a cooler full of beer.” *Id.* at 166. None of the witnesses called by the County acknowledged that they were aware that the cooler was full of beer prior to the cooler being opened when they returned to the vehicle after the presentation of colors. *See id.* at 175, 191; H.T. II at 148-49, 194. Nor could any, save Capt. A, remember if there were any beers remaining in the cooler before the Honor Guard left FedEx Field to return to the Park-n-Ride. H.T. I at 186, 209-10; H.T. II at 197. Therefore, the Board concludes that the County failed to prove the requisite knowledge on the part of Appellant to support this specification.

The Board is at a loss as to how the second specification establishes a violation of the regulation cited. The County did not assert, much less prove that Appellant used alcohol in the County vehicle. H.T. I at 186 (no drinking done inside the vehicle). Operating a County vehicle while under the influence is not proscribed by this personnel regulation. Therefore, the Board concludes that the County did not prove this specification either.

### **The County Proved Part Of The Third Charge By A Preponderance Of The Evidence.**

The third charge in the SOC states that Section 33-5(e) of the MCPR provides for discipline against an employee who fails to perform his duties in a competent and acceptable manner. This charge has two specifications:

- a) on November 30, 2008, Appellant knowingly transported alcohol in a cooler from the Park-n-Ride in College Park to FedEx Field; and
- b) after the game, Appellant transported alcoholic beverages back to the

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<sup>35</sup> As noted *infra*, while Appellant may not have “knowingly” transported alcohol to FedEx Field, Appellant had a duty to determine whether there was any alcohol remaining in Capt. A’s cooler before transporting it back to the Park-n-Ride after the game.



## Park-n-Ride.

As discussed above under the analysis of the SOC's second charge, the Board concludes that Appellant did not "knowingly" transport alcohol in the County Honor Guard vehicle to FedEx Field. Therefore, the County did not prove the first specification of the third charge.

However, the second specification of this charge does not require proof that Appellant knew Appellant was transporting alcohol back to the Park-n-Ride. The Board finds that Appellant, as a high ranking MCFRS official, had a duty to ascertain whether Capt. A's cooler contained alcohol before transporting it along with the Honor Guard members back to the Park-n-Ride. Clearly, at the time Appellant left FedEx Field, Appellant was aware that the cooler had contained beer. H.T. II at 149, 196. As a senior management official, Appellant had a duty to be knowledgeable of and enforce the various County internal policies, including the one that forbade transporting alcohol in a County vehicle. Yet, as Appellant testified, Appellant never looked in the cooler to see if there was any more beer nor did it occur to Appellant to look in it. H.T. II at 197. This failure to act constitutes unacceptable performance of Appellant's duties as Officer-in-Charge of the Honor Guard. Accordingly, the Board finds the County proved the second specification of this charge.

### **The County Proved The Fourth Charge By A Preponderance Of The Evidence.**

This charge alleges a violation(s) of DFRS Policy No. 502, which provides "employees will not consume **or** be under the influence of any alcoholic beverage **or** have alcohol on their breath while on duty **or** wearing any part of the insignia of DFRS.<sup>36</sup> All employees are prohibited from operating a County or Corporation vehicle while under the influence of alcohol **or** with the odor of alcohol on the breath." C. Ex. 8 at 2 (emphasis added).

The facts to support this charge indicate that Appellant drank an unspecified number of alcoholic beverages at the Redskins game. Appellant then operated the County-owned vehicle, which was involved in a significant collision.

As previously determined by the Board, it is clear from the record of evidence that Appellant was under the influence of alcohol at the time Appellant operated the Honor Guard vehicle while returning from FedEx Field. This constitutes a violation of DFRS Policy No. 502.

Moreover, it is clear from the record of evidence that Appellant had the odor of alcohol on Appellant's breath when Appellant operated the Honor Guard vehicle. H.T. I at 31, 33, 35-36; see also H.T. I at 94, 228. This also constitutes a violation of DFRS Policy No. 502.

In addition, as the Board previously found that Appellant was on duty when operating the

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<sup>36</sup> As pointed out by Appellant's counsel, this charge incorrectly cites the wording of the applicable DFRS section. H.T. II at 208-09. The DFRS Policy No. 602 section at issue proscribes employees from consuming, being under the influence of alcohol or having alcohol on the breath while on duty or "while wearing any part of the uniform with the DFRS insignia." C. Ex. 8 at 2.

Honor Guard vehicle, the County proved that Appellant again violated DFRS Policy No. 502, as Appellant was under the influence of alcohol while on duty.

Similarly, the record of evidence establishes that Appellant had the odor of alcohol on Appellant's breath while on duty. This constitutes a separate violation of DFRS Policy No. 502.

Accordingly, the County has proved this charge.

### **The County Proved Parts Of The Fifth Charge By A Preponderance Of The Evidence.**

This charge alleges violations of MCFRS Regulation 22-00AM, which provides that “[o]n duty personnel must not possess, be under the influence of, or consume an alcoholic beverage while on duty.” C. Ex. 9 at 8 (emphasis added). This charge has two specifications: a) Appellant's possession of alcohol; and b) Appellant's being under the influence of alcohol.

With regard to the first specification, the County charges the following two sub-specifications: 1) on November 30, 2008, Appellant knowingly transported alcohol in a cooler from the Park-n-Ride in College Park to FedEx Field; and 2) after the game, Appellant transported alcoholic beverages back to the Park-n-Ride. The Board has previously determined that Appellant did not knowingly transport alcohol to FedEx Field. The Board has also previously determined that Appellant had a duty to ascertain whether Appellant was transporting alcohol back from FedEx Field to the Park-n-Ride and that Appellant failed to meet this duty. Thus, the Board concludes that the County proved part of the first specification of this charge.

With regard to the second specification, the County states that Appellant drank an unspecified number of alcoholic beverages at the Redskins game and admitted drinking one alcoholic beverage after the conclusion of the game. Appellant then operated the County-owned vehicle, which was involved in a significant collision. As previously stated, the Board has determined that Appellant was on duty when Appellant was operating the Honor Guard vehicle and was under the influence of alcohol. Accordingly, the Board finds that the County proved this second specification of the fifth charge.

### **The County Proved The Sixth Charge By A Preponderance Of The Evidence.**

This charge alleges a separate violation of MCFRS Regulation 22-00AM. Specifically, the charge relies on that section of the regulation which provides that “[a]ll **on-duty** personnel must not operate a LFRD or County vehicle, while under the influence of, **or** within four hours of consuming any alcoholic beverage.” C. Ex. 9 at 8 (emphasis added). Appellant testified at the hearing that Appellant consumed Appellant's last beer at 6:30 p.m. H.T. II at 34. Appellant subsequently operated the Honor Guard vehicle, transporting the Honor Guard members back to the Park-n-Ride, and then proceeding to return home in the Honor Guard vehicle. Appellant's collision occurred at 8:01 p.m., less than two hours from the consumption of Appellant's last beer. C. Ex. 5 at 134, 172. As previously noted, the Board has concluded that Appellant was “on duty” when Appellant was operating the Honor Guard vehicle. Thus, by Appellant's own admission, Appellant operated the Honor Guard vehicle within four hours of consuming an alcoholic beverage. Accordingly, the Board finds that the County proved this charge by a

preponderance of the evidence.<sup>37</sup>

### **The County Proved The Seventh Charge By A Preponderance Of The Evidence.**

This charge alleges a violation of DFRS Policy No. 602, which provides that “[a]ll employees are prohibited from operating a County-owned vehicle<sup>38</sup> while under the influence of alcoholic beverages **or** with the odor of alcohol on the breath **or** after ingesting any substance that may impair their ability to operate the vehicle.” C. Ex. 10 at 5 (emphasis added).

As previously stated, the Board has determined that Appellant operated the Honor Guard vehicle while under the influence of alcohol. Thus, the County has proven that Appellant violated DFRS Policy No. 602.

Similarly, the Board has previously determined that Appellant operated the Honor Guard vehicle with the odor of alcohol on Appellant’s breath. This constitutes a separate violation of DFRS Policy No. 602. Accordingly, the County has proved this charge by a preponderance of the evidence.

### **The County Proved The Eighth Charge By A Preponderance Of The Evidence.**

This charge alleges a violation of DFRS Policy No. 605, which provides that “DFRS employees who drive vehicles owned, loaned or leased by Montgomery County . . . are responsible for reporting all accidents and incidents to their immediate supervisor in the most expeditious means available.” C. Ex. 11 at 3. This charge states that Appellant never notified Appellant’s supervisor. Appellant, by Appellant’s own admission, never called Division Chief K. H.T. II at 50.

Appellant tried to argue at the hearing that Appellant was unclear with respect to what the meaning of “immediate supervisor” was in DFRS Policy No. 605, indicating that under the circumstances, DOC H would have been a point of contact. H.T. II at 51; see also C. Ex. 2 at 6. Appellant claimed Appellant never called Division Chief K, because he knew DOC H had been contacted. H.T. II at 50; C. Ex. 2 at 6.

While it is true that DOC H was a point of contact, contact with DOC H is to be made pursuant to Section 5.0.b of DFRS Policy No. 605. Nothing in DFRS Policy No. 605 relieved Appellant of the requirement to fulfill the mandate under Section 5.0.a to report Appellant’s accident to Division Chief K. Accordingly, the Board finds that the County proved this charge by a preponderance of the evidence.

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<sup>37</sup> As previously noted, the Board has determined that Appellant was under the influence of alcohol when Appellant operated the Honor Guard vehicle. Accordingly, this serves as an alternate reason to support the Board’s position that the County proved this charge.

<sup>38</sup> Thus, in proving a violation of this regulation, there is no requirement to prove that an employee is on duty while operating a County-owned vehicle.

### **The County Proved The Ninth Charge By A Preponderance Of The Evidence.**

This charge alleges a separate violation of DFRS Policy No. 605. Specifically it relies on that portion of the regulation which provides that “DFRS employees who drive vehicles owned, loaned or leased by Montgomery County . . . are responsible for reporting all accidents and incidents to ECC and requesting emergency assistance as appropriate.” C. Ex. 11 at 3. This charge states that Appellant never notified ECC.

Appellant acknowledged that Appellant never called ECC. H.T. II at 38. Appellant, however, argued that Appellant did not need to call ECC as he overheard Officer E contact ECC. Id. When asked by the County’s counsel about the fact that DFRS Policy No. 605 places the responsibility on Appellant to contact ECC, Appellant acknowledged it did but then argued that it didn’t specifically say Appellant was responsible as long as Appellant got it done. Id. at 39. As the Board has previously noted, Appellant’s assertion simply does not square with the wording of the policy. Accordingly, the Board finds that the County proved this charge.

### **The County Failed To Prove The Tenth And Eleventh Charges By A Preponderance Of The Evidence.**

Charges 10 and 11 involve the same alleged misconduct. Basically the charges assert that Appellant lied during the investigation. Charge 10 indicates that Appellant’s alleged untruthfulness violates MCFRS Regulation 22-00AM and Charge 11 indicates this untruthfulness violates DFRS Policy 529. The facts set forth in both charges are that Appellant, during the investigation into the incident, admitted to drinking 6-8 beers. See C. Ex. 5 at 147. However, according to the County, using a Blood-Alcohol Content Calculator, assuming Appellant was approximately 200 pounds,<sup>39</sup> Appellant’s breath alcohol should have been .118 g/210L; instead it was .141 g/210L. C. Ex. 1 at 7, 8.

Appellant’s clinical psychologist, Dr. Q, testified during the hearing that Appellant told him Appellant had consumed six to eight 16 ounce beers on November 30, 2008. H.T. II at 119. Given his experience in the field, Dr. Q testified that he did a time line and made a computation regarding Appellant’s alcohol content. Id. at 120. Dr. Q concluded Appellant had an alcohol content of right around .139. Id. Dr. Q pointed out that his calculation was within the ballpark of the results of Appellant’s breathalyzer test, id., and therefore stated confidently that he believed Appellant made a reasonable declaration of how many beers Appellant had. Id.

Dr. P indicated in her testimony that it was very unlikely that Appellant would have consumed six to eight beers and tested at .141 at 11:00 p.m. H.T. I at 52. Significantly, however, Dr. P based her opinion on Appellant consuming 12 ounce beers. Id. In addition, she discussed the metabolizing of alcohol by an average 170 pound male, H.T. I at 52, when Appellant was in fact 200 pounds. C. Ex. 5 at 145. Dr. P testified that there are a variety of factors, such as height, weight, age, consumption, medications, that could affect metabolism of alcohol. H.T. I at 75. According to Dr. P, her statement about the unlikeliness of Appellant

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<sup>39</sup> During Appellant’s investigatory interview, Appellant testified that Appellant’s weight was 200 pounds. See County Ex. 5 at 145.

having consumed only six to eight beers was based on the average increase in metabolism, as Appellant was never asked about the other factors which could affect Appellant's metabolism. H.T. I at 73-76.

As previously noted, it would appear to the Board that Dr. Q, who is treating Appellant for Appellant's alcohol problem, was in the best position to determine what Appellant's consumption was based on the information provided to Dr. Q by Appellant. Clearly, as part of his treatment of Appellant, Dr. Q would have been aware of any factors that might have affected Appellant's metabolism of alcohol. Accordingly, the Board concludes that the County failed to prove these two charges.

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

Having determined the County proved by a preponderance of the evidence most of the charges contained in the SOC, the Board will address whether the penalty of dismissal<sup>40</sup> is appropriate. The charges against Appellant involve serious misconduct – driving a County vehicle while under the influence of alcohol; driving a County vehicle within four hours of consuming alcohol; transporting alcohol in a County vehicle; and failing to contact Appellant's supervisor or the ECC on the night of the collision.

The Board notes that Appellant has worked for the County for twenty-eight years and Appellant's work, as characterized by the Fire Chief, was impeccable. Nevertheless, the Board notes that Appellant was a senior level manager in MCFRS before Appellant's dismissal and held this high level position in a department which is charged with public safety and public trust. 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 his/her subordinates. See MSPB Case No. 05-07 (2005); see also Fowler v. U.S. Postal Service, 77 M.S.P.R. 8, 13 (1997); Fischer. Department of Treasury, 69 M.S.P.R. 614, 619 (1996). Clearly, based on Appellant's actions, Appellant failed to serve as a role model for Appellant's subordinates. Appellant violated the very policies Appellant is charged with enforcing.

The mission of MCFRS is to protect lives and property. Appellant's actions on the night of November 30, 2008, which led to Appellant's vehicle being airborne and resulted in serious damage to several vehicles, are clearly antithetical to the mission of MCFRS and serve to undermine the public's trust in both Appellant and MCFRS.

The Board also considered Appellant's potential for rehabilitation. While it is true that Appellant has been seeing Dr. Q for counseling with regard to Appellant's alcohol problem, Appellant has not readily followed up on suggestions provided by Dr. Q. Dr. Q recommended in February 2009 education and Alcoholics Anonymous (AA) meetings to Appellant. H.T. II at 169, 179. However, Appellant has failed to take any educational course. Id. at 179. Although it

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<sup>40</sup> Appellant's counsel, in his closing argument, asked the Board to take notice of four of its prior decisions involving dismissals and provided cites to those decisions. H.T. II at 215-18. The Board has reviewed its decisions and finds they are not applicable, given the serious misconduct in this case.

was February when Dr. Q recommended Appellant start attending AA meetings, Appellant did not attend Appellant's first meeting until the Wednesday before Appellant's second day of hearing.<sup>41</sup> Id. at 180-81.

Accordingly, based on the totality of circumstances, the Board finds that dismissal was an appropriate penalty in this case.

### **ORDER**

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

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<sup>41</sup> Appellant informed the Interim Fire Chief in Appellant's March 6, 2009 Response to Statement of Charges – Dismissal that Dr. Q had recommended that Appellant participate in AA meetings. Appellant indicated to the Interim Fire Chief that Appellant intended to follow this recommendation. C. Ex. 2 at 1.

## **CASE NO. 10-04**

### **FINAL 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 the Montgomery County, Maryland, Department of Correction and Rehabilitation (DOCR) Director to dismiss Appellant.

### **FINDINGS OF FACT**

Appellant was a Correctional Officer – Sergeant<sup>1</sup> with the Department of Correction and Rehabilitation (DOCR) at the time of events that are at issue in this case. As a Sergeant, Appellant was a first-line supervisor. Hearing Transcript for January 19, 2010 (H.T. I) at 235, 253. According to Appellant, Appellant supervised a squad of approximately 12 to 14 people. Hearing Transcript for January 25, 2010 (H.T. II) at 257. Appellant was assigned to the Montgomery County Correctional Facility (MCCF), which is a maximum security correctional facility. H.T. I at 256. MCCF has approximately 730-780 inmates on any given day, id., but only 40-50 of the inmates are women. Id. at 180. The women are housed in a particular part of MCCF – two dormitories known as North 1 and North 2.<sup>2</sup> Id. at 145.

There are three shifts at MCCF – shift one, which runs from 10:30 p.m. to 7:00 a.m. (also referred to as 11-7); shift two, which runs from 6:30 a.m. to 3:00 p.m. (also referred to as 7-3 shift); and shift three, which runs from 2:30 p.m. to 11:00 p.m. (also referred to as the 3-11 shift). H.T. I at 157; see also H.T. II at 241. For most of the period at issue in this case, Appellant worked shift three, though on occasion Appellant worked shift two and shift one. H.T. I at 157.

Ms. B was incarcerated at least two times in the MCCF in 2007 and 2008.<sup>3</sup> H.T. II at 170. During her last incarceration at MCCF from March 18, 2008-September 11, 2008, Ms. B was housed in the North 2 housing pod. Joint Exhibit (Jt. Ex.) 22 at 5. Appellant, during the same period of time, worked twenty shifts at the North 2 Cluster post right outside the housing pod. Id.; Jt. Ex. 31; H.T. II at 281-82. Ms. B acknowledges that she had encounters with Appellant during her incarceration at MCCF. H.T. II at 170. Appellant also acknowledges that

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<sup>1</sup> The Board is quite familiar with the occupational class of Correctional Officer – Sergeant and its duties and responsibilities as the Board reviewed the class creation prior to the Office of Human Resources establishing the class. See MSPB Case No. 06-03 (2006). The Board is likewise familiar with the non-supervisory Correctional Officer III class. Id.; see also MSPB Case No. 08-09 (2008).

<sup>2</sup> The housing units are also referred to as pods. H. T. I at 144. Within the pods are inmates' cells. Id.

<sup>3</sup> Ms. B was convicted on December 4, 2006 of the crime of conspiracy to commit robbery and was sentenced to five years of incarceration, of which all but 18 months was suspended. H.T. II at 187. Ms. B was convicted of a parole violation and sentenced to nine months in prison on March 12, 2008. County Exhibit (C. Ex.) 2.

Appellant interacted with Ms. B during her incarceration at MCCF. Id. at 258.

After Ms. B finished her sentence at MCCF on September 11, 2008, she was transferred to the Frederick County Adult Detention Center. C. Ex. 2. She was incarcerated in the Frederick County Adult Detention Center until she was released on January 20, 2009. Stipulation, H.T. I at 23.

On February 9, 2009, a white female attempted to rob a bank in Montgomery County, Maryland. H.T. I at 76. The female was wearing a wig and dark glasses. Id. Major Crimes Division, Robbery Section, of the Montgomery County Police (MCP) Department began an investigation. Based on surveillance photos from the bank and her past criminal history, Major Crimes determined that Ms. B was their chief suspect. Id. On February 11, 2009, Major Crimes began the process of getting a search warrant to search Ms. B's residence. H.T. I at 77-78. A Special Assignment Team (SAT) was tasked with conducting surveillance on Ms. B's residence prior to the search warrant being executed. Id. at 78.

Police Officer A and Police Officer C were part of the SAT team that conducted pre-raid surveillance on Ms. B's house the evening of February 11, 2009. H.T. I at 45, 106. They were in plain clothes and unmarked vehicles. H.T. I at 46, 106-07. Ms. B's residence was located on Lane Z. Id. at 46. Officer A took up surveillance on Lane Y, close to where Lane Z ended. Id. at 47. If a car or anyone were to turn into Lane Z to approach Ms. B's residence, Officer A would be in a position to inform Officer C that someone was approaching. Id. Officer C was parked across the street and a few houses down from Ms. B's residence on Lane Z. Id. at 107. According to Officer A, the neighborhood was well lit and the houses had lights on outside. Id. at 49.

At approximately 11:45 p.m., Officer A saw a car, later identified as Appellant's car, H.T. I at 49, 50, 57, 108, 110, approach. The car drew his attention. Id. at 49. The car came up from behind on Lane Y slowly and turned onto Lane Z and then stopped near the intersection of the two streets and waited. Id. at 50. The car was stopped three to four houses down from Ms. B's residence. Id. at 51, 73. At the same time, Officer C observed Ms. B, scantily dressed,<sup>4</sup> with what appeared to be a cell phone to her ear, exit her residence and begin walking in the direction of where Officer A was positioned. Id. at 108. The two officers radioed each other to exchange information about what was going on and Officer A advised Officer C that the car he had observed had stopped and that subsequently someone got into the front passenger side. Id. at 53, 73-74. Officer A testified that some big trees blocked his view and all he could see were two legs and the bottom of a short black dress walk towards the parked vehicle and get in. Id.

Once Ms. B entered Appellant's car, the car headed toward where Officer C was positioned. Id. at 109-10. As Appellant's car passed him, Officer C had a clear view of both the

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<sup>4</sup> Officer A testified that Ms. B was wearing a very short black dress and her legs were exposed. H.T. I at 53. Police Detective E, of Major Crimes, described Ms. B as being scantily dressed with no underwear on. Id. at 80-81. Police Detective E indicated that when the search warrant on Ms. B's residence was executed, the police picked up clothes from her house and told Ms. B at the police station to put them on. Id. at 81.



driver and Ms. B. Id. at 110.

Officer A's Sergeant, who had been monitoring the radio transmissions between Officer A and Officer C, called him to determine what was going on and then contacted Major Crimes to determine whether they wanted the vehicle stopped. H.T. I at 55. Both Officer A and Officer C subsequently began following Appellant's vehicle. Id. at 55, 110. Appellant drove to the Shopping Center, parked in front of the pharmacy, exited the car and went inside, leaving Ms. B in the car. Id. at 56, 110.

While Appellant was inside the pharmacy, Officers A and C arrived at the CVS, approached Appellant's car and asked Ms. B to exit from it. H.T. I at 56, 122. The two officers then advised Ms. B that the Major Crimes Unit had a search warrant for her house. Id. at 56, 111. At about this time, a police cruiser, clearly marked as such, arrived on the scene. Id. at 62, 70, 111-12, 123-24.

Appellant subsequently exited the pharmacy and approached the back of Appellant's vehicle where Ms. B was standing with Officers A and C. H.T. I at 56-57. Appellant asked about what was going on with Ms. B. Id. at 113. Officer C, who had spotted a blue line sticker on the back of Appellant's vehicle, asked Appellant if Appellant had someone in Appellant's family who was in corrections. Id. at 113, 126. Appellant indicated that Appellant was actually the person in corrections at Clarksburg. Id. at 113, 114, 127. Officer C then noticed Appellant was wearing Appellant's uniform pants. Id. at 113, 122. Officer C responded to Appellant's question about Ms. B, indicating that Officer C couldn't divulge totally what was going on but that because of Appellant's position Appellant should pretty much know what was going on with Ms. B. Id. at 113-115, 127, 130. Appellant said "No." Id. at 114, 115, 130. Appellant indicated Appellant didn't know of her or her status with regard to any kind of criminal activity. Id. at 114, 130. Officer C did not find Appellant's denial about knowing of Ms. B's criminal history to be credible given the fact that Appellant acknowledged being in corrections at Clarksburg. Id. at 135, 136.

Ms. B was put into the police cruiser and transported over to where the Robbery Section of Major Crimes had set up a staging area. H.T. I at 70, 117. Officer A then asked Appellant for some identification. Id. at 70, 115. Subsequently, Appellant was allowed to leave as the Robbery Section instructed the officers to release Appellant. Id. at 62-63, 115.

From the staging area, Ms. B was brought back to her house, where the police executed the search warrant at approximately 12:30 a.m. H.T. I at 81. Upon searching the house, the police discovered disguise items that could have been used in the bank robbery. Id. at 82. They also found marijuana in the house. Id. at 82-83.

After releasing Appellant, Officers A and C returned to Ms. B's house to assist in the execution of the search warrant. H.T. I at 64-65, 117-18. At some point, both officers went outside the house to ensure no one would try to enter. Id. at 65, 118. At approximately 12:55 a.m., Ms. I, a friend of Ms. B, arrived at Ms. B's residence in a silver Mercedes SUV. Id. at 65, 72-73, 118-119. Officers A and C went out to the SUV and Ms. I demanded to know what was going on. Id. at 65, 119. She was told that the police were executing a search warrant and she

couldn't enter the premises. Id.

The police arrested Ms. B and charged her with robbery and the possession of marijuana. H.T. I at 85. They searched Ms. B and confiscated a cell phone from her. Id. at 84, 86. The police subsequently conducted a search of the cell phone. Id. at 86. The police then subpoenaed Ms. B's phone records, Jt. Ex. 30, and discovered that Appellant's cell phone number was one of the numbers listed in the phone records.<sup>5</sup> H.T. I at 91. The police subsequently determined that they needed to speak with Appellant. Id. They also decided to contact the Warden at MCCF.

On February 27, 2009, the Warden received an email from Lieutenant (Lt.) V of the MCP, about Appellant. H.T. I at 225. The Warden called Lt. V and she related to the Warden what had occurred during their surveillance of Ms. B's residence on the evening of February 11, 2009. Id. at 225-26. Lt. V also informed the Warden that based on phone records subpoenaed by the police there had been phone calls between Ms. B and Appellant. Id. at 226. Lt. V also stated that at the time the police took Ms. B from the Shopping Center parking lot, they noticed that Appellant had on Appellant's uniform pants. Id. Lt. V indicated to the Warden that Ms. B was arrested for bank robbery. Id. Lt. V stated that she would provide a packet of material to the Warden the following week and the Warden indicated that DOCR would begin an internal investigation. Id. Lt. V also indicated that the police intended to speak to Appellant. Id.

As soon as the Warden finished the phone call with Lt. V, the Warden called the Director to brief the Director on the conversation the Warden had just had with the police concerning Appellant.<sup>6</sup> H.T. I at 226-27. They discussed the need, given the circumstances, to place Appellant on administrative leave pending the outcome of DOCR's internal investigation. Id. at 227. Thereafter, the Warden called the shift commander and instructed the shift commander to relieve Appellant of duty, escort Appellant out of the building, and told the shift commander that an internal affairs investigation would commence shortly.<sup>7</sup> Id. at 227-28.

After Appellant was escorted out of MCCF, Appellant contacted Lt. Q of MCCF, who had previously been Appellant's supervisor and was a friend. H.T. II at 229, 231-32, 253. According to Lt. Q, Appellant related to him what had occurred on the evening of February 11, 2009. Id. at 232. Appellant told Lt. Q that Appellant was going to meet a lady friend and she

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<sup>5</sup> Ms. B's cell phone number is: (111) 111-1111. H.T. II at 173. Appellant's cell phone number is: (666) 666-6666. See Stipulation, H.T. I at 23.

<sup>6</sup> At this point in time, the Warden testified that the Warden had received no notification from any of the Warden's subordinate supervisors that Appellant had reported the matter to them. H.T. I at 227. Lt. V's call was the first time he learned of the February 11 incident involving Appellant. Id.

<sup>7</sup> On March 3, 2009, Mr. D, Investigator for DOCR, met with the Warden to commence his investigation into Appellant's conduct. Jt. Ex. 21 at 1; Jt. Ex. 22 at 1. Subsequently, the Warden met with Mr. D again and provided him with the packet of information received from Lt. V, which included cellular telephone records for Ms. B, photographs, Lt. V's investigative notes, and cellular telephone records for Appellant. Id.

wasn't there. Id. Instead, her cousin or friend showed up and asked Appellant to give her a ride to the store. Id. Appellant went into the store to get cigarettes for the woman and when Appellant came out, police had the woman out of Appellant's vehicle. Id. at 233. Appellant told Lt. Q that the woman was an ex-inmate. Id. at 234.

Lt. Q indicated to Appellant that he would call Mr. D, the Investigator for DOCR, to relate the situation and find out if Mr. D thought Appellant had done something wrong. H.T. II at 233. Lt. Q called Mr. D at approximately 9:00 p.m., H.T. I at 163, and related what Appellant had told him. H.T. II at 234. Lt. Q wanted to know what was going on but Mr. D was unable to tell him as he was not yet involved in the matter. H.T. I at 163. Mr. D indicated to Lt. Q that he didn't think Appellant should have been escorted out of the building based on the incident.<sup>8</sup> H.T. II at 234.

On March 5, 2009, Police Detective E met with Appellant. H.T. I at 93. Appellant explained to Police Detective E that on the night of February 11, 2009, Appellant was on Appellant's way to meet Ms. I. Id. As Appellant was coming up the road, Ms. B was walking down toward Appellant. Id. Ms. B told Appellant that Ms. I would be there soon and that she needed to go to the Shopping Center to buy cigarettes. Id. at 93-94; Jt. Ex. 22 at 2. Appellant explained to Police Detective E that Appellant had first met Ms. I in early January and Ms. I had given Appellant a telephone number as a contact number for her. H.T. I at 94. Appellant told Police Detective E that Appellant had no knowledge that Appellant was ever speaking to Ms. B when Appellant called the number Ms. I had given Appellant. Id.; H.T. II at 271-72. Appellant asserted that Appellant believed Appellant was speaking with Ms. I each time that Appellant's cell phone number showed up on Ms. B's phone records. H.T. I at 95; see also Jt. Ex. 22 at 4. Appellant acknowledged during Appellant's meeting with Police Detective E that Appellant knew of Ms. B. H.T. I at 97.

On March 12, 2009, Mr. D met with Appellant, and Appellant's union representative, Field Representative S. See Jt. Ex. 21 at 3; Jt. Ex. 22 at 3; H.T. I at 147-48. Appellant explained to Mr. D that on the evening of February 11, 2009, Appellant was going to meet Ms. I, allegedly a cousin of Ms. B.<sup>9</sup> Jt. Ex. 64. Appellant told Mr. D that Ms. B approached Appellant's vehicle,<sup>10</sup> advised Appellant that Ms. I was not there, and asked Appellant to take her to the store

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<sup>8</sup> Mr. D acknowledged that he told Lt. Q that based on what Lt. Q told him about the incident involving Ms. B and Appellant, he didn't think it was a big deal. H.T. I at 164, 194, 195. Mr. D also acknowledged that when assigned the investigation, he never told the Warden about Lt. Q's call. Id. at 199.

<sup>9</sup> Ms. I testified that she refers to Ms. B as her cousin, even though the two are not related. H.T. II at 126-27; see also H.T. II at 169.

<sup>10</sup> According to Appellant, as Ms. B approached the car Appellant thought it was Ms. I. H.T. II at 265. Appellant indicated it was very dark outside. Id. Eventually, Appellant realized it wasn't Ms. I and assumed it was the cousin Ms. I talked about all the time. Id. at 265-66.

to buy cigarettes.<sup>11</sup> H.T. I at 148; H.T. II at 283; Jt. Ex. 64.

Appellant told Mr. D Appellant agreed to take Ms. B to the store. H.T. I at 148. Appellant related to Mr. D that Appellant did not recognize Ms. B at first as she had changed the color of her hair since she had been incarcerated at MCCF. Id. at 148-49. Appellant acknowledged that Appellant did recognize her on the way to the store. Id. at 149; H.T. II at 266-67, 279. Once Appellant arrived at the Shopping Center, Appellant exited Appellant's car and entered the pharmacy to purchase cigarettes for Ms. B. H.T. II at 291; Jt. Ex. 64. Upon exiting the pharmacy, Appellant saw Ms. B at the back of Appellant's vehicle with the two Police Officers. Jt. Ex. 64. Appellant recounted to Mr. D that Appellant was asked by one of the officers whether Appellant knew anyone in law enforcement and Appellant told them Appellant worked at the jail. Id. Appellant related to Mr. D that Appellant was told by the police Appellant could leave. Id. Appellant stated Appellant was never told what was going on; Appellant didn't ask and the police didn't tell Appellant. Id.

Although Mr. D didn't ask about Appellant's calls to Ms. B, Appellant volunteered that Appellant had never talked to Ms. B on the phone. H.T. I at 149, 184-85. He had only talked with Ms. I, never with Ms. B. Id.; Jt. Ex. 64; H.T. II at 270-72. Appellant offered to Mr. D several other numbers besides Ms. B's cell phone number that Appellant had used to communicate with Ms. I.<sup>12</sup> Id. Appellant acknowledged to Mr. D that Appellant had on Appellant's uniform pants during the evening of February 11, 2009 when Appellant was questioned by the MCP. Jt. Ex. 22 at 4; Jt. Ex. 64.

As part of his investigation, Mr. D obtained post assignment logs for the period March 2008 through February 2009. H.T. I at 153; Jt. Ex. 31; Jt. Ex. 36; Jt. Ex. 37; Jt. Ex. 68. Mr. D ascertained that during the period of Ms. B's incarceration at MCCF from March 18-September 11, 2008, Appellant was assigned to the North 2 Cluster twenty times. Jt. Ex. 22 at 5; Jt. Ex. 31; H.T. I at 154-55.

Mr. D also obtained the telephone records from the County's Department of Technology Services (DTS) for MCCF for the period December 1, 2008-February 25, 2009. H.T. I at 157; see Jt. Ex. 23. Using the list of posts that Appellant was assigned to during that period, Jt. Ex. 31, Mr. D developed a spreadsheet, containing the telephone numbers for each post and the calls that came into or went out from those post numbers. H.T. I at 158-59; Jt. Ex. 23. Mr. D then highlighted in red those phone calls which were from or to one of the phone numbers Appellant had indicated Ms. I had provided to Appellant to contact her. Id.; Jt. Ex. 24.

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<sup>11</sup> Appellant's own witness, Ms. B, had a different version of what transpired. According to Ms. B, she had two phone calls with Appellant where she gave Appellant directions on the evening of February 11, 2009. H.T. II at 178, 179, 191. During the first phone call, Ms. B told Appellant that Ms. I wasn't there yet. H.T. II at 178, 191.

<sup>12</sup> The phone numbers provided by Appellant were: (333) 333-3333; (444) 444-4444; and (555) 555-5555. Jt. Ex. 22 at 4; Jt. Ex. 24; Jt. Ex. 64. The police verified that (333) 333-3333 belonged to Ms. I. Jt. Ex. 22 at 4; see also H.T. II at 145.

Thereafter, Mr. D queried the criminal justice information system and obtained Ms. B's home phone number – (222) 222-2222. H.T. I at 161-62; see also H.T. II at 201. He correlated this information with the DTS MCCF phone records and developed another spreadsheet, indicating phone calls that were received from Ms. B's home number at telephone numbers for the post where Appellant was stationed. H.T.I at 161-62; C. Ex. 10.

Finally, Mr. D took the data contained in Jt. Ex. 23 and the data contained in C. Ex. 10 and combined them into one report which became C. Ex. 16. H.T. I at 162. Thus, C. Ex. 16 reflects all incoming and outgoing phone calls from posts where Appellant was stationed during the period January 22, 2009 through February 25, 2009 to or from Ms. B's cell phone, Ms. B's home phone, and one of the two additional numbers that Appellant indicated Ms. I gave Appellant to contact her at.<sup>13</sup> Id.; C. Ex. 16; Jt. Ex. 24.

Mr. D submitted his investigation report to the Director on May 12, 2009. See Jt. Ex. 21. The Warden subsequently asked Mr. D to gather more information and Mr. D resubmitted his investigation report to the Director on June 2, 2009. See Jt. Ex. 22; H.T. I at 207-08.

After reviewing the investigation report and after discussing the matter at length with the Director, the Warden drafted a Statement of Charges (SOC), proposing Appellant's dismissal. See Jt. Ex. 1; H.T. I at 229-31. The SOC contained ten charges:

- 1) Appellant violated Section 33-5(c) of the personnel regulations, when Appellant violated established policy or procedure;<sup>14</sup>
- 2) Appellant violated Section 33-5(e) of the personnel regulations when Appellant failed to perform Appellant's duties in a competent or acceptable manner;<sup>15</sup>
- 3) Appellant violated Section 33-5(g) of the personnel regulations, when Appellant knowingly made a false statement during the course of employment when Appellant stated Appellant had not made contact with Ms. B prior to her walking to Appellant's vehicle on February 11, 2009;

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<sup>13</sup> Specifically, this spreadsheet shows calls to (444) 444-4444. However, no call is made either to or from that number until February 13, 2009. C. Ex. 16; Jt. Ex. 22 at 4.

<sup>14</sup> This compound charge indicates that Appellant violated an established policy or procedure when: 1) Appellant knowingly established a relationship with a former inmate; 2) Appellant made false statements during the Department's internal investigation into Appellant's conduct (i.e., Appellant's phone calls were to Ms. I and Appellant was not told what was going on by the MCP); and 3) Appellant violated the Department dress code by wearing part of Appellant's uniform on February 11, 2009.

<sup>15</sup> This is actually a compound charge alleging: 1) Appellant knowingly established a relationship with a former inmate; and 2) Appellant gave false statements to the Department investigator.

- 4) Appellant violated Departmental Policy 3000-7, Section V, Association with an Inmate/Resident/Participant or an Inmate's/Resident's/Participant's Family and Friends, when Appellant knowingly made numerous calls to Ms. B;
- 5) Appellant violated Department Policy 3000-7, Section V, Association with an Inmate/Resident/Participant or an Inmate's/Resident's/Participant's Family and Friends, when Appellant admitted Appellant made calls to Ms. I, a relative or friend of Ms. B;
- 6) Appellant violated Department Policy 3000-7, Section VI, Departmental Rules for Employees, (D)(1), Conformance to Law, when Appellant knowingly established a relationship with a former inmate and gave false statements to the Department Investigator;<sup>16</sup>
- 7) Appellant violated of Department Policy 3000-7, Section VI, Departmental Rules for Employees, (D)(9), Conduct Unbecoming, when Appellant knowingly began a relationship with a former inmate who was also involved in criminal activities;
- 8) Appellant violated Department Policy 3000-7, Section VI, Departmental Rules for Employees, (D)(10), Neglect of Duty/Unsatisfactory Performance, when Appellant made contact with Ms. B while Appellant was on duty and some of the calls exceeded the time in which a security round should have been conducted;
- 9) Appellant violated Department Policy 3000-7, Section VI, Departmental Rules for Employees, (D)(14), Untruthful Statements, when Appellant made false statements to the Departmental Investigator;<sup>17</sup> and
- 10) Appellant violated Department Policy 3000-7, Section VII, Public Relations, enhancing the image of the Correction and Rehabilitation profession, when Appellant wore part of the Department uniform while Appellant was in contact with a former inmate who was involved in criminal activity.

Jt. Ex. 1 at 6-9.

The Statement of Charges provided Appellant with the right to respond. Appellant responded through counsel, indicating Appellant was waiving Appellant's right to respond to the

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<sup>16</sup> This is also a compound charge.

<sup>17</sup> This compound charge indicates that Appellant made false statements when Appellant informed the Investigator that: 1) Appellant had had no contact with Ms. B prior to Appellant's meeting with her on the evening of February 11, 2009; 2) Appellant's phone calls were to Ms. I; and 3) Appellant was not told what was going on by the MCP officer on the evening of February 11, 2009.

Statement of Charges but was doing so under duress. Jt. Ex. 3. Specifically, Appellant's counsel asserted that Appellant's due process rights had been violated because Appellant was not provided with a copy of the evidence relied upon to support the Statement of Charges.<sup>18</sup> Id. The Director issued the Notice of Disciplinary Action – Dismissal (NODA) to Appellant, who received it on August 7, 2009. Jt. Ex. 4 at 10.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### County:

- The County has a policy which forbids correctional staff from having personal relationships with former jail inmates within one year of the inmate's release from jail. At the time Appellant gave Ms. B a ride on February 11, 2009, it was still within the one-year period as she was released from MCCF in September 2008.
- Appellant acknowledged Appellant had a relationship with Ms. I, who was a friend of Ms. B.
- Appellant admitted that Appellant recognized that the passenger in Appellant's car on February 11, 2009 was Ms. B. Yet, Appellant denied any knowledge of Ms. B's criminal history when the police raised the issue to Appellant on February 11, 2009.
- Ms. B's cell phone records demonstrate that she and Appellant repeatedly called each other after she was released from the Frederick Detention Center in January 2009 up until her arrest on February 12, 2009. Also, there were calls to and from Ms. B's home number and the phones at the posts at MCCF where Appellant was stationed.
- Appellant denied to Mr. D during the DOCR investigation that Appellant ever spoke to Ms. B; Appellant insisted Appellant had only spoken to Ms. I.

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<sup>18</sup> The Board addressed this allegation in its Decision on Appellant's Motion for Reconsideration, wherein Appellant sought to have the Board reconsider some of its rulings on discovery disputes between the parties. In support of Appellant's reconsideration request, Appellant argued that pursuant to the Supreme Court's decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985), Appellant's due process rights had been violated when Appellant was not provided with a copy of the evidence used to support the Statement of Charges and noted that the Federal Government affords such an opportunity to its employees. The Board found that pursuant to Loudermill, Appellant's due process rights consisted of the right to notice of the charges against Appellant and an opportunity to respond. See also Stone v. FDIC, 179 F.3d 1368, 1375, 1377-78 (Fed. Cir. 1999) (noting the Due Process Clause only provides the minimum process to which a public employee is entitled prior to removal. Employees may also be entitled to other procedural protections afforded by statute, regulation or agency procedure). The Board noted that the County's personnel regulations, unlike the Federal Government's personnel regulations, do not require management provide an employee with the right to review all the material relied upon in proposing a disciplinary action. Based on this analysis, the Board concluded that Appellant's due process rights were not violated when Appellant failed to receive a copy of the material relied upon by the County in proposing Appellant's dismissal.

- Appellant lied when Appellant told the Investigator that the MCP officer did not tell Appellant what was going on the night of February 11, 2009.

Appellant:

- There was a rush to judgment in this case. The phone records do not establish a relationship between Ms. B and Appellant. This whole case hinges on a relationship between Ms. B and Appellant which never existed.
- The Warden improperly influenced the inquiry into the allegations of misconduct by Appellant. Specifically, the Warden appears to have determined without any supporting evidence that Appellant engaged in a sexual relationship with Ms. B.
- Appellant concedes that Appellant had a lapse of judgment when Appellant failed to report to Appellant's superiors the incident of February 11, 2009. Appellant was concerned about the impact on Appellant's career and Appellant's marriage.
- Appellant has been entirely forthcoming to the police and Mr. D about this matter.
- There were factual inaccuracies in Mr. D's report that he forwarded to DOCR management. Moreover, he failed to pursue potential exculpatory evidence when he decided not to interview either Ms. B or Ms. I so as to confirm Appellant's assertion that Appellant's relationship was with Ms. I not Ms. B.
- Appellant did contact Ms. I after the night of February 11, 2009. Appellant acknowledges this was a violation of policy but Appellant was trying to figure out what exactly had occurred, as well as the relationship between the parties.
- Removal is not an appropriate penalty in this case; it fails to consider all the mitigating circumstances.
- The penalty of dismissal is not consistent with the penalties imposed on other employees for the same or similar offenses.

**APPLICABLE REGULATIONS**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, and October 21, 2008), Section 33, *Disciplinary Actions***, which states in applicable part:

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

- (d) ***Consideration of other factors.*** A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:
  - (1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
  - (2) the employee's work record;
  - (3) the discipline given to other employees in comparable positions in the department for similar behavior;



(4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and

(5) any other relevant factor.

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

(c) violates an established policy or procedure;

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

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

(h) is negligent or careless in performing duties;

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

**33-6. Disciplinary process.**

(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.

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, Standards of Conduct, effective date March 26, 2007, which states in applicable part:**

**VI. ASSOCIATION OF PERSONNEL WITH AN INMATE/RESIDENT/  
PARTICIPANT OR WITH AN INMATE'S/RESIDENT'S/  
PARTICIPANT'S FAMILY AND FRIENDS:**

- B. Department personnel are prohibited from establishing a personal relationship, beyond what is required to perform official duties, with the following individuals:
2. A former inmate/resident/participant who is under the supervision of a criminal justice agency in Montgomery County (i.e., parole/probation, Pre-Release Center, CARG Program, etc.).
  3. Notwithstanding #2 above, a former inmate/resident/participant who has been released from a correctional facility, community corrections, or parole/probation program less than one year.

**VII. DEPARTMENT RULES FOR EMPLOYEES**

D. Specific Departmental 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.

9. Conduct Unbecoming:

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

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.

## VIII. PUBLIC RELATIONS

- A. Each employee is an emissary of the department and can do much to enhance the image of the Correction and Rehabilitation profession.

### ISSUES

1. Has the County proven its charges by a preponderance of the evidence?
2. Based on the charges sustained, is the penalty of dismissal excessive?

### ANALYSIS AND CONCLUSIONS

**The Board's Hearing Procedures Are Clear That Documents Not Contained In The Prehearing Submissions Will Only Be Allowed Into The Record Upon Good Cause Shown. Accordingly, The Board Hereby Strikes All Additional Documents Submitted By The Parties As Exhibits In Their Post-Hearing Submissions.**

At the close of the continuation of the hearing on January 25, 2010, the Board indicated that it wanted the parties to submit their closing arguments in post-hearing briefs. H.T. II at 305-06. In addition, Appellant asked for permission at the start of the hearing to file with the Board an affidavit from Mr. R, a witness that had been subpoenaed to testify in this case, in lieu of live testimony.<sup>19</sup> The Board agreed to this request, so long as the County would have an opportunity to provide a rebuttal. H.T. II at 11-12. Accordingly, at the end of the hearing, the parties were instructed to file their closing arguments and the **one** affidavit from Mr. R with the Board by COB January 28, 2010.<sup>20</sup> Id. at 13.

On January 28, Appellant, through counsel, filed Appellant's Closing Argument, along with fourteen additional exhibits, totaling one hundred and ninety-nine pages. It was sent via email, at 3:03 p.m. There was no affidavit from Mr. R among the fourteen exhibits. The County provided its closing brief via email at 3:51 p.m. Then, after reading Appellant's Closing Argument and the attached exhibits, the County, via email at 5:26 p.m., requested an additional

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<sup>19</sup> Mr. R is an Executive Board member and shop steward for the United Food & Commercial Workers Union, Local 1994, Municipal and County Government Employees Organization (MCGEO). MCGEO, on behalf of Mr. R, had filed a Motion to Quash Subpoena with the Board, which the Board had denied. Subsequently, MCGEO ordered Mr. R not to appear before the Board and Appellant had filed a Petition for Enforcement of the Board's subpoena with the Circuit Court for Montgomery County, Maryland. That action was still pending at the time the Board held the second day of hearing in this case.

<sup>20</sup> The parties were reminded that the Board's office closes at 3:00 p.m. H.T. II at 13, 306.

page of deposition be added to Appellant's Exhibit 7 to Appellant's Closing Argument, and provided a copy of the page.

The parties were clearly on notice that the Board would only grant the admission of additional exhibits after the Prehearing Conference based on a showing of good cause, as this very issue was discussed in the Board's decision in this case on Appellant's Motion in Limine. No good cause has been shown, nor did the Board grant leave to allow the parties to supplement the record at the close of the hearing save for one affidavit from Mr. R. Accordingly, the Board has determined to strike all of the additional exhibits provided in the closing briefs of the parties. See MSPB Case No. 07-05 (2007). Although both Appellant and the County filed after their closing arguments **after COB** on January 28, 2010, the Board has determined to allow these pleadings to remain in the record.

**The Board Finds That Appellant's Testimony, As Well As The Testimony Of Two Of Appellant's Witnesses, Ms. B and Ms. I, Simply Are Not Credible.**

A. The Board's Standards For Determining Credibility.

Because the testimony of various witnesses conflict with the testimony of other witnesses, the Board had to make credibility determinations with regard to the witnesses. 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 or her 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)).

B. Applying The Board's Credibility Standards In The Instant Case, Appellant and Several Of Appellant's Witnesses Lacked Credence.<sup>21</sup>

1. Appellant's Testimony Was Self-Serving.

The Board had ample opportunity to directly observe the demeanor of Appellant during Appellant's testimony. The Board finds that Appellant was evasive and less than forthcoming during Appellant's testimony and that Appellant's testimony was inconsistent with testimony of other witnesses, including Appellant's own witness, Ms. B. For example, Appellant claimed the neighborhood was very dark when Appellant approached Ms. B's house, and, therefore, Appellant was driving slowly. H.T. II at 265. Officer A testified credibly that the neighborhood was fairly well lit, with street lights on and the houses also had lights on outside. H.T. I at 49. Officer C testified credibly that when Appellant and Ms. B drove past, Officer C had a clear view of the driver and the front seat occupant, Ms. B. H.T. I at 110. Given that it was 11:45 p.m. at night, absent adequate lighting, Officer C would have had trouble identifying the occupants of Appellant's vehicle.

Mr. D testified that Appellant provided him with several phone numbers Appellant had for reaching Ms. I. H.T. I at 149; Jt. Ex. 24. According to Mr. D, Appellant told him that when Appellant called these numbers Appellant never talked to Ms. B or anybody else. H.T. I at 211, 212; Jt. Ex. 23. Likewise, Detective E testified that Appellant told her that when Appellant called Ms. B's cell phone number Appellant believed Appellant was talking with Ms. I. H.T. I at 94-95. However, on the stand, Appellant indicated that when Appellant called Ms. B's cell phone, sometimes Appellant would actually have conversations with an individual Appellant believed to be Ms. I's cousin. H.T. II at 272-73, 290-91.

According to Appellant, Appellant didn't recognize the difference in the Ms. B's and Ms. I's voices, even though Appellant talked to Ms. I a lot and conceded that Ms. I has an accent.<sup>22</sup> Id. at 290-91, 303. The Board had the opportunity to hear testimony from both Ms. I and Ms. B and notes that there is a significant difference both in their voice and manner of speech. Indeed, because of this marked difference, the Board examined Appellant repeatedly about it:

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<sup>21</sup> The Board notes that Mr. D did not interview either Ms. B or Ms. I during his investigation, as he didn't think they would add value to his investigation. H.T. I at 203. The Board believes that Mr. D should have done so. The Board has on a previous occasion criticized Mr. D for failure to do a complete investigation by interviewing a material witness. MSPB Case No 09-03 (2009). Nevertheless, in this case, the Board concludes that Mr. D's failure constitutes harmless error, as the Board has determined that neither individual provided credible testimony.

<sup>22</sup> Ms. I is from the Republic of Georgia. H.T. II at 121.

Board Member: Okay. Appellant, approximately how many times did you talk to Ms. I on the phone?

Appellant: A lot.

Board Member: A lot? So you're telling me tonight that you talked to her a lot, but you couldn't recognize her voice when you were talking with her – when you were talking on the phone to someone, you couldn't recognize their voice?

Appellant: I thought it was Ms. I when I talked to her on the phone. It may have been times where I know now Ms. B would have said hold on or wherever. But I thought at the time, okay, this is her cousin.

I didn't know who the cousin was, so that wasn't unusual to me for the cousin to answer the phone or tell me to hold on or she'll call you back. That wasn't unusual to me.

Board Member: So you could talk to a person a lot but you can't recognize their voice on the phone?

Appellant: Not always.

H.T. II at 290-91.

Board Member: We've heard that there were 38 calls between your phone and the phones that were either shared or used between Ms. I and Ms. B. Some of those were text messages and not direct telephone calls.

How many other conversations have you had with Ms. I either on the phone or in person? Did you talk to her a lot?

Appellant: I did talk to her a lot, but those 38 phone calls – I thought it was – from my statement of charges, the way it read it was like a combination of my cell phone, time on my personal use that I provided them along with a combination of some of the jail records.

Board Member: So there were a lot of calls between you and Ms. I?

Appellant: There were a lot of calls, yes.

Board Member: A lot of other conversations between you and Ms. I?

Appellant: Yes.

Board Member: Do you notice Ms. I's accent?

Appellant: Some of the time, I do. Other times, you know, I'm not going to say it's there and it's not there, but at points, yes. Some of the time, yes.

H.T. II at 302-04.

Appellant's witness, Ms. B, testified that she told Appellant during their phone conversation at 11:38 p.m. that Ms. I was not at Ms. B's residence yet. H.T. II at 178, 180, 191. According to Appellant, Appellant never knew Ms. I was not at the residence until Ms. B came up to Appellant's car and asked Appellant to take her to get some cigarettes. H.T. II at 266, 283. As Appellant saw Ms. B approach Appellant's vehicle, Appellant thought it was Ms. I; only when she got closer did Appellant realize it was not Ms. I. H.T. II at 265. Yet, incredibly, not knowing who this person was, Appellant allowed Ms. B to get into Appellant's vehicle and began driving her to the Shopping Center. Only as Appellant pulled up to the pharmacy did Appellant even think to ask Ms. B what her name was. H.T. II at 266-67. This account of events strains credulity.

Accordingly, the Board concludes that Appellant was defensive and evasive, and Appellant's testimony was self-serving – Appellant was not credible.

## 2. Ms. I's Testimony Was Contradictory And Evasive.

The Board had the opportunity to assess Ms. I's demeanor while she was testifying. Notably, she failed to make eye contact during her testimony and her testimony was contradictory and evasive at points. For example, during cross-examination by the County's attorney, Ms. I indicated that at some point on February 11, 2009 she left Ms. B's house and went to her boyfriend's house. At that point, she was questioned about the location of Ms. B's cell phone:

Q: When you left the house earlier on February 11, did you take Ms. B's cell phone with you or did you leave it with her[] at the house?

A: I left it with her at the house.

H.T. I at 144-45.

When the County Attorney tried to pursue this line of questioning, Ms. I changed her story:

Q: Well, earlier tonight, you said that when you left the house that day, before you came back and saw the cops coming out of the schoolyard and their cars, that you had left Ms. B's cell phone with

her at the house, am I right?

A: I never said that.

H.T. I at 162.

Moreover, Ms. I was evasive during questioning:

Board Member: Was Appellant wearing a uniform at any time when you met Appellant?

Ms. I: I didn't really pay attention and I don't know what the uniforms really are so I didn't really ask.

H.T. II at 164.

Ms. I was asked by the County's attorney what time she left Ms. B's house on February 11, 2009 to go to her boyfriend's house. Ms. I replied thusly: "Do you remember the time you left your house last year at that time? I don't. I'm sorry." H.T. II at 140.

Ms. I's version of what occurred when she arrived at Ms. B's residence in the early morning of February 13, 2009 differed markedly from that related by the two officers at the scene. According to Ms. I, she pulled up to the house, got out of her Mercedes SUV and wanted to go into the house and was told she couldn't. H.T. II at 134. She told the police she "kind of live[s] here" and she was informed she couldn't go inside. Id. So she then circled the block and came back and they let her inside. Id. at 134-35, 159. According to the officers, Ms. I never indicated she lived in the house; rather she mentioned she needed to get into the house and related to them her concern about Ms. B's grandmother. H.T. I at 65, 119-20.

Accordingly, based on Ms. I's demeanor, the Board concludes that she was not a credible witness.

### 3. Ms. B's Testimony Was Simply Not Credible.

Ms. B acknowledged that she and Ms. I were best friends since 8<sup>th</sup> grade and shared things with each other and talked about personal matters with each other. H.T. II at 168, 220-21, 223. However, according to Ms. B, Ms. I never spoke with Ms. B about Appellant or her relationship with Appellant, even though according to Ms. B, she was there for most of the conversations that Ms. I had with Appellant. H.T. II at 221. Given the fact that Ms. B had been at MCCF for six months and Ms. I knew that Appellant was a Correctional Officer, H.T. II at 162, it is impossible to believe that Ms. I did not share with her best friend that she was seeing a Correctional Officer or that she was purportedly asking Ms. B to dial a phone number at MCCF to contact Appellant.

On the evening of February 11, 2009, Ms. B left her residence at 11:45 p.m., scantily dressed with no underpants on, and went up to Appellant's vehicle, even though she purportedly



didn't know Appellant, to seek a ride to the Shopping Center. When asked about this, Ms. B testified thusly:

Board Member: Okay, all right. So when you went to meet this gentleman that evening, what kind of car was he driving?

Ms. B: A blue two-door car.

Board Member: How did you know what car to be looking for?

Ms. B: Well, my street is not really a busy street.

Board Member: But who told you to look for that car?

Ms. B: Well, I told him where to turn.

Board Member: Yes, but who –

Ms. B: So I assume that's where he was turning and it was him.

Board Member: So you were just going to get in and ask whoever it was, not knowing any information?

Ms. B: Well, I told him the street to turn on as he was turning on it.

Board Member: But he wasn't even at your house?

Ms. B: He was three doors down from my house.

Board Member: And so you weren't sure that that person was the one you were supposed to be meeting?

Ms. B: I was pretty sure.

Board Member: Because?

Ms. B: Common sense.

Board Member: I don't understand. If you didn't know the car he was driving, you hadn't spoken to him before, how would you know that that was him?

Ms. B: Assumption.

H.T. II at 223-25.

Given the fact that Appellant was only three doors down from Ms. B's house, it makes no sense why Ms. B would have come out of her house, scantily clad, and walked down to this stranger's car, not knowing for sure it was the individual she thought it might be, at 11:45 p.m. The more logical thing to do would have been to wait the minute or so it would have taken for Appellant to reach her house<sup>23</sup> to ensure that the driver of the car was who Ms. B assumed it would be. The Board notes that inherent improbability, i.e., the likelihood of the event occurring in the manner described, is a factor to be considered in a credibility determination. Hillen v. Department of the Army, 35 M.S.P.R. 453, 461 (1987). Accordingly, the Board concludes that Ms. B's testimony regarding the fact that she did not know it was Appellant in the car is simply not credible.

### **The Board Finds That There Are Four Main Charges Adequately Set Forth In The Statement Of Charges.**

As the Board has previously counseled DOCR, see MSPB Case 09-03 (2009), MSPB Case 09-04 (2008), an agency may take a single instance of misconduct and prepare a SOC based on several specifications. For example, if an employee does not show up for work and fails to call his supervisor to advise that he will not be reporting to work, a day of absence without leave (AWOL) may appear in a SOC as an AWOL charge and a charge of failure of the employee to follow regulations by reporting the absence to his supervisor. However, the Board will merge charges that are based on the same conduct and proof of one charge automatically constitutes proof of another. See, e.g., Southers v. Veterans Administration, 813 F.2d 1223, 1225-26 (Fed. Cir. 1987) (the court found that an agency's nineteen charges of false testimony were duplicative because they involved answers to the same question, slightly rephrased); Ruffin v. Dep't of Army, 35 M.S.P.R. 499, 502-03 (1987), aff'd, 852 F.2d 1293 (Fed. Cir. 1989); Delgado v. Dep't of Air Force, 36 M.S.P.R. 685, 688 (1988); Barcia v. Dep't of Army, 47 M.S.P.R. 423, 430 (1991). In the instant case, a portion of Charge 1 (i.e., establishing a relationship with a former inmate) is the same as the misconduct that encompasses Charges 4, 6, and 7. Likewise, a portion of Charge 1 (i.e., that Appellant made a false statement when Appellant indicated Appellant's phone calls were to a person named Ms. I) is the same as the misconduct that forms the basis of part of Charge 9.

Moreover, in the instant case, four of the charges (i.e., Charges 1, 2, 6 and 9) are in fact compound charges – i.e., they contain separate acts of misconduct, which are not dependent upon each other, and therefore, actually constitute separate charges. See Chauvin v. Department of the Navy, 38 F.3d 563, 565 (Fed. Cir. 1994); Walker v. Dep't of the Army, 102 M.S.P.R. 474, 477 (2006); MSPB Case No. 09-03.

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<sup>23</sup> According to Ms. B's version of events, Appellant did not stop Appellant's vehicle three houses down from her house but was in fact slowly coming up the street. H.T. II at 216. Her testimony was directly contradicted by Officer A, who testified that Appellant's car stopped three lots down from Ms. B's house. H.T. I at 50, 52, 53. Officer C credibly testified that Officer A told him that Appellant's vehicle had stopped. Id. at 108.

Based on the foregoing, the Board has determined there are four<sup>24</sup> basic charges in this matter:

**Charge 1** – Appellant violated Departmental Policy 3000-7, Section V, Association with an inmate/resident/participant or an inmate’s/resident’s/participant’s family and friends.

*Specification A – Appellant established a relationship with Ms. B, a former inmate.*

*Specification B – Appellant established a relationship with Ms. B’s friend/relative, Ms. I.*

**Charge 2** – Appellant made false statements during the course of a Departmental investigation.

*Specification A – Appellant made a false statement when Appellant informed the Investigator that Appellant had had no contact with Ms. B until the evening of February 11, 2009.*

*Specifications B – Appellant made a false statement when Appellant told the Departmental Investigator that Appellant’s phone calls were to Ms. I.*

*Specification C – Appellant made a false statement when Appellant told the Investigator that the MCP officer did not tell Appellant what was going on during the evening of February 11, 2009.*

**Charge 3** – Appellant neglected Appellant’s duties by spending time on phone calls with Ms. B when Appellant should have been conducting security checks.

**Charge 4** – Appellant violated Departmental Policy 3000-7, Section VII, Subsection 12, when Appellant wore part of Appellant’s uniform while off-duty.

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

A. Appellant Established A Relationship With Ms. B In Violation Of Departmental Policy 3000, Section V.

Appellant acknowledges that Appellant interacted with Ms. B while she was incarcerated

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<sup>24</sup> The Board has determined the last charge regarding Appellant having failed to enhance the image of the Department but rather diminished it is not a charge. The language from the Departmental regulation used to support this charge is horatory in nature not mandatory. See, e.g., Del A. v. Roemer, 777 F. Supp. 1297, 1307 (E.D. La. 1991) (citing to Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 24 (1981) (finding that language which is horatory indicates a preference rather than imposing an obligation)).

at MCCF. H.T. II at 258. According to Appellant, Appellant did not “knowingly” have contact with Ms. B after she was released. H.T. II at 259-60, 272. Rather, Appellant thought when Appellant called the various numbers given to Appellant by Ms. I, Appellant was speaking with Ms. I. H.T. II at 284-87.

Ms. I and Ms. B testified that because Ms. I’s boyfriend sometimes used her cell phone, Ms. I did not want Appellant’s number showing up on her phone. H.T. II at 119, 165, 176. Therefore, Ms. I, with Ms. B’s assistance, would call Appellant through a three-way call. H.T. II at 124, 176. Ms. I and Ms. B explained how this worked. Ms. I, using her cell phone, would call Ms. B’s home phone, and Ms. B would call the number Ms. I gave her, using the home phone, and then once the number was reached, she would lay down the phone so that she wouldn’t hear what they were saying. H.T. II at 124-25, 176.

At some point during February 11, 2009, Ms. I left Ms. B’s house and went to see her boyfriend. H.T. II at 159. Conveniently, neither Ms. I nor Ms. B could remember the time she left. *Id.* at 140-41, 177. Ms. I testified that when Ms. B called her cell phone at 6:28 p.m., Jt. Ex. 30, Ms. I was away from Ms. B’s house. H.T. II at 160-61. Likewise, when Ms. I called Ms. B’s cell phone at 6:38 p.m., she was not at Ms. B’s home.<sup>25</sup> *Id.* at 161. However, according to Ms. I, while she was away from Ms. B’s house on February 11, 2009, she participated in three-way phone calls with Appellant.<sup>26</sup> *Id.* at 145-46.

The phone records for calls from Ms. B’s home phone to the MCCF post where Appellant was stationed on February 11, 2009, indicate that at 18:55 (i.e., 6:55 p.m.), Appellant received a seventeen minute phone call from Ms. B. C. Ex. 16. Ms. I’s cell phone records, Jt. Ex. 73, do not show any phone call from her cell phone to Ms. B’s home phone number on February 11, 2009.<sup>27</sup> Thus, even if one were to believe the three-way phone call scenario, it did

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<sup>25</sup> Ms. B, who could not remember when Ms. I left her house that day, suggested that perhaps Ms. I’s boyfriend could have had Ms. I’s cell phone and called Ms. I on Ms. B’s cell phone. H.T. II at 195-96. While the Board has found that neither Ms. B nor Ms. I were credible witnesses, the Board credits Ms. I’s testimony over that of Ms. B as to where Ms. I was at the time of the two phone calls. A witness’s lack of credibility on one issue does not necessarily discredit her testimony on another issue. See, e.g., Anderson v. Department of Transportation, 827 F.2d 1564, 1570 (Fed. Cir. 1987).

Moreover, Ms. B did testify that she recalled talking with Ms. I while Ms. I was away from her house, H.T. II at 177, and Ms. I informing her that Appellant was coming to meet Ms. I at Ms. B’s house sometime after 11:00 p.m. *Id.* at 177-78. Ms. I’s cell phone records reflect no calls to either Ms. B’s home or cell phone after 6:38 p.m. until 11:15 p.m. Jt. Ex. 73.

<sup>26</sup> Ms. I could not recall whether the three-way calls were to Ms. B’s cell phone or her home phone. H.T. II at 145-46. None of Ms. I’s cell phone calls, as reflected in Jt. Ex. 73, were to Ms. B’s home phone on February 11, 2009. Significantly, Ms. B testified that the three-way phone calls were made on her home line not her cell phone. H.T. II at 176.

<sup>27</sup> Ms. I’s cell phone records in evidence only depict calls from her cell phone commencing at 5:02 p.m. on February 11. Jt. Ex. 73. However, Ms. B’s cell phone records

not take place at 6:55 p.m. The phone records for MCCF indicate that at 19:32 (i.e., 7:32 p.m.) on February 11, 2009, Appellant received a phone call from Ms. B's home phone which lasted an hour and nine minutes. C. Ex. 16. Appellant subsequently received another phone call from Ms. B's home phone at 22:01 (10:01 p.m.) from Ms. B's home phone and the call lasted fourteen minutes. Id.

The Board finds that the length of the telephone calls between Appellant and Ms. B's home on the evening of February 11, 2009 (lasting a total of one hour and forty minutes) standing alone establish that Appellant had a relationship with Ms. B.

B. Appellant Established A Relationship With Ms. I In Violation Of Departmental Policy 3000, Section V.

The second specification of this charge indicates that Appellant established a personal relationship with Ms. I. As was established during the hearing, Ms. B is friends with Ms. I. Even, assuming arguendo, one were to accept that Appellant did not know that Ms. I's "cousin" was in fact Ms. B, there can be no doubt that Appellant recognized the connection between the two woman based upon the events of February 11, 2009.

As previously noted, Ms. I had purportedly given Appellant three different phone numbers that Appellant could use to contact her. Appellant's telephone records establish that on February 12, 2009, beginning at 6:30 a.m. and continuing throughout the day, Appellant placed fourteen calls to one of Ms. I's numbers – (333) 333-3333. Jt. Ex. 29. Moreover, Appellant received a phone call from that very same number which lasted twenty-one minutes. Id. Appellant subsequently received another call from that number, lasting three minutes. Id. Appellant's counsel acknowledges that this communication with Ms. I was a violation of policy and shouldn't have happened. H.T. I at 42. However, counsel argues that Appellant was "blind-sided" by the events of February 11<sup>th</sup>, and had to spend some time figuring out the relationships between the parties, which accounts for Appellant's contact with Ms. I after the night of February 11. Id.

Even if one were to accept that Appellant might have been confused, surely after twenty-four minutes of discussion with Ms. I on February 12, 2009, Appellant would have understood the relationship between Ms. I and Ms. B. Nevertheless, Appellant continued to remain in contact with Ms. I, as demonstrated by Appellant's cell phone records, spending eighty-one minutes on one phone call with her on February 13, 2009 (on the (444) 444-4444 number), and over an hour on various phone calls to her on February 14, 2009. See Jt. Ex. 29. In addition, MCCF telephone records indicate Appellant spent over an hour, while on duty, on the phone with Ms. I the evening of February 13. Jt. Ex. 23. Thus, on February 13 alone, Appellant spoke to Ms. I for over two hours.

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reflect all calls received on February 11, 2009. Jt. Ex. 30. The two sets of cell phone records reflect the following calls between Ms. I's and Ms. B's cell phone on February 11: 12:57 a.m. (1 minute); 2:01 p.m. (2 minutes); 3:10 p.m. (1 minute); 6:28 p.m. (2 minutes); 6:38 p.m. (1 minute); and 11:15 p.m. (1 minute). Jt. Ex. 30; Jt. Ex. 73.

It is clear, based on the record of evidence, that Appellant violated Department Regulation 3000-7, when Appellant had a relationship with Ms. I after February 11, 2009. Accordingly, the Board finds that the County established the second specification of Charge 2.

**The County Proved Two Of The Three Specifications Of The Second Charge By A Preponderance Of The Evidence.**

A. Appellant Made A False Statement When Appellant Informed The Investigator That Appellant Had Had No Contact With Ms. B Until Appellant's Meeting With Her On The Evening Of February 11, 2009.

According to Appellant, Appellant had had no contact or relationship with Ms. B after she was released from MCCF up until the time she entered Appellant's car on February 11, 2009. H.T. II 259-60, 272; Jt. Ex. 22 at 4. Rather, Appellant was going to meet Ms. I. Appellant repeatedly stated Appellant never knowingly talked to Ms. B when Appellant called or received a call from her cell phone or her home line. H.T. II at 285-87, 289-90.

However, as discussed in greater detail supra, Appellant spent one hour and forty minutes on the phone with Ms. B the evening of February 11, 2009. Accordingly, the Board concludes Appellant made a false statement to the Investigator about Appellant's contact with Ms. B prior to the time she entered Appellant's car.

B. Appellant Made A False Statement When Appellant Told The Departmental Investigator That Appellant's Phone Calls Were To Ms. I.

Appellant told Mr. D that Appellant's phone calls were all to Ms. I; the only person Appellant ever talked to on the three numbers Appellant provided to Mr. D was Ms. I. Jt. Ex. 22 at 4; H.T. I at 149. Yet, even as Appellant acknowledged on the stand, Appellant did not always talk to Ms. I when Appellant called one of the three numbers; sometimes Appellant talked to Ms. I's cousin. H.T. II at 273.

It is clear that Appellant spoke with Ms. B when Appellant called her cell phone number on the evening of February 11, 2009. The cell phone records for Ms. B's phone indicate that Appellant called her for four minutes at 11:11 p.m. Jt. Ex. 30 at 11. According to both Ms. B and Ms. I, Ms. I was not present in Ms. B's house at that time. H.T. II at 160-61, 198.

Ms. B acknowledges she called Appellant at 11:38 p.m. and spoke with Appellant for three minutes. H.T. II at 197. According to Ms. B, during that conversation, she informed Appellant that Ms. I was not in the house. H.T. II at 178-80, 191.

Appellant then called Ms. B again at 11:43 p.m. and spoke to her for three minutes. Id. at 196-97. Appellant's claim that Appellant did not know Appellant was speaking to Ms. B is simply not credible; Ms. B's voice and manner of speaking differs markedly from Ms. I's. Moreover, given the fact that the Board has determined that Appellant had a relationship with Ms. B, having spoken to her on her home phone for an hour and forty minutes on the evening of February 11, 2009, Appellant had to know who Appellant was speaking to when Appellant

called Ms. B's cell phone on that evening.

C. Appellant Did Not Make A False Statement When Appellant Told The Investigator That The MCP Officer Did Not Tell Appellant What Was Going On During The Evening Of February 11, 2009.

The charge, as worded in the SOC, is that Appellant made a false statement when Appellant stated that Appellant was "not told what was going on by the MCP officer on the evening of February 11/12, 2009." Jt. Ex. 1 at 7, 8. Officer C testified that he told Appellant that "I can't advise you of what's going on now . . . ." H.T. I at 115; see also H.T. I at 113. Officer C indicated he did not offer Appellant any information as it might hinder the investigation. H.T. I at 125. Based on Officer C's testimony, the Board finds that the County did not prove this specification.<sup>28</sup>

**The County Failed To Prove The Third Charge By A Preponderance Of The Evidence.**

The third charge alleges that Appellant neglected Appellant's duties by spending time on phone calls with Ms. B when Appellant should have been conducting security checks. It is clear from the MCCF phone records that Appellant spent quite a significant amount of duty time on phone calls made to or from either Ms. B's cell phone or her home phone. For example, on January 23, 2009, Appellant spent a total of twenty five minutes on calls to or from Ms. B's cell phone (see Jt. Ex. 23, C. Ex. 16) and over one hour on a call received from Ms. B's home number. C. Ex. 10; C. Ex. 16. Similarly, on January 29, 2009, Appellant spent over twelve minutes on a call with Ms. B's cell phone, Jt. Ex. 23, C. Ex. 16, and over an hour and ten minutes on a call with Ms. B's home phone. C. Ex. 10; C. Ex. 16. On February 11, 2009, Appellant spent over an hour and forty minutes on phone calls with Ms. B's home phone. Id. Significantly, Appellant does not dispute that these calls occurred. H.T. II at 262-63, 286-87.

While it is abundantly evident that Appellant was clearly not focused on performing Appellant's duties, the County offered no evidence that Appellant actually failed to conduct a security check. Therefore, despite the significant evidence of neglect of duties, the Board cannot sustain the charge as worded.

**The County Proved The Fourth Charge By A Preponderance Of The Evidence.**

The fourth charge alleges that Appellant violated Departmental Policy 3000-7, Section VII, Subsection 12, when Appellant wore part of Appellant's uniform while off-duty. Officer C credibly testified that Appellant had on Appellant's uniform pants at the time of Appellant's encounter with Officer C on the evening of February 11, 2009. H.T. I at 113.

Moreover, Appellant acknowledged to Investigator D that Appellant had on Appellant's uniform pants. Jt. Ex. 64 at 11; Jt. Ex. 22 at 4. Accordingly, the Board concludes that the

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<sup>28</sup> The Board believes that Appellant made a false statement to Officer C when Appellant denied knowing about Ms. B's criminal background. H.T. I at 114, 115, 130. However, Appellant was not charged with this misconduct.

County proved the fourth charge by a preponderance of the evidence.

**Given The Seriousness of Appellant’s Misconduct, Dismissal Is An Appropriate Penalty.**

A. Appellant Failed To Establish That An Employee In A Comparable Position In DOCR Was Treated More Favorably Than Appellant.

Appellant has argued that the County’s penalty of dismissal is completely inconsistent with the discipline imposed upon other employees for the same or more severe offenses. Appellant’s Closing Brief at 16-17. The personnel regulations require that a Department Director consider the discipline given to other employees in comparable positions in the Department for similar behavior. MCPR, 2001, Section 33-2(d)(3). Appellant has introduced a number of disciplinary actions given to other Correctional Officers and argued that based on these decisions, Appellant was treated disparately. The Board notes that the key in assessing if discipline is disparately meted out at DOCR is whether these other employees actually occupied comparable positions.

The U.S. Merit Systems Protection Board has held that in order for employees to be deemed similarly situated to one another, all relevant aspects of the appellant’s employment situation must be “nearly identical” to those comparator employees, including that they report to the same supervisor,<sup>29</sup> are subject to the same disciplinary standards, and engaged in similar misconduct. Spahn v. U.S. Dep’t of Justice, 93 M.S.P.R. 195 (2003); Little v. Dep’t of Transportation, 112 M.S.P.R. 224 (2009). Moreover, the U.S. Merit Systems Protection Board has held that in cases of misconduct the appellant must show that he and the comparison employees engaged in similar misconduct without differentiating or mitigating circumstances so as to warrant distinguishing the misconduct or the appropriate discipline for it. Burton v. U.S. Postal Service, 112 M.S.P.R. 115 (2009).

The Board notes that Appellant was a first-line supervisor in law enforcement. While Appellant has tried to argue that incumbents of Correctional Officer III positions perform supervisory duties, they do not perform the full range of first-line supervisory duties on a day-to-day basis.<sup>30</sup> Accordingly, they are not valid comparators with regard to discipline. Likewise, employees in the positions of Correctional Officer II, Community Health Nurse, and Correctional Specialist II are not valid comparators. The Correctional Shift Commander would

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<sup>29</sup> Because the MCPR requires the Department Director to consider discipline given to comparable positions in the Department, the Board holds that in determining whether an employee is similarly situated under the MCPR so as to be a comparator, an appellant must show that the comparator employee had the same Department Director.

<sup>30</sup> While the incumbents of the Correctional Officer III (also known as Corporal) position may from time to time supervise their fellow Correctional Officers, they are considered to be non-supervisory personnel. Cf. Class Specification for Correctional Officer – Sergeant, available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RetrieveClassTitle1.cfm>, with Class Specification for Correctional Officer III, at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RetrieveClassTitle1.cfm>.



be a valid comparator, as the Correctional Shift Commander is a full supervisor. The Board notes, however, that the Correctional Shift Commander received the penalty of dismissal for the Correctional Shift Commander's misconduct, which included a charge of making a false statement during DOCR's internal investigation. See Jt. Ex. 43. Thus, the Board concludes Appellant was not treated disparately when Appellant was dismissed.

B. Appellant's Misconduct Was Serious.

The Board determined that Appellant established a relationship with an ex-inmate, Ms. B, within one year from her release from MCCF. The Board also determined that Appellant knowingly established a relationship with Ms. I, a friend of Ms. B. This was serious misconduct.

The Warden testified that the policy on not fraternizing with ex-inmates is woven into the ethics training that Correctional Officers undergo. H.T. I at 272. The Director testified that much time is spent on the issue of fraternization with the Correctional Officers as they are responsible for the safety and security of the correctional facility. H.T. II at 78. The Director explained that if an ex-inmate decides to use the issue of fraternization against the officer, the ex-inmate would "own" the officer. Id. The outcome could be that the officer brings contraband into the correctional facility. Id. at 78-79. As Officer C explained, someone in corrections does not fraternize with people who are arrested or involved in criminal activity as it jeopardizes the integrity of law enforcement. H.T. I at 135-36.

The Board also determined that Appellant made a false statement to Mr. D during DOCR's internal investigation regarding Appellant's contact with Ms. B before she approached Appellant's car on February 11, 2009. Additionally, the Board found that Appellant made a false statement to Mr. D when Appellant told him that all of Appellant's calls were to Ms. I not Ms. B.

Finally, the Board found that Appellant was wearing the pants of Appellant's uniform in violation of DOCR regulation on the evening of February 11, 2009.

The Board has held that a higher standard of conduct and a higher degree of trust are required of an incumbent of a position with law enforcement duties. MSPB Case No. 07-13 (2007); see also 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). Appellant failed to live up to this standard when Appellant established relationships with Ms. B and Ms. I.<sup>31</sup>

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<sup>31</sup> While the Board sustained both charges, either charge standing alone would warrant Appellant's dismissal.

As noted above, Appellant made false statements 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).

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.

## **CASE NO. 10-15**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the above-captioned appeal from the determination of the Montgomery County, Maryland, Urban District Director to dismiss Appellant.

### **FINDINGS OF FACT**

Appellant worked for the County for nearly twenty-five years, beginning as a janitor in the Department of Recreation. Hearing Transcript (H.T.) at 66. At the time of the events at issue in this case, Appellant was serving as an Urban District Public Service and Maintenance Team Supervisor with the Urban District. H.T at 66. The Urban District's mission is to keep the downtown Urban District clean and safe. Id. at 15. The Urban District employs about thirty employees and they are all identified by a red shirt, which is what they are often called. Id. The red shirts pick up litter, empty trash, power wash sidewalks, clean graffiti, look out for illicit activity, provide buddy escorts, jump start cars, and assist people who have locked their keys in their car. Id. at 15-16.

In the spring of 2009, the Urban District advertised for a grade 17 Urban District Public Service and Maintenance Team Supervisor. Appellant applied for the position. Id. at 16. The Manager of the Urban District interviewed Appellant and the other candidates for the supervisory position. Id. Because the Manager knew that Appellant was a County employee, the Manager did not check references before selecting Appellant. Id. at 17. The Manager just

assumed that Appellant was an employee in good standing.<sup>1</sup> Id.

Appellant began Appellant's new position on May 24, 2009. According to the Manager, shortly after Appellant began Appellant's employment with the Urban District, concerns began to arise from staff about Appellant. Id. at 17. Specifically, staff noted that Appellant had Appellant's own way of doing things. Id. These concerns included how the hose was put back on the truck by Appellant after power washing was completed, id. at 17-18, and moving of the stage without properly securing items that could shift while in transit. County Exhibit (C. Ex.) 16.

There was an incident in August 2009 where an employee's hand was pinched while Appellant was backing up to the stage.<sup>2</sup> H.T. at 17-19; C. Ex. 15. Appellant had Appellant's own way of removing the stage. Instead of following the regular protocol of backing directly into the stage trailer to hook it to the truck and hitch, Appellant would do a jackknife to the stage, coming at it from an angle to attach it to the hitch and truck. H.T. at 20-21, 122-23, 126; C. Ex. 15. While performing this maneuver one day in August, Mr. A, a member of the crew, and the Safety Officer, Mr. B, were directing Appellant as Appellant was backing up. C. Ex. 15; H.T. at 74. During this process, Mr. A stepped between the truck and the trailer stage. H.T. at 123. According to Mr. B, Mr. A was trying to get the hitch and the trailer to line up. Id. at 124. Mr. B was in the midst of trying to tell Mr. A that he might want to get to the side when Mr. A's hand was pinched between the trailer hitch and the truck.<sup>3</sup> Id. at 123-25.

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<sup>1</sup> As the record of evidence establishes, Appellant was, in fact, not in good standing. At the time of Appellant's selection, Appellant was a Public Service Worker IV, grade 14 (C. Ex. 19) with the County's Department of Transportation. While in this position, Appellant had received a performance rating of "Below Expectations" for the period March 1, 2008- February 28, 2009 (C. Ex. 26); a two-day suspension on November 18, 2008 for a physical altercation/assault with another employee (C. Ex. 23); a written reprimand on February 24, 2009 for failing to perform Appellant's duties in a competent or acceptable manner (C. Ex. 21), and was serving under a Last Chance Agreement with the County (C. Ex. 20), wherein Appellant was informed that should Appellant violate the County's Workplace Violence policy the County would initiate a dismissal action against Appellant.

<sup>2</sup> Another employee, Mr. D, reported to Mr. C, Appellant's first-line supervisor, that Appellant did not break down the stage the way the other supervisors had trained Appellant and Appellant insisted Appellant's way was quicker. Mr. D informed Mr. C that Mr. D did not feel safe when Appellant was backing up to the trailer and refused to be anywhere nearby. C. Ex. 15.

<sup>3</sup> Appellant's version of what occurred differs markedly. According to Appellant, Appellant stopped the truck, got out to determine how far back Appellant needed to come and told Mr. A to get out of the way. H.T. at 74. Appellant then got back in the truck to move it, and heard someone tell Appellant to stop. Id. When Appellant got out of the truck the second time, Mr. A told Appellant that Appellant "almost" pinched his hand, id. at 75, 97, and Appellant replied that Mr. A shouldn't have been there. Id. at 75. When questioned about Appellant's version, Appellant again testified that Appellant got out of the truck the first time and asked Mr.

Appellant's first-line supervisor heard rumors<sup>4</sup> that Appellant had almost gotten involved in a physical altercation with an off-duty D.C. officer near a café while Appellant was on duty and that the Montgomery County Police showed up at the scene so Appellant's supervisor followed up with them. C. Ex. 14. He received a report from the Police, providing Officer X's statement of what had occurred on June 30, 2009 at approximately 11:23 p.m. close to the café. Id. According to Officer X, when Officer X arrived at the scene, Appellant informed Officer X that a driver was giving Appellant problems. Id. When Officer X spoke to the driver, the driver identified himself as an off-duty D.C. Police Officer and indicated that Appellant had been blocking the roadway with Appellant's County pick-up truck. Id. When the D.C. officer beeped at Appellant, Appellant ignored the D.C. officer. Id. The officer then got out of his vehicle and asked Appellant to move Appellant's truck. Id. Appellant replied, "This is an emergency vehicle and I'm dealing with something, you will just have to wait."<sup>5</sup> The D.C. officer replied it wasn't an emergency vehicle and a verbal argument ensued. Id. As Officer X was speaking to the D.C. officer, Appellant began yelling and taunting the officer. Id. Officer X pulled Appellant aside and reminded Appellant that Appellant was a County employee and had to act like one. Id. Appellant agreed to stop taunting the D.C. officer. Id. However, when Officer X began speaking to the D.C. officer again, Appellant began yelling at the D.C. officer. Id. At this point, Officer X ordered Appellant to move Appellant's truck and allow the D.C. officer to pass.<sup>6</sup>

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A to move. Id. at 109. Asked whether Appellant knew if Mr. A had moved, Appellant stated Appellant did not know. Id. Appellant conceded that when Appellant returned to the truck and began moving it again, Appellant did not know where Mr. A was. Id. at 110.

<sup>4</sup> Appellant testified that although Appellant considered the incident at the café to be serious enough so that Appellant wanted to get the name and address of the gentleman Appellant was giving directions to at the time, Appellant did not report the incident to Appellant's supervisor because "we have incidents like that all the time." H.T. at 108.

<sup>5</sup> According to Officer X, Appellant was giving a woman directions. C. Ex. 14. According to Appellant, Appellant was giving a woman and a man directions. H.T. at 88.

<sup>6</sup> Once again, Appellant's version of this event differs significantly. According to Appellant, Appellant was on patrol when asked for directions by a gentleman and a lady. H.T. at 87-88. Appellant was getting ready to pull into an alley by the café and pulled Appellant's truck over to the side, leaving room for cars to pass on the right. Id. at 88. The D.C. off-duty officer pulled up and started blowing his horn. Id. Appellant asked him to let Appellant finish what Appellant was doing and Appellant would pull up. Id. Appellant testified that the D.C. officer (who had not identified himself as a police officer) got out of his vehicle and started cursing. Id. at 89, 91. Appellant then got out of Appellant's vehicle, asked the D.C. officer to get back in his vehicle and Appellant would move Appellant's truck. Id. The two continued to exchange words. Id.

According to Appellant, when Officer X arrived on the scene, Officer X was not polite at all and informed Appellant that Appellant needed to move Appellant's truck. Id. at 90. Appellant tried to explain what had been happening and that the D.C. officer appeared to be intoxicated but Officer X only responded by telling Appellant to move Appellant's truck. Id. Appellant then indicated to Officer X that Appellant needed to get the name and phone number

Id. Officer X testified that had Appellant not been a red shirt, based on Appellant's outbursts and behavior, Officer X would have easily arrested Appellant for disorderly conduct.<sup>7</sup> H.T. at 57.

Because of concerns about Appellant's conduct and safety issues with Appellant, the Manager of the Urban District determined to extend Appellant's promotional probationary period. H. T. at 25. On September 23, 2009, Appellant was issued a notification that Appellant's probation was being extended based on a number of concerns, including employee safety and Appellant's conduct on the job, which Appellant's supervisors had documented and discussed with Appellant. C. Ex. 13. Appellant's probation was extended from November 24, 2009 until February 24, 2010. Id. In addition, following the incidents with the power washer and the stage, Appellant was relieved of Appellant's duties of operating the power washer or moving the stage. Id. at 23.

On October 5, 2009, another incident occurred involving Appellant. Specifically, Appellant was in the process of letting Appellant's crew off at the firehouse where they are based so that they could go in for lunch, when Appellant received a call on Appellant's hot line. H.T. at 78. Appellant pulled over into the right driveway of the firehouse and took the call. Id. It was reported to Appellant that somebody was injured or was being attacked. Id. Accordingly, Appellant put on Appellant's strobe lights, told Appellant's crew members to get out of the vehicle and then proceeded to attempt to pull out of the driveway. Id. at 78-79. It was rush hour and Appellant couldn't get out of the driveway because of the traffic. Id. at 79. The traffic light changed to red and traffic stopped in the three lanes of Avenue J in front of the firehouse. Appellant pulled out of the driveway and across lanes one and two where the traffic was stopped. Id. However, as Appellant pulled into lane three of Avenue J there was a vehicle coming southbound and the two vehicles collided.<sup>8</sup> Id.; C. Ex. 11. Although no ticket was issued to Appellant,<sup>9</sup> H.T. at 39, an insurance claim was filed against the County and the County held responsible for the incident. Id. at 39, 41-42.

On November 2, 2009, Appellant was involved in another incident while driving a

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of the gentleman who Appellant had been giving directions to at the time the D.C. officer appeared on the scene. Id.

<sup>7</sup> Officer X testified that it is Officer X's practice to give County employees the benefit of the doubt where it is within the Police Officer's discretion whether to issue a ticket or not. H.T. at 56.

<sup>8</sup> Depending on which of Appellant's versions of events one accepts, see infra, Appellant either hit the southbound vehicle, C. Ex. 12, or was hit by the southbound vehicle. H.T. at 79.

<sup>9</sup> According to the Manager of the Urban District, it was the Manager's belief that the Police give consideration to the red shirts; had Appellant been just a citizen and the same thing happened Appellant would have received a citation. H.T. at 39. Officer X lent credence to this belief when Officer X testified that Officer X did not like to write up County employees but give them the benefit of the doubt. Id. at 56.

County vehicle. Specifically, Appellant hit a pedestrian, Mr. E, while the pedestrian was in a crosswalk. H.T. at 28. Mr. E was at the crosswalk of Avenue J and Avenue K. Id. at 45. There was a woman standing next to Mr. E. Id. at 46. When the traffic light changed and the walk light came on, Mr. E and the woman proceeded to cross the street.<sup>10</sup> Id. at 46, 52-53. As Mr. E got to the middle of the street, he was struck by Appellant<sup>11</sup> who was making a left-hand turn onto Avenue J. Id.; C. Ex. 9. The woman began screaming, and Appellant's wheels ran over Mr. E's feet. H.T. at 46. The woman subsequently left the scene of the accident. Id.

Fire and Rescue arrived at the scene and found Mr. E in the center of the crosswalk. C. Ex. 9 at 2; H.T. at 55. Mr. E was moved to the median to get him out of the street. Id. Subsequently, Officer X arrived at the scene. Officer X first spoke to Appellant, who informed Officer X that Appellant hadn't hit any pedestrian at all and there had been no accident. H.T. at 52. Rather, according to Appellant, Mr. E was thirty feet north of the crosswalk in the roadway. Id.; C. Ex. 9 at 2.

Officer X then spoke with Mr. E, and noticed that his pant leg was torn from the knee down and he had an abrasion just above his ankle going down to below his ankle. H.T. at 52. Mr. E explained to Officer X that he had been in the crosswalk when Appellant made a left-hand turn and struck him. Id. at 52-53.

After hearing Mr. E's description of the accident, the Officer X decided to speak to Appellant again. H.T. at 53. Appellant related that Appellant thought that Mr. E had slapped the side of the truck and yelled at Appellant. Id.; C. Ex. 9. At this point, the Officer X explained to Appellant that as there was contact between a person and a vehicle, Officer X would need to write an accident report. H.T. at 53. Subsequently, Appellant told the Officer X that Appellant had been mistaken. Id. There had been no contact at all with the vehicle; Appellant just heard Mr. E yell, not hit the side of the vehicle. Id.; C. Ex. 9.

Fire and Rescue treated Mr. E at the scene. H.T. at 47. Mr. E informed Fire and Rescue that he did not want to go to the hospital. Id. However, Mr. E was in pain most of the night and could hardly walk the next day. Id. Accordingly, Mr. E called an ambulance, which took him to Holy Cross Hospital the next morning at 7:00 a.m. Id. at 47, 49. Mr. E was treated for two broken bones in his right foot and two sprained ankles. Id. at 49.

Officer X spoke to Mr. E again after Fire and Rescue left the scene on November 2, 2009. Id. at 48, 53-54. Officer X had seen Appellant speaking to Mr. E. Id. at 48. Mr. E related to Officer X that Appellant had asked if there was anything Appellant could help Mr. E with as Appellant did not want Mr. E to file a police report. Id. at 48, 50. According to Officer X, Mr. E

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<sup>10</sup> Although Appellant testified that Appellant neither saw nor heard any woman crossing the street at the time Mr. E was, H.T. at 86, Officer X recalled that both Mr. E and Appellant mentioned another person crossing the street with Mr. E at the time of the incident. Id. at 58.

<sup>11</sup> Appellant provided several versions of what occurred, as set forth infra. The Board finds that Appellant was not a credible witness with regard to this event, and credits the testimony provided by Mr. E.

informed Officer X that Appellant had told Mr. E Appellant needed to work something out because Appellant didn't want a report written as Appellant was on probation. Id. at 54.

Officer X did not initially issue a ticket to Appellant but allowed Appellant to leave the scene. H.T. at 54. Officer X believed Officer X needed to ascertain whether the accident had in fact occurred in the crosswalk, as Mr. E had related, or thirty feet from the crosswalk, as Appellant had maintained. Id.; C. Ex. 9 at 2. Appellant had indicated to Officer X that Fire and Rescue could back up Appellant's version of what occurred. C. Ex. 9 at 2. Therefore, Officer X returned to the fire station and sought out Firefighter Y who had been with Fire and Rescue at the scene of the accident. H.T. at 54-55. Firefighter Y informed Officer X that Mr. E had been in the middle of the crosswalk when Fire and Rescue arrived. Id.; C. Ex. 9 at 2. Officer X then spoke to Officer X's Sergeant and explained the situation. H.T. at 55. The Sergeant instructed Officer X that if someone was struck and Officer X believed Appellant was at fault then Officer X needed to cite the person regardless of who they worked for. Id. Officer X, recognizing that someone had been injured and that there was a lot of deception on Appellant's part, decided to locate Appellant in the fire station and issued Appellant a ticket for failing to yield to a pedestrian in a crosswalk, resulting in an accident. Id. at 56; C. Ex. 8.

Appellant, after being issued a citation, sent an email to Appellant's supervisors, Mr. C and the Manager of the Urban District, informing them that there had been an incident. C. Ex. 7. Appellant told Appellant's supervisors that Mr. E had slipped and fallen but claimed that Appellant had hit him. Id. Appellant insisted Mr. E was not in the crosswalk but some twenty-five feet away. Id. Appellant also insisted that no one had seen the accident and that both the Police Officer and the Firefighter had found Mr. E at the median near the crosswalk where Appellant had helped him to go after Mr. E fell. Id.

Both the Manager of the Urban District and Mr. C met with Appellant the next day to discuss what had happened. According to the Manager, Appellant was not very clear about what had occurred. H.T. at 42. The Manager was left with the impression that the pedestrian had thrown his body into Appellant's vehicle. Id. What the Manager did know was that a ticket had been issued and a pedestrian who had the right-of-way struck. Id. The Manager subsequently learned that Appellant had asked Mr. E if they could work something out as Appellant was on probation. Id. at 34. The Manager relieved Appellant of Appellant's driving responsibility. Id. at 28.

Because of the seriousness of the November 2 incident,<sup>12</sup> the Manager determined that disciplinary action against Appellant was warranted. H.T. at 28-29. At this point, Appellant was not doing a lot of what Appellant had been hired to do. Id. at 29. Appellant's probation had been extended and the Manager was spending more time dealing with Appellant's issues than with the rest of the Manager's staff's issues collectively. Id. The Manager believed that the Manager could not continue to put the Urban District staff's and citizens' safety at risk in the hands of someone hired by the County to ensure their safety. Id. at 30. The Manager could no longer trust Appellant and the Manager needed to trust that the Urban District supervisors would make good decisions and not be reckless. Id. at 34. The Manager toiled with the decision as the

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<sup>12</sup> Mr. E subsequently filed a claim against the County. H.T. at 41-42.

Manager recognized Appellant was a long-term County employee. Id. at 30. However, the Manager was concerned about the lack of Appellant taking responsibility for Appellant's actions; it was always someone else's fault. So ultimately, the Manager recommended to the Manager's supervisor, Mr. F, that a Statement of Charges (SOC) for dismissal be issued to Appellant. Id. at 30, 62. Mr. F agreed with the Manager's assessment that based on the Urban District's mission of safety for its employees and the citizens in Silver Spring, Appellant's dismissal was warranted. Id. at 62.

Appellant was issued the SOC on December 16, 2009. C. Ex. 3. Appellant replied to the SOC on December 30, 2009. C. Ex. 2. The Manager was disappointed in Appellant's response as Appellant failed to take responsibility for Appellant's actions. H.T. at 32. On January 27, 2010, Appellant received a Notice of Disciplinary Action (NODA), dismissing Appellant effective January 31, 2010. C. Ex. 1.

This appeal followed.

### **APPLICABLE REGULATIONS**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, and November 3, 2009), Section 33, *Disciplinary Actions***, which states in applicable part:

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

...

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

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



...

- (d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, or is convicted of a criminal offense, if such violation is related to, or has a nexus with, County employment;

...

- (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; . . .

### **POSITIONS OF THE PARTIES**

#### County:

- Almost immediately after Appellant came to work for the Urban District, Appellant’s supervisors began hearing complaints about Appellant. Some of the complaints had to do with safety.
- One of Appellant’s coworkers was injured due to Appellant’s actions.
- Appellant was involved in a vehicle accident in October 2009.
- Less than a month later, Appellant failed to yield to a pedestrian in a crosswalk and hit the pedestrian.
- Insurance claims have been filed against the County due to both of Appellant’s accidents.
- Appellant has shown an unwillingness to accept responsibility for any of Appellant’s actions. According to Appellant, none of the incidents are Appellant’s fault; rather, it is always someone else that is to blame.
- Appellant lacks credibility; Appellant failed to even acknowledge the disciplinary action Appellant received as a janitor.
- The Manager needs to be able to trust the Manager’s supervisors and the Manager can no longer trust Appellant as a supervisor.
- Appellant has a history of disciplinary actions.

#### Appellant:

- Appellant has been an employee for twenty-five years with the County and for most of the twenty-five years Appellant has had a solid record.
- There were no witnesses, other than Mr. E and Appellant, to the alleged striking of Mr. E. If he was struck, it was an accident.
- Mr. E was intoxicated, and Mr. G and Mr. H were witnesses to his intoxication.

- Appellant had four co-workers who came to the hearing on their own time to testify for Appellant. Two of Appellant’s witnesses, Mr. H and Mr. B, indicated that they did not believe that Appellant was at fault with regard to the power washing or the stage incidents.
- Appellant was never charged for the incident that occurred on October 5, 2009.
- The penalty of dismissal is too severe and should be mitigated.

### ISSUES

1. Has the County proven its charges by a preponderance of the evidence?
2. Based on the charges sustained, is the penalty of dismissal excessive?

### ANALYSIS AND CONCLUSIONS

#### Appellant Was Not A Credible Witness.

##### A. The Board’s Standards For Determining Credibility

Because the testimony of Appellant conflicts with the testimony of other witnesses, the Board had to make credibility determinations with regard to the witnesses. 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 or her 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)).

B. Applying The Board’s Credibility Standards In The Instant Case, Appellant Lacked Credence.

1. Appellant Did Not Give Consistent Versions Of The Accident With The Pedestrian.

Appellant has provided several versions of what occurred the night of the November 2, 2009 accident. The first account stated:

This evening about 6:45 p.m. there was an incident with a man/homeless man on his way to progress place. He claim[ed] that the truck I was driving hit him while he was crossing Avenue [J]. This was not the case he crossed in front of the truck and he slipped and fell and claimed I hit him. He was not in the cross walk but was in middle of [Avenue J] near the cross walk, but he was intoxicated and fell while running in front of the truck when I was turning. Fire rescue came and the man did not want to go to the hospital. The man had ripped his pants when he fell and when the police came to do the report they said that I did not yield the right [of w]ay, but the man was drunk and you could smell the alcohol. About hour or two later the officer came up[stairs] and wrote me a ticket for not yielding the right [of way], even though he was not the[re] and the fire board said he was in the cross walk, but he was not in the cross walk he was up from it about 25” from when he crossed.

C. Ex. 7.

The next version of the accident from Appellant, provided to Montgomery County Risk Management, read thusly:

[M]aking a left on Ave[nue J] from Ave[nue K], the light changed green[.] I made a left behind a man crossing the street between cars at the light not in the crosswalk. As I passed the man behind him I seen him slip or stumble hitting the street and ripped his pants I believe. I seen this in my mirror. The man claimed I hit him, but not sure the[re] was a sound or not, did not see truck hit him. Seen his bag on his shoulder move as he was slipping or swinging it at the truck. He said [“you tr[ie]d to hit me[”]. I stop[ped] and asked him is he all right, he said yes and I helped him to the median. Firetruck guys help him from the street near the median to the other side, w[h]ere the ambulance checked him out and the left

without him.<sup>13</sup>

C. Ex. 5.

The third version of the accident was provided by Appellant during the hearing: As I wrote in my report and as I spoke to the officer numerous times about this situation, I was at Avenue [K] at the traffic light which is a light that goes east to west, and I was proceeding across the intersection when the light changed green. As I proceeded through the green light, had my turn signal on, was getting ready to make my left-hand turn, I noticed that there was a pedestrian cutting between the traffic. This was 6:30, quarter to 7:00. It was still kind of rush hour traffic in [the city]. That usually lasts until 8:00 or 8:30.

So I noticed a person cutting through the cars as I proceeded through the intersection. You know, I kind of watched him and I really didn't pay a lot of attention to him because he had cleared the cars and was, and was walking above the sidewalk, above the crosswalk. Now, the officer stated I said 30 feet. I told him anywhere from 10 to 15 feet above the crosswalk itself. The crosswalk is faded. I barely see the crosswalk. As I made my left-hand turn, I passed the gentleman. I didn't see anything with him, I didn't hear anything except for someone screaming, hey you almost hit me.

I pulled over immediately and I looked to see the guy sitting on the ground, so I got out of my truck, I stayed in the middle lane because I was in between the middle lane and the left turning lane, got out of the truck, offered him assistance. I said are you okay, did you fall, did you slip. He said well, you almost hit me. I said well, sir, I didn't hear you hit anything. I didn't hear you hit the truck or anything. I seen you swing around your bag when you were sitting on the floor. I don't know what happened, did you slip or fall.

So I proceeded to try to help him out of the street which he was near the crosswalk. I went back to my truck, picked up my phone, called for EMS to come. The fire department came with a ladder truck. They were the first on the scene, not Firefighter Y and the ambulance. Fire truck came, asked what happened. Mr. E was very argumentative, he [ree]ked of alcohol, and the first thing the fire guy said is this guy is going to charge you with hitting him. And I said there's no evidence that I hit him. There is no damage to the truck. There is no evidence on him and he said well, look. His pants are ripped.

H.T. at 81-83.

When questioned again about the incident, Appellant testified thusly:

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<sup>13</sup> On another part of the Risk Management form, Appellant wrote: "The man was intoxicated and smelled of alcohol and that was why he fell or slipped on gravel/dirt that was in the streets. The[re] is a lot of construction going on on Ave[nue J]." C. Ex. 5 at 2.

Board Member: Now, on the November 2<sup>nd</sup> incident, you said that you noticed this pedestrian, who turned out to be Mr. E, cutting through the cars.

The Witness: Yes.

Board Member: Okay. Did you notice was he running, was he walking?

The Witness: He was walking in a strolling type of atmosphere where it wasn't fast, it wasn't slow.

Board Member: You notice that he was limping or anything like that?

The Witness: It was dark. I tell you, I barely seen the guy as he came across the street. And when he came, he hit like a part of the light where the intersection was lit, that's where I noticed him as I started to proceed out, I didn't notice him limping and I'm not going to lie and say that he was.

Board Member: Okay. But you knew that there was somebody out there and you were driving a vehicle at the time.

The Witness: Yes.

Board Member: Okay. You didn't see where he was?

The Witness: I did see where he was, sir. He walked in front of the truck and had passed the truck, and I was three-quarters of the way into the intersection and into my left-hand turn. He was out of the view and I had already made my turn.

H.T. at 112-13.

A comparison of these four versions of events by Appellant clearly demonstrates inconsistencies. In the first version of events, Mr. E is allegedly running in front of Appellant's truck and slips and falls while Appellant is turning. In the second version, Mr. E is crossing the street between cars at the light as Appellant makes a left turn behind Mr. E, and as Appellant passes Mr. E he slips and falls. The third version of events has Mr. E cutting through cars, making it clear of the cars as Appellant watched him, then Appellant paid no attention to Mr. E as Mr. E was walking above the side walk and cross walk, when Appellant made a left-hand turn passing Mr. E. The fourth version of events has Mr. E cutting between cars in a strolling manner, walking in front of Appellant's truck, passing the truck and out of view when Appellant made the turn.

Notably, in the second version of events, Appellant claimed Appellant saw Mr. E slip and fall in Appellant's mirror and saw Mr. E's bag move as he was swinging or slipping it at

Appellant's truck. However, in the third version of events, Appellant didn't see anything in connection with Mr. E's fall but did see Mr. E swing his bag when he was sitting on the floor.<sup>14</sup> The fourth version of events has Mr. E out of view when Appellant made Appellant's turn.

2. Appellant Did Not Give Consistent Versions Of The Accident With Another Car.

In the report filled out for Risk Management, Appellant described the events of October 5, 2009 thusly:

I was coming out of the driveway in front of the fire house, the traffic way heavy. Two of the three lane[s] had vehicle[s] stopped, (lane 1 & 2)[.] I proce[ed]ed across the lanes in front of a van in lane 2, looked too [sic] my left to see no cars. Looked to my right to see no cars, went [to] go when a car pulled in front of my trunk[']s path and I hit it on right side panel and bumper.

C. Ex. 12.

During the hearing, Appellant described the accident thusly:

At that time, I proceeded to pull out of the driveway. I couldn't get out of the driveway because it was rush hour traffic and it was all backed up, so I backed up a little bit and got my truck straight so I could see everything that was coming down the road. Lights red, also the traffic was stopped lane one, two and three. I pulled out between one and two, seeing that three was not stopped and stopped at two and looked up the street to see if there was anything coming, looked to the right, nothing was coming. I proceeded to pull. A car sped down and ran into the County truck.

Now, he didn't do no damage to the truck, he really didn't do any damage to his car. He just dented his fender. And at that instance, when the police came, they told us to pull out of the street and they ruled it as basically no fault, you know, they said I was in the street, he came down and hit my car.

H.T. at 79. Appellant, on cross-examination during the hearing, again insisted that the other car hit Appellant's vehicle on October 5, 2009. Id. at 102.

3. Appellant's Testimony Was Argumentative And Self-Serving.

At various times during Appellant's testimony, Appellant was argumentative. For example, while being cross-examined about the accident Appellant had on October 5, 2009, Appellant testified thusly:

Q: Who was in the road?

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<sup>14</sup> The Board presumes that Appellant meant to say ground instead of floor.

A: I just answered that.

Q: The other vehicle was in the road, is that correct?

A: No, it wasn't.

Q: Where was he?

A: I don't know. He came up and he struck my vehicle.

Q: But you were pulling, you were pulling into the road, is that correct?

A: As I testified, I pulled into the road –

Q: This is a simple question.

A: No, no, no.

H.T. at 102.

Appellant's testimony was self-serving with regard to the accident with Mr. E:

Q: Okay. Now, you said that, you said two things. You said the pedestrian was 10 or 15 feet from the crosswalk and then later in your testimony, you said well, he was near the crosswalk. Which is it?

A: As I said, when I seen him first, he was 10 or 15 feet from the crosswalk. When I got out of the vehicle, he was near the crosswalk. I did not measure. It was a guesstimation.

Q: And you have testified that you believe he was intoxicated.

A: Yes, I do.

Q: And what does that have to do with having a right to hit him?

A: It doesn't have anything to do with the right to hit him but if he walks into the truck or he stumbles and falls, then there has to be some type of consequences that Mr. E plays. As I said –

H.T. at 104-05.

#### 4. The County Impeached Appellant's Veracity.

Appellant testified that Appellant started Appellant's employment with the County as a janitor and held the position for about ten years. H.T. at 66. Appellant was asked if Appellant had any problems while a janitor and Appellant indicated Appellant had none. Id.

On cross-examination, Appellant was again queried about Appellant's time as a janitor:

Q: Okay. Appellant, I believe you testified at the beginning of your testimony that while you were basically a janitor with recreation, you never had any problems, is that right?

A: Yes.

Q: Is that your testimony?

A: To my best of my knowledge.

Q: To the best of your knowledge?

A: Yes.

Q: You don't remember that you were in fact disciplined, and I don't have the document because I felt it was too old but you have opened the door on this, in fact, you were disciplined by the Recreation Department for having a physical confrontation with a minor client at the rec center, isn't that true?

A: I do not recall that incident but I do recall that there was something with a gentleman at a rec center to be honest.

Q: You recall that there was a confrontation –

A: I do recall.

Q: -- you had.

A: I don't recall it as being a confrontation. I remember, recall that there was an argument ensued.

Q: And you don't remember being disciplined for it?

A: No, ma'am. That was 20 plus years ago.

H.T. at 93-94. At the end of the hearing, the Board agreed to the County's request to submit the disciplinary action which Appellant had been cross-examined on. H.T. at 148-51. The County subsequently provided the Board with a copy of C. Ex. 27, a copy of a three-day suspension, which Appellant received for a verbal and physical confrontation with a minor.

### **The Board Finds That There Were Three Basic Charges In The Statement Of Charges.**

The Statement of Charges sets forth four violations of the Montgomery County Personnel Regulations which Appellant is charged with: 1) Section 33-5(d), "violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal Laws"; 2) Section 33-



5(e), “fails to perform duties in competent or acceptable manner”; 3) Section 33-5(g), “knowingly makes a false statement or report in the course of employment”; and 4) Section 33-5(h), is negligent or careless in performing duties.” The Board has previously held that a charge of failure to perform duties in competent or acceptable manner is nearly identical to a charge of negligent or careless performance of duties and will treat the two charges as one. See MSPB Case No. 07-10 (2007); MSPB Case No. 09-04 (2008); MSPB Case No. 09-10 (2009).

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

The first charge against Appellant is that Appellant violated applicable law when Appellant failed to yield to a pedestrian in the crosswalk. In support of this charge, the County introduced the police citation that Appellant received, for failing to stop for a pedestrian in the crosswalk. C. Ex. 8.

Appellant denies that Appellant hit the individual, claiming that Mr. E shouted out to Appellant: “You almost hit me.” H.T. at 82. In Appellant’s response to the Statement of Charges, Appellant stated that there were no witnesses to the alleged striking of Mr. E and if indeed Mr. E was struck, it was an accident, not done intentionally or with malice. C. Ex. 2 at 1. As previously noted, the Board did not find Appellant to be a credible witness with regard to this incident.

The Board did, however, have the opportunity to observe Mr. E and finds he was a credible witness. Mr. E stated that he was at the crosswalk and as he began to cross he was struck, and the back wheels of the vehicle Appellant was driving ran over his feet. H.T. at 46. Officer X also testified credibly that Mr. E related to Officer X that Mr. E was crossing Avenue J, westbound at the crosswalk on a walk signal, when he was struck. Id. at 52-53. Failure to stop for a pedestrian in a crosswalk is a violation of Section 502(2) of Title 21, Vehicle Laws – Rules of the Road.<sup>15</sup>

Accordingly, based on the record of evidence in this matter, the Board finds that the County proved this charge by a preponderance of the evidence.

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<sup>15</sup> Title 21, Subtitle 5, Pedestrians’ Rights and Rules, states in applicable part:

21-502. Pedestrians’ right-of-way in crosswalks

(b) In general –

(2) The driver of a vehicle shall come to a stop when a pedestrian crossing a roadway is at a crosswalk is:

(i) On the half of the roadway on which the vehicle is traveling; or

(ii) Approaching from an adjacent lane on the other half of the roadway.

### **The County Proved The Second Charge By A Preponderance Of The Evidence.**

The second charge was that Appellant failed to perform Appellant's duties in a competent manner. There is ample evidence in the record that this was true. The Manager testified credibly that Appellant did not properly put the hose back on the reel in the correct manner after a power washing was completed. The Manager counseled Appellant about this and removed power washing as one of Appellant's duties. H.T. at 23.

Appellant's behavior, where Appellant had a verbal confrontation with the D.C. officer at the café site, was unacceptable. Even after being counseled by Officer X that Appellant was a County employee and should behave like one, Appellant continued to taunt the D.C. officer. C. Ex. 14.

With regard to the stage incident, even if one were to accept Appellant's account of what occurred, what is clear is that Appellant did not exercise caution while backing up the truck to the stage. By Appellant's own admission, when Appellant returned to the truck (after purportedly telling Mr. A to get out of the way) and began backing it up again, Appellant did not know where Mr. A was. H.T. at 110.

Accordingly, based on the record of evidence in this case, the Board finds that the County proved the second charge by a preponderance of the evidence.

### **The County Proved The Third Charge By A Preponderance Of The Evidence.**

The third charge against Appellant is that Appellant knowingly made a false statement or report in the course of employment. Specifically, Appellant repeatedly changed Appellant's story during Officer X's investigation into Appellant striking Mr. E while he was in the crosswalk. C. Ex. 3 at 1. Appellant, in Appellant's reply to the Statement of Charges, C. Ex. 2, denied changing the information provide to Officer X and insisted that Appellant did not give a false statement regarding the accident. However, as noted above, Appellant repeatedly changed Appellant's version of the events of November 2, 2009. Moreover, as Officer X credibly testified, Officer X's investigation into the matter led Officer X to conclude that Mr. E was in the crosswalk at the time he was struck, despite Appellant's repeated statements to the contrary. H.T. at 58. Thus, Officer X determined that there was a lot of deception on Appellant's part.<sup>16</sup> Id. at 56, 58.

Accordingly, based on the evidence produced by the County, the Board concludes that the County proved this charge by a preponderance of the evidence.

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<sup>16</sup> Officer X testified that Appellant told Officer X that Mr. E had slapped the side of the truck and yelled at Appellant. H.T. at 53. Upon hearing this, Officer X told Appellant that if there was any contact between a person and a vehicle then an accident report needed to be written. Id. A few moments later, Appellant told Officer X that Appellant had been mistaken, that there was no contact at all, Appellant just heard Mr. E yell, not hit the side of the vehicle at all. Id.

**Given The Nature Of Appellant's Misconduct And Appellant's Refusal To Accept Responsibility For Appellant's Behavior, The Penalty Of Dismissal Is Appropriate.**

Appellant has committed serious misconduct. The Board has considered Appellant's twenty-five years of service. However, Appellant's continued refusal to accept responsibility for Appellant's conduct, along with Appellant's disciplinary record prior to coming to the Urban District, demonstrates that Appellant lacks the potential for rehabilitation.

Particularly egregious is the fact that Appellant sought to blame the victim, Mr. E, for the accident, rather than taking responsibility. Appellant insisted that Mr. E was intoxicated when Appellant first reported the matter. C. Ex. 7. Appellant continued to insist this was the case when Appellant replied to the SOC, C. Ex. 2, and indicated that there were two witnesses to this fact, Mr. G and Mr. H. Id. On the stand, Appellant asserted that Mr. E reeked of alcohol. H.T. at 83. Appellant also asserted that when Mr. H, a member of Appellant's crew showed up at the scene of the accident, Mr. H told Appellant that Mr. E smelled of alcohol. Id. at 87. Significantly, however, when Mr. H was called to the stand, he not only denied smelling alcohol on Mr. E's breath, he also denied that he told Appellant that Mr. E smelled of alcohol. Id. at 145.

Also egregious is the fact that Appellant tried to work something out with Mr. E so that there would be no report written since Appellant was on probation. While Appellant denied that Appellant tried to do so, H.T. at 86, Appellant's testimony in this regard is simply not credible. Again, Mr. E and Officer X provided credible testimony regarding Appellant's actions. Mr. E related that Appellant indicated to him that Appellant did not want Mr. E to file a police report. Id. at 48, 50. Officer X recounted Mr. E telling him that Appellant indicated to Mr. E that Appellant needed to work something out because Appellant didn't want to have a report written on the incident as Appellant was on probation. Id. at 54.

It is clear from the record of evidence in this case that Appellant lacks credibility and could not be trusted by the Manager to be a supervisor anymore. Therefore, the penalty of dismissal was appropriate.

**ORDER**

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

# **SUSPENSION**

## **CASE NO. 09-13**

### **FINAL 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 the Montgomery County, Maryland, then-Interim Fire Chief to suspend Appellant for two weeks, effective May 3, 2009.

### **FINDINGS OF FACT**

This appeal involves the decision of then-Interim Fire Chief,<sup>1</sup> Montgomery County Fire and Rescue Service (MCFRS), to suspend Appellant. Appellant is an Assistant Chief (A/C) in MCFRS. Assistant Chief is the third highest rank in MCFRS.<sup>2</sup> The charges in the suspension action stem from the events surrounding Appellant's decision to assist Appellant's friend and coworker, Assistant Chief (A/C) Y, on November 30, 2008, after A/C Y was in a collision on I-270 near Falls Road. Earlier that day, A/C Y, as the Officer-in-Charge of the MCFRS Honor Guard, had participated with the Honor Guard at a Washington Redskins pre-game ceremony at FedEx Field. County Exhibit (C. Ex.) 5 at 128-31.<sup>3</sup> On the morning of November 30, A/C Y had driven a County vehicle known as the Honor Guard vehicle to a Park-n-Ride in College Park to pick up three of the four other Honor Guard personnel for the Redskins event. Id. at 131.

At approximately 12:45 p.m., the Honor Guard, in uniform, presented the colors at FedEx Field. Id. at 162. The Honor Guard then proceeded back to the dressing room, changed into civilian clothes, received tickets for the game, and returned the equipment to the Honor Guard vehicle. Id. at 132.

At this point, members of the Honor Guard, including A/C Y began drinking beer. C. Ex. 5 at 20, 33, 146, 147. Once inside the stadium, the record of evidence reflects that the members bought rounds of beer for each other. Id. at 28, 29. At some point, the members decided to go to

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<sup>1</sup> The Interim Fire Chief was subsequently appointed as Fire Chief. Hearing Transcript for August 31, 2009 (H.T.) at 140.

<sup>2</sup> The command structure of MCFRS management is as follows: Fire Chief; Division Chiefs; Assistant Chiefs; and Battalion Chiefs.

<sup>3</sup> C. Ex. 5 is the report of the inquiry into A/C Y's collision conducted for MCFRS by the Firm. Appellant had challenged the legality of the investigation in Appellant's Motion to Rescind Suspension, Award Back-Pay and Leave, Readjustment of Calculation of Retirement Benefits, Reimburse Attorney Fees and For Appropriate Relief (Appellant's Motion to Rescind Suspension). Because the Board finds that the investigation was legal, see *infra* Analysis and Conclusions, it cites where appropriate to the investigation, which consists largely of verbatim transcripts of taped employee interviews.

Hooters and order some food. Id. at 29, 36, 133. Again, beer was also ordered. Id. at 29, 36, 147. Finally, approximately around 6:00-6:30 p.m., the Honor Guard returned to their vehicle, where they ate the sandwiches purchased that morning and some consumed more beer. Id. at 15, 28, 40, 133.

A/C Y then drove the Honor Guard participants back to the Park-n-Ride. Id. at 30, 38, 133. After dropping the others off, A/C Y proceeded to drive home via I-495 and I-270. Id. at 134.

While on I-270, going north, A/C Y began to merge from the local lanes to the main lanes. Id. at 134. At approximately 8:01 p.m., A/C Y collided with three vehicles (a Honda, a Montgomery County Police (MCP) car, and a BMW) on the main lanes of I-270. Id. at 134, 172. All four vehicles sustained damage. Id. at 173-76.

A/C Y contacted Appellant, who is a very good friend, at 8:24 p.m.,<sup>4</sup> and asked Appellant whether Appellant could give A/C Y a ride home. H.T. 114; C. Ex. 6 (phone records for A/C Y); C. Ex. 5 at 136, 149. According to A/C Y, A/C Y contacted Appellant because A/C Y's "head was spinning" and A/C Y needed a "logical thinker at the time" to "pull this together" for A/C Y. C. Ex. 5 at 149. Appellant, who was off-duty, agreed to help A/C Y. Id. at 102-03; H.T. at 114. Appellant decided because of the bad weather condition, to drive Appellant's County-owned vehicle to the scene. H.T. at 115.

Prior to arriving at the scene of the collision, Appellant had several other discussions with A/C Y. H.T. at 117-18; C. Ex. 6 (phone records for A/C Y and Appellant). During one of the discussions, A/C Y told Appellant that the A/C Y had "f'd up." H.T. at 119; C. Ex. 5 at 152, 153. It was during this conversation that Appellant learned that A/C Y had been driving a County vehicle and needed a tow truck.<sup>5</sup> C. Ex. 5 at 104, 152, 153. Upon learning this, Appellant, who did not know whether A/C Y had called the Duty Operations Chief (DOC),<sup>6</sup> C. Ex. 5 at 104, H.T. at 122, decided to call DOC H. C. Ex. 5 at 104-05; H.T. at 122.

Appellant contacted DOC H at approximately 8:58 p.m. (and again at 9:12 p.m.). H.T. at 16, 19; C. Ex. 6 (phone records for DOC H and Appellant). According to DOC H, Appellant informed him that A/C Y had been involved in an accident, that four vehicles, including a County Police Officer's vehicle were involved, and that A/C Y had been drinking and had stopped drinking at half-time.<sup>7</sup> H.T. at 17; C. Ex. 5 at 78. Appellant also informed DOC H that

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<sup>4</sup> Both the Statement of Charges and the Notice of Disciplinary Action incorrectly assert that Appellant was called at "21[:]24 hours." See C. Ex. 1 at 1; C. Ex. 3 at 1.

<sup>5</sup> On Appellant's way to the collision, Appellant arranged for a tow truck for the Honor Guard vehicle. C. Ex. 5 at 103-04, 152; H.T. at 118.

<sup>6</sup> The Duty Operations Chief has the responsibility and full authority over the entire County with respect to an emergency. H.T. at 172-73.

<sup>7</sup> Appellant did not recall having a specific conversation with DOC H about alcohol. According to Appellant, Appellant did not learn about A/C Y's drinking at the game until

A/C Y had taken a field sobriety test so MCFRS just needed somebody to investigate the accident. C. Ex. 5 at 78.

Appellant then suggested that DOC H do the investigation.<sup>8</sup> C. Ex. 5 at 77; H.T. at 18, 123. DOC H refused to do the investigation, as he thought it was inappropriate and would appear that he was covering for one of his peers, given the fact that alcohol was involved. H.T. at 18-19; C. Ex. 5 at 77. Appellant then offered to do the accident investigation. C. Ex. 5 at 77-78; H.T. at 18, 123-24. DOC H told Appellant that Appellant should not attempt to influence the matter, that they needed “to make sure we do this by the book.” C. Ex. 5 at 78, 105. DOC H then suggested Battalion Chief (B/C) I do the investigation. Id.; H.T. at 20. Appellant indicated Appellant did not want B/C I to do the investigation. C. Ex. 5 at 78; H.T. at 20. DOC H then suggested the Safety Officer, Captain (Capt.) J, do the investigation. C. Ex. 5 at 78; H.T. at 20.

DOC H subsequently notified the Interim Fire Chief about the A/C’s collision. H.T. at 23. DOC H also contacted Capt. J about doing the investigation and instructed Capt. J to contact him immediately if anyone tried to influence him to do things differently than he believed was correct. H.T. at 21-22; C. Ex. 5 at 78.

DOC H realized that because of the four vehicles involved in the crash, the \$2,500 threshold for ordering a post-accident test pursuant to MCFRS policy would be reached. H.T. at 20. When he spoke with Capt. J about the need for testing, Capt. J expressed reluctance about taking Appellant, who was a higher ranking officer, for post-accident testing. Id. at 22.

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Appellant arrived at the scene of the collision. C. Ex. 5 at 108, 109. Appellant indicated Appellant may have told DOC H that A/C Y sounded “a little off” but does not recall mentioning alcohol specifically. Id. at 109. However, Appellant did testify: “I could tell that there was something wrong when A/C Y talked to me on the phone. At least, maybe not initially, but the more A/C Y started calling me and talking to me the more I could tell that there just wasn’t something right . . . . So anyway, and I’m thinking to myself I know A/C Y and A/C Y probably had had a beer or two you know at the Redskins game . . . . In my mind that’s what I’m thinking. I didn’t really have that conversation with A/C Y and I don’t know that I had that conversation with DOC H, although I may have. I may have said something to him about you know I’m concerned because A/C Y is in the Honor Guard vehicle coming from the Redskins game. I may have had that conversation.” Id. at 115-16.

The Board credits DOC H’s version of the conversation. The Board bases its determination on the fact that A/C Y testified during the Firm’s investigation that when A/C Y called Appellant about A/C Y’s collision, A/C Y told Appellant that A/C Y had screwed up and that A/C Y had been drinking. C. Ex. 5 at 138.

<sup>8</sup> DOC H insisted that the discussion about the investigation, including his ultimate determination to have the Safety Officer do it, occurred during his first conversation with Appellant. H.T. at 46; C. Ex. 5 at 77-78. Appellant asserts that DOC H did not make the determination until their second conversation. C. Ex. 5 at 105, 106, 156; H.T. at 129, 132. According to the Safety Officer, he received a call from DOC H about doing the investigation shortly before 9:00 o’clock on the station phone rather than his cell phone. H.T. at 100.

Accordingly, DOC H decided to send Battalion Chief (B/C) M to take A/C Y to the Fire Rescue Occupational Medical Service (FROMS) for the testing. Id. DOC H contacted B/C M about escorting A/C Y to FROMS. Id.; C. Ex. 5 at 93.

B/C M called a 24-hour number to arrange for personnel from CMA Services<sup>9</sup> to come to FROMS to do the testing. C. Ex. 5 at 93. He arranged to meet with CMA Services' personnel at 10:30 p.m. at FROMS. Id. at 93; H.T. at 107.

In the meantime, Appellant arrived at the scene of the collision. Appellant informed the police that Appellant was a shift chief with MCFRS and that A/C Y had called Appellant. H.T. at 127; C. Ex. 5 at 108, 116. Appellant was told by a Police Officer that A/C Y was going to be charged with failure to avoid a collision. C. Ex. 5 at 108, 155, 156. Appellant was also informed that there had been an implication of possible alcohol so the police had done a field sobriety test on A/C Y who had checked out fine. Id. at 108, 156; H.T. at 121. Appellant indicated that Appellant may have mentioned to the police that Appellant might be doing the investigation for MCFRS. H.T. at 128; C. Ex. 5 at 110. Appellant informed the police that MCFRS would need pictures of all of the vehicles that had been involved. H.T. at 128-29; C. Ex. 5 at 110, 156. The police informed Appellant that the vehicles had been taken to the lot but they had pictures. Id. Appellant then asked that the police email Appellant the pictures.<sup>10</sup> Id.

Appellant spoke with A/C Y and asked how many beers A/C Y had actually had. C. Ex. 5 at 110; H.T. at 132, 133-34. A/C Y responded that A/C Y had had four to five beers and had stopped drinking at half-time. Id. Appellant told A/C Y to get inside Appellant's vehicle and they discussed the fact that there would be ramifications as a County vehicle was involved. C. Ex. 5 at 110. According to Appellant, Appellant informed A/C Y that A/C Y would be tested and if A/C Y were drinking that day, A/C Y would have to face the consequences. H.T. at 134.

Captain J arrived at the scene at approximately 9:19 p.m. and began his investigation. H.T. at 93. He got into the car with Appellant and A/C Y and had a brief discussion with them. Id. at 94. Capt. J asked A/C Y about the collision and A/C Y indicated A/C Y couldn't remember much about the collision. Id. at 94-95. At some point, Capt. J asked the County Police Officer, Officer X, whether there was anything else that needed to be done or could A/C Y leave. Id. at 95. Officer X indicated A/C Y was free to leave. Id. at 95-96. Capt. J told both Appellant and A/C Y that the Police Officer was done and recommended they get off the highway. Id. at 96. Appellant and A/C Y had just heard from B/C M. Id. at 96, 134-35. Because B/C M was on his way to the scene, Appellant and A/C Y indicated to Capt. J they would wait for B/C M to arrive. Id.

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<sup>9</sup> The County contracts with CMA Services to perform drug and alcohol collection services. C. Ex. 5 at 93; H.T. at 62.

<sup>10</sup> According to Appellant, when Capt. J arrived to do the investigation, Appellant informed Capt. J that the police had pictures and told Capt. J to make sure the police knew that Capt. J was doing the investigation so that Capt. J would get the pictures. H.T. at 129. Appellant believed Capt. J followed Appellant's advice and Appellant asserts that Appellant never received any of the accident pictures. Id. In fact, Capt. J testified during his investigatory interview that he had received the pictures from the police. C. Ex. 5 at 88.

Capt. J went back to his County car to finish up his investigation and subsequently B/C M arrived. H.T. at 96. B/C M then got out of his car and entered Appellant's car. C. Ex. 5 at 94. B/C M informed A/C Y that he, B/C M, was there to take A/C Y to FROMS. Id. at 95. However, as the County Honor Guard vehicle had not yet been towed, B/C M determined to wait for that to occur before leaving for FROMS. C. Ex. 5 at 95; H.T. at 108. When the tow truck arrived, Appellant and A/C Y removed some of A/C Y's belongings from the Honor Guard vehicle. H.T. at 137-38; C. Ex. 5 at 112, 120, 158.

In the meantime, DOC H attempted to go to the scene but was unable to do so as the police had blocked the entrance from the local lanes of I-270 to the express lanes and the accident scene was on the express lanes. H.T. at 26; C. Ex. 5 at 81. DOC H saw Appellant's vehicle, B/C M's vehicle, two police cars and a tow truck loading the Honor Guard vehicle when he passed the accident scene the first time.<sup>11</sup> H.T. at 26-27; C. Ex. 5 at 81. DOC H turned around and tried again to get to the accident scene but was unsuccessful. Id. During his second pass-by, DOC H testified that the tow truck and the Honor Guard vehicle were no longer at the scene. H.T. at 28-29.

While turning around to make a second attempt to get to the accident scene, DOC H attempted twice to contact B/C M to ascertain why he and A/C Y had not left to go to FROMS. H.T. at 27; C. Ex. 5 at 81. DOC H also tried to reach Appellant on Appellant's work cell phone. C. Ex. 5 at 81. Failing in DOC H's attempts, DOC H called on the Fire Department radio to B/C M. H.T. at 28; C. Ex. 5 at 81. DOC H received a reply, indicating that "[w]e'll contact by phone." C. Ex. 5 at 81. Subsequently, Appellant called DOC H. H.T. at 29. DOC H demanded to know what they were doing and Appellant replied that they were waiting for the police to finish their paperwork before they left for FROMS.<sup>12</sup> Id. DOC H also indicated that Appellant told DOC H that the reason A/C Y hadn't called DOC H was because A/C Y was upset about the accident. Id.; C. Ex. 5 at 81. Appellant also related that A/C Y had quit drinking at half-time, C. Ex. 5 at 81; H.T. at 29, and had called Appellant because A/C Y wanted someone to help A/C Y, to do "damage control." C. Ex. 5 at 81. DOC H became convinced that Appellant and A/C Y were stalling to put more time between the accident and the testing at FROMS. Id. at 82; H.T. at 35. DOC H then told Appellant DOC H would meet them at FROMS. C. Ex. 5 at 81.

While waiting for the vehicle to be towed, A/C Y told B/C M that A/C Y needed to use the bathroom.<sup>13</sup> H.T. at 108, 138; C. Ex. 5 at 143, 159-60. B/C M suggested that they stop at the

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<sup>11</sup> DOC H testified that Capt. J had left the scene at the time DOC H passed by the first time around 10:00 p.m. H.T. at 34.

<sup>12</sup> According to DOC H, he later learned that this was not a correct statement. H.T. at 31. He spoke with Capt. J around 10:34 p.m. and told Capt. J that Appellant, B/C M and A/C Y were still at the scene waiting for the paperwork to be completed. H.T. at 31, 32, 34. DOC H related that Capt. J's reaction was that this was "a lie" as the paperwork was done before Capt. J left the scene. Id. DOC H indicated that at this point he believed he was being "bamboozled." H.T. at 48.

<sup>13</sup> According to A/C Y, A/C Y told B/C M that A/C Y was thirsty and needed to use the bathroom. C. Ex. 5 at 143. Appellant offered to get A/C Y a bottle of water. Id.



7-11 on Shady Grove Road. Id. Appellant left the scene before B/C M and A/C Y and met them at the 7-11. C. Ex. 5 at 96-97. B/C M remained in his car while Appellant and A/C Y went inside the 7-11. C. Ex. 5 at 96; H.T. at 107. Appellant bought water for both Appellant and A/C Y. C. Ex. 5 at 122; H.T. at 139. When A/C Y returned to B/C M's car, A/C Y had a bottle of water. H.T. at 107; C. Ex. 5 at 96.

A/C Y and B/C M arrived at FROMS at 10:50 p.m. H.T. at 37, 65. DOC H was already there, waiting for them. Id. at 37. While waiting, DOC H had had a conversation with the Interim Chief during which he told the Interim Chief that he thought he was being "bamboozled", that someone was trying to "pull the wool over his eyes", and that he "smelled a rat." H.T. at 35, 36, 44; see also H.T. at 141.<sup>14</sup> DOC H indicated that the Interim Fire Chief assured him that there would be a complete investigation into the matter. H.T. at 53.

The Interim Fire Chief subsequently determined to request a third party investigation be conducted into the entire matter. H.T. at 141. At that point in time, MCFRS did not have an Internal Affairs Officer as the Internal Affairs Officer had left County employment. Id. at 142. The Interim Fire Chief reviewed the Interim Fire Chief's alternatives for conducting an investigation, as the Interim Fire Chief had a Battalion Chief in the internal affairs office, but the Battalion Chief was at a lower rank than the Assistant Chiefs involved in the matter to be investigated. Id. The Chief indicated that as there were two high ranking officials involved, the Chief believed it was appropriate to have a third party investigate the matter. Id. at 141, 146. The decision was made to contract out the investigation to the Firm, which had done work for MCFRS in the past. H.T. at 67-68, 148. The Fire Chief testified that the Fire Chief wanted an outside investigator to make sure the Fire Chief had all the facts and information before making a decision on any disciplinary action. H.T. at 143.

The Firm conducted the investigation from December 16-23, 2008, and provided it to MCFRS on January 16, 2009. C. Ex. 5. The Fire Chief reviewed the investigative report before determining to suspend Appellant. H.T. at 143, 150. On March 2, 2009, Appellant received the Statement of Charges, containing five charges and proposing Appellant be suspended for two weeks. C. Ex. 1.

On March 3, 2009, Appellant responded to the Statement of Charges, asserting the charges were unfounded. C. Ex. 2.

On April 15, 2009, Appellant received a Notice of Disciplinary Action – Two Week Suspension, suspending Appellant for two weeks. C. Ex. 3.

This appeal followed.

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<sup>14</sup> The Fire Chief testified that DOC H conveyed to him that DOC H believed there was some obstruction and delay in the investigation as a result of some of the actions or lack thereof by Appellant. H.T. at 141. The Fire Chief asserted that DOC H told the Fire Chief that he had appointed Appellant to ensure that A/C Y was tested. Id. at 152-53.

## POSITIONS OF THE PARTIES

### County:

- Appellant failed to contact DOC H in a timely manner after Appellant became aware that A/C Y was in an accident.
- Appellant inappropriately attempted to influence who would do the investigation into A/C Y's accident.
- Appellant, who drove Appellant's County vehicle to the scene of the accident, represented to Montgomery County Police that Appellant would be doing the investigation.
- Appellant delayed taking A/C Y for alcohol and drug testing at FROMS.
- Appellant permitted A/C Y to stop at 7-11 before A/C Y's test to urinate and obtain water.
- As the highest ranking MCFRS officer at the scene of an accident involving alcohol, Appellant had a responsibility to oversee activities and ensure that MCFRS policies were followed.

### Appellant:<sup>15</sup>

- Appellant had no duty to notify DOC H. After learning that A/C Y was in a County-owned vehicle, Appellant did in fact notify DOC H as a courtesy.
- Appellant was not on duty when Appellant went to the scene of the collision.
- DOC H, who was Duty Operations Chief on the night of the collision, made the determination as to who would do the investigation and who would take A/C Y to FROMS.

## APPLICABLE LAWS AND REGULATION

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-8. Hearings**, which states in applicable part,

- (d) **Burden of going forward with the evidence.** The charging party shall have the burden of going forward with the production of evidence at the hearing before the hearing authority; . . .

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-10. Decisions**, which states in applicable part,

- (b) **Evidence required.** All recommendations and/or decisions of the hearing authority shall be based upon and supported by a preponderance of the evidence of record.

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<sup>15</sup> Several additional arguments advanced by Appellant regarding the validity of Appellant's discipline are discussed *infra* in the section dealing with the Board's denial of Appellant's Motion to Rescind Suspension.

**Montgomery County Code, Chapter 21, Fire and Rescue Services, Section 21-3, Fire Chief; Division Chiefs**, which states in applicable part:

- (b) The Fire Chief is the uniformed department head of the Montgomery County Fire and Rescue Service, and has all the powers of a department director.
- (e) The Fire Chief must appoint an Internal Affairs Officer, after considering any recommendation by the Commission. The Officer must assist the Chief in monitoring compliance with County laws, regulations, policies, and procedures and investigate matters assigned by the Chief.

**Montgomery County Personnel Regulations (MCPR), Section 33, Disciplinary Actions** (as amended December 11, 2007, and October 21, 2008), 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.

**33-5. 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;
- (h) is negligent or careless in performing duties;
- (r) interferes with or disrupts the work of another County employee; . . .

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 503 (DFRS Policy No. 503), Disciplinary Action Procedures, dated 04/25/95**, which states in applicable part:

**DEFINITIONS**

- 3.0 Complaint – A written statement alleging misconduct, violation of procedure or rule, dereliction of duty, or other action not consistent with the duties and responsibilities of employees of DFRS. The complaint must be in writing and

must indicate the time, nature of complaint, witnesses, contact numbers, and all other pertinent information necessary for an investigation.

#### POLICY

- 4.4 Except in cases of theft or serious violations of policy or procedure that create a health or safety risk, disciplinary actions must be progressive in severity. The severity of the action should be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record and other relevant factors.

#### PROCEDURE

- 5.0 Any employee of DFRS can direct a complaint against another employee of DFRS to the employee's supervisor.
- 5.4 If the actions of the employee warrant a level of discipline above an oral admonishment, the supervisor will request that discipline by forwarding a complaint to the Deputy Chief, Program Support Services Bureau via the Chain of Command.
- 5.5 The Department will investigate the circumstances surrounding the complaint and determine the policy(s), or regulation(s) which have been violated.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 529 (DFRS Policy No. 529), Internal Affairs, dated 09/09/97**, which states in applicable part:

#### DEFINITIONS

- 3.0 Complaint – An allegation of misconduct made against an employee.

#### POLICY

- 4.0 The Department of Fire and Rescue Service is committed to investigating all written complaints of incidents brought to its attention. . . .
- 4.1 Incidents investigated by the Internal Affairs Section may include but are not limited to:
  - a. Those actions of an employee which appear to be in violation of law, Department policy and procedure or other statute which could result in suspension, demotion, or dismissal.
- 4.2 Allegations should be in writing, however verbal complaints and anonymous complaints are not excluded from investigation, at the discretion of the Director.

## RESPONSIBILITY

- 5.6 Director - The Director will have full and final authority and responsibility over all matters relating to the Internal Affairs Section.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 809 (DFRS Policy No. 809), Substance Abuse Testing and Rehabilitation, dated 05/08/94**, which states in applicable part:

## POLICY

- 4.21 Reasons for Testing.

b. Accidents:

2. An employee who is the operator of a County or Corporation-owned vehicle that is involved in a property damage accident resulting in at least \$2,500 damage must be tested immediately after the police authority having jurisdiction over the accident authorize that the operator may leave the scene.
3. The Duty Chief, or Designee at the scene of the accident will authorize testing for accidents involving personal injury or \$2,500 in property damage.

## RESPONSIBILITIES

- 5.4 Supervisory personnel are responsible for implementing all aspects of this policy and procedure under the direction of their respective Bureau Chief.<sup>16</sup>

## ISSUES

1. Has the County proven its charges by a preponderance of the evidence?
2. Based on the charges sustained, is the penalty of a two-week suspension excessive?

## ANALYSIS AND CONCLUSIONS

### The Board Denies Appellant's Motion To Rescind Suspension.

On July 28, 2009, Appellant, through counsel, filed Appellant's Motion to Rescind Suspension, Award Back-Pay and Leave, Readjustment of Calculation of Retirement Benefits,

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<sup>16</sup> The regulation does not define the term "Bureau Chief."

Reimburse Attorney Fees and for Appropriate Relief.<sup>17</sup> In Appellant's Motion to Rescind Suspension, Appellant argued that the County conducted an illegal investigation and that the County failed to comply with Section 4.0 of DFRS Policy No. 503, as Appellant's discipline was not progressive in nature. Appellant's Motion to Rescind Suspension at 6-19. On August 3, 2009, the County filed its Response to Appellant's Motion to Rescind (County's Response),<sup>18</sup> denying it had conducted an illegal investigation or violated DFRS Policy No. 503.

After reviewing the pleadings, the Board determined to take Appellant's Motion to Rescind Suspension under advisement. The Board then proceeded to hear the evidence in this case on August 31, 2009. In addition to making arguments to support Appellant's Motion during the hearing, Appellant's counsel added a new argument not in the pleadings. Appellant's counsel asserted that pursuant to DFRS Policy No. 529, because DOC H did not file a written complaint regarding Appellant's conduct during the evening of November 30, 2008, MCFRS was prevented from taking disciplinary action against Appellant.<sup>19</sup> H.T. at 176-81.

Having considered all of the evidence in this case, including the additional arguments made during the hearing, the Board determined to deny Appellant's Motion to Rescind Suspension at the close of the County's case-in-chief. H.T. at 181. The following constitutes the Board findings and conclusions in support of this determination.

A. The County Did Not Conduct An Illegal Investigation into Appellant's Conduct.

Appellant notes that the Montgomery County Code requires the Fire Chief to appoint an Internal Affairs Officer. Appellant's Motion to Rescind Suspension at 6. Appellant further asserts that DFRS Policy No. 529 sets forth the procedures for investigations handled by Investigative Programs, under the auspices of the Internal Affairs Officer. *Id.* at 6-8. Appellant argues that the Interim Fire Chief did not follow the Code and DFRS Policy No. 529 with respect to conducting an investigation into Appellant's conduct. *Id.* at 9. Rather, the Interim Fire Chief impermissibly had the investigation contracted out to the Firm.<sup>20</sup> *Id.* at 15. Appellant argues

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<sup>17</sup> In support of Appellant's Motion to Rescind Suspension, Appellant filed 17 exhibits, each delineated as "Appellant Attachment \_\_\_" (hereinafter Appellant Attach.).

<sup>18</sup> In support of the County's Response, it filed three documents which were not numbered. For ease of reference, this Decision will refer to the documents as follows: Affidavit of MCFRS Fire Chief – C. Attach. 1; Affidavit of Mr. T – C. Attach. 2; and Memorandum to CAO from the County Attorney, dated 03/04/09, subject: Contract Claim – The Firm - \$5,809.11 – C. Attach. 3.

<sup>19</sup> Because the Board found this argument to be completely without merit, it decided there was no need to give the County the opportunity to respond.

<sup>20</sup> Appellant argues that the Interim Fire Chief entered into an unlawful agreement with the Firm and this also serves as a reason to invalidate the investigation. Appellant's Motion to Rescind Suspension at 12. Specifically, the Firm investigation exceeded \$5,000 (the threshold for a formal contract document) without MCFRS signing a contract with the Firm for the

that in order for the Interim Fire Chief to utilize an external investigator for the purposes of conducting an internal affairs investigation, the Interim Fire Chief had to amend the requirements of DFRS Policy No. 529. Id. at 15-16.

Appellant further notes that at the time MCFRS contracted out the investigation it had B/C Z on staff as a member of the Office of Investigative Programs. Appellant's Motion to Rescind Suspension at 8. Moreover, Appellant states that even though MCFRS opened Internal Affairs Case 33-8 regarding the events surrounding A/C Y's collision, the Firm failed to follow the procedures set forth in DFRS Policy No. 529. Id. at 12, 14.

The County asserts that the hiring of the Firm to conduct the investigation did not violate DFRS Policy No. 529, as the position of Internal Affairs Officer was vacant at the time. County's Response at 1. While the County acknowledges that it had B/C Z in the Office of Investigative Programs, it argues that it is not good practice for a subordinate officer to investigate a superior. Id. Finally, the County asserts that since the Firm is not a part of the Office of Investigative Programs, it was not required to follow DFRS Policy No. 529. Id.

Section 21-9 of the Montgomery County Code provides for the appointment of an Internal Affairs Officer by the Fire Chief. One of the duties established in the Code for the Internal Affairs Officer is to "investigate matters assigned by the Chief." Indeed, as pointed out by Appellant's own exhibit, the mission of the Office of Investigative Programs is to investigate matters assigned by the Fire Chief. See Appellant Attach. 10. Inherent in a manager's authority to assign work to an individual is the right not to assign work to an individual. See National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553, 563 (D.C. Cir. 1982) ("Without a doubt, the right to determine what work will be done, and by whom and when it is to be done, is at the very core of successful management of the employer's business, whether a private-sector enterprise or the public service operations of a federal agency."). In the instant case, it is established that the position of Internal Affairs Officer was vacant. H.T. at 142, 146; C. Attach. 1. Regardless of whether or not the Internal Affairs Officer position was vacant, it was the right of the Interim Fire Chief to assign the investigation to whomever the Interim Fire Chief. The Interim Fire Chief could have chosen to assign it to Investigative Programs. However, the Interim Fire Chief also had the right to choose to have someone else conduct the investigation, which the Interim Fire Chief did given the fact that the Internal Affairs Officer

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investigation. See Appellant Attach. 14; C. Attach. 3. The issue of whether MCFRS adhered to the procurement regulations is not an issue within the purview of this Board's jurisdiction. The only issue before this Board is whether then-Interim Chief could assign the investigation of the events surrounding A/C Y's collision to someone other than an individual in the Office of Investigative Programs.

Similarly, Appellant argued that as Mr. T, the person who did the Firm's inquiry, was not licensed as a private detective in Maryland, the Firm's investigation was not in accordance with Maryland law. Appellant's Motion to Rescind Suspension at 11-12; H.T. at 76-78. Again, whether Mr. T was in violation of Maryland law regarding the fact that he is licensed as a private investigator in the state of Virginia, C. Attach. 2, not Maryland, is beyond the Board's purview. What matters is that the Interim Fire Chief had the authority to assign the investigation to Mr. T.

position was vacant at the time and given the ranks of those involved.

Appellant also argues that in order for the then-Interim Fire Chief to assign the investigation to the Firm, the Interim Fire Chief had to amend DFRS Policy No. 529. The Board notes that DFRS Policy No. 529 is an internal policy which sets forth the procedures for investigations conducted by Internal Affairs (now the Office of Investigative Programs). See Appellant Attach. 8. As the Interim Fire Chief chose not to assign the investigation to Investigative Programs, there was no need for the Interim Fire Chief to amend DFRS Policy No. 529.

While it is true that Investigative Programs opened a file on the investigation of the events surrounding A/C Y's collision, this would appear to have been done solely for administrative convenience to allow MCFRS to keep track of the investigation. Simply because MCFRS opened a file on the matter for administrative convenience, this did not require that the Firm follow the procedures of DFRS Policy No. 529. As already noted, DFRS Policy No. 529 is an internal policy, governing how the Office of Investigative Programs does investigations. It is certainly not controlling on how an outside entity, such as the Firm, conducts an investigation. While the Interim Fire Chief could have required the Firm to follow the procedures in DFRS Policy No. 529, there was no requirement that the Interim Fire Chief do so.

Accordingly, based on the record of evidence before the Board, it finds that the investigation conducted by the Firm was not illegal.<sup>21</sup>

**B. The County Did Not Violate Section 4 Of DFRS Policy No. 503.**

Appellant argues that the County must rescind its suspension because it did not comply with Section 4.4 of DFRS Policy No. 503, which requires (with certain exceptions not applicable here) that disciplinary actions be progressive in severity. Appellant's Motion to Rescind Suspension at 17-18. Appellant points to the fact that Appellant has never been subject to a disciplinary action before and has been employed for over thirty years with the County. Id. at 17.

The County argues that while DFRS Policy No. 503 requires progressive discipline, Appellant serves as a senior level officer. Because of Appellant's position, the County has a right to expect a higher standard of conduct. County's Response at 3.

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<sup>21</sup> As a corollary matter, Appellant also argued that the County failed to advise Appellant that Appellant was under investigation regarding Appellant's actions. Appellant asserts that Appellant had the right to be advised in advance of the nature of the investigation and the charges against Appellant as well as the right to consult with counsel. Appellant's Motion to Rescind Suspension at 16. The County argues that the personnel regulations do not require the County to provide an employee with the right to counsel during a fact-finding inquiry. County's Response at 1. The Board agrees with the County that there is no procedural due process right to counsel during an agency investigation into misconduct. See Deatrick v. Department of Treasury, 10 M.S.P.R. 262, 266-67 (1982) (citing to Hannah v. Larche, 363 U.S. 420, 441-42 (1960)).



While it is true that DFRS Policy No. 503 calls for discipline to be progressive in severity, it goes on to set forth the considerations that must be used in determining the severity of the action taken. Appellant Attach. 16 at 3. The considerations include: the nature and gravity of the offense; its relationship to the employee's assigned duties and responsibilities; the employee's work record; and other relevant factors. Id. The Board has repeatedly held that the County has the right 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 his subordinates. See MSPB Case No. 09-11 (2009); MSPB Case No. 05-07 (2005); see also 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).

In the instant case, Appellant holds a very senior position in MCFRS. Appellant was accused of disrupting a collision investigation. Appellant was also charged with delaying the testing of A/C Y for drugs and alcohol after the collision. In addition, Appellant was charged with failing to follow the very MCFRS policies and procedures Appellant is expected to uphold. These were serious charges that if they had been proven would have called for some type of suspension, given Appellant's position. Accordingly, the Board finds that the County did not violate Section 4.4 of DFRS Policy No. 503.

C. The Board Rejects The Contention That Absent A Written Complaint, MCFRS Cannot Discipline An Employee.

Appellant argued for the first time during the hearing that DFRS Policy No. 503 requires a written complaint against an employee before MCFRS may undertake to discipline the employee for misconduct. H.T. at 179-81; Appellant Ex. 1 at 1, 3. Appellant asserted that because DOC H failed to file a written complaint against Appellant,<sup>22</sup> MCFRS could not take disciplinary action against Appellant. H.T. at 179-80. While it is true that DFRS Policy No. 503 requires a written complaint, the policy deals with the process by which an employee can direct a complaint against another employee. Appellant Ex. 1 at 3. Clearly this policy does not prevent a manager who is aware of misconduct by an employee from being able to discipline the employee notwithstanding the fact that there is no written complaint. It is absurd to think that a supervisor would have to have a written complaint in order to take such action.

Moreover, as Appellant's counsel pointed out during the course of the hearing, DFRS Policy No. 503 is interrelated with DFRS Policy No. 529. H.T. at 176, 177. Significantly, DFRS Policy No. 529, governing internal affairs investigations, indicates that allegations should be in writing but at the discretion of the Fire Chief verbal complaints may be investigated. C. Ex. 12 at 2, § 4.2. In the instant case, the Interim Fire Chief had a verbal complaint from DOC H at the time he launched an investigation into A/C Y's collision. H.T. at 53. As a result of the investigation, the Interim Fire Chief had a written report detailing the events of November 30, 2008. The Board finds that this written report was sufficient to satisfy the need for a written complaint, assuming arguendo that one is necessary, in order to take disciplinary action pursuant to DFRS Policy No. 503.

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<sup>22</sup> DOC H testified that he filed a verbal complaint with the Interim Fire Chief. H.T. at 53. He indicated he didn't file a written complaint because the Interim Fire Chief informed him that there would be a complete investigation into the circumstances surrounding the collision. Id.

Accordingly, based on the foregoing analysis, the Board finds that the absence of a written complaint by DOC H concerning Appellant's conduct on November 30, 2008, does not serve as a basis to dismiss the charges against Appellant.<sup>23</sup>

### **The County Failed To Prove The Charges Against Appellant.**

The County has the burden of going forward with the production of evidence in this case. See Montgomery County Code, Administrative Procedures Act (APA), Section 2A-8(d). The County must prove its charges by a preponderance of the evidence. APA, Section 2A-10(b). At the close of the County's case-in-chief on August 31, 2009, Appellant's counsel renewed Appellant's Motion to Rescind Suspension. As previously noted, the Board denied Appellant's Motion to Rescind Suspension. However, sua sponte, the Board determined to dismiss the case against Appellant, holding that the County had failed to prove the charges against Appellant.<sup>24</sup> H.T. at 181-82.

The Board was then asked by Appellant's counsel whether it would issue a written decision in this case, H.T. at 182, and the Board indicated it would. Id. The Board made its decision to dismiss the charges against Appellant based on the following analysis.

A. **The County Failed To Prove The First Charge By A Preponderance Of The Evidence.**

The first charge of the Statement of Charges (SOC) relies on Section 33-5(r) of the MCPR which provides for discipline against an employee who "interferes with or disrupts the work of another County employee." C. Ex. 1 at 3. This charge has two specifications. The first specification states that Appellant, while driving to the collision scene, had a conversation with DOC H during which Appellant indicated Appellant did not want the appropriate Battalion Chief (i.e., B/C I) to conduct the investigation. The specification indicates that Appellant's insertion of Appellant's preference as to who should investigate was inappropriate and disruptive to the collision investigation.

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<sup>23</sup> The Board would urge the County to amend DFRS Policy No. 503 to ensure that no employee mistakenly believes that a written complaint is required before a supervisor may discipline an employee for misconduct.

<sup>24</sup> An alternative basis for dismissing the charges against Appellant is their untimeliness. Normally, a department director must issue charges against an employee within 30 calendar days of when the supervisor became aware of the employee's misconduct. MCPR, Section 33-2(b)(1). An exception to this requirement is when an investigation into the employee's conduct justifies a delay. MCPR, Section 33-2(b)(2). The Board has previously ruled that where an investigation justifies a delay, the Fire Department must bring charges within 30 days of completion of any investigation. See MSPB Case No. 04-15 (2005). In the instant case, the record of evidence indicates the investigation was completed on January 16, 2009, C. Ex. 5, and the Statement of Charges was not issued until March 2, 2009, some 49 days after the investigation was completed.

The County has argued during the course of this appeal that Appellant was on duty as soon as Appellant got into Appellant's County vehicle. H.T. 170, 173. According to the County, Appellant, as the senior level MCFRS officer on the scene of a serious collision involving alcohol, had a duty to act to ensure that MCFRS policies and procedures were followed. H.T. at 12, 170, 171, 173. If one accepts the County's argument that Appellant had a duty to act,<sup>25</sup> it is difficult to understand why Appellant is being faulted for having discussed with DOC H who should do the necessary investigation.

DOC H testified that in the ordinary course of business there are two individuals who can do an investigation. H.T. at 19. While primarily the Battalion Chief who is assigned to an area where an accident occurs does the investigation, sometimes the Safety Officer will do the investigation in the absence of the Battalion Chief or if the accident is particularly complicated. Id. at 19, 20-21; C. Ex. 5 at 78. According to DOC H, Safety Officers are better qualified to do an accident investigation. H.T. at 19.

DOC H related that normally in the course of business B/C I would have been assigned. Id. at 20. However, when Appellant objected to B/C I, DOC H chose the Safety Officer to do the investigation and rejected Appellant's suggestions that either Appellant or he do the investigation.<sup>26</sup> Id. at 18-19, 20; C. Ex. 5 at 77, 78. DOC H insisted that the Safety Officer would have been his first or second choice. C. Ex. 5 at 83. DOC H testified that it was he who determined to send Capt. J to the accident scene. H.T. at 45, 46.

According to DOC H, he made the determination to send the Safety Officer during his first conversation with Appellant, H.T. at 46, which occurred at 8:58 p.m., C. Ex. 6; H.T. at 45-46. Assuming this is true, the County has certainly not shown any disruption of the investigation, as the phone records indicate that this conversation between DOC H and Appellant only lasted three minutes. C. Ex. 6. Therefore, given the undisputed testimony of the person who was in charge on the night of November 30, that he made the ultimate determination with regard to who would do the investigation within a three-minute time frame after being informed about the collision, the Board concludes that the County failed to prove this specification.

The second specification states that Appellant failed to tell B/C M that the police had

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<sup>25</sup> The Board finds that DOC H's observation about how the incident needed to be handled was correct. Had Appellant taken on a more active role in this matter, (which the Interim Fire Chief insisted Appellant should have), given the fact that Appellant was very good friends with A/C Y, it would have appeared as if Appellant was covering for one of Appellant's peers. This was precisely what DOC H sought to avoid when he refused to personally do the investigation or to allow Appellant to do the investigation. H.T. at 18-19; C. Ex. 5 at 77.

Moreover, any duty Appellant might have had to act ended when DOC H made it clear to Appellant that Appellant was not to have any role in the investigation of A/C Y's collision.

<sup>26</sup> DOC H testified during the investigation that the only thing he did that he wouldn't have done normally with regard to this collision incident was get a Battalion Chief involved to assist with the drug and alcohol test. C. Ex. 5 at 83.

cleared A/C Y to leave the scene of the accident. The specification states that this alleged failure caused B/C M to wait until the tow truck towed the Honor Guard vehicle before taking A/C Y to FROMS, thus resulting in an unnecessary delay in A/C Y's drug/alcohol testing.

B/C M testified that it was his standard operating procedure to remain at the scene of an accident until the County vehicle was towed. H.T. at 108-09. The County never asked B/C M whether he would have left the scene sooner, had he known that A/C Y had been cleared by the police to leave the scene. Thus, it is pure speculation on the County's part that B/C M would have acted differently, had he known this information. Accordingly, the County did not prove this specification.

B. The County Failed To Prove The Second Charge By A Preponderance Of The Evidence.

The second charge of the SOC relies on Section 33-5(e) of the MCPR which provides for discipline against an employee who "fails to perform duties in a competent or acceptable manner." C. Ex. 1 at 4. There are three specifications for this charge.

The first specification indicates that Appellant delayed notifying DOC H about A/C Y's collision with a County vehicle for at least twenty minutes after Appellant learned of the event. As the Fire Chief acknowledged, it was A/C Y's obligation to contact DOC H after the collision, not Appellant's. H.T. at 156, 157, 172, see C. Ex. 11 at 3. Accordingly, the Board finds that the County did not prove this specification.

The second specification deals with Appellant's attempt to influence who was sent to do the collision investigation. Thus, the alleged misconduct underlying this specification is identical to the alleged misconduct involved in specification one of Charge 1, which the Board has determined was not proven by the County.

The third specification of this charge alleges that Appellant, as the highest ranking MCFRS officer on the scene, had a duty to ensure that A/C Y was brought to FROMS as soon as possible for the required drug/alcohol test. According to this specification, Appellant remained on the scene of the collision after being told that the police had cleared A/C Y to leave, and then Appellant condoned and collaborated with a stop at 7-11 on the way to FROMS.

The record of evidence indicates that DOC H, who as DOC that night, had responsibility over any emergency in the County, made the determination that B/C M, not Appellant, would be assigned to escort A/C Y to FROMS.<sup>27</sup> H.T. at 22-23, 45-46. As previously noted, B/C M testified that it was his standard practice to wait at the scene of an accident until the County vehicle had been towed. H.T. at 108-09. Moreover, B/C M testified that it was his determination, not Appellant's, to stop at the 7-11 enroute to FROMS, after A/C Y informed B/C

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<sup>27</sup> Unfortunately, this determination apparently was not conveyed to the Fire Chief, who testified that DOC H told the Fire Chief that it was Appellant who was appointed to ensure that A/C Y completed post-accident drug and alcohol testing. H.T. at 152-53.

M that A/C Y needed to use the bathroom. H.T. at 108, 138. Accordingly, the County has failed to prove this specification of Charge 2.

C. The County Failed To Prove The Third Charge By A Preponderance Of The Evidence.

The third charge of the SOC relies on Section 33-5(h) of the MCPD which provides for discipline against an employee who “is negligent or careless in performing duties.” C. Ex. 1 at 4. The charge has four separate specifications. The first specification alleges Appellant failed to timely notify the appropriate parties after Appellant learned that A/C Y’s collision involved a County-owned vehicle. While the SOC does not indicate who the “parties” are that it is referring to in this charge, the Board assumes it is simply DOC H. Thus, this specification is the same as the first specification of Charge 2, which the Board has determined was not proven by the County.

The second specification of this charge alleges that Appellant was negligent in influencing who would complete the collision investigation. Again, this specification deals with the same misconduct that forms the basis of specification one of Charge 1 and specification two of Charge 2. And as previously stated, the County has not proved this alleged misconduct.

The third specification of this charge alleges that Appellant was negligent in failing to tell B/C M that A/C Y was available to be taken to FROMS for drug/alcohol testing. Thus, the misconduct alleged in this specification is identical to the misconduct alleged in specification two of Charge 1, which the Board has determined was not proven by the County.

The fourth specification of this charge alleges that Appellant was negligent in allowing A/C Y to stop at 7-11 so he could consume water and urinate before submitting to a drug/alcohol test. This alleged misconduct is similar to the misconduct alleged in part of the third specification of Charge 2, which the Board determined was not proven by the County.

Accordingly, as the alleged misconduct underlying all of the specifications in this charge is similar to alleged misconduct addressed in other specifications of other charges not proven, the Board finds the County did not prove this charge.

D. The County Failed To Prove The Fourth Charge By A Preponderance Of The Evidence.

This charge appears to allege a violation of Section 4.21(b) of DFRS Policy No. 809, which provides that “[a]n employee who is the operator of a County or Corporation-owned vehicle that is involved in a property damage accident resulting in at least \$2,500 damage must be tested immediately after the police authority having jurisdiction over the accident authorize that the operator may leave the scene.” C. Ex. 1 at 5. The charge indicates that Appellant was the highest ranking MCFRS officer on the scene of A/C Y’s collision on November 30, 2008. The charge states that Appellant failed to ensure that A/C Y was brought to FROMS for the drug/alcohol testing immediately after the police authority having jurisdiction over the accident authorized A/C Y to leave the scene.

The section of DFRS Policy No. 809 quoted in this charge only requires that an employee be tested immediately after the police authorize the employee to leave the scene. It does not indicate who is responsible for assuring the test is done immediately. However, DFRS Policy No. 809 does state that the Duty Chief, or designee at the scene of the accident, will authorize testing for accidents involving \$2,500 in property damage. C. Ex. 7 at 7, § 4.21b(2).

On the night of November 30, 2008, DOC H, who had full authority with regard to the handling of the collision, appointed B/C M to take A/C Y to FROMS. It was not Appellant's responsibility to ensure DFRS Policy No. 809 was followed;<sup>28</sup> it was B/C M who had been assigned this duty. If anyone should be charged with failure to adhere to this policy, it is B/C M not Appellant.<sup>29</sup> Accordingly, the Board finds that the County did not prove this charge by a preponderance of the evidence.

E. The County Failed To Prove The Fifth Charge By A Preponderance Of The Evidence.

This charge appears to allege a violation of Section 4.21(b) of DFRS Policy No. 809, which provides that "[s]upervisory personnel are responsible for implementing all aspects of this policy and procedure under the direction of their respective Bureau Chief." The charge then incorporates all facts and "allegations"<sup>30</sup> stated in Charges 1-4. The Board notes this charge is vague in its wording.<sup>31</sup> However, it appears to allege the same misconduct by Appellant which forms the basis of the fourth charge, which the Board has determined the County did not prove. Accordingly, the Board finds the County failed to prove this charge.

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<sup>28</sup> The Fire Chief testified during the hearing that this charge, as well as the fifth charge against Appellant, was based on the Fire Chief's understanding that Appellant was responsible for having A/C Y's post-accident drug and alcohol testing performed. H.T. at 163. Clearly, the record of evidence establishes that this was incorrect. Moreover, the Fire Chief was unable to point to a single policy or procedure which Appellant was charged with violating that supported the Fire Chief's view of how Appellant should have behaved. H.T. at 164.

<sup>29</sup> The Board notes that had DOC H immediately gone to the scene of the collision, he could have personally overseen A/C Y being escorted to FROMS. Instead, when he finally attempted to go to the scene he was unsuccessful twice, despite the fact that both Appellant and B/C M were able to get to the scene. The Fire Chief asserted that DOC H did not arrive on the scene as he had not been notified in a timely manner. H.T. at 173. However, the Board finds that DOC H, even after finding out about the collision, failed to act in a timely manner to take charge of the accident scene.

<sup>30</sup> The Board would point out to the County that allegations cannot be used to support charges; only facts may support charges.

<sup>31</sup> The Board has previously warned the County that it must give adequate notice to an employee concerning the misconduct with which the employee is charged. MSPB Case No. 09-03 (2009); MSPB Case No. 07-13 (2007). Failure to give adequate notice will result in a charge being dismissed. Id.

## **ORDER**

Based on the foregoing, the Board grants Appellant's appeal from Appellant's suspension. Specifically, the Board hereby orders the following:

1. The Board sustains the appeal, and orders that the County revoke the two-week suspension, and make the Appellant whole for lost wages and benefits.

2. In as much as Appellant prevailed, the Board authorizes Appellant's request for attorney fees. Appellant must submit a detailed request for attorney fees to the Board within ten (10) days of the date of receipt of this Final Decision, 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).

# **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, July 31, 2007, October 21, 2008, and July 20, 2010), 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 Form which must be completed within ten (10) working days. Upon receipt of the completed Appeal Form, 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 2010, the Board issued the following decisions on appeals concerning the denial of employment.



# **EMPLOYMENT DECISIONS**

## **CASE NO. 10-03**

### **DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County's Office of Human Resources (OHR) that Appellant did not meet the minimum qualifications for the position of Manager II, in the Department of Health and Human Services (DHHS).

### **FINDINGS OF FACT**

On July 20, 2009, Appellant submitted an on-line application<sup>1</sup> for the position of Manager II in DHHS. The announcement closed on July 30, 2009. See County Response, Attach. 2. On August 3, 2009, Appellant received an email from OHR, informing Appellant that based on a review of Appellant's application, Appellant did not meet the minimum qualifications for the position. The minimum qualifications for the Manager II position were a Bachelor's Degree and seven years of progressively responsible experience in human services, three of which were in a supervisory or executive capacity. Id.

Upon receiving the OHR email, Appellant contacted OHR regarding Appellant's failure to meet the minimum qualifications. Appellant spoke with Mr. B of OHR, who informed Appellant that Appellant had failed to submit a resume. Appellant told Mr. B that Appellant was "shocked" and indicated that there must have been a technology error. Mr. B suggested Appellant discuss the matter with Ms. C of OHR, which Appellant did. Appellant then sent both Mr. B and Ms. C an email, indicating that Appellant's resume must have become detached as Appellant was editing Appellant's application on-line. Appellant included a copy of Appellant's resume with Appellant's email and asked if Appellant's application would be reevaluated. OHR refused to reevaluate Appellant's application, as it has a policy of not accepting information after the closing date. See County Response, Attach. 4.

Appellant subsequently contacted OHR to indicate Appellant wanted to grieve the OHR decision not to accept Appellant's resume, and was informed that Appellant could appeal the matter to the Board. This appeal followed.

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<sup>1</sup> OHR requires all applicants to submit applications using OHR's Peopleclick on-line application system. OHR does not accept hard copy resumes or resumes submitted via email or fax. See County Response, Attachment (Attach.) 5.

## POSITIONS OF THE PARTIES

### Appellant:

- There are several flaws in the on-line application system, which does not require an applicant's resume as a "required" document and permits an application to be submitted without a resume. As OHR acknowledged that it needed Appellant's resume, the resume should have been a required document and the technology of the on-line system should have prevented the submission of Appellant's application without Appellant's resume.
- The on-line application system causes attachments to detach when an applicant edits their application without informing the applicant that the attachment has been detached and the attachment needs to be uploaded again.
- Appellant's application should have been considered incomplete instead of OHR rating Appellant as not meeting the minimum qualifications.
- On the "How to Apply" page of OHR's website, it indicates that once an applicant submits their resume they will receive a confirmation email notice. If the applicant does not receive the confirmation email notice, they are advised to call OHR to ensure that their resume was successfully submitted and received by OHR. Appellant receive notice from the on-line application system that Appellant's resume had been received.
- Had Appellant received timely notice that OHR had not received Appellant's resume, Appellant could have immediately sent it to OHR before the announcement closed.

### County:

- Based on the application received from Appellant, Appellant did not meet the minimum qualifications for the position of Manager II. While Appellant submitted a cover letter and a statement relating to the preferred criteria, Appellant did not include a resume with Appellant's application.
- Appellant could have established Appellant had the requisite experience by means of a resume, in Appellant's cover letter, or as part of Appellant's documentation regarding the preferred criteria for the position. However, Appellant failed to do so.
- OHR has a strict policy of not permitting applications or additional information to be submitted after the application deadline has passed.
- Appellant's contention that attachments detach when an applicant edits their application is incorrect. Notwithstanding this fact, there is a safeguard in place at the end of the process whereby applicants may "preview" the information contained in their applications prior to submission of their applications. Had Appellant previewed Appellant's application before hitting the submit button, Appellant would have realized that Appellant's resume was not part of Appellant's application process.
- The confirmation email is automatically generated by the system. It is for the purpose of acknowledging that OHR has received whatever documentation was submitted. The system does not have the capacity to "read" the application and determine what exactly was submitted.
- Appellant is correct in pointing out that the on-line system instructions are misleading as they indicate that once an applicant submits their resume, they will receive a confirmation notice. OHR will clarify this language to indicate that once an applicant submits their

application, they will receive a confirmation email that their submission has been received.

### **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), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

#### **6-3. Employment application deadline.**

- (c) The OHR Director must not accept an application submitted after an announced application deadline.

### **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**

The County asserts that it "rigidly" follows the policy of not accepting additional information or documentation after the application deadline, pursuant to MCPR, Section 6-3(c). It notes that thirty-one applicants applied for the Manager II position and one other candidate, like Appellant, failed to include a resume as part of the application process. That candidate was treated the same as Appellant and was deemed not eligible for the Manager II position. County Response at 3. OHR notes that it received 35,414 job applications in FY 2009. OHR states that it is not possible to treat an application as incomplete and allow the applicant to submit information after the deadline date. Instead, OHR argues that it is the responsibility of the applicant to read and follow the instructions of the on-line application system.<sup>2</sup>

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<sup>2</sup> OHR acknowledges that Appellant has made a valid point about its system-generated email acknowledgment, which indicated to Appellant that Appellant's resume had been received when in fact it had not. As OHR notes, the system is incapable of reading the application to determine whether a resume has in fact been received. OHR states that it has changed the

OHR notes that Appellant has applied for some twenty-three positions since 2004, using the on-line application system and has never before reported to OHR that the system is flawed. County Response at 2. Appellant acknowledges that Appellant is a “high end” user of the application system. See Appeal, attached Email to Executive Director, dated 08/20/09, subject: Requisition 3701 Program Manager II.

Appellant states that Appellant deduced from Appellant’s conversation with OHR that Appellant’s resume was detached in the editing process. Appellant asserts that

I had known about this from other positions that I have applied for but was now worried that I was sending multiple resumes and did not want to clog the system. What I had noticed was that after you get through the final online process the user can edit any errors but all attachments detach. When you go back to edit you have to upload every [at]tachment that you have previously. However, the system does not tell you this; the user must figure this out.

Id.

Given the fact that Appellant acknowledges that Appellant was aware of the purported problem in the system, it was incumbent on Appellant to preview Appellant’s application before submitting it. Appellant’s failure to do so is the reason why Appellant was not considered qualified for the position of Manager II. Notwithstanding this fact, the Board believes that Appellant has made an excellent point that an applicant’s resume should be considered a “required document.” The Board urges OHR to change its on-line application system so as to make a resume a required document. If this is not feasible, then the Board urges OHR to include an instruction in its “How to Apply” page, emphasizing the importance of previewing an application before submitting it.

### **ORDER**

Based on the above, the Board denies Appellant’s appeal from OHR’s determination that Appellant did not meet the minimum qualifications for the position of Manager II, DHHS.

## **CASE NO. 10-05**

### **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’s Office of Human Resources (OHR) Director to rescind a conditional offer of employment made to Appellant based on the results of a pre-employment physical.

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confirmation so as to only confirm an applicant’s submission has been received, not what documents have been received.

## FINDINGS OF FACT

Appellant applied for the position of Firefighter/Rescuer I (Recruit) and was given a conditional offer of employment with the Montgomery County Fire and Rescue Service (FRS). The offer of employment was contingent upon Appellant's successful completion of a physical examination.

On July 1, 2009, Appellant was given an examination at the Montgomery County, Maryland, Fire and Rescue Occupational Medical Service clinic. At that time, Appellant reported to the County's Medical Examiner that Appellant was taking Advair<sup>1</sup> and used an Albuterol inhaler.<sup>2</sup> County Response, Attach 1. Both medications are used to treat pulmonary conditions. During the medical examination, Appellant provided to the County's Medical Examiner Appellant's medical records, documenting a diagnosis of extrinsic asthma and allergic rhinitis, for which Appellant's healthcare provider had prescribed Albuterol and Advair. Id.

The County's Medical Examiner explained that a diagnosis of asthma may prevent medical clearance of an individual for Firefighter duties. The County's Medical Examiner cited to the medical standards embodied in the National Fire Protection Association (NFPA) 1582: Standard on Comprehensive Occupational Medical Program for Fire Departments (NFPA 1582), 2003 edition. NFPA 1582 medical standards, according to the County's Medical Examiner, have been adopted by Montgomery County, Maryland for its Fire and Rescue Service. The County's Medical Examiner stated that NFPA 1582, Section 6.8.1, addresses "Reactive Airway Disease requiring bronchodilator or corticosteroid therapy in the previous two years." Specifically, it provides:

A candidate who has required the medications but who does not believe he/she has asthma shall demonstrate a normal response to cold air or methacholine (PC20 greater than 16 mg/ml). To be safely administered, this test shall be performed by a qualified specialist and to be valid, the candidate shall be off all anti-inflammatory medications for at least 4 weeks and off bronchodilators the day of the testing. A negative challenge as described by the American Thoracic Society (ATS), along with no recent episode of bronchospasm off medication shall be considered evidence that the candidate does not have clinically significant airways hyperactivity or asthma.

NFPA 1582, Section 6.8.1. As Appellant claimed that Appellant did not have clinically significant airways hyperactivity or asthma, the County's Medical Examiner advised Appellant to undergo a methacholine challenge test.

In order to prove Appellant's fitness, Appellant underwent the methacholine challenge

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<sup>1</sup> Advair is an anti-inflammatory medication and long acting bronchodilator. County Response, Attachment (Attach.) 1, Memorandum from the County's Medical Examiner, dated 10/20/09.

<sup>2</sup> Albuterol is a short-acting bronchodilator.

test, paying \$1600 for it. See Appellant's Reply. The test was performed on July 23, 2009 by Dr. A at the Hospital Center Pulmonary Function Lab. County Response, Attach. 1. The test results "demonstrated a 28% drop from baseline FEVI levels (a measure of lung function that may change based on lung irritants like methacholine), indicating the presence of Reactive Airway Disease from baseline. A 20% drop in FEVI levels is considered a positive test." Id. Because the test confirmed Reactive Airway Disease and due to the prescription medications that Appellant was prescribed, the County's Medical Examiner determined that Appellant did not meet the medical standards for a Firefighter in Montgomery County, Maryland. Id.

By memorandum, dated August 6, 2009, the County's Medical Examiner informed OHR that Appellant was determined to be "Not Fit For Duty". By letter, dated August 4, 2009,<sup>3</sup> the Director, OHR, informed Appellant that Appellant's conditional offer of employment was being withdrawn as Appellant had not passed the medical examination.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant has wanted to be a Firefighter for a very long time. After the medical review, the County's Medical Examiner informed Appellant that Appellant would have to undergo a methacholine challenge as Appellant was prescribed a bronchodilator by Appellant's healthcare provider. Appellant was informed that if Appellant did not pass the methacholine challenge Appellant's conditional offer would be withdrawn; if Appellant passed, Appellant's conditional offer would stand.
- Appellant has never been diagnosed with asthma and Appellant has produced letters from Appellant's physician stating Appellant is in excellent health and clearing Appellant for Firefighter duties.
- Appellant is a life-long athlete, and a personal trainer. Appellant undergoes vigorous training every day. Such training would send any asthmatic into an episode but Appellant has never had one.
- Appellant only uses the bronchodilator for allergies, due to Appellant's dog and because of an upper respiratory infection.
- Appellant underwent the methacholine challenge, paying \$1600 to do so.
- According to the test results, Appellant experienced a decrease in Appellant's baseline breathing on the very last phase of the test, which has the highest concentrate of

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<sup>3</sup> Appellant indicates that Appellant did not receive OHR's letter until September 1, 2009. Appellant produced an envelope from OHR, addressed to Appellant and postmarked August 27, 2009. As OHR was not notified of the disqualification of Appellant by the County's Medical Examiner until the County's Medical Examiner's memorandum of August 6, 2009, it is inconceivable that OHR could have sent a letter to Appellant on August 4, 2009, before it even received the August 6 memorandum which was included as an attachment to OHR's letter to Appellant. Accordingly, based on the totality of evidence before the Board, it finds that Appellant timely appealed Appellant's disqualification.

methacholine. The test should not disqualify Appellant from the FRS as anyone inhaling such a chemical would experience a negative affect on their capacity to breathe.

- The County's Medical Examiner gave Appellant permission to retake the test, but Appellant can not afford to do so.
- The Board should overturn the County's Medical Examiner's ruling, as Appellant has been cleared for duty by Appellant's physician. Also, Appellant believes that Appellant is in better shape than over 50% of the County's Firefighters.

County:

- The County uses the National Fire Protection Association standards regarding an Occupational Medical Program for Fire Departments. Under these standards, Appellant was determined to be medically unfit for duty.
- Appellant was provided with an opportunity to demonstrate that Appellant did not have clinically significant airways hyperactivity or asthma. The test Appellant took confirmed Appellant had Reactive Airway Disease, and Appellant was therefore disqualified under the NFPA 1582 Standard.

**APPLICABLE REGULATION**

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

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

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

...

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

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

**ISSUE**

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

## **ANALYSIS AND CONCLUSIONS**

It is undisputed that Appellant takes two medications for pulmonary (lung) conditions – Albuterol and Advair. During the pre-employment medical examination, Appellant informed the County’s Medical Examiner about these medications. As Appellant was prescribed a bronchodilator, the County’s Medical Examiner was concerned that Appellant might have Reactive Airways Disease, which would disqualify Appellant from serving as a Firefighter. Such a disqualification is in accordance with the NFPA standards, which are utilized by governmental fire department occupational medical programs. Appellant claimed Appellant did not have clinically significant airways hyperactivity or asthma. Accordingly, the County’s Medical Examiner indicated to Appellant that Appellant’s conditional offer of employment would not be withdrawn if Appellant successfully passed a methacholine challenge test. However, the County’s Medical Examiner also informed Appellant that if Appellant failed the test Appellant’s offer would be withdrawn.

Appellant, at considerable expense, underwent the test on July 23, 2009. Appellant concedes Appellant did not pass the test. The Appellant had the opportunity to take a retest but declined to do so given the expense. While Appellant challenges why such a test should be used to disqualify individuals from being Firefighters, it is undisputed that such disqualification is called for under the NFPA medical standards used by Montgomery County, Maryland. While Appellant may indeed be in excellent physical shape, the Board holds that the County had the right to withdraw Appellant’s conditional offer of employment based on the application of the NFPA medical standards after Appellant failed to pass the methacholine challenge test.

## **ORDER**

Based on the above, the Board denies Appellant’s appeal from OHR’s determination to rescind Appellant’s conditional offer of employment as a Firefighter/Rescuer I (Recruit).

## **CASE NO. 10-06**

## **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’s Department of Correction and Rehabilitation (DOCR) to rescind its conditional offer of employment to Appellant as a Correctional Officer I.

## **FINDINGS OF FACT**

Appellant previously worked for the Department of Police as a Public Safety Communications Specialist. Appellant left Appellant’s County employment in November 2008. Subsequently, Appellant applied for the position of Correctional Officer I with the County. By letter dated August 12, 2009, Appellant was notified that DOCR was extending Appellant a conditional offer of employment with DOCR as a Correctional Officer I. The letter stated that



the offer of employment was contingent upon the completion of a satisfactory background check, a psychological evaluation and a medical fitness examination. See Appeal Form, Enclosure 2.

By letter dated September 4, 2009,<sup>1</sup> DOCR informed Appellant that Appellant's application was no longer being processed by DOCR for employment. See Appeal Form, Enclosure 1. No reason was provided to Appellant for this decision.

On September 17, 2009, Appellant filed the instant appeal with the Board. The Board received the County's Response to the instant appeal, dated October 8, 2009, on October 12, 2009.<sup>2</sup> Appellant replied to the County's Response (Appellant's Rebuttal), by letter dated October 25, 2009, which was received by the Board on November 2, 2009.<sup>3</sup>

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant completed the medical examination on August 27, 2009 but was denied the opportunity to take the required psychological examination. Appellant was given no reason for this denial.
- Appellant previously worked for the County's Department of Police as a Public Safety Communications Specialist. Appellant left employment with the Police Department due to religious discrimination, repeated instances of retaliation and ultimately constructive discharge. Appellant filed a complaint with the Equal Employment Opportunity Commission (EEOC) against the Police Department.
- Appellant was not given the conditional offer of employment until after a meeting with a DOCR Background Investigator on August 12, 2009, during which Appellant informed the Investigator about Appellant's past disciplinary actions while employed with the

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<sup>1</sup> According to Appellant, Appellant received this letter on September 11, 2009. See Appeal Form, Block 8.

<sup>2</sup> The County's response was due to the Board by October 9, 2009. As October 9 was a Friday, the Board's office was closed since the Board's normal hours of operation are Monday-Thursday, from 9:30 a.m. to 3:00 p.m. By letter dated October 10, 2009, (which was received by the Board on October 13, 2009), Appellant filed a Motion with the Board seeking to have it rule in Appellant's favor as Appellant had not received a copy of the County's Response as ordered by the Board. The County answered Appellant's Motion by email, noting it had delivered its Response to the Board's office on October 9, 2009 (although the Board's office is closed, mail may be delivered by depositing it in the mail slot). The County also asserted that it had mailed its Response to Appellant by first-class mail on October 9, 2009. Having reviewed all the facts in this matter, the Board concludes the County timely filed its Response and mailed a copy to Appellant. Therefore, the Board denies Appellant's Motion.

<sup>3</sup> The Board notes that Appellant's Reply was due to the Board by October 30, 2009. As October 30 was a Friday, the Board's office was closed.

- Police Department, Appellant's ongoing credit problems, and the complaint filed with the EEOC.
- Appellant believes that the sudden removal of Appellant from the hiring process was due to interference by the Police Department and information supplied to DOCR by the Police Department to further retaliate against Appellant for filing with the EEOC.<sup>4</sup>
  - Appellant acknowledges Appellant mistakenly put September as the beginning date of Appellant's employment for Maryland Plumbing and Heating; however, Appellant stands by Appellant's performance while with this company. This was a part-time job with no benefits and Appellant acknowledges Appellant gave short notice before leaving but needed a full-time job.
  - Appellant notes that while with the Police Department, Appellant received a T.E.A.M. award and on three occasions was recognized for Appellant's excellent performance by Appellant's Deputy Director.

County:

- The conditional offer of employment to Appellant indicated it was contingent on a satisfactory background check. The background check done by DOCR proved to be unfavorable and the information uncovered bears on Appellant's suitability for employment as a Correctional Officer, a position where dependability, reliability, punctuality, and attendance are of critical importance.
- In Appellant's application for employment, Appellant indicated that Appellant had worked for Maryland Plumbing and Heating from September – December 2004. In fact, Appellant only worked for a few weeks and gave no letter of resignation or notice before leaving.
- A review of Appellant's personnel file with the Police Department revealed a history of lateness and attendance problems. Appellant received a disciplinary action in the form of forfeiture of annual leave for Punctuality – AWOL. Appellant was subsequently given a 5-day suspension for punctuality. Appellant was later disciplined again for punctuality, receiving another 5-day suspension. Appellant's yearly evaluations stressed tardiness issues. Appellant left employment with the Police Department in November 2008 and when Appellant sought reinstatement in June 2009, the Police Department would not reinstate Appellant.
- Appellant's credit report shows that all open credit cards and loans are delinquent. It also shows that Appellant lived at an address Appellant did not disclose on Appellant's application.
- There is a nexus between the pattern of lateness and absences and the dependability issues that surfaced in Appellant's background investigation and the duties of a Correctional Officer. If a Correctional Officer reports to work late or fails to report to work without notice, it results in significant overtime costs to DOCR and may jeopardize the safety of fellow officers and prisoners alike if minimum staffing needs in a correctional facility are not met.

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<sup>4</sup> Any challenge by Appellant to Appellant's nonselection due to retaliation for filing with the EEOC falls within the purview of the Human Relations Commission, not the Board.

## 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 discrimination prohibited by chapter 27,<sup>5</sup> “Human Relations and Civil Liberties,” of this Code, may be filed in the manner prescribed therein. 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, July 31, 2007, and October 21, 2008), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

### **6-4. Reference and background investigation requirements; Review of applications.**

- (a) (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job-related personal characteristics of applicants and employees.

## 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

The County has offered a variety of reasons for rejecting Appellant. The first reason was that Appellant indicated Appellant worked for Maryland Plumbing and Heating for a period of time longer than Appellant actually worked and left on short notice. Appellant indicates Appellant made a mistake as to the date and had always told Appellant’s employer Appellant was looking for full-time work. Given that Appellant worked for Maryland Plumbing and Heating for a few weeks in 2004 and then worked for the County for the period May 2005 until October 2008, the proper emphasis should be on Appellant’s work performance for the County not this brief temporary job that Appellant held five year ago.

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<sup>5</sup> Montgomery County Code, Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, marital status, age, sex, sexual orientation, disability, genetic status, and family responsibilities.

Appellant appears to have had a mixed record with regard to Appellant's employment with the County. Clearly Appellant performed excellently on occasion, being recognized several times by the Deputy Director. See Appellant's Rebuttal, Attachments 1, 4-6. Yet, there is also a history of issues around punctuality and attendance. Appellant acknowledges that there were disciplinary actions based on attendance and punctuality. Appellant's Rebuttal at 3-4. However, Appellant argues that Appellant participated in a Diversion Program and all material related to the incidents was to be purged from Appellant's personnel file. Appellant's Rebuttal at 3-4; Attachment 2, Diversion Program Contract, dated 02/21/08. Appellant asserts that these incidents occurred between October 2006 and August 2007, and were the result of marital issues. Appellant's Rebuttal at 3-4. Appellant asserts that Appellant accepted responsibility for these incidents and took concrete steps to correct them. Appellant notes Appellant had multiple instances of outstanding work for the Police Department during 2008. Appellant's Rebuttal at 4, Attachments 4-6.

However, it is clear from additional material submitted by Appellant that Appellant continued to have punctuality and attendance problems after Appellant's participation in the Diversion Program. On July 12, 2008, Appellant acknowledged to the Operations Manager for the Police Department's 9-1-1 Emergency Communications Center that Appellant was late for work that morning. See Appellant's Rebuttal, Attachment 8a at 4. On July 27, 2008, Appellant sent another email to the Operations Manager for the Police Department's 9-1-1 Emergency Communications Center indicating that if Appellant's leave request was not approved Appellant would consider being absent without leave (AWOL) from the Communication Center for the dates in question. Id. at 6. On July 30, 2008, Appellant sent the Operations Manager for the Police Department's 9-1-1 Emergency Communications Center another email, indicating Appellant intended to be absent on Sunday August 3, 2008 and if leave without pay (LWOP) was approved Appellant would accept it in lieu of AWOL. Id. The Operations Manager for the Police Department's 9-1-1 Emergency Communications Center replied that Appellant's LWOP request had been denied. Id. While Appellant may have believed that Appellant had valid reasons for needing leave, Appellant's threat to go AWOL if the leave was denied borders on insubordination.

The Board agrees with the County that the issue of attendance and punctuality is important to the position of Correctional Officer I. It is important that the County be able to sufficiently staff its correctional facilities. While Appellant states that all available facts were made known to the DOCR Background Investigator about Appellant's disciplinary actions before the conditional offer was made, the Investigator had a right to review material obtained from Appellant's former County employer before finalizing the offer of employment. As Appellant was only extended a conditional offer of employment, the Board finds that the County had the right to withdraw the conditional offer.<sup>6</sup>

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<sup>6</sup> The Board notes that when DOCR contacted Appellant after the conditional offer was made, instead of telling Appellant it was rescinding the conditional offer and the reasons therefore, it simply informed Appellant that Appellant had not been selected for further processing. The Board finds this notification was misleading. In the County's Response, it notes that DOCR has a longstanding practice of sending a form letter to applicants simply telling them that their application was not selected for further processing. The Board is concerned with this

## **ORDER**

Based on the above, the Board denies Appellant's appeal from DOCR's determination to rescind its conditional offer of employment as a Correctional Officer I to Appellant.

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practice, as the letter informs the applicant that they may reapply for the position six months after the date of their current application. If DOCR decides that it is not going to select someone based on their background check, DOCR should tell the applicant this instead of encouraging the employee to apply again.

# **CASE NO. 10-11**

## **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's Department of Technology Services (DTS), not to select Appellant for the position of Program Manager II.

### **FINDINGS OF FACT**

In October 2009, Appellant submitted Appellant's application for the position of Program Manager II position. A total of three individuals applied for the position and one was found not to meet the minimum qualifications for the position. The other two individuals, Appellant and the Selectee, were rated as "Qualified".

Interviews were scheduled before an interview panel, consisting of two subject matter experts, Mr. A and Mr. B, and Mr. C, a Manager in DTS, on November 23, 2009. At the last minute, neither of the two subject matter experts was able to attend the interviews and so DTS determined to proceed with the interviews by substituting another Manager, Ms. D. Appellant, when Appellant became aware that there were going to be no subject matter experts on the interview panel, approached Appellant's supervisor, Mr. E, about Appellant's concerns. Appellant asserts that Mr. E indicated to Appellant that management wanted to move quickly on the filling of the position. Appellant assumed this was due to impending budget reductions.<sup>1</sup>

After the November panel interviews were completed, the two candidates were tied based on the ratings received.<sup>2</sup> Therefore, Mr. E told Appellant that there would be a second round of interviews on December 2, 2009. This time the panel consisted of Mr. E, the immediate supervisor of both Appellant and the Selectee and the immediate supervisor for the vacant position, and Mr. F, a Manager.

According to Appellant, Appellant was told by Mr. E on December 16, 2009, that the Selectee had been selected for the position.

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<sup>1</sup> The County asserts that DTS had determined to abolish the position of whichever applicant was selected for the Program Manager II vacancy. DTS needed to submit its budget savings plan by December 3, 2009. Therefore, DTS decided to move forward with the interview process instead of waiting for the subject matter experts to become available.

<sup>2</sup> The interview process rating sheets indicate that for the first round of interviews there were a total of fifteen questions asked of each candidate. Based on the answer provided by the candidate, they received a score of "1" for a Below Average answer; a score of "2" for an Average answer; and a score of "3" for an Above Average answer. Appellant received a score of "41" from Mr. C and the Selectee received a score of "38". Ms. D awarded Appellant a score of "36" and the Selectee a score of "39".

This appeal followed.<sup>3</sup>

### **POSITIONS OF THE PARTIES**

#### Appellant:

- The County violated its Selection Guidelines when it failed to have subject matter experts on the first interview panel.
- The Selection Guidelines should be considered an extension of the Personnel Regulations as OHR requires all employees serving on interview panels to complete a one-day training course.
- The selection process was improperly rushed; had DTS waited until subject matter experts were available, the outcome would have been different.
- Despite what the County says to the contrary, the subject matter expert on the second interview panel, Mr. E, who is the supervisor of the position at issue, was not allowed to make the hiring decision. Rather, Mr. F, who is not a subject matter expert, unilaterally selected the Selectee.
- The Selectee lacks the technical know-how to perform the position.
- The County did not abolish the Selectee’s prior position as part of its FY10 savings plan; thus, there was no need for DTS to rush the interview process.

#### County:

- The Selection Guidelines are merely guidelines; they do not have the force of the Personnel Regulations or law.
- The word “must” used in the Selection Guidelines is inconsistent with the fact that the publication is merely guidance and may be confusing. Accordingly, OHR will correct this in future printings of the Guidelines.
- Pursuant to the Personnel Regulations, a Department Director has the right to select anyone in the highest rating category.
- DTS was not required to conduct interviews; once it chose to conduct interviews it was only obligated to conduct a fair process that did not violate law or regulation. Such was the case here.
- Pursuant to Board precedent, the Board, in determining whether a selection is arbitrary or capricious, will not substitute its judgment for that of a selecting official unless the Appellant shows that Appellant’s qualifications were plainly superior to the Selectee’s. This is not the case here.
- Appellant is correct that the abolishment of Selectee’s prior position was not part of DTS’ budget savings plan for FY10. Rather, it was part of DTS’ FY11 MARC<sup>4</sup> reduction plan.

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<sup>3</sup> The County filed its response to the appeal (County Response) on January 26, 2010. Appellant filed Appellant’s comments (Appellant’s Reply) to the County Response on February 16, 2010.

<sup>4</sup> MARC stands for Maximum Agency Request Ceiling. See County’s Submission (County Submission), dated 03/18/09, Exhibit 1, p. 7.

**APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 2A, Administrative Procedures Act (APA), Section 15, Procedures for adoption of regulations**, which states in applicable part,

...

(f) *Procedures for approval.*

- (1) Each regulation must be adopted under one of the 3 methods in this subsection. To amend or repeal an adopted regulation, an issuer must use the procedure under which the regulation was adopted.

...

*Method (1)*

- (A) A regulation proposed under this method is not adopted until the County Council approves it.

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

- (b) **Personnel Regulations.** The County Executive shall adopt personnel regulations under method (1) of section 2A-15 of this Code.

The personnel regulations shall provide the framework for:

- (2) Minimum qualifications for merit system positions, methods of determining qualifications and methods of selection for any positions; . . .

**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, July 31, 2007, and October 21, 2008), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:



**6-11. Selection process.** A department director may, in consultation with the OHR Director, use any selection process that meets the department’s needs and is consistent with these Regulations.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, and October 21, 2008), Section 7, *Appointments, Probationary Period, and Promotional Probationary Period***, which states in applicable part:

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

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

### ISSUE

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

### ANALYSIS AND CONCLUSIONS

The MCPR provides that a selecting official may choose any individual from the highest rating category. In the instant case, given the few applicants, the highest rating category was “Qualified”. Thus, management was free to select anyone in the “Qualified” category, including Appellant, as long as the selection process was consistent with law or regulation, or not otherwise improper. Appellant alleges that the selection process was improper for two reasons – there were no subject matter experts on the first interview panel and Mr. E, the supervisor of the position in question, was not permitted to make the ultimate selection.

As the County correctly notes, the MCPR does not require that DTS hold interviews. Nor does the MCPR require that interview panels be made up of subject matter experts. The MCPR authorizes the Department Director to use any selection process that meets the Department’s needs. Notably, the requirement for subject matter experts is only contained in the County’s Selection Guidelines. These Guidelines have been issued by OHR and contain “information describing how the selection process should be conducted.” County’s Response, Attachment 2 at 1. As noted above, the County’s APA and merit system law together require that the MCPR be approved by the County Council; thus, these personnel regulations have the force and effect of law. The Selection Guidelines lack the force and effect of law; they are merely guidance. Thus, the Board concludes that contrary to Appellant’s assertion, the County was not required to have subject matter experts on the first interview panel.

According to Appellant, the second interview panel had one subject matter expert on the interview panel – Mr. E. However, Appellant asserts that Mr. E, who was the immediate

supervisor of the vacancy in question, was not permitted to make the actual selection for the position. The Board disagrees with this assertion. The Board has reviewed the results of the rating of the candidates by the two panel members during the second round of interviews. This second round interview consisted of ten questions, with ratings of “Well Above Average”, “Above Average”, “Average”, “Below Average” and “Well Below Average”. Mr. F rated the Selectee higher than Appellant, giving the Selectee three “Well Above Average” ratings; six “Above Average Ratings”; and one “Average” rating. In contrast, he gave Appellant three “Above Average” ratings and seven “Average” ratings. Mr. E likewise rated the Selectee higher than Appellant, giving the Selectee two “Well Above Average” ratings; seven “Above Average” ratings; and one “Average” rating. In contrast, he gave Appellant seven “Above Average” ratings and three “Average” ratings. Thus, Mr. E, who is the immediate supervisor of the vacancy and has supervised both the Selectee and Appellant, County’s Response at 4, did in fact have a say in the selection of the Selectee.

There is no doubt that Appellant’s credentials are impressive; however, the Selectee also has excellent credentials. The courts have consistently held that where there are equally desirable candidates, absent a prohibited reason, a trier of the fact should not substitute its judgment for the legitimate exercise of managerial discretion. Bauer v. Bailar, 647 F.2d 1037, 1048 (10<sup>th</sup> Cir. 1981). An employer has the discretion to choose among equally qualified candidates. See Canham v. Oberlin College, 666 F.2d 1057, 1061 (6<sup>th</sup> Cir. 1981), cert. denied, 456 U.S. 977 (1982). Moreover, an employer has greater discretion when filling a management level position. Wrenn v. Gould, 808 F.2d 493, 502 (6<sup>th</sup> Cir. 1987). In assessing a challenge to a selection decision as arbitrary and capricious, the Board will not substitute its judgment for that of the selecting official unless the Appellant demonstrates that Appellant’s qualifications were plainly superior to those of the Selectee. MSPB Case No. 06-02 (2006); see also Bauer v. Bailar, 647 F.2d at 1048. Appellant has failed to do this.<sup>5</sup>

Finally, the Board notes that Appellant is correct in Appellant’s assertion that DTS did not abolish the Selectee’s position to meet its FY10 savings plan reduction. Rather, as Mr. F explained, the Selectee’s position was abolished as part of the FY11 MARC reduction plan due to the Office of Management and Budget on December 3, 2009. County Submission, Exhibit 2. Thus, DTS has explained to the Board’s satisfaction its decision to move ahead on interviews for the Program Manager II position rather than to wait for subject matter experts to be available.

Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant’s burden of showing that the County’s decision was arbitrary, capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

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<sup>5</sup> While Appellant claims that the Selectee has “numerous negative performance and behavioral issues” that are pertinent to the Selectee’s suitability for the position in question, Appellant’s Reply at 5, Mr. E, who has supervised both Appellant and the Selectee, County Response at 3, would have been aware of such alleged issues. Significantly, as previously pointed out, Mr. E chose to rate the Selectee higher than Appellant.

**ORDER**

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

# **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, and October 21, 2008) 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 Form which must be completed within ten (10) working days. Upon receipt of the completed Appeal Form, 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 2010, the Board issued the following decisions on appeals concerning grievance decisions.

# **GRIEVANCE DECISIONS**

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

### **SUPPLEMENTAL FINAL DECISION AND ORDER**

This is a Supplemental Final Decision of the Montgomery County Merit System Protection Board (Board) on the appeal of the above-captioned consolidated grievances<sup>1</sup> concerning alleged pay compression following a remand of the case from the Court of Special Appeals of Maryland

### **PRIOR BOARD AND COURT DECISIONS**

In its Final Decision in this case, the Board denied Appellants' appeal of the Chief Financial Officer's (CAO's) denial of their consolidated grievances (hereinafter grievance) concerning pay compression. The grievance alleged that the creation of a new occupational class, Correctional Supervisor – Sergeant, in the Department of Correction and Rehabilitation (DOCR), and the subsequent promotion of Master Correctional Officers into the new occupational class would lead to a pay compression situation for those individuals holding the rank of Lieutenant (Lt.). Specifically, the grievance alleged that when in the future the newly promoted Sergeants were promoted to the rank of Lieutenant they would receive a ten percent pay increase so that many of the Sergeants would eventually have greater salaries than the current Lieutenants.

The Board predicated its rejection of Appellants' appeal on its finding that it lacked the authority to grant Appellants relief, absent a showing that their salary was somehow violative of law or regulation. The Board indicated it had carefully reviewed the various portions of the County Code and Montgomery County Personnel Regulations (MCPR or Personnel Regulations) bearing on the case and could not find how the pay compression alleged violated any provision of applicable law or regulation.

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<sup>1</sup> There were originally eleven grievants that filed an appeal to the Board from the Chief Administrative Officer's (CAO's) decision, denying their consolidated grievances. The eleven grievants were: Lt. A; Lt. B; Lt. C; Lt. D; Lt. E; Lt. F; Lt. G; Lt. H; Lt. I; Lt. J, and Lt. K. See Final Decision, MSPB Case No. 06-03 (2006) at 3 n.5.

However, only seven of the eleven grievants filed a subsequent appeal with the Court of Special Appeals based on the Board's decision. See County's Supplemental Motion to Dismiss. Thus, only seven grievants are now before the Board on this remand. The seven grievants are: Lt. A; Lt. B; Lt. C; Lt. E; Lt. F; Lt. H; and Lt. K.

While Appellants' counsel claims to represent an eighth grievant, Lt. L, see Letter to the Merit System Protection Board from Appellants' counsel, dated 09/14/09, at 2, as discussed infra, the Board finds Lt. L failed to exhaust his administrative remedies.

Appellants appealed the Board's Decision to the Circuit Court. The Circuit Court affirmed the Board's decision, holding that the Appellants had not filed a proper grievance.

On appeal, the Court of Special Appeals, in deciding the case, focused on the Board's powers, as outlined in the Montgomery County Code and MCPR. In particular, the Court noted the Code vests the Board with authority "to protect the merit system and to protect employee and applicant rights. . . 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." See Mr. A, et al. v. Montgomery County, Maryland, No. 2516, slip op. at 3, 12 (Md. Ct. Spec. App. Jan 9, 2009).<sup>2</sup>

The Court also pointed out that the Code confers on the Board expansive remedial powers, including the authority to "[o]rder corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale . . .[and] [o]rder such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County." Id.

The Court indicated that, based on the record before it, Appellants' grievance, which alleged that they were adversely affected by the unfair application of compensation policy, came within the definition of a grievance as set forth in MCPR. The Court also noted that both the Board and the County acknowledged that the compensation policy caused inequalities in pay among the Lieutenants.<sup>3</sup> Finding that the Board had broad authority to resolve grievances, even absent a violation of law or regulation, slip op. at 17, the Court of Special Appeals reversed the decision of the Circuit Court.

Upon remand of the case to the Circuit Court, it in turn remanded the case back to the Board for further proceedings before the Board consistent with the opinion of the Court of Special Appeals. See Lt. A et al., v. Montgomery County, Maryland, No. 275763 (Cir. Ct. June. 30, 2009)(Order remanding case), Tab AX.<sup>4</sup>

Upon receipt of the case from the Circuit Court, the Board permitted the parties to supplement the record. Appellants filed a pleading with the Board, asserting that the Court of Special Appeals had affirmed "beyond review" that the Appellants had been subjected to inequitable and unfair compensation policy and the Board had full authority to order appropriate

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<sup>2</sup> The Court of Special Appeals decision is unreported.

<sup>3</sup> This statement by the Court is not correct. The Board's Final Decision carefully avoided making a determination as to whether there was an inequity in pay. Rather, the Board's Final Decision noted that the County indicated that it was aware of "perceived" inequalities, see Final Decision at 9, and the Final Decision went on to note the Board lacked authority to grant relief absent a violation of law or regulation. Id. at 9-10.

<sup>4</sup> Because of the numerous pleadings filed in this case, the pleadings have been indexed for ease of reference. Reference to a particular Tab indicates the location of the pleading in the Pleadings File.

corrective measures. See Letter to the Merit System Protection Board from Appellants' counsel, dated 09/14/09, Attachments (Attachs.) 1-8.<sup>5</sup> According to Appellants, the only issue that remained before the Board was that of damages. To assist the Board in determining damages, counsel for Appellants submitted assessments of pay and overtime damages for each Lieutenant.<sup>6</sup> Appellants' counsel took the position that the Court of Appeals' decision mandated a 10% increase for each of the Appellants whom Appellants' counsel was representing. Moreover, Appellants' counsel's position was that Appellants were due their raises in July 2005. Tab AZ. Appellants sought a total of \$383,094.33 in damages. Id. In addition, they sought reimbursement of \$17,000 in attorney fees. Id.

The County filed a Motion to Dismiss the case, asserting that no further proceedings were necessary before the Board. According to the County, it granted Appellants' requested relief by implementing a tenure-based alignment of salaries within the Lieutenant rank on April 26, 2007.<sup>7</sup> In support of this assertion, the County filed a memorandum from the Director, Office of Human Resources (OHR), to the Director, DOCR, indicating that based on an analysis of the salaries of uniformed Correctional Lieutenants, the Director, OHR, was adjusting certain employees' annual base salaries so as to effect a tenure-based alignment of salaries within each rank and to ensure that future promotions into the rank of Lieutenant did not disturb the structure. Motion to Dismiss, Attach. 2. Significantly, the County did not seek to retroactively correct the pay inequity; rather, it corrected it on or after July 7, 2007.<sup>8</sup>

The County filed a Supplement to its Motion to Dismiss, asserting that only those eight Lieutenants who actually appealed the case to Court of Special Appeals were entitled to relief.<sup>9</sup>

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<sup>5</sup> This letter is found at Tab AZ of the Pleading Files, and the eight attachments are found at Tab AZ-1 through Tab AZ-8.

<sup>6</sup> Notably, it appears that these assessments were done by each of the Appellants, not counsel, as each Appellant signed the assessment. See Tabs AZ-1 through AZ-8. Moreover, it does not appear that counsel made any attempt to verify the correctness of these statements prior to submitting them to the Board. The Board further notes that the assessment submitted by Lt. F is clearly inaccurate on its face, which should have been readily discernable to Appellants' counsel, had he taken the time to review the correctness of the submissions he was making. At the time of the litigation in this case (i.e., July 2005), the maximum salary range was \$79,244 with a longevity step capped at \$80,829. See County's Line, Attach. 1. Lt. F asserted in his assessment that his annual base salary was \$91,333. Tab AZ-5.

<sup>7</sup> The Board in its Final Decision had encouraged the County, which acknowledged that there were pay inequities in the rank of Lieutenant, to rectify these inequities. See Final Decision at 9-10, n.11.

<sup>8</sup> Specifically, what the County did was implement the equity adjustment for each Lieutenant as of the date of each employee's next increment. See County's Line, Attach. 1.

<sup>9</sup> The County failed to note that although Lt. L was one of the Appellants who retained counsel to file an appeal with the Court of Special Appeals, he was never one of the eleven grievants before the Board in the original case.

**SUPPLEMENTAL FINDINGS OF FACT**<sup>10</sup>

Although Appellants filed their grievance on July 5, 2005, the first promotions from the newly created class of Sergeant to the Lieutenant rank did not occur until November 13, 2005. The record of evidence reflects that at the time the first three Sergeants (Sgts) were promoted to the rank of Lieutenant, the following was the annual base salary and years of service for the eight Appellants in this case<sup>11</sup>:

<b>CHART 1</b>				
<b>Name</b>	<b>Employment Date</b>	<b>Years of Service as of 11/13/2005</b>	<b>Base Salary of Lts</b>	<b>Base Salary Of Promoted Sgts</b>
Mr. F	01/21/74	31	\$76,112	
Mr. C	08/02/82	23	\$76,112	
Mr. A	11/23/87	17	\$74,619	
<b>Mr. M*</b>				
Mr. H	02/25/90	15	\$74,619	
Mr. B	02/23/92	13	\$70,829	
Mr. K	10/17/94	11	\$66,914	
<b>Ms. N</b>	02/27/95	10		\$72,341
Mr. E	10/28/96	09	\$62,474	
<b>Mr. O</b>	02/03/97	08		\$67,534
<b>Mr. P</b>	04/28/97	08		\$67,534

\* Not yet promoted to Lieutenant

Thus, it is clear from this chart, that when Mr. O and Mr. P were promoted to Lieutenant, Appellant Mr. E became aggrieved as he had nine years of service but was making less than these two newly promoted individuals who only had eight years of service. Likewise, when Ms. N was promoted, it is clear that Mr. B, who had thirteen years of service, and Mr. K, who had eleven years of service, became aggrieved as they were making less than Ms. N, who had only ten years of service.

The record of evidence reflects that at the time the fourth Sergeant was promoted to Lieutenant, the following was the base salary and years of service of the Appellants:

<b>CHART 2</b>				
<b>Name</b>	<b>Employment Date</b>	<b>Years of Service as of 03/05/2006</b>	<b>Base Salary of Lts</b>	<b>Base Salary Of Promoted Sgts</b>
Mr. F	01/21/74	32	\$76,112	
Mr. C	08/02/82	23	\$76,112	

<sup>10</sup> The Board notes that Appellants never challenged the Board's Findings of Fact in its Final Decision. Accordingly, the Board hereby incorporates those Findings of Fact into this Decision.

<sup>11</sup> The information on Charts 1, 2, and 3 below is derived from the Chart submitted as an attachment to the County's Line, filed on November 12, 2009. See Tab BL-1.



Mr. A	11/23/87	18	\$74,619	
<b>Mr. M</b>	07/03/89	16		\$78,395
Mr. H	02/25/90	16	\$74,619	
Mr. B	02/23/92	14	\$70,829	
Mr. K	10/17/94	11	\$66,914	
<b>Ms. N</b>	02/27/95	11		\$72,341
Mr. E	10/28/96	09	\$62,474	
<b>Mr. O</b>	02/03/97	09		\$69,898 <sup>12</sup>
<b>Mr. P</b>	04/28/97	08		\$67,534

Thus, it is clear that when Mr. M was promoted to the rank of Lieutenant on March 5, 2006, Appellants Mr. A, Mr. C, and Mr. F, all of whom had more years of service than Mr. M, became aggrieved as they were receiving less pay than Mr. M. Similarly, Mr. H, who had the same number of years service as Mr. M, but was making less than Mr. M, became aggrieved.

The record of evidence reflects that the County made the following equity adjustments to Appellants' pay on or after July 8, 2007:

<b>CHART 3</b>				
<b>Name</b>	<b>Employment Date</b>	<b>Years of Service as of 07/08/2007</b>	<b>Base Salary of Lts</b>	<b>Salary after Adjustment<sup>13</sup></b>
Mr. F	01/21/74	33	\$85,737	\$88,168
Mr. C	08/02/82	24	\$85,737	\$88,168
Mr. A	11/23/87	19	\$85,737	\$88,168
<b>Mr. M</b>	07/03/89	18	\$85,737	\$88,168
Mr. H	02/25/90	17	\$85,737	\$88,168
Mr. B	02/23/92	15	\$82,093	\$88,168
Mr. K	10/17/94	12	\$77,553	\$86,779
<b>Ms. N</b>	02/27/95	12	\$83,844	\$86,779
Mr. E	10/28/96	10	\$72,408	\$81,012
<b>Mr. O</b>	02/03/97	10	\$78,272	\$81,102
<b>Mr. P</b>	04/28/97	10	\$78,272	\$81,102

<sup>12</sup> It would appear that Mr. O received a service increment on 02/03/2006, after he was promoted on 11/13/2005.

<sup>13</sup> The chart does not reflect additional longevity raises that take effect when an employee reaches the top of the pay range and has twenty years of service.

## POSITIONS OF THE PARTIES

### Appellants:

- The only remaining issue to be decided by the Board is the issue of damages.
- Each of the eight Appellants is entitled to a 10% raise as of July 5, 2005.<sup>14</sup>
- Appellants should be paid \$17,000 to offset their legal costs.

### County:

- Contrary to Appellants' assertion, the Court of Special Appeals' decision only found that Appellants could file a grievance with the Board over unfair compensation policy; the Court never addressed the substantive issues of this case.
- The County granted Appellants relief by implementing a tenured based alignment of salaries within the Lieutenant rank on April 25, 2007.
- Based on the County's actions in 2007, the Board should dismiss this case.

## APPLICABLE LAW AND REGULATION

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of the Board**, which states in applicable part,

...

- (c) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

...

- (8) Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale;
- (9) Order the county to reimburse or pay all or part of the employee's reasonable attorney's fees. The reasonableness of the attorney fees shall be determined by the following factors:
  - a. Time and labor required;
  - b. The novelty and complexity of the case;
  - c. The skill requisite to perform the legal service properly;

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<sup>14</sup> This is the date that Appellants filed their grievance. Lt. A v. Montgomery County, slip op. at 2.

- d. The preclusion of other employment by the attorney due to 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.
- (10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, and October 21, 2008), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations**, which states in applicable part:

**35-16. MSPB decisions.**

- (a) The MSPB may decide an appeal in any manner deemed necessary and appropriate, under County Code Section 33-14(c), *Hearing Authority of MSPB*. The MSPB may order appropriate relief, which includes but is not limited to the following:
  - ...
  - (8) corrective measures regarding any management procedure adversely affecting employee pay, status, working conditions, leave, or morale; and
  - (9) reimbursement or payment by the County of all or part of an employee's reasonable attorney's fees.

**ISSUES**

1. Did the Court of Special Appeals hold that Appellants had been subjected to pay disparity?
2. Were Appellants subjected to pay disparity when the four Sergeants were promoted into the rank of Lieutenant in 2005 and 2006?
3. If Appellants were subjected to pay disparity, what should their remedy be?

**ANALYSIS AND CONCLUSIONS**

**Mr. L Failed To Exhaust His Administrative Remedies.**

As noted above, Mr. L was never one of the original eleven grievants before this Board.

Apparently, he only sought to join the challenge to the County's pay policies at the appellate level. It is hornbook employment law that an employee must exhaust his administrative remedies before filing suit. See, e.g., Vaca v. Sipes, 386 U.S. 171, 184 (1967). In the instant case, Mr. L failed to do so. Accordingly, the Board finds that Mr. L is not a proper party in this matter.<sup>15</sup>

**Contrary to Appellants' Assertion, The Court Of Special Appeals Never Ruled On The Merits Of Their Claim.**

In its Final Decision, the Board never addressed the merits of Appellants' claim, as it found that it lacked the authority to grant relief to Appellants absent finding a violation of law or regulation. The holding of the Court of Appeals was that "the Board erroneously determined that it only had authority to grant relief upon a finding that a 'law or regulation' has been violated." Carroll, slip op. at 18. Thus, it is clear that the Court, like the Board, never ruled on the merits of Appellants' claim.

**Based On The County's Admission Of Inequity, The Board Holds That Appellants Have Been Subjected To Pay Inequity.**

In an affidavit filed as Attachment 1 to the County's Motion to Dismiss, the OHR Director indicated that when the four Sergeants were promoted to Lieutenant and received an additional 10% increase in salary, "[t]his caused pay compression among the Lieutenants because some senior [L]ieutenants were earning less than some newly promoted Lieutenants." The OHR Director noted that the Board in its Final Decision had encouraged the County to "rectify the perceived inequities" the County indicated existed. Id.; Final Decision at 9 n.11. Accordingly, the Board finds that the County acknowledged the pay inequity which occurred at the time of the promotion of the Sergeants to the rank of Lieutenant.

**An Appellant Must Be Aggrieved To Challenge A Matter; The Board Finds Appellants Were Not Aggrieved As Of July 5, 2005.**

In order for an appellant to have standing to challenge a matter, the appellant must be "aggrieved"; i.e., the appellant must have actually suffered an injury as opposed to a merely speculative injury. See, e.g., Emory v. Roanoke City School Board, 432 F.3d 294, 298 (4<sup>th</sup> Cir. 2005) (citing to Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 320 (4<sup>th</sup> Cir. 2002)). Specifically, the appellant must have been personally adversely affected by the matter. United States v. Hays, 515 U.S. 737, 747 (1995). Prospective affect is merely speculative; something tangible must occur for an appellant to be aggrieved. Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d at 322.

This case is about the alleged pay compression which occurred when the four Sergeants were promoted into the Lieutenant rank. Appellants assert that they are entitled to relief as of

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<sup>15</sup> The Board would be remiss if it did not note its deep dismay and concern over the failure of Appellants' counsel, as an officer of the court, to ascertain that each of the Appellants in this case had in fact exhausted their administrative remedies.

July 5, 2005, when they filed their grievance in this matter. However, as of July 2005, nothing had occurred that caused Appellants to be aggrieved. Rather, at that time their injury was only speculative. Appellants only began to be aggrieved when the first promotions occurred. Thus, the Board finds that Appellants are not entitled to any relief dating before November 13, 2005.

The Board disagrees with the County's assertion that it made Appellants whole at the time it instituted the tenure-based alignment of salaries on April 26, 2007. Appellants were entitled to corrective measures as of November 13, 2005. Accordingly, the Board denies the County's Motion to Dismiss.

**The Board Has Determined That Appellants Are Not Entitled To The Ten Percent Increase They Seek.**

In the instant case, Appellants seek an across-the-board ten percent increase, as each of the Sergeants received a ten percent increase when promoted into the rank of Lieutenant. As the record of evidence established, the Sergeants received this ten percent increase pursuant to their negotiated contract. Appellants, as part of DOCR management, are not covered by a collective bargaining agreement. There is no requirement contained in applicable law or regulation that unrepresented employees receive identical benefits as those received by represented employees as a result of collective bargaining.

Rather, Appellants are only entitled to pay equity. Such equity is established when no employee with less service receives more base pay than an employee with more service absent extenuating circumstances.<sup>16</sup> Accordingly, the Board finds that it must exercise its broad remedial powers to order relief for Appellants. Appellant E is entitled to have his salary adjusted to the same amount that was provided to Mr. O and Mr. P on November 13, 2005. Appellants K and B are entitled to have their salaries adjusted to the same amount that was provided to Ms. N on November 13, 2005. Appellants F, C, A, and H are entitled to have their salaries adjusted to the amount provided to Mr. M, when he was promoted.<sup>17</sup>

**While Appellants Are Entitled To An Award Of Attorney Fees, They Have Not Established That \$17,000 Is The Proper Amount.**

Where an appellant prevails in a case before the Board, the Board will authorize the appellant to submit a request for attorney fees. See MSPB Case No. 09-13; MSPB Case 07-17. In the instant case, Appellants, through counsel, have requested \$17,000 but have provided no

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<sup>16</sup> Such extenuating circumstances would include the delay of a service increment due to performance or conduct issues. See MCPR, 2001, Section 12-7(a).

<sup>17</sup> The Board finds that the County should have recognized on November 13, 2005, based on the effects of the promotions of Ms. N, Mr. O, and Mr. P, that pay compression was resulting in the rank of Lieutenant. Based on this recognition, the County should have taken steps at that time to relieve the compression. Accordingly, based on this failure of the County to act, the Board will award Appellants F, C, A, and H adjustment of their salaries retroactive to November 13, 2005, instead of March 5, 2006.

support for this request. As noted above, the County Code at Section 33-14(c)(9) sets forth the criteria to be considered by the Board in an award of attorney fees. As Appellants' counsel is new to practice before this Board, the Board will permit him to submit an attorney fee request, addressing the various factors in the Code.<sup>18</sup>

### **ORDER**

On the basis of the above, the Board hereby orders the following:

1. The County's Motion to Dismiss is denied in its entirety.
2. Appellant L is dismissed as a party in this case, for failure to exhaust his administrative remedies.
3. Appellant E shall have his salary retroactively adjusted to \$67,534 as of November 13, 2005.
4. Appellants B and K shall each have their salaries retroactively adjusted to \$72,341 as of November 13, 2005.
5. Appellants F, C, A, and H shall each have their salaries retroactively adjusted to \$78,395 as of November 13, 2005.
6. Appellants must submit a detailed request for attorney fees to the Board, with a copy to the County Attorney, no later than **10 calendar days from the date of this Final Decision**. The County Attorney will have ten (10) days from receipt of the attorney fee request to file a response.

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<sup>18</sup> The Board notes that part of Appellants' counsel's retainer agreement is already in evidence. See County's Supplement Motion to Dismiss, Attach. 1.

# **CASE NO. 10-01**

## **FINAL 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 the Montgomery County, Maryland, Human Resources Director to deny Appellant's grievance, as it was not grievable under the County grievance procedure but instead had to be grieved under the collective bargaining agreement.

### **FINDINGS OF FACT**

On April 29, 2005, Appellant, who had been employed by the County as a Ride-On Bus Driver, filed an appeal with the Board, seeking to overturn Appellant's dismissal.<sup>1</sup> The dismissal was based on an alleged violation of a Last Chance Settlement Agreement (Last Chance Agreement),<sup>2</sup> which Appellant had entered into on February 23, 2004 with the County to resolve a previously proposed disciplinary action.<sup>3</sup> During the course of the appeal, Appellant was represented by counsel. Subsequently, the parties settled the appeal pending before the Board on March 10, 2006, and Appellant's counsel submitted a Stipulation of Dismissal to the Board. The Board then dismissed the appeal.

As part of the 2006 Settlement Agreement,<sup>4</sup> the parties agreed that the 2004 Last Chance Agreement would continue in full force and effect. See Settlement Agreement ¶ 3. The parties also agreed that Appellant would not be permitted to drive the public in any County-owned vehicle. Id. ¶ 5.

On January 10, 2009, Appellant requested to be returned to the position of bus operator, as Appellant's Last Chance Agreement was due to expire on February 23, 2009. On April 21,

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<sup>1</sup> As a Bus Driver, Appellant was part of the bargaining unit represented by the Municipal County and Government Employees Organization (MCGEO). At the time of Appellant's dismissal in 2005, Appellant had the right to challenge it through the negotiated grievance procedure or appeal it to the Board.

<sup>2</sup> The Last Chance Agreement was for a period of five years. See Last Chance Agreement ¶ 1. At the time Appellant entered into the Last Chance Agreement, Appellant was represented by MCGEO.

<sup>3</sup> The disciplinary action involved (e.g., a Statement of Charges) was a proposal for Appellant's dismissal based on a specific sexual harassment complaint, repeated incidents of failure to follow policy and procedure, engaging in verbal and physical altercations with passengers, being off route with unauthorized passengers, repeated preventable accidents and being negligent and careless in performing Appellant's duties. See Last Chance Agreement.

<sup>4</sup> As MCGEO was not representing Appellant with regard to Appellant's appeal to the Board, it was not a signatory to the Settlement Agreement.

2009, the Chief, Department of Transportation (DOT), denied Appellant's request. While acknowledging that the Last Chance Agreement had ended, the Chief cited to the Settlement Agreement to support the Chief's contention that DOT was restricted from permitting Appellant to drive the public in any County vehicle.

On May 4, 2009, Appellant, through counsel, filed an administrative grievance with DOT and the Office of Human Resources (OHR), concerning Appellant's request to be returned to Appellant's Bus Driver position. On May 5, 2009, the Director, OHR, wrote counsel indicating that the grievance was denied, as MCGEO was the exclusive representative for filing a grievance on the matter. Accordingly, Appellant would have to pursue Appellant's grievance through MCGEO.

Counsel then wrote to MCGEO on May 20, 2009, requesting that they file a grievance on Appellant's behalf. MCGEO responded on May 21, 2009, indicating that as Appellant had exercised Appellant's right to have Appellant's 2005 dismissal reviewed by the Board instead of the Union, the Union had no jurisdiction with regard to the 2006 Settlement Agreement.

On June 10, 2009, Appellant's counsel wrote to the Director, DOT, indicating that based on MCGEO's response, Appellant's administrative grievance should be reinstated. On June 26, 2009, the Director, OHR, responded to counsel, denying Appellant's request to reconsider the grievability of Appellant's grievance. According to the Director, OHR, because Appellant was grieving Appellant's work assignment, the Director, OHR, was asserting a violation of the terms and conditions of Appellant's employment which is covered by Appellant's collective bargaining agreement.

On July 9, 2009, Appellant filed the instant appeal.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- MCGEO has asserted that it has no jurisdiction over the Settlement Agreement entered into in 2006.
- As the Settlement Agreement was in connection with an appeal Appellant made to the Board, the Board should exercise jurisdiction and interpret the Settlement Agreement.
- Appellant was never allowed to confront any complainant with respect to any alleged misbehavior as a Bus Driver. Appellant understood the provision in the Settlement Agreement "the County will not permit Appellant to drive the public" to apply during the term of the Last Chance Agreement, not forever.

#### **County:**

- Appellant, as a Motor Pool Attendant, holds a position in the bargaining unit represented by MCGEO.
- Appellant's grievance relates to an assignment of work, as Appellant seeks to be assigned to driving the public as a Ride-On Bus Driver. As the grievance deals with an



assignment of work, it is a subject covered by the collective bargaining agreement. Accordingly, Appellant may only challenge the assignment through the contract grievance procedure.

- The May 21, 2009 email from MCGEO does not constitute a clear and unequivocal waiver of exclusive representation rights by the Union. Absent such a waiver, the County would be engaging in a prohibited practice and breaching the collective bargaining agreement by processing Appellant’s grievance under the County administrative grievance procedure.

**APPLICABLE LAW, REGULATION AND CONTRACTUAL PROVISION**

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-10. Decisions**, which states in applicable part,

- (g) **Informal disposition.** Where appropriate to the nature of the proceedings and the governing laws, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.

**Montgomery County Personnel Regulations (MCPR), 2001, Section 35, Merit System Protection Board Appeals** (as amended February 15, 2005, and October 21, 2008), which states in applicable part:

- 35-15. MSPB may enforce settlement agreements.** If a settlement agreement is before the MSPB in connection with an appeal, the MSPB may interpret and enforce the agreement.

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, Article 10, Grievances**, which states in applicable part:

10.1 Definition

A grievance is any complaint by the certified employee organization arising out of a violation or misinterpretation of any provision of the collective bargaining Agreement, . . .

**ISSUE**

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

## ANALYSIS AND CONCLUSIONS

### Appellant's Grievance Was Properly Filed Under The County's Administrative Grievance Procedure.

The County has characterized Appellant's grievance as dealing with Appellant's work assignment. The Board disagrees. The gravamen of Appellant's grievance is the interpretation of Appellant's 2006 Settlement Agreement. As such, Appellant's grievance cannot be viewed as an allegation of a violation or misinterpretation of the collective bargaining agreement. This determination is supported by the fact that the Union refuses to have anything to do with the Settlement Agreement, indicating that it has "no jurisdiction."

The Administrative Procedures Act, which governs Board proceedings, contemplates that an appeal may be resolved through a settlement, such as was the case with Appellant's appeal in 2005. The Settlement Agreement between Appellant and the County clearly contemplated that there might arise an issue over the breach of the Agreement. Specifically, the Settlement Agreement provides:

The parties agree that the existence and terms of this Agreement are strictly confidential, and the parties expressly agree that they will not disclose any terms of this Agreement to any person, unless the disclosure of such information is reasonably required to implement the terms of this Agreement or reasonably required as relevant evidence in an adversarial proceeding between the parties in which it claimed that there has been a breach of any of the terms, bars, or provisions of this Agreement.

Settlement Agreement ¶ 12. As the Settlement Agreement resolved a case that had been pending before the Board, the Board finds that it has jurisdiction over Appellant's instant grievance.

### The Board Finds That The Settlement Agreement Is Clear And Unequivocal With Regard To Appellant's Consent Not To Drive The Public In A County Owned Vehicle.

Because the County misinterpreted the nature of the grievance, it failed to address the merits of the grievance. Normally, when the Board finds that a grievance is in fact grievable, it remands the matter to the County to address the merits of the grievance. However, in the instant case because of the record of evidence before the Board, the Board has determined that in the interests of judicial economy, it will address the merits of Appellant's grievance. Pursuant to the Board's procedures, if a settlement agreement is before the Board in connection with an appeal, the Board may interpret and enforce the agreement. MCPR, Section 35-15.

Appellant argues that Appellant has successfully completed Appellant's 5-year Last Chance Agreement. Appellant notes that Appellant never had an opportunity to confront the individual who accused Appellant of sexual harassment. Appellant also indicates that the Last Chance Agreement did not contain a provision that Appellant never drive the public again.

While Appellant may be right that Appellant never had an opportunity to confront the individual who complained about Appellant's conduct which led to a Statement of Charges against Appellant, the lack of any opportunity was due to Appellant's conscious decision to enter into a Last Chance Agreement to resolve the matter, in lieu of proceeding to litigate the issue and confront Appellant's accuser. As Appellant has successfully completed Appellant's Last Chance Agreement, the County can no longer rely on a violation of its terms to dismiss Appellant from employment.

It is well established that a settlement agreement is a contract between the parties. See Rivas v. United States Postal Service, 72 M.S.P.R. 383 (1996) (citing to Greco v. Department of the Army, 852 F.2d 558, 560 (Fed. Cir. 1988)). To be binding and enforceable, contracts must be supported by sufficient consideration. Chernick v. Chernick, 327 Md. 470, 479, 610 A.2d 770, 774 (1992); Peer v. First Federal Savings and Loan Association of Cumberland, 273 Md. 610, 614, 331 A.2d 299, 301 (1975).

The Settlement Agreement which Appellant entered into in 2006 was to resolve a violation of Appellant's Last Chance Agreement, which served as the grounds for dismissing Appellant in 2005. The Settlement Agreement provided Appellant with valuable consideration – Appellant received six weeks of paid administrative leave and \$2,000 in attorney fees. Appellant also was rehired and permitted to work as a Grade 15, performing Motor Pool Attendant duties.<sup>5</sup> In return for this consideration, Appellant agreed to retire from County service on June 1, 2017, the earliest date on which Appellant could receive full retirement benefits. Appellant also agreed that the County would not permit Appellant to drive the public in any County owned or funded transportation vehicle. While it is true that the Settlement Agreement also contains a provision continuing the Last Chance Agreement, that provision is separate and apart from the provision that proscribes Appellant from driving the public in any County owned vehicle. See Settlement Agreement ¶ 3, ¶ 5.

The Board notes that Appellant was represented by counsel when Appellant entered into the Settlement Agreement. In fact, one of the provisions of the Settlement Agreement notes that Appellant has had the opportunity to discuss thoroughly all aspects of the Settlement Agreement with counsel. See Settlement Agreement ¶ 11. Having received valuable consideration from the County for Appellant's agreement to not drive the public in any County owned vehicle, Appellant cannot now complain about the resolution Appellant accepted.

### **ORDER**

Based on the foregoing, the Board finds Appellant's grievance is grievable under the County's administrative grievance procedure and not the collective bargaining agreement. Having determined to assert jurisdiction over Appellant's grievance, the Board finds that the County is correct in its interpretation of the Settlement Agreement. Accordingly, the Board orders the County to continue to enforce the provision of the Settlement Agreement which bars

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<sup>5</sup> The Board notes that Motor Pool Attendant position is currently classified at a Grade 8. See <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RetrieveClassTitle1.cfm>

Appellant from driving the public in any County owned or funded transportation vehicle. Therefore, the Board denies Appellant's grievance on the merits.

## **CASE NO. 10-02**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the above-captioned consolidated grievance<sup>1</sup> concerning the County's action of removing personal leave days from the leave banks of employees of Local Fire and Rescue Departments (LFRDs).

### **FINDINGS OF FACT**

#### **Background**

The Montgomery County Fire and Rescue Service (MCFRS), which includes the Local Fire and Rescue Departments, is charged with the delivery of fire, rescue and emergency services for the County. Montgomery County Code, § 21-1(a)(1). However, employees of LFRDs, who are paid with tax funds, are not County employees. Montgomery County Code, § 21-16(a). Rather, they are members of a separate merit system. Id.

Prior to its abolishment in 2008,<sup>2</sup> the Fire and Rescue Commission (FRC), pursuant to the County Code, was charged with developing effective, efficient and equitable fire, rescue, and emergency medical services County-wide, and providing policy, planning, and the regulatory framework for all fire, rescue and medical service operations.

LFRD employees are governed by generally applicable County personnel regulations except as expressly modified by regulations that the County Executive adopts after receiving FRC approval. Montgomery County Code, § 21-16(a). The County's Office of Human Resources (OHR) provides for the administration of personnel regulations for the LFRDs and disbursement of salaries through the County's payroll system. Montgomery County Code, § 21-16(b)(1) & (3).

In late 2008 and early 2009, the County began implementing a new electronic timekeeping system throughout the County, known as Mctime. During this process, the OHR discovered that LFRD employees had mistakenly been given personal leave days since 1998. According to the OHR, these personal leave days were not authorized under the Montgomery

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<sup>1</sup> The grievance was filed by Appellant, Mr. A, Mr. B, Mr. C, and Ms. D, all employees of the Volunteer Fire Department (VFD).

<sup>2</sup> Bill 38-08 abolished the Fire and Rescue Commission and created a Fire and Emergency Services Commission, which performs some similar functions.

County Fire and Rescue Corporation Personnel Regulations.<sup>3</sup> Therefore, OHR discontinued the practice of providing LFRD employees with personal leave days.

Appellants filed a grievance with the head of the VFD and the MCFRS Fire Chief with copies to the VFD Board of Directors, on February 27, 2009. When no response was received from VFD, the grievance was raised to the Fire Chief. Subsequently, the grievance was raised to the Chief Administrative Officer (CAO). On July 9, 2009, the CAO issued a decision, sustaining the grievance in part<sup>4</sup> and denying it in part.

This appeal followed.<sup>5</sup>

### History of Code and Regulation Changes

#### A. Prior to 1998

Chapter 21 of the Montgomery County Code deals with Fire and Rescue Services. Section 21-4M(b) of the County Code, in effect prior to 1998, provided in applicable part:

- (2) The comprehensive County personnel regulations enacted by County Council Resolution No. 9-1072,<sup>6</sup> shall be adopted by the Commission unless modified in accordance with subsection (b)(3) of this section and will apply to all career personnel employed by the local corporations and paid with tax funds.
- (4) Amendments to the comprehensive personnel regulations made by the County Executive and approved by the County Council after December

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<sup>3</sup> Personal leave days were authorized for County merit system employees covered by the Montgomery County Personnel Regulations beginning in January 1998.

<sup>4</sup> The CAO sustained that part of Appellants' grievance dealing with holiday pay for Inauguration Day. See County Response, Attach. B at 6. Accordingly, that portion of Appellants' grievance is not before the Board.

<sup>5</sup> The Appeal consists of a completed Board Appeal Form and four attachments. For ease of reference, the four attachments have been designated thusly: March 9, 2009 Grievance – Attachment EE; July 9, 2009 CAO Response – Attachment FF; March 12, 2009 FRC Minutes – Attachment GG; and July 27, 2009 MCFRS Policy and Procedure 04-04 – Attachment HH.

Pursuant to the Board's procedures, each party was given the opportunity to submit comments on the grievance. The County responded on August 18, 2009 (County Response), and submitted Attachments A-H in support of its response. Appellant responded on September 15, 2009 (Appellants' Response), and submitted Attachments AA-DD.

<sup>6</sup> As the County notes, this Resolution concerns the 1980 Personnel Regulations, which were adopted by the County Council and became effective December 2, 1980. See County Response at 3.

10, 1980, shall take effect thirty (30) days after Council approval unless the Commission adopts an exception. . . .

In 1986, the County Council amended the Montgomery County Personnel Regulations (MCPR). The FRC took exceptions to the 1986 MCPR amendments. The County Council disapproved these FRC exceptions on March 1, 1988. Thereafter, the FRC issued the Montgomery County Fire and Rescue Corporation Personnel Regulations (MCFRCPR), which superseded the 1986 MCPR amendments. The effective date of the MCFRCPR was August 1, 1988, with a sunset date of June 30, 1992. See County's Response, Attachment (Attach.) E. FRC subsequently took action to eliminate the sunset date of the MCFRCPR. See County's Response, Attach. F. On March 13, 1997, the FRC reprinted the 1988 MCFRCPR, with those amendments made to the County's personnel regulations. See Appellant's Response, Attach. BB, exhibit C thereto.

B. 1998 Changes

In 1998, the Council amended Chapter 21 of the Code through Bill 37-97. See County Response, Attach. G. Prior to this amendment, the County's fire and rescue services were designated as the Department of Fire and Rescue Services (DFRS). Id. In 1998, DFRS became the Division of Fire and Rescue Services within the newly established MCFRS. Id. Bill 37-97 also provided for the Division of Volunteer Fire and Rescue Services within MCFRS. Id. The Chief of the Division of Volunteer Fire and Rescue Services would report to the Fire Chief and coordinate the operations and administration of volunteer personnel and LFRDs. See County Code, Section 21-3(d). The Fire Chief was given full authority over all fire, rescue and emergency medical services in the County, including any fire, rescue, and emergency services provided by the LFRDs. County Code, Section 21-6(b). Thus, once enacted, Bill 37-97 provided that LFRD employees, although not part of the County Government, would come under and be subject to supervision by the Fire Chief.

Among the provisions contained in Bill 37-97 was a section dealing with the applicability of County regulations to LFRDs, now that they would be part of MCFRS. Specifically, the provision which became Section 21-16 of the Montgomery County Code stated in applicable part:

- (a) *Applicability of County Regulations.* Employees of local fire and rescue departments who are paid with tax funds are not County employees. They are members of a separate merit system governed by generally applicable County personnel regulations except as expressly modified by regulations that the County Executive, after receiving Commission approval under Section 21-2(d)(4), adopts under method (2).<sup>7</sup>

The County Executive in 1998 did not adopt any modification to the MCPR after receiving Commission approval. See Appellants' Response, Attachs. AA, BB.

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<sup>7</sup> Method (2) denotes one of the three methods by which a County regulation is adopted. See County Code, Section 2A-15(f).

C. 2001 MCPR Issuance

In 2001, the County Council approved the MCPR, 2001, which superseded the 1994 MCPR, as amended. See Appellant's Response, Attach. BB, Exhibit A thereto. No personnel regulations were subsequently issued by the County Executive, after receiving Commission approval, that provided exceptions to the MCPR, 2001. See Appellant's Response, Attachs. AA, BB.

**APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 2A, Administrative Procedures, Section 2A-15, Procedure for adoption of regulations**, which states in applicable part:

- (a) Requirement. Before a regulation takes effect, the regulation must meet:
  - (1) The requirements of this Article; and
  - (2) Any other requirement imposed by law.
- (c) Publication. An issuer must publish in the Register:
  - (1) A summary of the proposed regulation;
  - (5) The deadline for submitting comments; . . .
- (f) Procedures for approval.
  - (1) Each regulation must be adopted under one of the 3 methods in this subsection. To amend or repeal an adopted regulation, an issuer must use the procedure under which the regulation was adopted.
  - (2) A law authorizing a regulation may specify that one of the 3 methods must be used.
  - (3) If the law does not specify that one of the 3 methods must be used, method (2) must be used.
    - Method (1)
      - (A) A regulation proposed under this method is not adopted until the County Council approves it.
      - (B) The issuer must send a copy of the proposed regulation to the Council after the deadline for comments published in the Register.

- (C) The Council by resolution may approve or disapprove the proposed regulation.
- (D) If the Council approves the regulation, the regulation takes effect upon adoption of the resolution approving it or on a later date specified in the regulation.

Method (2)

- (A) The issuer must send a copy of the proposed regulation to the County Council after the deadline for comments published in the Register.
- (B) The Council by resolution may approve or disapprove the proposed regulation within 60 days after receiving it.
- (C) If necessary to assure complete review, the Council by resolution may extend the deadline set under subparagraph (B).
- (D) If the Council approves the regulation, the regulation takes effect upon adoption of the resolution approving it or on a later date specified in the regulation.
- (E) If the Council does not approve or disapprove the proposed regulation within 60 days after receiving it, or by any later deadline set by resolution, the regulation is automatically approved.
- (F) If a regulation is automatically approved under this method, the regulation takes effect the day after the deadline for approval or on a later date specified in the regulation.

**Montgomery County Code, Chapter 21, Fire and Rescue Services, Section 21-16, Personnel Administration for local fire and rescue departments**, which states in applicable part:

- (a) *Applicability of County Regulations.* Employees of local fire and rescue departments who are paid with tax funds are not County employees. They are members of a separate merit system governed by generally applicable County personnel regulations except as expressly modified by regulations that the County Executive, after receiving Commission approval under Section 21-2(d)(4), adopts under method (2).

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



- (b) **Personnel regulations.** The County Executive shall adopt personnel regulations under method (1) of section 2A-15 of the Code.

**Montgomery County Personnel Regulations (MCPR), Section 2, General Provisions,** which states in applicable part:

- 2-2. Applicability of Personnel Regulations.** The Personnel Regulations apply to all merit system positions and all employees of the County government except:

- (m) employees of independent agencies or corporations supported in whole or in part with Montgomery County general or special tax funds, unless authorized by statute to be members of the Montgomery County merit system.

- 2-3. Interpretation of Personnel Regulations.**

- (c) **CAO response to a request for interpretation.**

- (3) The MSPB is not bound by the CAO's interpretation of these Regulations.

### **POSITIONS OF THE PARTIES**

#### **Appellants:**

- Section 21-16 of the Montgomery County Code mandates that County personnel regulations are applicable to LFRD employees unless expressly modified by regulations that the County Executive adopts, after receiving FRC approval.
- The opinion of the Legislative Attorney to the County Council supports Appellants' view of how the statute should be interpreted.<sup>8</sup>
- The practice of granting personal days to LFRD employees began in 1998, when employees covered by the MCPR were first given personal days.

#### **County:**

- Employees of the LFRDs are covered by the 1997 MCFRCPR not the MCPR, 2001, as amended.
- Section 21-16(a) of the Code, when enacted, implicitly authorized the continued applicability of the 1997 MCFRCPR to LFRD employees.
- Any doubt as to whether the MCFRCPR or the MCPR apply to LFRD employees was resolved in 2001 when the County Council approved the MCPR, 2001. Specifically, Section 2-2(m) indicates the regulations do not apply to employees

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<sup>8</sup> In an email response to an employee of one of the LFRDs, the Legislative Attorney to the County Council opined on the Council's intent in enacting Section 21-16. See Appellants' Response, Attach. AA.

- of independent corporations supported by tax funds unless authorized by statute to be members of the County merit system.
- The CAO’s decision, upholding the determination of OHR to remove the personal leave days from LFRD employees, is correct.

### ISSUE

Does the 1997 MCFRCPR or the 2001 MCPR, as amended, apply to employees of LFRDs?

### ANALYSIS AND CONCLUSIONS

Appellants have provided the Board in support of their appeal with an email from a Legislative Attorney for the County Council. The Legislative Attorney, having worked as Council staff on amendments to Chapter 21 of the Code for the last two decades, is quite familiar with Bill 37-97, which produced the current Section 21-16 of the County Code. Appellants’ Response, Attach. AA. The Legislative Attorney provided a quote from the Council staff action memo, co-authored by him and which accompanied Bill 37-97, regarding the intent of bill:

Throughout this bill it was unnecessary to apply to MCFRS provisions of law that already apply to all departments of County government. For example, MCFRS, as a department of County government, is subject to generally applicable audit requirements and personnel rules which need not be restated, even though they are expressly applied in current law *and this bill* to the local fire and rescue departments precisely because they are not units of County government.

Id.

The County Council intent regarding the personnel regulation coverage of LFRDs in 1998 is crystal clear – LFRD employees, although not County employees, were to henceforth be governed by generally applicable County Personnel Regulations. County Code, Section 21-16. The only exception to this mandate was where the County Executive, after receiving FRC approval, took action to provide for an exception to the County Personnel Regulations by promulgating said exception in a regulation under method (2).

The County argues that Section 21-16, somehow implicitly authorized the continuation of the 1997 MCFRCPR, notwithstanding its express language otherwise.<sup>9</sup> The Council’s Legislative Attorney, notes in an email to an LFRD employee, that Bill 37-97, which ultimately became law and included Section 21-16, contained an uncodified transition clause. Specifically, the clause provided:

*Transition; Department organization.* On July 1, 1998, the Department of Fire and Rescue Services becomes the Division of Fire and Rescue Services in the

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<sup>9</sup> The County does acknowledge in a footnote that Section 21-16(a) is subject to a different interpretation than the one being advanced by the County. County Response at 4 n.2.

*Montgomery County Fire and Rescue Services. . . All personnel or other regulations applicable to employees of the Department of Fire and Rescue Services or any local fire and rescue department on July 1, 1998, remain in force until otherwise amended or repealed, and apply to employees of the Montgomery County Fire and Rescue Service or the local fire and rescue departments respectively.*

Appellants' Response, Attach. AA at 2. The Council's Legislative Attorney states that it is the Legislative Attorney's belief that the transition clause cannot be cited in support of continuing to apply pre-existing personnel regulations for as long as eleven years. Id. Such an argument would clearly undermine the essential intent of any provision of the bill to which it was attached. Id.

The Board agrees with the Council's Legislative Attorney's views. At best, the uncodified transition clause can only be viewed as providing the County Executive with a small window of opportunity to act to adopt under method (2) an exception to the then-current County Personnel Regulations (after receiving approval by the FRC) before they became applicable to LFRD employees. However, as the Council's Legislative Attorney indicates, the FRC has never approved of any modification to the County Personnel Regulations since July 1, 1998. Id. at 1. Thus, pursuant to Section 21-16(a), the County's Personnel Regulations became applicable to LFRD employees in 1998.

The County argues that Section 2-2(m) of the MCPR, 2001, expressly excludes the LFRD employees from the MCPR's coverage. Specifically, that portion of the MCPR provides that the County Personnel Regulations do not cover employees of independent corporations supported in whole or part with Montgomery County tax funds. The Council's Legislative Attorney, in an email to Mr. E, notes that this portion of the MCPR directly conflicts with Section 21-16(a) and thus is "invalid." Appellant's Response, Attach. AA at 2. The Council's Legislative Attorney indicates that when this version of the Personnel Regulations was sent to the Council for review, Council staff was not informed that the effect of Section 2-2(m) would be to apply a different set of personnel regulations to fire corporation employees. Id.

The Board agrees with the Council's Legislative Attorney that Section 2-2(m) is invalid with respect to LFRD employees. The Board notes that Montgomery County Code Section 33-7(b) requires that the County Executive adopt personnel regulations under method (1) of section 2A-15 of the Code. See also Fraternal Order of Police, Montgomery County Lodge No. 35 v. Mehrling, 343 Md. 155, 171 (1996) (noting that the County Executive is required to adopt personnel regulations under method (1) and pursuant to that authority the County Executive has promulgated the MCPR). Thus, MCPR, 2001 was adopted pursuant to method (1). Id.

However, the County Council, in enacting Section 21-16 of the Code, expressly provided only one means of exempting LFRD from the County Personnel Regulations. To do so, the County Executive is required to adopt regulations under method (2) modifying the County Personnel Regulations after receiving approval from the FRC. There is no record in anything submitted by the County that the County Executive adopted Section 2-2(m) of the MCPR, after

receiving approval from the FRC, utilizing method (2).<sup>10</sup> Accordingly, this specific section of the MCPR conflicts with Section 21-16 of the Code and is deemed by the Board to be invalid.

### **ORDER**

Based on the foregoing, the Board grants Appellants' appeal from the denial of their grievance on the merits. The Board orders the following relief:

1. Appellants, within thirty days from the date of this decision, will be made whole for the personal leave days withdrawn from them in January of this year;
2. OHR will modify MCPR, 2001 to delete Section 2-2(m), within thirty days from the date of this decision; and
3. OHR will notify all LFRD employees that MCPR, 2001, as currently amended, applies to them, within thirty days from the date of this decision.

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<sup>10</sup> Nor could the County Executive have adopted this MCPR provision as part of the MCPR using method (2) – the County Executive had to use method (1).

## **CASE NO. 10-17**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the above-captioned appeal concerning the Chief Administrative Officer's (CAO's) interpretation<sup>1</sup> regarding the calculation of Appellant's retirement benefit. Specifically, Appellant challenges the CAO's determination that certain sick leave accrued by Appellant should not be included in the retirement benefit calculation. The County filed a response to the appeal (County's Appeal Response) and Appellant filed Final Comments (Appellant's Reply).

### **FINDINGS OF FACT**

Appellant was a Firefighter/Rescuer III with the County. Appellant's Reply at 2. Appellant began Appellant's employment with the County on July 2, 1972. County's Appeal Response at 1. Upon entering County employment, Appellant was covered by the Employees' Retirement System (ERS). Id.

Pursuant to collective bargaining between the County and Local 1664 Montgomery County Career Fire Fighters Association of the International Association of Firefighters (IAFF), the County instituted the Deferred Retirement Income Plan (DROP) under the ERS in 1999. The DROP permits Firefighters to continue employment for three years while having monthly pension benefits the Firefighter would have received had Appellant retired accounted for in a recordkeeping account with 8.25% interest.

Appellant entered the DROP on August 1, 2000. County's Appeal Response at 1. On July 22, 2003, Appellant filed an application for a non-service connected disability retirement. Appellant's Reply at 2. Appellant retired on August 1, 2003. County's Appeal Response at 1. Following an appeal, Appellant was notified by Mr. A of the Office of Human Resources (OHR) on August 21, 2009 that Appellant had been granted a non-service connected disability retirement, effective August 1, 2003. County's Appeal Response, Ex. 2, Attach. 1.<sup>2</sup>

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<sup>1</sup> As set forth infra, Section 33-56 of the Montgomery County Code, vests the CAO with the authority to issue interpretations of the County's retirement statute.

<sup>2</sup> Unfortunately, the County failed to label the documents it attached as exhibits to its Response. For ease of reference, the Board has labeled them thusly: 1) Exhibit (Ex.) 1 – Letter from the CAO to Appellant's counsel, subject: RE: Appellant, dated 03/17/10; 2) Ex. 2 – Letter from Appellant's counsel to CAO, subject: Appellant's request for Interpretation, Section 33-56, dated 01/27/10, with Attachments 1-3; 3) Ex. 3 – Agreement between IAFF and the County for the years July 1, 1999 through June 30, 2002; 4) Ex. 4 – Agreement between IAFF and the County for the years July 1, 2008 through June 30, 2011; 5) Ex. 5 – Montgomery County Code, Section 33-38A; 6) Ex. 6 – Montgomery County Code, Section 33-42; 7) Ex. 7 – Montgomery County Code, Section 33-43; 8) Ex. 8 – Code of Montgomery County Regulations, Section 33.07.01.17; 9) Ex. 9 – Email from Mr. B to Mr. C, Appellant, and Mr. D, dated 05/05/06, subject: Legislation; 10) Ex. 10 – Memorandum from Ms. E to County Council, subject:

Subsequently, Appellant completed the paperwork for Appellant's non-service connected disability retirement. Mr. A then informed Appellant that Appellant would be receiving less per month than Appellant had previously been receiving. Specifically, Appellant was told that Appellant would receive \$2,856.68 monthly, as opposed to the \$2,899.10. County's Appeal Response, Ex. 2, Attach. 2.

Appellant queried Mr. A about why there was a difference and was informed that Appellant's non-service connected disability retirement was calculated differently. Specifically, the benefit was calculated as of the date Appellant entered DROP and did not include the sick leave Appellant accrued while in DROP. Id.

Appellant determined to challenge OHR's interpretation of Appellant's retirement calculation. On January 27, 2010, Appellant, through counsel, wrote to the CAO,<sup>3</sup> arguing that the sick leave Appellant accrued while in DROP should be used in calculating Appellant's retirement benefit. Assuming the CAO did not accept this argument, Appellant argued that at the very least the sick leave accrued during DROP should be considered a portion of Appellant's DROP account for which Appellant should be paid. County's Appeal Response, Ex. 2.

The CAO responded on March 17, 2010. County's Appeal Response, Ex. 1. The CAO cited to County Code provision Section 33-38A(b)(D)(7), enacted in 2006, for the proposition that Appellant's retirement benefit was to be calculated as of the date of Appellant's entry into DROP. Id. The CAO also noted that in addition to receiving the retirement benefit, Appellant was entitled to receive the DROP account balance. Id. The CAO determined that Appellant had no entitlement to the sick leave accumulated during the DROP period; rather, it was forfeited. Id. at 2.

This appeal followed.

### **APPLICABLE LAW AND CONTRACTUAL PROVISIONS**

**Montgomery County Code, Section 33-56, Interpretations**, which states in applicable part:

- (a) The Chief Administrative Officer is responsible for deciding questions arising under this Article. Any member of the County's retirement system and any retiree or designated beneficiary eligible to receive benefits from the retirement system, may request, in writing, a decision on questions arising under this Article from the Chief Administrative Officer, who must respond in writing to such request within 60 days. The response must include a statement of appeal rights.

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Action: Expedited Bill 26-06, Personnel Retirement – Miscellaneous Amendments, with attachments.

<sup>3</sup> Appellant, through counsel, apparently first contacted the CAO on December 29, 2009, requesting that the CAO issue an interpretation with regard to Appellant's retirement calculation. See County's Appeal Response, Ex. 2 at 1.

- (b) The Chief Administrative Officer's decision on a disability application under Section 33- 43 may be appealed under subsection 33-43.
- (c) Any other decision by the Chief Administrative Officer may be appealed within 15 days to the Merit System Protection Board under procedures established by the Board. The decision of the Board is final.

**Agreement between Montgomery County Career Firefighters Association, International Association of Firefighters, Local 1664, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, for the Years July 1, 2002 through June 30, 2005 (2002 CBA), Article 7, SICK LEAVE,<sup>4</sup> which states in applicable part:**

Section 7.9 Disposition of Accumulated Sick Leave at Separation from County Service

Accumulated sick leave must be forfeited upon separation for any purpose other than retirement. Accumulated sick leave is creditable for retirement purposes as provided in the employee's retirement system of Montgomery County.

**2002 CBA, Article 51, PENSIONS, which states in applicable part:**

- A. The employer shall submit proposed legislation to the County Council on or before July 15, 1999, amending Chapter 33, Article III of the Montgomery County Code in accordance with the following principles. Proposed legislation drafted pursuant to this collective bargaining agreement shall be reviewed and approved by both parties prior to submission to the County Council. The following changes will effect only those retirement applications filed after the adoption of the legislation.
  - 5. Amend the Montgomery County Code to provide for an optional Deferred Retirement Option Plan (DROP) for bargaining unit employees. The maximum period of time an eligible employee may participate in the DROP plan will be 36 months. No COLA will be applied to the frozen pension benefit deposited in the DROP account. In addition, the DROP plan shall include the elements set forth in Appendix VII<sup>5</sup> of this Agreement.

**2002 CBA, Appendix VI, DROP PLAN FEATURES, which states in applicable part:**

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<sup>4</sup> Although neither party provided a copy of this Agreement in their submissions, the Board requested the County supplement the record with the Agreement. Accordingly, the 2002 CBA is hereby designated Ex. 11 to the County's Appeal Response.

<sup>5</sup> Appendix VII appears to be a typo in the CBA as the DROP Plan Features are found at Appendix VI therein.

Eligibility	Any time after completion of 25 years of service (Military Service Credit included).
Drop Account (Three Components)	Employee's monthly pension benefit; Employee's pension contribution (pre-tax); Interest @ 8.25% compounded quarterly.
Monthly Pension	Accrued benefit frozen upon entering DROP.
Term Election	3 years with yearly opt out permitted (on anniv. of entrance to DROP);
Retirement	Upon completion of 3 years of DROP participation, or earlier opt out (see above); Employee cannot continue in DFRS employment; Employee receives DROP Account distribution (see below) and begins to receive monthly pension (accrued benefit at time of entering DROP + COLA increases).
Form of Distribution of DROP Account	Lump sum cash payment; or Lump sum rollover to IRA; or Annuitize.
Service-Connected Disability During DROP period	The participant will be entitled to either (at participant's option): 1. The actuarial value of his service retirement benefit and his DROP account, or 2. The service-connected disability benefit that would have applied if he had not elected DROP.
Death During Drop Period	The participant's spouse/beneficiary will receive the greater of: 1. The value of the participant's DROP account and the applicable survivor's benefit based on the participant's monthly pension amount (including COLAS); or 2. The service-connected death benefit that would have applied if the participant had not elected DROP.



**Agreement between Montgomery County Career Firefighters Association, International Association of Firefighters, Local 1664, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, for the Years July 1, 1999 through June 30, 2002 (1999 CBA), Appendix VII, DROP PLAN FEATURES.<sup>6</sup>**

**POSITIONS OF THE PARTIES**

Appellant:

- A correct reading of the applicable provisions of the Montgomery County Code requires that Appellant receive credit for sick leave earned during Appellant’s participation in the DROP Program in the calculation of Appellant’s retirement benefit.
- Section 33-38A of the Montgomery County Code provides that a non-service connected disability retirement benefit is calculated pursuant to Section 33-43(h) of the Code. Section 33-43(h) in turn provides for a pension amount to be calculated under Section 33-42(h). Section 33-42(h) provides the calculation of a pension and indicates sick leave credits are included.
- Nothing in the statutory framework for retirement indicates that sick leave earned during an employee’s participation in DROP would just go away. Appellant is entitled to compensation for that unused sick leave.

County:

- The Code provisions enacting the DROP in 1999 were silent as to a participant in DROP who retires due to a non-service connected disability. Bill 26-06, enacted in 2006, provided that an employee receiving a non-service connected disability would receive the retirement benefit as calculated at the time of the employee’s entry into DROP and the DROP account balance.
- Sick leave is forfeited unless it is included for retirement purposes. As the DROP does not include sick leave accumulated after entry into the DROP in the calculation of a retirement benefit, Appellant forfeited this sick leave when Appellant retired.

**ISSUE**

Is the Chief Administrative Officer’s interpretation with regard to the calculation of Appellant’s retirement benefit correct?

**ANALYSIS AND CONCLUSIONS**

**The CAO’s Interpretation Of The Retirement Statute Is Not Entitled To Deference.**

The County Council has by law vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to the CAO’s

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<sup>6</sup> Appendix VII of the 1999 CBA is identical in its wording to Appendix VI of the 2002 CBA.

interpretation so long as it is reasonable See, e.g., Martin v. OSHA, 499 U.S. 144, 156 (1991). Where, however, the CAO's interpretation is predicated on an error of law, no deference is appropriate. See Department of Health and Mental Hygiene v. Riverview Nursing Centre, 104 Md. App. 593, 602, 657 A.2d 372 (Md. Ct. Spec. App. 1995).

Both the CAO's interpretation, County's Appeal Response, Ex. 1, and Appellant, Appellant's Reply at 3, cite to Section 33-38A(b)(D)(7) with regard to the calculation of Appellant's retirement benefit. Significantly, both the County and Appellant agree that the provision was not enacted until 2006. See County's Appeal Response at 2; Appellant's Reply at 5. As both parties agree, when the DROP was enacted in 1999, pursuant to bargaining with IAFF, the Code provisions dealing with DROP did not contain any special benefit for a participant who terminated employment due to a non-service connected disability. Id.

Of note is the fact that Appellant retired on August 1, 2003. County's Appeal Response at 1. After appealing the nature of Appellant's retirement, Appellant was notified on August 21, 2009 that Appellant had been granted a non-service connected disability retirement **effective August 1, 2003**. County's Response, Ex. 2, Attach. 1.

Thus, Appellant's retirement was effective almost three years **before** the statutory provision came into being. Accordingly, the Board finds that the CAO's reliance on this statutory provision is misplaced and to the extent the CAO's interpretation relies on this statutory provision, it is not entitled to deference.

**As The DROP Was Established Pursuant To Collective Bargaining, The Board Will Look To The Provisions Of The Applicable Collective Bargaining Agreement In Effect At The Time Appellant Entered The DROP And At The Time Appellant Retired For Guidance.**

The law enacted in 1999 regarding the DROP did not address a non-service connected disability retirement; it only specifically addressed a service-connected disability retirement. The law was enacted based on collective bargaining between IAFF and the County. County's Appeal Response at 1. Accordingly, the Board will look to the collective bargaining agreement in effect when Appellant entered the DROP and when Appellant retired from the County.

Not surprisingly, both CBAs do not mention anything in regard to a non-service connected disability during the DROP period. It was only in 2006 that the parties to the CBA, IAFF and the County, decided to introduce legislation to address the matter. County's Appeal Response at 3.

While neither of the CBAs addresses a non-service connected disability, the CBA provisions do put bargaining unit members on notice of what the parties have bargained for in general with regard to DROP. Indeed, it was because of the collective bargaining process that the DROP came into existence. Under both the CBA in effect at the time Appellant entered the DROP and the one in effect when Appellant retired, the DROP account consists of three components: 1) the employee's monthly pension benefit; 2) the employee's pension contribution (pre-tax); and 3) interest at the rate of 8.25% compounded quarterly. The DROP Plan Features also indicate that the monthly pension has the accrued benefit frozen upon entering the DROP.

Finally, the DROP Plan Features provides that at retirement the employee receives the DROP Account distribution (which may be in the form of a lump sum cash payment, a lump sum rollover to an IRA; or annuitized). The employee also begins to receive a monthly pension benefit, which is the accrued benefit at the time of entering the DROP plus COLA increases. No where in the DROP Plan Features is there any mention of sick leave accrued during DROP. Rather, the only thing that is clear is that an employee who participates in DROP has his accrued monthly pension benefit frozen upon entering DROP.

Based on its review of the applicable 1999 and 2002 CBA provisions, the Board agrees with the CAO's ultimate determination that sick leave earned during the period an employee participates in DROP is not to be used in calculating Appellant's retirement benefit for a non-service connected disability retirement under DROP on August 1, 2003.

**Appellant Is Not Entitled To Be Compensated For Appellant's Unused Sick Leave Accumulated During Appellant's DROP Period.**

Appellant argues that if Appellant's unused sick leave accumulated during the DROP period is not used in the calculation of Appellant's non-service connected disability retirement benefit, Appellant should at least receive compensation for it as part of the DROP account. The Board disagrees.

The 2002 CBA makes clear that there are only three components to the DROP account: the employee's monthly pension benefit which is frozen upon entry into DROP; the employee's pension contribution (pre-tax); and interest at 8.25% compounded quarterly. No where in the contractual provisions does it state that sick leave is part of the DROP account.

The 2002 CBA provision governing sick leave clearly indicates it is forfeited upon separation from County service. 2002 CBA, Section 7.9. The only exception to this mandatory forfeiture is where it is creditable for retirement purposes as provided in the employee's retirement system. However, as the DROP Plan Features make clear, the monthly pension benefit of Appellant was frozen upon entry into DROP and there was no provision for crediting sick leave accumulated while in DROP for retirement purposes. Accordingly, the Board denies Appellant's request for sick leave compensation.

**ORDER**

Based on the foregoing, the Board denies Appellant's appeal from the CAO's interpretation of the calculation of Appellant's retirement benefit and the denial of compensation for Appellant's unused sick leave accumulated during the DROP period.

**CASE NO. 10-20**

**FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the above-captioned grievance concerning the County's action of refusing to provide

compensation to Appellant and other individuals of the Local Fire and Rescue Departments (LFRDs) for Inauguration Day 2009, in accordance with the Chief Administrative Officer's Grievance Decision on July 9, 2009.<sup>1</sup> The County filed its response (County's Response) to the grievance on May 18, 2010. Appellant filed Appellant's reply to the County's Response (Appellant's Reply) on May 24, 2010.

## **FINDINGS OF FACT**

### **Procedural Background**

The Montgomery County Fire and Rescue Service (MCFRS), which includes the LFRDs, is charged with the delivery of fire, rescue and emergency services for the County. Montgomery County Code, § 21-1(a)(1). However, employees of LFRDs, who are paid with tax funds, are not County employees. Montgomery County Code, § 21-16(a). Rather, they are members of a separate merit system. *Id.*

The County's Office of Human Resources (OHR) provides for the administration of personnel regulations for the LFRDs and disbursement of salaries through the County's payroll system. Montgomery County Code, § 21-16(b)(1) & (3). OHR, up until the Board's decision in MSPB Case No. 10-02,<sup>2</sup> assumed that LFRDs were governed by the Montgomery County Fire and Rescue Corporation Personnel Regulations (MCFRCPR).

In late 2008 and early 2009, the County began implementing a new electronic timekeeping system throughout the County, known as Mctime. During this process, OHR discovered that LFRD employees had mistakenly been given personal leave days since 1998. These personal leave days were not authorized under the MCFRCPR.<sup>3</sup> Therefore, OHR discontinued the practice of providing LFRD employees with personal leave days.

In addition, LFRD employees were informed that Inauguration Day 2009 would be considered a holiday for all LFRD employees,<sup>4</sup> which was a departure from past practice. However, LFRD employees who did not report to work that day were purportedly charged with

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<sup>1</sup> Appellant also requests that the Board compensate those employees who are no longer working for the County with the three personal leave days they would have used prior to their leaving County employment. As Appellant is the sole grievant in this case before the Board, as discussed in greater detail *infra*, the Board is only empowered to grant Appellant relief, if appropriate.

<sup>2</sup> In MSPB Case No. 10-02, the Board held that OHR should be applying the provisions of the Montgomery County Personnel Regulations (MCPR) to LFRDs not the provisions of MCFRCPR.

<sup>3</sup> Personal leave days were authorized for County merit system employees covered by the MCPR beginning in January 1998.

<sup>4</sup> Under the MCFRCPR, Inauguration Day is a holiday. Under the MCPR, it is not.

leave for the day. Moreover, those LFRD employees who did work on Inauguration Day were not compensated with holiday pay, as required under the MCFRCPR.

Various LFRD employees, including the Appellant, all of whom worked for the Volunteer Fire Department (VFD), filed a consolidated grievance with the President of the VFD and MCFRS Fire Chief regarding the issues of personal leave days and Inauguration Day. Subsequently, the grievance was raised to the Chief Administrative Officer (CAO). In their grievance, the LFRD employees alleged that they were covered by the MCPR not the MCFRCPR.

On July 9, 2009, the CAO issued the CAO's decision (CAO's Grievance Decision), sustaining the grievance in part and denying it in part. Specifically, the CAO found that LFRD employees were covered under the MCFRCPR. Under the MCFRCPR, Inauguration Day is a holiday for LFRD employees. Consequently, the CAO ordered that LFRD employees who were improperly charged leave for the day or paid regular pay instead of holiday pay would be made whole for this mistake. However, under the MCFRCPR, LFRD employees were not entitled to personal leave days. Accordingly, the CAO denied that portion of the grievance.

An appeal to the Board regarding the CAO's denial of personal leave days followed.<sup>5</sup> As the appeal to the Board dealt with the issue of whether the MCPR or the MCFRCPR applied, the County decided to hold in abeyance the implementation of that portion of the CAO's Grievance Decision which granted relief to Appellant and others. County Response at 5.

Subsequently, in MSPB Case No. 10-02, the Board ruled that the MCPR not the MCFRCPR applied to LFRD employees. The Board ordered the County to make the grievants whole for the personal leave days taken away from them and to notify the LFRD employees that the MCPR applied to them.

#### Events Subsequent To The Issuance Of MSPB Case No. 10-02

On January 12, 2010, Appellant sent an email to the OHR Director and CAO (as well as to the Board's Executive Director), asserting that the County had failed to make the grievants whole, despite the Board's Decision in MSPB Case No. 10-02. On January 13, 2010, the County's counsel notified the Board's Executive Director that the County had complied with the Board's Order in MSPB Case No. 10-02.

On February 2, 2010, Appellant sent a memorandum to the OHR Director, the CAO and others (including the Board's Executive Director), subject: Grievance Regarding Non-Compliance of CAO's Directive and of MSPB Ruling Concerning LFRD Employees. On February 5, 2010, the OHR Director responded to Appellant, indicating that the County had fully complied with the Final Decision in MSPB Case No. 10-02. With regard to the allegation of non-compliance with the CAO's Grievance Decision, the OHR Director explained that the CAO's Grievance Decision was premised on the view that the MCFRCPR applied to LFRD

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<sup>5</sup> As the CAO had sustained that part of consolidated grievance dealing with holiday pay for Inauguration Day, that portion of the grievance was not before the Board.

employees. The OHR Director noted that the Board subsequently had held that the MCPR not the MCFRCPR applied. As the MCPR applied, and under its provisions Inauguration Day was not a holiday, the OHR Director concluded the Board's Final Decision had the effect of negating the CAO's award of holiday pay for Inauguration Day. County's Response, Attachment (Attach. 4).

On February 19, 2010, Appellant again sent a memorandum to the OHR Director, the CAO and others (including the Board's Executive Director), subject: Grievance Regarding Non-Compliance of CAO's Directive and of MSPB Ruling Concerning LFRD Employees. In this memo, Appellant acknowledged receiving the personal leave days ordered by the Board. However, Appellant continued to insist on being made whole for Inauguration Day 2009, as required by the CAO's Grievance Decision.

On March 24, 2010, having received nothing back in response to Appellant's February 19, 2010 memorandum, Appellant filed a Step III Grievance with the CAO over the County's non-compliance with the CAO's Grievance Decision. Appellant's Reply at 4. Appellant noted that the Board had never addressed the issue of Inauguration Day in its Final Decision, as the CAO had indicated the CAO was granting that portion of the grievance.<sup>6</sup> Id. at 3.

On March 30, 2010, the OHR Director issued a memorandum to Appellant, almost identical to the one issued on February 5, 2010.<sup>7</sup> According to Appellant, Appellant received the memorandum via email. County Response, Attach. 8. Appellant indicated that Appellant received the email on April 7, 2010. See Appeal Form. Appellant stated Appellant was out of town (without email) from March 25, 2010 through April 6, 2010. Appellant also asserted Appellant was out of town from April 10, 2010 through April 18, 2010, without email. Id.

On April 27, 2010, at 6:28 p.m.,<sup>8</sup> Appellant sent the Board's Executive Director an email, indicating Appellant wanted to be on the record that Appellant would be appealing to the Board Appellant's grievance concerning compensation for Inauguration Day 2009.<sup>9</sup> The Board's Executive Director responded to Appellant on April 28, 2010, informing Appellant that Appellant could file Appellant's appeal form on line and gave Appellant the address for the Board's website. On May 3, 2010, Appellant filed Appellant's appeal with the Board.

### **APPLICABLE REGULATIONS**

#### **Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5,**

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<sup>6</sup> Appellant indicated in Appellant's Step III Grievance that Appellant would be out of town from March 25 through April 6. County Response, Attach. 6 at 2.

<sup>7</sup> The one change to the memorandum issued March 30, 2010, other than the date of issuance, is the omission of 2010 from the initial line in the body of the memorandum.

<sup>8</sup> The Board's office is open 9:30 a.m. - 3:00 p.m., Monday through Thursday.

<sup>9</sup> This notification constituted a notice of intent to file an appeal, as provided for in Section 35-4(a) of the MCPR.

2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, and November 3, 2009), Section 1, *Definitions*, which states in applicable part:

**1-81. Working days.** All days except Saturdays, Sundays, and official or special County holidays.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended September 19, 2006, and October 21, 2008), Section 2, General Provisions**, which states in applicable part:

**2-5. Computation of time under Personnel Regulations.** Time limits for filing actions are expressed in these Regulations as either calendar days or working days. In either case the following applies:

- (a) the day of the act or event is not counted;
- (b) the last day of the time period is counted unless it is a Saturday, Sunday, legal holiday, or a day on which the County government or relevant County office is closed; . . .

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, and October 21, 2008), Section 34, Grievance Procedure**, which states in applicable part:

**34-9. Grievance procedure.**

- (b) *Technical and procedural review of grievances.*
  - (1) An employee must submit a written grievance on the OHR-approved grievance form (Appendix Q) and must provide the information requested on the form.
  - (2) The OHR Director may return the grievance to the employee if the employee does not complete the grievance form or provide the information requested on the form.
- (e) *Steps of the grievance procedure.* The following table shows the 3 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 problem informally to immediate supervisor.
		If unable to resolve the problem, submit a written grievance on appropriate grievance form to immediate

		supervisor within 30 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>Department Director</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 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 30 calendar days to attempt 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 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 45 calendar days after the Step 2 meeting.
<b>3</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>		

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, and November 3, 2009), 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:



- (3) receives a written final decision on a grievance; . . .

**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:
  - (1) appellant's name, signature and date;
  - (2) home address and telephone number;
  - (3) title of position;
  - (4) department, agency, or office, if applicable.

**POSITIONS OF THE PARTIES**

Appellant:

- The MSPB's ruling in MSPB Case No. 10-02 does not relieve the County of the obligation to follow the rules in effect during the time period at issue.<sup>10</sup>
- Compensation and benefits during the time period at issue are to be awarded in accordance with the MCFRCPR rules as the CAO indicated in the CAO's July 9, 2009 decision.
- Compensation should be awarded to those employees who no longer work for the County for the three personal leave days they would have used prior to leaving County employment had they received them.
- The County should clarify who is responsible to get personnel information to LFRD employees.<sup>11</sup>

County:

- Appellant lacks the right to appeal to the Board, as no final CAO decision on a grievance was issued in this case.

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<sup>10</sup> Although the Board is dismissing this appeal on procedural grounds as discussed *infra*, the Board would note that a fair reading of its Final Decision in MSPB Case No. 10-02 is that the MCPR was applicable to LFRD employees in January 2009. Absent such an interpretation, the Board would never have ordered that the personal leave days taken from the appellants in MSPB Case No. 10-02 be restored to them.

<sup>11</sup> While the Board will not address this issue, as it is dismissing the appeal as untimely, *see infra*, it encourages the parties to improve the lines of communication.

- Appellant failed to file a timely appeal to the Board. Appellant received a decision from the OHR Director by email, dated February 9, 2010, indicating that it was the County’s position that the Board’s Final Decision in MSPB Case No. 10-02 negated the CAO’s award of holiday leave for Inauguration Day. Appellant’s time for filing an appeal began to run from the date of receipt of that email.
- OHR did not consider the memoranda filed by Appellant to be formal grievances notwithstanding the use of the word “grievance” in the subject line of the February 2 and February 19, 2010 communications. Section 34-9(b) of the MCPR requires an employee to submit a written grievance on the OHR-approved grievance form found at Appendix Q of the MCPR. Appellant failed to do this.
- The CAO had the right not to grant the relief requested concerning Inauguration Day after the Board issued its Final Decision in MSPB Case No. 10-02. LFRD employees cannot pick and choose between the MCFRCPR and the MCPR. The Board ruled that LFRD employees were covered by the MCPR, which does not grant employees Inauguration Day as a holiday.
- Employees who no longer work for the County are not entitled to receive a cash payment in lieu of personal leave days.

### **ISSUES**

1. Did Appellant file a grievance?
2. Did any other LFRD employee file a grievance?
3. If Appellant did file a grievance, did Appellant timely file an appeal to the Board?

### **ANALYSIS AND CONCLUSIONS**

**The Board Finds That Given The Circumstances Present In This Case Appellant Filed A Valid Grievance Concerning The Issue Of Non-Compliance With The CAO’s Grievance Decision.**

The County argues that Appellant failed to file a grievance as Appellant did not comply with Section 34-9(b)(1) of the MCPR, 2001, which requires that a grievance be submitted on an OHR-approved form. While it is true that Appellant did not complete the form contained in the MCPR, not once but twice Appellant filed a document labeled “grievance” with the OHR Director. The MCPR indicates that the OHR Director may return a grievance to the employee if the employee does not complete the grievance form or provide the information requested on the form. This did not occur. Instead, not once but twice, the OHR Director responded to Appellant’s grievance.<sup>12</sup> Thus, the Board finds that given the circumstances of this case, Appellant had every right to believe that Appellant had filed a valid grievance with the County.

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<sup>12</sup> While the County indicates that the second memorandum from the OHR Director to Appellant (which was almost identical to the first memorandum sent by the OHR Director) was “inexplicably” sent, that does not change the fact that it was sent.

It is the Board's position that OHR staff has the responsibility to treat every correspondence labeled "grievance" as a grievance. OHR staff may return said correspondence to an employee if it is not on an OHR-approved form,<sup>13</sup> but cannot ignore the processing of such correspondence pursuant to the grievance procedure if it is labeled as a "grievance".

The grievance procedure provides that an employee is to file with their immediate supervisor at the first step of the three-step grievance procedure. However, if the grievance is based on an action taken or not taken by OHR, the grievance is to be submitted to OHR. The Board finds that the gravamen of Appellant's grievance was the County's failure to comply with the CAO's Grievance Decision. As OHR would have been responsible for ensuring compliance, it was logical for Appellant to address Appellant's grievance to the OHR Director, which Appellant did by memorandum dated February 2, 2009, addressed, *inter alia*, to the OHR Director, the CAO, and others.

The OHR Director responded to Appellant on February 5, 2009. It appears that the OHR Director's response was sent via email to Appellant on February 9, 2009. County's Response, Attach. 9. Pursuant to the grievance regulations, Appellant had ten calendar days after receipt of the OHR Director's response to file at the next step of the grievance procedure. Thereafter, Appellant who was unhappy with the OHR Director's response, sent another memorandum, dated February 19, 2010, to both the OHR Director and the CAO. In accordance with the grievance procedure, an employee not satisfied with the Step 1 response may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OHR.<sup>14</sup> Thus, the Board concludes that the February 19, 2010 memorandum was in fact timely and correctly filed.

Appellant received no response to Appellant's February 19, 2010 memorandum. Accordingly, Appellant sent a memorandum, dated March 24, 2010, subject: Step III<sup>15</sup> Grievance Regarding Non-Compliance of CAO's Directive and of MSPB Ruling Concerning LFRD Employees. At this point, the County should have clearly been put on notice that Appellant believed Appellant was going through the various steps of the grievance process. If the County wanted to object to the form of the grievance, it was incumbent upon the County to do so. Instead, on March 30, 2010, the OHR Director issued the OHR Director's second memorandum to Appellant on the issue of non-compliance. While the grievance procedure contemplates a Step 2 meeting with the CAO's Designee, before the issuance of a written decision by the CAO, or the CAO's designee, clearly it was not illogical for Appellant to believe that Appellant had obtained the CAO's written response and was free to raise the matter to the

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<sup>13</sup> The Board believes there is merit to the requirement that an employee file a grievance using the OHR-approved form, as it provides certain basic information that is of assistance in processing the grievance.

<sup>14</sup> The Labor/Employee Relations Team, which is supervised by the OHR Director, is also delineated as the CAO's Designee for grievances in Section 34 of the MCPR.

<sup>15</sup> As the County correctly notes, there are only three steps to the grievance procedure, with the third step being an appeal to the Board. Previously, there were four steps, with the third step involving the CAO, but at the Board's urging, OHR streamlined the grievance process.

Board.

Accordingly, based on the totality of circumstances in this case, the Board finds that Appellant filed a proper grievance and had the right to appeal to the Board upon receipt of the OHR Director's March 30, 2010 memorandum.

**No Where In The Record Of Evidence Before The Board Is There Documentation That The Grievance Filed By Appellant Was Also Filed By Any Other LFRD Employee.**

In MSPB Case No. 10-02, when the grievants filed their initial grievance with the President of the VFD and MCFRS Fire Chief, the memorandum indicated on the "From" line the names of all six of the grievants. In the instant case, the grievance filed by Appellant only contains one name on the "From" line – Appellant's. The grievance procedure specifically requires that an employee submit a grievance in writing. MCPR, Section 34-9(b)(1). The only written grievance submitted was by Appellant. Accordingly, Appellant is the only party in this case.

As Appellant is the only grievant before the Board, Appellant is the only one to which relief could be granted, if appropriate. See Final Supplemental Decision and Order, MSPB Case No. 06-03 (2010) (wherein the Board declined to grant relief to an individual who was not part of the consolidated grievance appealed to the Board). Accordingly, the Board denies Appellant's request for relief for other LFRD employees, who are non-parties to this appeal.

**Appellant's Appeal To The Board Is Untimely.**

In Appellant's appeal, Appellant notes that Appellant received the OHR Director's March 30, 2010 memorandum, which Appellant deemed to be the grievance response from the CAO, on April 7, 2010. Appellant had ten working days, pursuant to Section 35-3(a) of the MCPR, to file Appellant's notice of intent to appeal with the Board. Thus, Appellant had to file any notice of intent to file an appeal by April 21, 2010. However, Appellant did not file Appellant's notice until April 27, 2010. Therefore, Appellant's appeal is untimely. Accordingly, the Board will dismiss the appeal for lack of timeliness.

**ORDER**

Based on the foregoing, the Board dismisses Appellant's appeal as untimely.

## **DISMISSAL OF APPEALS**

The County's Administrative Procedures Act (APA), Montgomery County Code, Section 2A-8(J), provides that the Board may, as a sanction for unexcused delays or obstructions to the prehearing or hearing process, dismiss an appeal. Section 35-7 of the Montgomery County Personnel Regulations allows the Board to dismiss an appeal if the appellant fails to prosecute an appeal or fails to comply with a Board order or rule.

The Board also may dismiss an appeal if it lacks jurisdiction over the appeal or if the case becomes moot.

During FY 2010, the Board issued the following dismissal decisions.

# **DISMISSAL FOR LACK OF TIMELINESS**

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

### **FINAL 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 to eliminate Appellant's position as Office Services Coordinator (OSC) with the Local Fire Department (LFD or Appellee), effective February 1, 2009.

### **FINDINGS OF FACT**

The Montgomery County Fire and Rescue Service (MCFRS), which includes the local fire and rescue departments (LFRDs), is charged with the delivery of fire, rescue and emergency services for the County. LFD is one of the LFRDs, providing fire and rescue services for a designated area of the County. Pursuant to Section 21-16 of the Montgomery County Code, LFRD employees, who are paid with County tax funds, are not Montgomery County employees. Rather, they are members of a separate merit system governed by generally applicable County Personnel Regulations.<sup>1</sup> Montgomery County Code § 21-16; MSPB Case No. 10-02.

Appellant served as the Office Services Coordinator at LFD. In November 2009, due to a significant projected budget shortfall for FY10, the County Executive transmitted to the County Council a FY09 Savings Plan for the County's various departments. The savings plan for MCFRS included the elimination of County funding for Appellant's position. See Appellant's Letter to the MSPB, dated November 26, 2009, at 1; LFD's Prehearing Submission, Exhibit (Ex.) 5. Appellant first became aware that Appellant's position had been submitted for elimination on November 14, 2008. LFD's Prehearing Submission, Revised Ex. 1. On November 28, 2008, Appellant found out that the County Council had approved the elimination of Appellant's position. *Id.* Subsequently, MCFRS went back to the County Council with revised budget cuts. *Id.* However, the recommendation to eliminate Appellant's position did not change. *Id.*

In an email to LFD management, dated December 3, 2008, Appellant asked about the status of Appellant's job and indicated that if Appellant's position was "eliminated and I can retire on discontinued service, I'll be fine. If it's not eliminated and I stay at the LFD, I'll be fine." LFD's Prehearing Submission, Revised Ex. 1 at 2. On or about December 13, 2008,<sup>2</sup> the Division Chief, MCFRS, notified LFD management that Appellant's position would be eliminated as a

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<sup>1</sup> Until recently, the LFRDs had been governed by the Montgomery County Fire and Rescue Corporation Personnel Regulations (MCFRCPR), which were issued in 1988 and reprinted in 1997 with amendments by the now defunct Fire and Rescue Commission.

<sup>2</sup> It is not clear from the record of evidence when the Division Chief sent the email to LFD. Appellant avers that it was sent on December 11, 2008. See Appellant's Appeal, Attach. 3 (Letter from Appellant to Director, OHR, dated April 16, 2009) at 1.

result of the FY09 Savings Plan.<sup>3</sup> Id. Chief A of LFD then notified Appellant that Appellant's position would be eliminated on December 13, 2008. Id. Chief A advised Appellant at that time "to proceed immediately to protect yourself in this matter the best way possible for you!" Id. Mr. B, then Vice-President of LFD, advised Appellant to contact Mr. C of the County's Office of Human Resources (OHR). Appellant's Response at 2.

Subsequently, Appellant applied for a discontinued service retirement,<sup>4</sup> effective February 1, 2009. LFD's Prehearing Submission, Ex. 4. Appellant received an early retirement with no penalties. Appellant's Response at 1; LFD's Prehearing Submission, Ex. 2 at 1.

Subsequent to Appellant's retirement, the County continued to experience budgetary problems. In order to balance the FY10 budget, the County Executive recommended to the County Council that a number of County positions be eliminated. LFD's Prehearing Submission, Ex. 7. As a result of collective bargaining with the County's unions, the County Executive also recommended legislation to enact a new early Retirement Incentive Plan (RIP) that would allow full-time County employees who were in a defined benefit plan and within two years of retirement eligibility to retire before June 1, 2009 without penalty and receive \$40,000.<sup>5</sup> Id.

Appellant, upon learning about the RIP, wrote OHR's Director on April 16, 2009. In Appellant's letter, Appellant raised for the first time Appellant's concern that Appellant never received a Notice of Intent about the abolishment of Appellant's position.<sup>6</sup> Appellant complained that Appellant retired on discontinued service and subsequently the County was offering a voluntary early retirement with no penalties plus a \$40,000 bonus. Appellant also asserted that placement assistance and transition services were not offered to Appellant.

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<sup>3</sup> The Division Chief, in the email to LFD, incorrectly stated that Appellant's position was abolished as a result of the FY10 Savings Plan. See LFD's Prehearing Submission, Revised Ex. 1.

<sup>4</sup> A Discontinued Service Retirement is available to County employees whose positions are abolished by administrative action and who have at least ten years of continuous service. See Montgomery County Code, Section 33-45(d).

<sup>5</sup> The Board notes that the County Council did not enact this new RIP.

<sup>6</sup> Pursuant to the County's Personnel Regulations, a Notice of Intent is sent by the OHR Director to an employee in an affected class before a reduction-in-force (RIF) to tell the employee of the potential RIF and that the employee is entitled to priority consideration. Montgomery County Personnel Regulations, 2001 (as amended), Section 30-1(m). The MCFRCPR provided for no such Notice of Intent. See MCFRCPR, Section 26.

Now that the Board has ruled the MCPR applies to the LFRDs, they will need to ensure henceforth that OHR provides their employees with a Notice of Intent before the issuance of a RIF notice. Failure to conform to this requirement could lead to the Board overturning a termination appealed to it in a timely manner.

The OHR Director responded to Appellant on April 21, 2009. LFD's Prehearing Submission, Ex. 4. The OHR Director noted that Appellant was not a County employee but rather employed by LFD. Therefore, Appellant was not entitled to the rights and benefits of the County's merit system under Chapter 33 of the County Code and the Montgomery County Personnel Regulations. Id.

On October 14, 2009, the Board issued a decision in another case, MSPB Case No. 10-02. See LFD's Prehearing Submission, Ex. 8. In that case, the Board held that MCFRS had erred in applying the MCFRCPR to LFRD employees; rather, the MCPR should apply.

On November 26, 2009, Appellant wrote to the Board, asserting that the MCPR was not applied to Appellant when Appellant's position was eliminated. Appellant was provided with an appeal form, which Appellant completed and filed with the Board on December 15, 2009. Appellant indicated that the relief Appellant was seeking was retroactive pay for wages lost from February 1, 2009 to the current date; \$25,000 incentive paid in 2008 for early retirement;<sup>7</sup> and the LFD receive reinstatement of the position eliminated. See Appeal Form, Block No. 11.

Thereafter, LFD was notified of Appellant's appeal and instructed to file a Prehearing Submission with the Board. LFD, through counsel, filed its Prehearing Submission on January 14, 2010. In its Prehearing Submission, LFD asserted that Appellant's appeal was untimely and should be dismissed; LFD was not required to provide Appellant with notice of the RIF; LFD complied with all RIF procedural requirements; and Appellant was not entitled to the relief requested.<sup>8</sup>

Subsequently, Appellant filed Appellant's Response. In Appellant's Response, Appellant argues that Appellant's appeal is not against LFD but the County as it failed to give Appellant the required Notice of Intent under the MCPR. Appellant also argues that Appellant was never provided with any other options for dealing with Appellant's position elimination such as appealing to the Board. Appellant notes that LFD did not mention reinstatement of Appellant's position in its Prehearing Submission; accordingly, Appellant is withdrawing Appellant's request for this relief. Finally, Appellant states that Appellant does not want to hire an attorney to assist Appellant in defending Appellant's appeal and so is withdrawing it.<sup>9</sup> Nevertheless, Appellant requests that Appellant be given the additional 5% in retirement that Appellee claimed Appellant

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<sup>7</sup> In the spring of 2008, the County offered certain employees an early retirement without penalty and \$25,000.

<sup>8</sup> LFD asserted that the \$25,000 bonus Appellant seeks was not available at the time Appellant retired. LFD also argued, without any supporting evidence, that Appellant was made whole when the County approved Appellant for an early retirement option in 2009, with an additional 5% for "Discontinued Service Retirement." See LFD's Prehearing Submission at 6.

<sup>9</sup> The Board notes that there is no requirement for an employee to be represented by an attorney. The Board has made this clear in its Brochure, available on its County website. Moreover, as is evident in the decision Appellant cites to, MSPB Case No. 10-02, the appellants therein were not represented by counsel, although the County was, and the appellants prevailed.



received, but which Appellant asserts Appellant did not receive. Appellant's Response at 3.

As Appellant, despite Appellant's assertion that Appellant is withdrawing Appellant's appeal, is still seeking relief, the Board has determined to issue a Final Decision in this matter.

### **POSITIONS OF THE PARTIES**

#### **Local Fire Department:**

- Appellant filed Appellant's appeal almost a year after Appellant was notified that Appellant's position was being eliminated. Therefore, it is untimely under the Board's regulations.
- If the MCPR applied at the time of Appellant's position elimination, it was OHR's responsibility to give Appellant notice of Appellant's position elimination, not LFD.
- LFD complied with the procedural requirements of MCFRCPR, which only required a thirty-day written notice. Chief A notified Appellant fifty days prior to the date of Appellant's RIF.
- Appellant could have taken advantage of the appeal rights in either the MCFRCPR or MCPR and appealed Appellant's RIF to the Board. However, Appellant chose instead to apply for and receive early retirement benefits from the County.
- The \$25,000 incentive bonus Appellant seeks as relief was not in effect at the time of Appellant's RIF and early retirement on February 1, 2009.

#### **Appellant:**

- OHR failed to give Appellant the required notice pursuant to the MCPR.
- The notification received from Chief A did not constitute official notification of a RIF as Chief A lacks the authority to deal with administrative employees.
- Appellant was left to Appellant's own devices without options.
- Appellant never received the additional 5% in retirement pay as claimed by LFD.

### **APPLICABLE LAW AND REGULATIONS**

**Montgomery County Personnel Regulations (MCPR), 2001, Section 30, Reduction-in-Force and Furlough**, which states in applicable part:

#### **30-15. Appeal of RIF or furlough.**

- (a) An employee with merit system status who is demoted or whose employment is terminated due to RIF may appeal under Section 34 or 35 of these Regulations.

**Montgomery County Personnel Regulations (MCPR), 2001, 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:
  - (2) receives a notice of termination; . . . .

**35-7. Dismissal of an appeal.**

- (a) The MSPB may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3.

**MCFRCPR (originally adopted 08/25/1988; reprinted 03/10/97), Section 26, Reduction-in-Force**, which states in applicable part:

Section 26-5. Appeals. Except for those employees as defined in Section 3-11 and 3-14 of these Regulations, a merit system employee who is demoted or terminated due to reduction-in-force may appeal in accordance with Section 29 or 30 of these Regulations.

**MCFRCPR (originally adopted 08/25/1988; reprinted 03/10/97), Section 30, Appeals and Hearings**, which states in applicable part:

Section 30-4. Appeal Period. An employee has 10 working days from receipt of a written decision of the Chief Administrative Officer or notice of a disciplinary action to note an appeal, in writing, with the Board.

Section 30-5. Dismissal of an Appeal. If an appeal is not noted or submitted within the specified time limits, the Board may dismiss the appeal.

**ISSUE**

Is Appellant's appeal timely?

**ANALYSIS AND CONCLUSIONS**

LFD argues that Appellant failed to timely appeal Appellant position abolishment. As LFD notes, Appellant, under the MCPR, had the right to appeal Appellant's employment termination due to RIF to the Board. MCPR, Section 30-15.<sup>10</sup> Moreover, Section 26-5 of the

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<sup>10</sup> LFD mistakenly cites to Section 29-2 of the Montgomery County Code for the proposition that Appellant has the right to appeal a termination action. See LFD's Prehearing Submission at 2. It would appear that LFD meant to cite to Section 29-2 of the MCPR for this proposition. However, the correct citation would be to Section 30-15 of the MCPR which deals with termination due to RIF as opposed to Section 29-2 which deals with termination for a nondisciplinary act, such as failure to perform duties in a satisfactory manner.

MCFRCPR also provided that an employee could appeal a termination due to RIF to the Board.

Appellant asserts that Appellant was never told of Appellant's right to appeal to the Board. However, Appellant does acknowledge Appellant was informed by Chief A of Appellant's position elimination and counseled "to proceed immediately to protect yourself in this matter the best way possible for you!" Mr. B, then Vice-President of LFD, advised Appellant to contact Mr. C of the County's Office of Human Resources (OHR), with regard to Appellant's options. Appellant did go to OHR and elected to take a discontinued service retirement – the very option Appellant informed LFD on December 13, 2008, would be fine with Appellant. No where in Appellant's appeal or supporting documents does Appellant assert that Appellant asked OHR about other options but was not told of any. Moreover, the very regulations that Appellant relied on in April 2009 to assert that Appellant should have been given a Notice of Intent told Appellant of Appellant's appeal options and the time limit for exercising them.

Given the totality of circumstances in this case, the Board finds that Appellant had a duty to ascertain Appellant's options with regard to Appellant's position elimination when Appellant went to OHR but failed to do so. Appellant was content with receiving a discontinued service retirement – the very result Appellant had indicated to LFD would be fine with Appellant. It was not until some two months later, after Appellant learned that County employees facing an impending RIF in the next few months might get more than just a mere discontinued service retirement, that Appellant sought to assert that Appellant was not provided with all Appellant's rights. Appellant then waited another seven months before contacting the Board regarding Appellant's RIF. Accordingly, the Board finds that Appellant was not diligent in attempting to discover and exercise Appellant's appeal rights in a timely manner and is therefore dismissing Appellant's appeal based on a lack of timeliness.<sup>11</sup>

### **ORDER**

Based on the foregoing, the Board dismisses the instant appeal for lack of timeliness.

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<sup>11</sup> The Board notes that Appellant has requested as relief that Appellant be given an additional 5% that LFD thinks Appellant should have gotten. The Board would point out that Appellant's retirement amount is governed by statute and Appellant is only entitled to that amount set therein.

# **DISMISSAL FOR LACK OF JURISDICTION**

## **CASE NO. 10-09**

### **DISMISSAL OF APPEAL**

On December 17, 2009, Appellant filed an appeal with the Merit System Protection Board (Board or MSPB), challenging Appellant's rating of "Qualified" for the position of Manager III (Requisition ID 3829),<sup>1</sup> Manager Services Division, Department of Recreation. On December 23, 2009, the Office of Human Resources (OHR) notified the Board that Appellant's application had been reevaluated and Appellant had been deemed "Well Qualified" for the Manager III position. On December 28, 2009, the County moved to dismiss the appeal for lack of jurisdiction.

### **FINDINGS OF FACT**

Appellant, a Management and Budget Specialist with the County, applied on November 27, 2009, for the position of Manager III with the Department of Recreation. On December 7, 2009, Appellant received a computer-generated notification from OHR that Appellant had been rated "Qualified" for the Manager III position. The notification further informed Appellant that since it was expected that a selection would be made from the "Well Qualified" rating category, it was unlikely that Appellant would receive further consideration for the position.

Appellant immediately contacted Mr. B, a Human Resources Specialist in OHR, about Appellant's unhappiness concerning Appellant's rating. Appellant pointed out to Mr. B that Appellant had many years of budgeting and supervisory experience. Appellant also noted that Appellant had applied for a very similar Manager III position in Recreation a year ago and had been deemed "Well Qualified". Mr. B informed Appellant that he would contact Recreation and ask that it review Appellant's rating again. He informed Appellant he would notify Appellant after he received feedback from Recreation.

On December 9, 2009, Mr. B informed Appellant he had received a response from one of the subject matter raters on Appellant's application and was awaiting a response from the second rater. Appellant replied, indicating again that Appellant had been found "Well Qualified" for numerous Manager III positions.

On December 16, 2009, Appellant asked Mr. B the status of the reevaluation. Appellant also indicated Appellant wanted information regarding what the next steps would be for

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<sup>1</sup> Pursuant to its class specification, the Manager III position is part of the Management Leadership Service (MLS). See Office of Human Resources website, Class Specification available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RetrieveClassTitle1.cfm> The Management Leadership Service is defined in the personnel regulations as "[a] program for merit 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 . . . ." See Montgomery County Personnel Regulations, 2001, Section 1-36.

Appellant. Mr. B replied that he was still waiting for a response from the second rater, who had retired and relocated to Phoenix, and hoped to receive assistance from the Department of Recreation regarding the matter. Appellant thanked Mr. B and indicated that Appellant did not want the interview process for the position to occur before Appellant had an answer regarding Appellant's reevaluation. Appellant also indicated that Appellant would still like to know the exact steps an applicant can go through if he/she does not agree with a rating.

Mr. B responded on December 16, 2009, informing Appellant that Appellant could file an appeal with the Board, challenging the selection process. On December 17, 2009, Appellant filed this appeal with the Board.

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

- (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.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, and October 21, 2008), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

- 6-13. Appeals by applicants.** Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB 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.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February**

15, 2005, and October 21, 2008), Section 35, *Merit System Protection Board Appeals, Hearings, and Investigations*, which states in applicable part:

**35-2. Right of appeal to MSPB.**

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.

**ISSUE**

Does the Board have jurisdiction over this appeal?

**ANALYSIS AND CONCLUSIONS**

**The Board’s Jurisdiction Over An Appeal Is That Which Is Granted By Statute Or Regulation.**

The Board’s jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. *See, e.g., King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit System Protection Board’s jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep’t of Army*, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

**An Appellant Must Be Aggrieved To Challenge A Matter.**

Moreover, in order for an appellant to have standing to challenge a matter, the appellant must be “aggrieved”; i.e., the appellant must have actually suffered an injury as opposed to a merely speculative injury. *See, e.g., Emory v. Roanoke City School Board*, 432 F.3d 294, 298 (4<sup>th</sup> Cir. 2005) (citing to *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4<sup>th</sup> Cir. 2002)). Specifically, the appellant must have been personally adversely affected by the matter. *United States v. Hays*, 515 U.S. 737, 747 (1995). Prospective affect is merely speculative; something tangible must occur for an appellant to be aggrieved. *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d at 322.

**The Board Has Jurisdiction Over A Denial Of Employment; Based On OHR’s Notification, Appellant Has Not Yet Been Denied Employment And, Therefore, Is Not Aggrieved.**

The Code provides that an applicant may challenge the Chief Administrative Officer’s (CAO’s) decision regarding an application for employment. As the Board’s regulations make clear, basically an applicant may challenge any denial of employment. In the instant case, when Appellant initially was notified that Appellant had only been rated “Qualified”, Appellant was also told that based on this rating it was unlikely that Appellant would receive further consideration for the position. Thus, OHR effectively informed Appellant that Appellant had been denied employment in the Manager III position. Accordingly, when Appellant filed Appellant’s appeal with the Board, it determined it had jurisdiction over the appeal as Appellant

was aggrieved by Appellant's nonselection.

However, at Appellant's request, OHR sought a review of Appellant's rating. OHR subsequently informed Appellant that based on the reevaluation of Appellant's application, Appellant had been deemed "Well Qualified" for the position. Because of this change in ratings, Appellant has been placed on the "Eligible" list for the Manager III position. OHR has indicated that the position has not been filled yet and interviews for the position will begin in January.

Thus, based on OHR's actions, Appellant can no longer be deemed to have been denied employment in the position of Manager III and therefore, Appellant is no longer aggrieved.<sup>2</sup> Accordingly, the Board concludes that it currently lacks jurisdiction over Appellant's appeal. Therefore, it will dismiss Appellant's appeal without prejudice.<sup>3</sup>

### **ORDER**

On the basis of the above, the Board hereby dismisses Appellant's appeal without prejudice based on lack of jurisdiction.

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<sup>2</sup> Appellant has indicated Appellant's continued unhappiness over the rating process, which initially deemed Appellant to be "Qualified". However, whatever mistakes were made initially have been rectified in Appellant's favor so that absent jurisdiction over Appellant's appeal, the Board has no authority at this time to order any corrective relief.

Appellant has also indicated Appellant's unhappiness over the fact that it took OHR some time to notify Appellant of Appellant's right to appeal to the Board. The Board would point out to OHR that until such time as OHR notifies an applicant of their right to appeal to the Board, the time for filing an appeal with the Board will be deemed stayed by the Board.

<sup>3</sup> By dismissing the appeal without prejudice, the Board is ensuring that Appellant has the right to refile Appellant's appeal with the Board should Appellant ultimately not be selected for the Manager III position.

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

### **DISMISSAL OF APPEAL**

On December 22, 2009, Appellant filed an appeal with the Merit System Protection Board (Board or MSPB), challenging Appellant's rating of "Qualified" for the position of Manager III (Requisition ID 3829),<sup>1</sup> Department of Recreation. On December 23, 2009, the Office of Human Resources (OHR) notified the Board that Appellant's application had been reevaluated and Appellant had been deemed "Well Qualified" for the Manager III position. On December 28, 2009, the County moved to dismiss the appeal for lack of jurisdiction.

### **FINDINGS OF FACT**

Appellant, a Management and Budget Specialist with the County, applied for the position of Manager III with the Department of Recreation. On December 7, 2009, Appellant received a computer-generated notification from OHR that Appellant had been rated "Qualified" for the Manager III position. The notification further informed Appellant that since it was expected that a selection would be made from the "Well Qualified" rating category, it was unlikely that Appellant would receive further consideration for the position.

On December 22, 2009, Appellant filed this appeal with the Board.

### **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 Code, Chapter 2A, Administrative Procedures Act,**

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<sup>1</sup> Pursuant to its class specification, the Manager III position is part of the Management Leadership Service (MLS). See Office of Human Resources website, Class Specification available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RetrieveClassTitle1.cfm> The Management Leadership Service is defined in the personnel regulations as "[a] program for merit 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 . . . ." See Montgomery County Personnel Regulations, 2001, Section 1-36.



**Section 2A-7. Pre-hearing procedures**, which states in applicable part,

- (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.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, and October 21, 2008), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

- 6-13. Appeals by applicants.** Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB 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.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, and October 21, 2008), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations**, which states in applicable part:

**35-2. Right of appeal to MSPB.**

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.

**ISSUE**

Does the Board have jurisdiction over this appeal?

**ANALYSIS AND CONCLUSIONS**

**The Board's Jurisdiction Over An Appeal Is That Which Is Granted By Statute Or Regulation.**

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. *See, e.g., King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit System Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of Army*, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

**An Appellant Must Be Aggrieved To Challenge A Matter.**

Moreover, in order for an appellant to have standing to challenge a matter, the appellant must be “aggrieved”; i.e., the appellant must have actually suffered an injury as opposed to a merely speculative injury. See, e.g., Emory v. Roanoke City School Board, 432 F.3d 294, 298 (4<sup>th</sup> Cir. 2005) (citing to Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 320 (4<sup>th</sup> Cir. 2002)). Specifically, the appellant must have been personally adversely affected by the matter. United States v. Hays, 515 U.S. 737, 747 (1995). Prospective affect is merely speculative; something tangible must occur for an appellant to be aggrieved. Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d at 322.

**The Board Has Jurisdiction Over A Denial Of Employment; Based On OHR’s Notification, Appellant Has Not Yet Been Denied Employment And, Therefore, Is Not Aggrieved.**

The Code provides that an applicant may challenge the Chief Administrative Officer’s (CAO’s) decision regarding an application for employment. As the Board’s regulations make clear, basically an applicant may challenge any denial of employment. In the instant case, when Appellant initially was notified that Appellant had only been rated “Qualified”, the computer-generated notice also told Appellant that based on this rating it was unlikely that Appellant would receive further consideration for the position. Thus, OHR effectively informed Appellant that Appellant had been denied employment in the Manager III position. Accordingly, when Appellant filed Appellant’s appeal with the Board, it determined it had jurisdiction over the appeal as Appellant was aggrieved by Appellant’s nonselection.

However, OHR subsequently reevaluated Appellant’s application. OHR then informed Appellant that based on the reevaluation of Appellant’s application, Appellant had been deemed “Well Qualified” for the position. Because of this change in ratings, Appellant has been placed on the “Eligible” list for the Manager III position. OHR has indicated that the position has not been filled yet and interviews for the position will begin in January.

Thus, based on OHR’s actions, Appellant can no longer be deemed to have been denied employment in the position of Manager III and therefore, Appellant is no longer aggrieved. Accordingly, the Board concludes that it currently lacks jurisdiction over Appellant’s appeal. Therefore, it will dismiss Appellant’s appeal without prejudice.<sup>2</sup>

**ORDER**

On the basis of the above, the Board hereby dismisses Appellant’s appeal without prejudice based on lack of jurisdiction.

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<sup>2</sup> By dismissing the appeal without prejudice, the Board is ensuring that Appellant has the right to refile Appellant’s appeal with the Board should Appellant ultimately not be selected for the Manager III position.

## **CASE NO. 10-12**

### **DISMISSAL OF APPEAL**

On January 4, 2010, Appellant filed an appeal with the Merit System Protection Board (Board or MSPB), challenging the decision of the Montgomery County, Maryland, Department of Correction and Rehabilitation (DOCR) Director, to dismiss Appellant. On January 25, 2010, the County moved to dismiss the appeal for mootness, as the County had rescinded Appellant's dismissal. Appellant was provided with the opportunity to respond to the County's motion but failed to do so.

### **FINDINGS OF FACT**

Appellant has been employed as a Correctional Officer II at the Montgomery County Correctional Facility (MCCF). On December 21, 2009, Appellant received a Notice of Disciplinary Action – Dismissal (NODA) from the DOCR Director. See Appeal, Block 7b. The NODA informed Appellant that Appellant's dismissal would be effective January 29, 2009.<sup>1</sup>

Appellant filed an appeal with the Board and the Board notified the Office of the County Attorney of the appeal. The County Attorney's office responded to the appeal, asserting that it had rescinded Appellant's dismissal and reinstated Appellant to the position of Correctional Officer II. See County's Motion to Dismiss. The County included as an attachment to its Motion to Dismiss a copy of the PAF rescinding Appellant's dismissal. Id., Attachment A.

### **APPLICABLE LAWS**

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

- (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.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-12, Appeals of disciplinary actions; grievance procedures**, which states in applicable part,

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<sup>1</sup> In Appellant's appeal, Appellant asserts that Appellant was terminated effective December 29, 2009. See Appeal, Block 7d. This would appear to be the effective date of Appellant's dismissal, not January 29, 2009, as it is the date indicated on the Personnel Action Form (PAF) filed by the County as an attachment to its Motion. See County's Motion to Dismiss, Attachment A.

- (a) **Appeals of certain disciplinary actions.** Any merit system employee, excluding those in probationary status, who has been notified of impending removal, demotion or suspension shall be entitled to file an appeal to the Board, which shall cause a hearing to be scheduled without undue delay unless the appeal has been settled during the administrative review of the appeal by the Chief Administrative Officer or a designee.

### ISSUE

Does the Board have jurisdiction over this appeal?

### ANALYSIS AND CONCLUSIONS

#### **The Board's Jurisdiction Over An Appeal Is That Which Is Granted By Statute Or Regulation.**

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. *See, e.g., King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit System Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of Army*, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

#### **An Appellant Must Be Aggrieved To Challenge A Matter.**

Moreover, in order for an appellant to have standing to challenge a matter, the appellant must be "aggrieved"; i.e., the appellant must have actually suffered an injury as opposed to a merely speculative injury. *See, e.g., Emory v. Roanoke City School Board*, 432 F.3d 294, 298 (4<sup>th</sup> Cir. 2005) (citing to *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4<sup>th</sup> Cir. 2002)). Specifically, the appellant must have been personally adversely affected by the matter. *United States v. Hays*, 515 U.S. 737, 747 (1995). Prospective affect is merely speculative; something tangible must occur for an appellant to be aggrieved. *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d at 322.

#### **The Board Has Jurisdiction Over A Dismissal; However, Appellant's Dismissal Has Been Rescinded And, Therefore, Appellant Is Not Aggrieved.**

The Code provides that a merit system employee may challenge a removal action. In the instant case, Appellant was terminated on December 29, 2009. Thus, Appellant was aggrieved when Appellant initially filed Appellant's appeal with the Board. Since then, however, DOCR, on January 15, 2010, completed a PAF, rescinding Appellant's termination and reinstating Appellant as a Correctional Officer II. Thus, based on DOCR's actions, Appellant can no longer be deemed to be aggrieved. Accordingly, the Board concludes that it currently lacks jurisdiction over Appellant's appeal. Therefore, it will dismiss Appellant's appeal.

## ORDER

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

### CASE NO. 10-16

#### DECISION ON COUNTY'S MOTION TO DISMISS

On March 23, 2010, Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board) from the determination of Montgomery County, Maryland, Chief Administrative Officer (CAO) to deny a grievance filed by the Municipal and County Government Employees Organization (MCGEO) regarding the County's alleged failure to pay Appellant stand-by pay. The County filed a Motion to Dismiss the appeal, asserting that because Appellant is in a bargaining unit represented by MCGEO, the only appropriate forum for Appellant to pursue Appellant's grievance is through the grievance procedure set forth in Article 10 of the Collective Bargaining Agreement (CBA or contract). Appellant replied to the County's Motion to Dismiss, asserting that Appellant had sought to file Appellant's grievance under Section 34 of the Personnel Regulations, which would have permitted Appellant to appeal to the Board but was steered by the Office of Human Resources (OHR) to the Union to file a grievance on the matter.

#### FINDINGS OF FACT

Appellant is a Program Manager I, who manages parking security, for the Department of Transportation. As a Program Manager I, Appellant is part of the bargaining unit represented by MCGEO.<sup>1</sup> On September 19, 2009, Appellant wrote Appellant's supervisor requesting compensation for time spent in a stand-by status as the after hours point of contact for the County's Parking Security Contractor. Appellant sought compensation for the period October 18, 1999 to September 8, 2009, when Appellant was relieved by Appellant's supervisor from being the after hours point of contact. Appellant's supervisor replied to Appellant, on September 25, 2009, indicating Appellant's supervisor was willing to pay Appellant for any work done outside normal duty hours for the last thirty days prior to Appellant's supervisor relieving Appellant of any duties associated with being an after hours contact.

On October 5, 2009, Appellant contacted Ms. A, requesting information as to where Appellant could obtain a copy of the grievance form referenced in Section 34 of the Montgomery County Personnel Regulations (MCPR). Ms. A replied to Appellant, informing Appellant that pursuant to Section 34-2 of the MCPR, Appellant could not file a grievance under that section of the regulations but had to contact the Union, which would file a grievance on Appellant's behalf.

Appellant followed Ms. A's advice and on October 13, 2009, MCGEO filed a grievance

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<sup>1</sup> When Appellant first became a Program Manager I on October 18, 1999, OHR inadvertently excluded Appellant from bargaining unit status. This error was corrected in May 2006.

on Appellant's behalf. Subsequently, the grievance was appealed to the CAO, who issued a written decision on March 8, 2010, to the Union President, denying the grievance.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **County:**

- The subject of Appellant's grievance is stand-by pay. The subject of stand-by pay is covered in detail in Section 5.7 of the CBA.
- Pursuant to the CBA, a grievance is defined as a violation of any provision of the CBA.
- The grievance procedure in the CBA is the exclusive forum for addressing any grievance under the CBA.
- During the processing of Appellant's grievance, the Union never raised an assertion of disparate treatment. To the extent Appellant wishes to pursue an allegation of employment discrimination, Appellant must seek relief from the Human Relations Commission not the Board.

#### **Appellant:**

- Appellant wanted to file an administrative grievance under Section 34 of the MCPR but was told to contact the Union.
- For the first six and a half years of Appellant's service as a Program Manager I, Appellant was not covered by the CBA. Appellant should not be made to suffer because of a decision by OHR that Appellant's position should be part of the bargaining unit.
- The Department acted based on race when it removed Appellant from Appellant's stand-by duties while permitting a white coworker to take calls after hours.

### **APPLICABLE LAW, CONTRACTUAL PROVISIONS AND REGULATION**

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

A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to a term or condition of employment. . . . Grievances do not include the following: Classification allocations, except due process violations; failure to reemploy a probationary employee; or other employment matters for which another forum is available. . . .

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, Article 5, *Wages, Salary and Employee Compensation***, which states in applicable part:

#### **5.7 Stand By Pay**

- (a) If an employee is required to remain ready during off-duty hours to perform unscheduled and unanticipated work, the County must pay stand-by compensation to the employee at the rate of 15 percent of the employee's regular hourly salary or \$4.00 per hour, whichever is greater.

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, Article 10, Grievances**, which states in applicable part:

10.1 Definition

A grievance is any complaint by the certified employee organization arising out of a violation or misinterpretation of any provision of the collective bargaining [a]greement. . . .

10.3 Exclusivity of Forum

This procedure shall be the exclusive forum for the hearing of any grievance and the exclusive remedy for any grievance as defined above.

**Montgomery County Personnel Regulations, 2001, Section 34, Grievances** (as amended February 15, 2005 and October 21, 2008), which states in applicable part:

**34-2. Eligibility to file a grievance.**

- (c) A bargaining unit employee may not file a grievance under this section over a matter covered in the collective bargaining agreement, but may file a grievance under the grievance procedure in the appropriate collective bargaining agreement.

**Montgomery County Personnel Regulations, 2001, Section 35, Merit System Protection Board Appeals, Hearings, and Investigations** (as amended February 15, 2005 and October 21, 2008), which states in applicable part:

**35-2. Right of appeal to MSPB.**

- (d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

**ISSUE**

Does the Board have jurisdiction over the instant appeal?

## ANALYSIS AND CONCLUSIONS

### The Board's Jurisdiction Over An Appeal Is That Which Is Granted By Statute Or Regulation.

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. See, e.g., King v. Jerome, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit System Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); Monser v. Dep't of Army, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. Schwartz v. USPS, 68 M.S.P.R. 142, 144-45 (1995).

### The Board Lacks Jurisdiction Over A Grievance Which Is Covered By A Collective Bargaining Agreement.<sup>2</sup>

The Montgomery County Personnel Regulations clearly indicate that a bargaining unit employee may not file a grievance under the administrative grievance procedure but must instead file a grievance under the applicable collective bargaining agreement. The record of evidence establishes that Appellant is a member of the bargaining unit represented by MCGEO.<sup>3</sup> Therefore, Appellant was obligated to file under the CBA, whether Appellant wanted to or not, if Appellant wished to pursue Appellant's grievance. The MCGEO CBA makes it clear that the CBA grievance procedure is the exclusive forum for grievances. The CBA further defines a grievance to encompass any violation of a provision of the CBA. As noted above, stand-by pay is a provision of the CBA. Therefore, any grievance by Appellant concerning stand-by pay may only be pursued through the grievance procedures set forth in the CBA. Accordingly, the Board finds it lacks jurisdiction over the instant appeal.

## ORDER

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

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<sup>2</sup> As the MCPR establishes, the Board also lacks jurisdiction over an allegation of discrimination prohibited by Chapter 27 of the County Code. Chapter 27 prohibits discrimination based on race. See Montgomery County Code, Section 27-1.

<sup>3</sup> While Appellant argues that for six and one half years Appellant was not part of the bargaining unit, what matters is that Appellant was part of the bargaining unit at the time Appellant first raised Appellant's grievance to Appellant's immediate supervisor on September 1, 2009.



# **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 2010, the Board issued two Reconsideration Decisions with regard to a Final Decision. Also during FY 2010, in the course of proceedings in one case, the Board issued a decision on a request for reconsideration of a preliminary matter.

# **RECONSIDERATION DECISIONS**

## **CASE NO. 09-10**

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

On July 9, 2009, Appellant filed<sup>1</sup> a Request for Reconsideration, seeking to have the Merit System Protection Board (MSPB or Board) reconsider its Final Decision and Order dated June 25, 2009. In its Final Decision, the Board denied Appellant's appeal from Appellant's dismissal from the Fire Department (FD). On July 12, 2009, FD's counsel<sup>2</sup> submitted an Opposition to Appellant's Request for Reconsideration.

### **THE PARTIES' ARGUMENTS**

Appellant asserts in Appellant's reconsideration request that Appellant was denied the opportunity for progressive discipline based upon the seriousness of two incidents which were deemed to constitute a safety risk.<sup>3</sup> According to Appellant, Appellant only learned about these two incidents at the hearing on June 1, 2009. Had Appellant known beforehand, Appellant alleges Appellant would have been able to present additional witnesses and documents. Appellant also appears in the Request for Reconsideration to be submitting testimony regarding Appellant's version of each of the two incidents.

Furthermore, Appellant argues that there wasn't adequate time allocated at the hearing for many of Appellant's witnesses to testify. Appellant asserts that Mr. B was subpoenaed but failed to appear. Appellant states that Chief C was to testify that the Office of Human Resources asked FD not to terminate Appellant while Chief C was conducting an investigation into Appellant's hostile work environment complaint. Moreover, Appellant alleges that Captain D was going to testify that Captain D never asked for a transfer. In addition, Appellant states that Appellant's counsel was unable to question many of the persons that FD had on their witness list, as at the last minute FD did not call many of their listed witnesses. According to Appellant, this action by FD deprived Appellant of the opportunity to cross-examine witnesses that had information critical to Appellant's case.

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<sup>1</sup> Appellant noted in Appellant's Request that Appellant was no longer represented by counsel.

<sup>2</sup> As there was no indication in Appellant's Request for Reconsideration that Appellant had served FD's counsel, as required under the Board's Hearing Procedures, Board staff contacted FD's counsel to ascertain whether counsel had been served. Upon learning that Appellant had not served counsel, Board staff faxed FD's counsel a copy of the Request for Reconsideration.

<sup>3</sup> The two incidents to which Appellant cites are Appellant's failure to send out several thermal imagers for repair and Appellant's failure to order ALS supplies in a timely manner.

Finally Appellant asserts that Appellant's requested a copy of Appellant's hearing transcript from MSPB staff in order to prepare Appellant Request for Reconsideration but the person who could grant Appellant's request was out of town. Therefore, Appellant requests that Appellant be provided the opportunity to provide additional comments once Appellant receives the transcript.

FD opposes Appellant's Request for Reconsideration, asserting that pursuant to the Board's Hearing Procedures, Section XII, Appellant had 10 days from the date of the Final Decision to seek reconsideration. After that, the Board may only grant reconsideration in a case of fraud, mistake or irregularity. FD asserts there is no fraud, mistake or irregularity and therefore, Appellant's request is untimely filed.

FD asserts that even if Appellant only first learned of the two incidents Appellant cites in Appellant's Request for Reconsideration at the hearing, Appellant was represented by competent counsel during the hearing. As FD had to put its case on first, Appellant and Appellant's counsel were present during the testimony concerning the two incidents and had the ability to address the testimony offered. First, Appellant's counsel could have cross-examined the witnesses about the thermal imagers and the ALS supplies. Secondly, Appellant could have and should have offered testimony in opposition to the testimony offered by FD concerning these incidents. However, Appellant never provided testimony concerning these two issues during the hearing and Appellant and Appellant's counsel failed to request the case be held over to call additional witnesses to present testimony on these matters.

With regard to Appellant's argument that there was insufficient time allocated at the hearing for many of Appellant's witnesses to testify, FD notes that at the Prehearing Conference both parties' counsel<sup>4</sup> were advised that the Board was amenable to holding the hearing on multiple days if the parties needed the time. FD states that it has no knowledge that Mr. B was actually subpoenaed by Appellant. Finally, FD notes that in accordance with the Board's Hearing Procedures, both parties were aware that "[n]either party shall be bound to introduce witnesses or documentation contained in their Prehearing Submission at the hearing." Therefore, if Appellant believed certain FD witnesses were critical to Appellant's case, Appellant should have had them subpoenaed.

### **APPLICABLE LAW, REGULATION AND BOARD PROCEDURES**

**Montgomery County Code, Chapter 1, General Provisions, Article 3. The Meaning of Provisions of This Code, Section 1-301, Rules of interpretation**, which states in applicable part,

The following rules of interpretation apply to resolutions adopted by the Council and to laws enacted by the Council in legislative session:

- (3) *How to compute deadlines.* If the Code requires or allows a person to perform an

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<sup>4</sup> As FD notes in its Opposition, Appellant was not present during the Prehearing Conference but was represented by counsel.

act within a specific time period measured in days, the person must compute the deadline in the following manner:

- a. Count the day after the event as the first day of the period, if the period follows an event.
- b. Count the remaining number of days in the period . . . .
- c. Do not count the last day if it is a Saturday, Sunday, or legal holiday or if the office where the person must file a paper or perform an act is not open during the regular hours of that office.

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Article I. Appeals from Administrative Agencies, Section 2A-10, Decisions**, which states in applicable part,

- (f) *Rehearing and reconsideration.* Where otherwise permitted by law, any request for rehearing or reconsideration shall be filed within ten (10) days from a final decision. Thereafter, a rehearing or reconsideration may be approved only in the case of fraud, mistake or irregularity. . . . Any decision on a request for rehearing or reconsideration not granted within ten (10) days following receipt of the request therefore in accord with subsection (c) of this section shall be deemed denied.

**Montgomery County Fire and Rescue Corporation Personnel Regulations (originally adopted 8/25/88, reprinted 03/10/97), Section 30, Appeals and Hearings**, which states in applicable part,

30-19. Request for Reconsideration. Either party may request reconsideration of the Board's decision within 10 working days from date of receipt. Thereafter, the Board may not reconsider its decision, except in the case of fraud, mistake, or irregularity.

**MSPB HEARING PROCEDURES (revised August 2008)**, which states in applicable part,

### III. DISCOVERY

- Once the Board has issued a notice, acknowledging the receipt of an appeal, the parties may commence discovery. Unless otherwise ordered by the Board, the period for discovery ends on the date of the prehearing conference.
- Subject to the provisions of the Maryland State Public Information Act and at the requesting party's own expense, each party has the right to inspect and copy documents of the other party, where such discovery is not otherwise prohibited by law.
- The parties have the right to engage in other forms of discovery, including the use

of interrogatories and the taking of depositions.

- If there is a dispute over discovery, a party may file a motion with the Board to compel discovery.

#### VI. PREHEARING REQUIREMENTS

Neither party shall be bound to introduce witnesses or documentation contained in their Prehearing Submission at the hearing.

#### XII. REQUEST FOR RECONSIDERATION OR REHEARING OF A FINAL BOARD DECISION

- Either party may request reconsideration or rehearing of the Board's Final Decision within ten (10) days from the date of a Final Decision. Thereafter, the Board may only grant reconsideration or rehearing in cases of fraud, mistake or irregularity.
- Requests for reconsideration or rehearing shall be in writing and contain supporting reasons with copies served by hand-delivery or facsimile on all parties of record on the same date as served on the Board. The opposing party shall have five (5) days to file a response with the Board.

#### ISSUE

Has Appellant shown good cause as to why the Board should reconsider its Final Decision and Order of June 25, 2009?

#### ANALYSIS AND CONCLUSIONS

#### **Although Appellant's Request for Reconsideration Was Untimely Filed, the Board Will Address The Merits of Appellant's Request.**

Pursuant to Section 2A-10(f) of the Administrative Procedures Act (Chapter 2A of the Montgomery County Code), any request for reconsideration is to be filed within ten days from a final decision. The Board has ten days from receipt of the request to grant or deny the request. Section 1-301 of the Montgomery County Code indicates that when a deadline is set in the Code, the deadline is to be computed beginning with the day after the event as the first day of the period. Since the event in question is the Board's Final Decision, which was issued on June 25, 2009, June 26, 2009 is the first day of the ten-day period and July 5, 2009 is the last day of the ten day period. Section 1-301 of the Montgomery County Code indicates that if the last day falls on a Saturday or Sunday, it is not counted. Thus, pursuant to Section 2A-10(f), Appellant had until July 6, 2009 to file Appellant's Request for Reconsideration. After the ten day period has passed, the Board may only set aside its Final Decision upon a finding of "fraud, mistake or

irregularity”.<sup>5</sup> Nowhere in Appellant’s Request for Reconsideration does Appellant argue that there was fraud, mistake or irregularity.

The Board notes that Appellant, as a merit employee of Fire Department, was subject to the Montgomery County Fire and Rescue Corporation Personnel Regulations (MCFRCPR). MCFRCPR Section 30-19 provides that Appellant could request reconsideration of the Board’s decision within 10 working days from date of receipt. Where a regulation conflicts with the wording of a statute, the statute must prevail See, e.g., Mohasco Corporation v. Silver, 447 U.S. 807, 825 (1980). Thus, Appellant untimely filed Appellant’s Request for Reconsideration. The Board notes that the MCFRCPR was last published in 1997 and is woefully out of date. Because at the time of Appellant’s Request for Reconsideration Appellant was no longer represented by counsel, the Board has determined to address the merits of Appellant’s Request, notwithstanding the fact that it is untimely filed and could be dismissed on that basis alone.

**The Board Concludes that Appellant Has Failed To Show Good Cause Why the Board Should Reconsider Its Final Decision.**

Appellant argues that Appellant in essence was the victim of surprise as Appellant was unaware of the two incidents which the Board determined constituted safety risks created by Appellant’s failure to follow procedures. Appellant states that Appellant only learned of these incidents at the time of Appellant’s hearing.

As FD correctly points out, Appellant was represented by counsel. Pursuant to the

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<sup>5</sup> The Court of Appeals for Maryland has held that the terms “fraud, mistake, and irregularity,” a finding of any of which allows a court to revise a judgment once it has become final, are to be narrowly defined and strictly applied. See Tandra S. v. Tyrone W., 336 Md. 303, 313-15, 648 A.2d 439 (1994). To vacate a final judgment, extrinsic fraud must be shown. Id. at 315. Fraud is extrinsic if it prevents an adversarial trial. Hresko v. Hresko, 83 Md. App. 228, 232, 574 A.2d 24 (1990). As FD notes, Appellant was represented by counsel at the hearing, was allowed to present counsel’s legal arguments, call witnesses on Appellant’s behalf, cross-examine FD’s witnesses, and provide testimony in support of Appellant’s appeal. Thus, as there clearly was an adversarial trial in the instant case, Appellant is unable to show extrinsic fraud.

A “mistake” is defined as a jurisdictional mistake where the court has no power to enter the judgment. Tandra S., 336 Md. at 317 (citing Hamilos v. Hamilos, 297 Md. 99, 107, 465 A.2d 445 (1983)). In the instant case, Section 21-16 of the Montgomery County Code vests the Board with jurisdiction over appeals of local fire and rescue employees. Thus, Appellant cannot establish “mistake”.

Finally, the term “irregularity” connotes irregularity of process or procedure. Weitz v. MacKenzie, 273 Md. 628, 631, 331 A.2d 291 (1975). Appellant has cited no irregularity of process or procedure in the instant case nor could Appellant.

Board's Hearing Procedures,<sup>6</sup> both parties were entitled to engage in discovery prior to the hearing. If Appellant fails to take advantage of the procedures available to Appellant to obtain information through discovery, Appellant cannot later claim that Appellant was hindered in the presentation of Appellant's case. See, e.g., Head v. Office of Personnel Management, 53 M.S.P.R. 421, 422 (1992). In the instant case, there is no evidence that Appellant, through counsel, sought to engage in discovery such as depositions or interrogatories so as to determine the factual basis for FD's decision to dismiss Appellant. Accordingly, the Board concludes that Appellant failed to use due diligence in pursuing discovery and is responsible for the absence of evidence to support Appellant's claims. Id.

Mr. E of the Board of Directors, testified regarding the incident involving the thermal imagers. Significantly, during Appellant's counsel's cross-examination of Mr. E, counsel did not ask him a single question regarding the thermal imagers. See Hearing Transcript (H.T.) for June 1, 2009 at 86-114. Similarly, when Appellant testified on Appellant's own behalf, Appellant failed to address the issue of thermal imagers. At no time during the hearing, or before resting Appellant's case, did Appellant or Appellant's counsel indicate the need to call additional witnesses to offer testimony in opposition to Mr. E's testimony. Accordingly, the Board finds that Appellant failed to exercise due diligence in rebutting the testimony of Mr. E and cannot, after the fact, argue that Appellant was prejudiced.

Mr. F, a FD Director, was the witness who testified regarding the lack of ALS supplies and the fact that an engine with a medic would have had to be put out of service because of the low supplies. H.T. at 134-35. Significantly, when Appellant's counsel cross-examined Mr. F, counsel asked him only four questions, none of which dealt with the ALS supplies. According to Mr. F, he acted on the ALS supplies based on an email from Chief G. The Board notes that Chief G was a witness for Appellant. However, Appellant's counsel failed to ask Appellant's own witness, Chief G, a single question regarding the ALS email. Moreover, when Appellant testified, Appellant's counsel never asked Appellant a question about the ALS matter. Accordingly, the Board concludes that Appellant had ample opportunity during the course of Appellant's hearing to dispute Mr. F's testimony but failed to do so.

The Board rejects Appellant's argument that there was insufficient time at the hearing for Appellant's witnesses to testify. As FD points out, during the Prehearing Conference, which Appellant did not attend but Appellant's counsel did, the Board made it clear that it was amenable to holding the hearing on multiple days if the parties needed the time.

Appellant alleges that Appellant's witness, Mr. B, was subpoenaed but failed to appear. This is simply untrue. During the Prehearing Conference, the parties were asked whether there were witnesses that could be eliminated as their testimony would only be repetitive of another witness' testimony. See Decision on Appellant's Request for Additional Witnesses and Appellee's Request for Additional Exhibits at 2. Appellant, through counsel, agreed to limit

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<sup>6</sup> A copy of the Board's Hearing Procedures was provided to both parties by letter, dated February 24, 2009, from the Board's Executive Director.

Appellant's witnesses to a total of seven, including Appellant.<sup>7</sup> Appellant's counsel specifically agreed to eliminate Mr. B as a witness at the Prehearing Conference. *Id.* at 3. Subsequently, by email dated May 26, 2009, Appellant's counsel sought subpoenas from the Board for witnesses not approved during the Prehearing Conference, including Mr. B. FD filed an opposition to Appellant's counsel's request to add additional witnesses, including Mr. B, arguing that it would be prejudiced by the addition of witnesses at such a late date. *Id.* The Board agreed with FD and refused to issue subpoenas for Appellant's additional witnesses, including Mr. B.

Appellant notes that Appellant's list of witnesses included Chief C. As previously noted, this was one of the witnesses approved for Appellant by the Board at the Prehearing Conference. Subsequently, when Appellant's counsel was asked by Board staff to provide a final list of witnesses who needed to be subpoenaed by the Board, Appellant's counsel did not include Chief C on any of counsel's various lists.<sup>8</sup> As noted in the Board's Hearing Procedures, a party is not bound to call a witness listed in its Prehearing Submission. Thus, the failure of Chief C to testify at the hearing was based on the decision of Appellant and Appellant's counsel not on any lack of time for witnesses to testify.

Appellant also complains that Captain D was going to testify but did not. Captain D was approved as a witness for Appellant at the Prehearing Conference. On May 27, 2009, the Board's Executive Director issued and hand-delivered to Appellant's counsel's office a subpoena for Captain D. *See Decision on Appellant's Request for Additional Witnesses and Appellee's Request for Additional Exhibits at 4-5 & n.11.* The Board is unaware of whether Appellant's counsel ever served the subpoena on Captain D.

Appellant also argues that Appellant was unable to question many of the witnesses listed by FD in its Prehearing Submission, as FD chose not to call them at the hearing. As FD correctly notes, the Board's Hearing Procedures do not require a witness listed in a Prehearing Submission to be called at the hearing. Therefore, if a witness is crucial to a party's case, it is incumbent upon the party to list the witness and request the witness be subpoenaed.

Finally, Appellant alleges that Appellant requested from the Board a copy of Appellant's hearing transcript but was informed that the person who could provide a copy was out of town and unable to do so before the deadline for submitting Appellant's Request for Reconsideration.

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<sup>7</sup> The witnesses for Appellant approved by the Board were: Mr. H; Mr. D; Chief C; Chief G; Ms. J; and Mr. I.

<sup>8</sup> As noted in the Board's Decision on Appellant's Request for Additional Witnesses and Appellee's Request for Additional Exhibits, Appellant's counsel sent a series of three emails to the Board, as well as a letter, regarding which witnesses she wanted to subpoena. The list of witnesses in Appellant's counsel's emails did not correspond to the witnesses approved by the Board during the Prehearing Conference and the lists in the various emails differed in some respects from the list contained in Appellant's counsel's letter regarding the matter. *See Decision on Appellant's Request for Additional Witnesses and Appellee's Request for Additional Exhibits at 4.*



This is simply not accurate. Appellant telephoned Board staff who indicated that Appellant had to put Appellant's request in writing for a copy of Appellant's transcript and would have to pay for the copy. Appellant was informed Appellant's request would have to be approved by the Board staff member who was out of town but was told that Appellant's request would be forwarded to the staff member. Appellant was provided with the Board's fax number so that Appellant could fax Appellant's written request. However, Appellant failed to follow up. Thus, the lack of a copy of the transcript to aid Appellant in preparing Appellant's Request for Reconsideration is due solely to Appellant's inaction.

### **ORDER**

On the basis of the above, the Board denies Appellant's Request for Reconsideration.

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

### **DECISION ON APPELLANTS' REQUEST FOR RECONSIDERATION**

On May 10, 2010, Appellants' counsel, on behalf of Mr. L,<sup>1</sup> filed a Petition for Re-Instatement of Mr. L (Reconsideration Request),<sup>2</sup> seeking to have the Merit System Protection Board (MSPB or Board) reconsider a portion of its Supplemental Final Decision and Order dated April 26, 2010. In its Supplemental Final Decision, the Board dismissed Mr. L as a party in this case. On May 11, 2010, the County's counsel submitted the County's Response to Mr. L's Petition for Re-Instatement (County's Response), asserting that the Board was correct to dismiss Mr. L as a party.

### **THE PARTIES' ARGUMENTS**

Appellants' counsel asserts in Appellants' Reconsideration Request that Mr. L retained counsel at the same time the Appellants in this matter retained counsel and was included by counsel in the list of parties to the matter when it went on appeal before the Court of Special Appeals. Counsel also asserts that Mr. L was considered by the County as a party to the matter. Therefore, Appellants' counsel argues that under the doctrine of substantial compliance, Mr. L should be "reinstated" as an Appellant in this matter.

The County argues that Appellant, by Appellant's own admission,<sup>3</sup> failed to exhaust

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<sup>1</sup> The Board, in its Supplemental Final Decision, found that Mr. L was not a party to this matter as he failed to exhaust his administrative remedies. See Supplemental Final Decision and Order, MSPB Case No. 06-03 at 8.

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

<sup>3</sup> The County points to one of the attachments to the Reconsideration Request, Attachment (Attach.) D, wherein Mr. T (who at the time represented Appellants in this case)

Appellant's administrative remedies.

### **FINDINGS OF FACT**

As the record of evidence indicates, on July 5, 2005, Mr. T, then counsel for Appellants, filed eleven individual grievances with the Director, Office of Human Resources (OHR), Montgomery County, concerning pay inequity on behalf of the following Department of Correction and Rehabilitation Lieutenants: Mr. A; Mr. B; Mr. C; Mr. D; Mr. E; Mr. F; Mr. G; Mr. H; Mr. I; Mr. J; and Mr. K. See Tabs A-7, A-7(1)-A-7(11).<sup>4</sup> By memorandum dated August 8, 2005, counsel for the eleven grievants was informed by the OHR Director, that the eleven grievances were being consolidated with three additional grievances concerning pay inequity filed pro se by Grievants Q, R, and S. Tab A-5. The fourteen consolidated grievances were to be captioned as Mr. A, et al. Id.

On February 22, 2006, Mr. T filed an appeal with the Board concerning his eleven clients' grievances. See Tab A. Included in the appeal were the eleven individual grievance forms filed with OHR. See Tabs A-7, A-7(1)-A-7(11).

On May 25, 2006, Appellants filed an Amended Grievance Statement with the Board. The Amended Grievance Statement indicated that "Lieutenants A, B, C, D, E, F, G, H, I, J, and K are employees of Montgomery County." Tab L, Section 1.

On August 1, 2006, the Board received a package of pleadings from Mr. T on behalf of the eleven grievants,<sup>5</sup> see Tabs AO-1-AO-4(3), including one entitled "Residual Issues". Significantly, in the Residual Issues pleading, Mr. T stated the following:

This Grievance was taken on July 5, 2005 by eleven of the approximately 22 then-incumbent Lieutenants in DCR. Lieutenants M, N and O were not participants with Appellants in the filing of their Grievances.\* Proof can be presented, if requested, to prove that the remaining incumbent Lieutenants were aware of the Grievance and deliberately eschewed participation. Needless to say, they did not hire [Mr. T's Firm] nor pay into Appellants' retainer fund at any time.\*\* Their time for filing a grievance on this subject has apparently expired, forever barring recovery, if any, for the compression events here complained of.

Appellants are aware that restriction of any award under this Grievance is

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specifically tells Mr. L he is not part of the grievance filed by Mr. T on behalf of the Lieutenants.

<sup>4</sup> Because of the numerous pleadings filed in this case, the pleadings have been indexed for ease of reference. Reference to a particular Tab indicates the location of the pleading in the Pleadings File.

<sup>5</sup> It would appear that Mr. T sent Appellants and Mr. L a copy of these pleadings. See Reconsideration Request, Attach. C. This would explain why Mr. T subsequently wrote his Memorandum of Understanding to Mr. L, dated August 24, 2006, concerning Mr. L's inclusion in an amended grievance. See Reconsideration Request, Attach. D.

necessarily limited to the original 11 Appellants. They are also aware, however, that if Appellants recover, the County may choose to equalize any award throughout all 22 Lieutenants. If this happens, the original 11 Appellants will have been the only Lieutenants, not only to have paid the venture capital to finance the Grievance, but the only ones to suffer subtle retaliation from the Department for having done so.

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\* Director, OHR, consolidated their grievances with Appellants; however, their date of filing is unknown. *See*, Exhibit 3.

\*\* The Appellants kept open their invitation for other Lieutenants to join until approximately July 1. One other incumbent Lieutenant (Mr. L) joined recently by contributing to date.

Tab AO-4 at 4 (footnotes in the original).

On August 24, 2006, Mr. T wrote a memorandum to Mr. L. Mr. T informed Mr. L that

I was not given your name for inclusion with the 15 Lieutenants who filed the grievance. I do not believe this will be critical[;] also, I would suspect that there would be several more Lieutenants wishing to join in the new grievance. I suggest that as soon as everyone is satisfied that they are “in” or “out,” I file an Amended Grievance indicating that these Grievants had indicated inclusion but had inadvertently been omitted in the transmittal of that information to my office. . . . I should add for your comfort, that [in] situations wherein an award of this type is made, it has been my experience that the County will come back and make the award uniform throughout the class. Accordingly, I do not believe it will be a critical omission even if an amendment is not accepted.

Reconsideration Request, Attach. D. No amended grievance was filed with the Board by Mr. T after the issuance of this memorandum to Mr. L. Instead, the Board issued its Final Decision on September 13, 2006.

### **APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 33, Merit System Law**, which states in applicable part,

#### **Section 33-12. Appeals of disciplinary actions; grievance procedures.**

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

#### **Section 33-13. Appeal procedures.**

The County Executive shall prescribe by personnel regulations, adopted under method (1) of section 2-A-15 of this Code, procedures covering appeals,

including grievances which shall include the time limit for filing such appeal . . . .

**Section 33-15. Judicial review and enforcement.**

- (a) Any aggrieved merit system employee, or applicant, or the Chief Administrative Officer may obtain judicial review of a Merit System Protection Board order or decision from the circuit court for the county in the manner prescribed under chapter 1100, subtitle B of the Maryland Rules.

**Montgomery County Personnel Regulations (MCPR), 2001, 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:
  - (3) receives a written final decision on a grievance; . . .<sup>6</sup>

**ISSUE**

Have Appellants shown good cause as to why the Board should reconsider its Supplemental Final Decision and Order of April 26, 2010?

**ANALYSIS AND CONCLUSIONS**

**The Board Concludes That Appellants Have Failed To Show Good Cause As To Why The Board Should Reconsider Its Final Decision.**

Appellants’ counsel makes several arguments on behalf of why Mr. L should be “reinstated” as part of this case, asserting that the Board’s holding “came as a complete shock to Lieutenant L.” Reconsideration Request at 1. This assertion is completely undermined by the facts in this case, as set forth above. Specifically, Mr. L was aware, based on Mr. T’s Residual Issues pleading, that any remedy in this case was limited to the eleven original grievants, which did not include him. See Tab AO at 4.

Counsel points to the fact that Mr. L was included in a settlement effort made by the County. The mere inclusion of Mr. L, along with other non-party Lieutenants to this matter, in a settlement offer made by the County is totally irrelevant to the issue of whether Mr. L exhausted

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<sup>6</sup> If the Chief Administrative Officer (CAO) does not issue a response to a grievance within the time limits specified by the grievance procedure, the grievant may file an appeal directly with the Board, without a final decision being issued. MCPR, 2001, Section 34-9(3) & (4). This is what occurred in this case.

his administrative remedies.

Counsel also asserts that on “March 31, 2006, Lieutenant L and eight (8) other Lieutenants retained Mr. T to represent them in this matter.” This assertion is completely undermined by the exhibit Appellants’ counsel filed in connection with his Petition for Attorney’s Fees (Fee Petition). Specifically, Attachment C to the Fee Petition is a document entitled “Mr. [T’s Firm’s] Client Ledger”. The ledger shows billings and payments in connection with this case over the period 2005-2006.<sup>7</sup> The ledger quite clearly shows that Mr. A, Mr. B, Mr. C, Mr. D, Mr. E, Mr. F, Mr. G, Mr. H, Mr. I, Mr. J, and Mr. K all made attorney fee payments to Mr. T in 2005. Mr. L’s name does not appear on the Client Ledger until sometime after May 22, 2006.<sup>8</sup>

Significantly, Appellants’ counsel acknowledges that Mr. L was informed by Appellants’ previous counsel, Mr. T, that he was not included in the group of Lieutenants on whose behalf Mr. T filed a grievance concerning pay compression. See Reconsideration Request, Attach. D. While it is true that Mr. T sought to assure Mr. L that his failure to be included as a grievant was not a critical omission, Mr. T did indicate to Mr. L that an attempt to amend the grievance so as to include Mr. L might not be accepted. Mr. T was compelled to tell Mr. L this, given the statements he had made to the Board in the Residual Issues pleading.

It appears that Mr. L was included as one of the addressees in a letter conveying a package of pleadings submitted to the Board by Mr. T. Reconsideration Request, Attach. C. What is more significant, however, is that the enclosed package of pleadings provided to the addressees most likely included the Residual Issues pleading, which was dated July 31, 2006 and was received by the Board as part of a package of pleadings on August 1, 2006.<sup>9</sup> This pleading made it crystal clear that Mr. L was not part of this case. Tab AO at 4.

Appellants’ counsel asserts that the letter from Mr. T, dated July 21, 2008, contained the names of eleven Lieutenants, including Mr. L. Upon receiving this letter, counsel states that Mr. L assumed he was a party in this matter. Likewise, counsel states that upon receiving this

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<sup>7</sup> It is impossible to tell from the ledger what the specific date of an entry is. Only the year of the service or payment, and in some cases the day of the payment is legible.

<sup>8</sup> Specifically, on page six of the ledger, before the appearance of Mr. L’s name, there is an entry for “22/2006” indicating a letter was drafted to the County’s counsel concerning the “inadequacy of 5/19 documents”. Fee Petition, Attach. C. Having reviewed the pleadings in this case, the Board notes that Mr. T sent Ms. U, of the County Attorney’s office, a letter, dated 05/22/2006, concerning missing documents and incorrect information provided by Ms. U to Mr. T on 05/19/2006. See Tab L-D.

<sup>9</sup> The Board firmly believes that this pleading was in the package conveyed to the addressees. The Board’s belief is based on the Pleadings Index in this matter, which demonstrates that prior to receiving this package of pleadings from Mr. T on August 1, 2006, the last communication received from Mr. T was a letter, dated July 17, 2006. See Tab AJ. After receipt of the package of pleadings from Mr. T, the Pleadings Index indicates the next communication received from Mr. T was on August 14, 2006. See Tab AQ.

document, he believed that the listing of the eleven Lieutenants on Mr. T's letter represented the parties to the appeal before the Court of Special Appeals.<sup>10</sup> While Appellants' counsel attempts to excuse his obvious negligence in this case by asserting that he had no reason to question Mr. T's listing of the parties to this case, the Board finds that counsel had a responsibility to review the entire record in this matter as a part of due diligence and clearly failed to do so.

Appellants' counsel asserts that the County considered Mr. L a party to this case. As the County accurately points out in its Response, a misstatement by the County is insufficient to waive the requirement that Mr. L exhaust his administrative remedies.

Finally, Appellants' counsel attempts to argue that because the Board denied the County's Motion to Dismiss in its entirety, which sought to dismiss the case against the six other Lieutenants who did not join the appeal to the Court of Special Appeals,<sup>11</sup> somehow this constitutes "the clear implication that all 14 Lieutenants remain parties to this action. This is squarely inconsistent with its holding that Lieutenant L is not a proper party to this matter." Reconsideration Request at 2. This argument is totally unavailing. First, not all of the 14 original Lieutenants who filed a grievance in this matter in July 2005, filed with the Board. Only 11 Lieutenants, represented by Mr. T, filed with the Board. More importantly, the Board made it unequivocally clear on page one of its Supplemental Final Decision and Order which of the Lieutenants were still before the Board after the remand of the case to the Board from the courts.

Under the Montgomery County Code and implementing personnel regulations, issued by the County Executive and approved by the County Council, an employee is required to file a grievance with the County and appeal any adverse decision to this Board before invoking judicial remedies. In the instant case, as conceded by Mr. T in August 2006, see Tab AO at 4; Reconsideration Request, Attach. D, it is clear that Mr. L never filed a grievance with the County in July 2005, much less appealed to the Board. Thus, the Board finds that Mr. L failed to exhaust his administrative remedies. Public Service Commission v. Wilson, 389 Md. 27, 89 (2005) (quoting Furnitureland South, Inc. v. Comptroller, 364 Md. 126, 133 (2001)).

Appellants' counsel asserts that the doctrine of substantial compliance should be invoked,

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<sup>10</sup> Missing from the addressees on this letter is Mr. D. Mr. D left County employment in the spring of 2007. See MSPB Case No. 07-13 (2007). Had counsel exercised due diligence and compared the various letters sent by Mr. T, counsel would have readily seen the omission. Cf. Reconsideration Request, Attach. C with Attach. E. Alternatively, counsel could have consulted the very Board Decision he was appealing on behalf of Appellants, as the Final Decision set forth on page three in footnote five the names of the eleven grievants. See Tab AS.

<sup>11</sup> Actually it was the County's Supplement Motion to Dismiss, which sought to dismiss six of the original Lieutenant grievants. The Board, in denying the County's Motion to Dismiss, made clear that its denial was based on its disagreement with the County's assertion in its Motion to Dismiss that it had made the Appellants whole. Supplemental Final Decision and Order at 9. There was no need to address the Supplement Motion to Dismiss, as the Board made it clear on the first page of its Supplemental Final Decision that there were only seven grievants still before the Board.

as Mr. L “responsibly took every step necessary, from the very beginning, to be a party to this matter.” Reconsideration Request at 3. This assertion is undermined by Mr. T’s statement to the Board that “[p]roof can be presented, if requested, to prove that the remaining incumbent Lieutenants were aware of the Grievance and deliberately eschewed participation.” Tab AO at 4. It is clear from the record of evidence in this case that Mr. L was never one of the original 11 grievants represented by Mr. T who filed grievances on this matter in July 2005. Indeed, Mr. L never filed a grievance at all. The Maryland Court of Appeals has held that where there is an outright failure to file a written claim in a timely manner, the doctrine of substantial compliance is not applicable. Simpson v. Moore, 323 Md. 215, 228-29, 592 A.2d 1090 (1991).

### **ORDER**

On the basis of the above, the Board denies Appellants’ Request for Reconsideration.

## **CASE NO. 10-04**

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

On November 2, 2009, Appellant filed a Motion for Reconsideration of the Merit System Protection Board’s (MSPB’s or Board’s) Decision on the County’s Motions for Protective Orders, which sought to quash Interrogatories, Requests for Production of Documents and Notices of Depositions served by Appellant. On November 3, 2009, the County filed a brief Opposition to Appellant’s Request for Reconsideration (Opposition). In its Decision, the Board denied the County’s Motions for Protective Orders and ordered the County to answer certain of Appellant’s Interrogatories, provide documents in response to certain of Appellant’s Requests for Production, and order the County to have all six of the deponents requested by Appellant appear for deposition. The Board denied the rest of Appellant’s discovery requests.

### **BACKGROUND**

This appeal involves the dismissal of Appellant from Appellant’s position as a Correction Supervisor-Sergeant, with the Department of Correction and Rehabilitation (DOCR). According to the Statement of Charges, on the evening of February 11, 2009, Appellant’s car was stopped by the police and Appellant was found to be in the company of Ms. B,<sup>1</sup> a former female inmate of DOCR. See County Exhibit 1 at 1.<sup>2</sup> Appellant was subsequently placed on administrative leave with pay by DOCR while it launched an investigation into Appellant’s conduct. Appellant was subsequently charged with making false statements during the DOCR investigation, having

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<sup>1</sup> According to the Statement of Charges, the County police were conducting an undercover surveillance of Ms. B, who was wanted in connection with a felony bank robbery that occurred in the County. During the stop, Appellant was questioned and permitted to leave the scene, and Ms. B was taken into custody. See C. Ex. 1 at 2-3.

<sup>2</sup> The County filed its Prehearing Submission, along with fifty five proposed exhibits, with the Board on September 15, 2009. Appellant was granted an extension of time to file Appellant’s Prehearing Submission, so as to permit the parties to engage in discovery.

a relationship with a former inmate, contacting Ms. B by phone while Appellant was on duty<sup>3</sup> and wearing a part of the DOCR uniform while being in contact with a former inmate. Id. at 7-9.

### **APPLICABLE LAW AND REGULATION**

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

- (b) **Discovery.** Subject to the provisions of the state public information law:
- (1) Any party shall have the right to review at reasonable hours and locations and to copy at its own expense documents, statements or other investigative reports or portions thereof pertaining to the charging document to the extent that they will be relied upon at the hearing or to question the charging party or agency personnel at reasonable times on matters relevant to the appeal, provided such discovery is not otherwise precluded by law.
  - (3) The provisions contained herein shall not infringe upon any attorney-client privilege and shall not include the work product of counsel to any party to the proceedings.
  - (4) Where it appears that a party possesses information or evidence necessary or helpful in developing a complete factual picture of a case, a hearing authority may order such party to answer interrogatories or submit itself or its witnesses to depositions upon its own motion or for good cause shown by any other party. . . .

### **ANALYSIS AND CONCLUSIONS**

#### **A. Appellant's Interrogatory Requests**

**Interrogatory No. 6:** Please identify each and every communication between any employee of the Employer and any representative of the Municipal and County Government Employees Organization, including but not limited to Ms. S, Field Representative, Mr. T, Steward, Mr. U, Steward, and Ms. Y, Steward, regarding: a) the facts and circumstances contained in the June 16, 2009 Statement of Charges and the July 15, 2009 Notice of Disciplinary Action; and b) Appellant's alternative dispute resolution hearing and Appellant's decision to forgo union representation. For each communication state: the date on which the communication occurred, whether any other person(s) were present and the nature and content of the communication.

Appellant argues that Appellant needs the information sought in this interrogatory, as Appellant's due process rights were violated when Appellant was denied a copy of the material

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<sup>3</sup> According to the Statement of Charges, some of these phone calls exceeded the time in which a security round should have been conducted. C. Ex. 1 at 8.



relied upon to support the Statement of Charges. However, pursuant to the Supreme Court's decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985), Appellant's due process rights consist of the right to notice of the charges against Appellant and an opportunity to respond. See also Stone v. FDIC, 179 F.3d 1368, 1375, 1377-78 (Fed. Cir. 1999) (noting the Due Process Clause only provides the minimum process to which a public employee is entitled prior to removal. Employees may also be entitled to other procedural protections afforded by statute, regulation or agency procedure). The Board notes that the County's personnel regulations, unlike the Federal Government's personnel regulations, do not require management provide an employee with the right to review all the material relied upon in proposing a disciplinary action. Accordingly, Appellant has failed to show good cause as to why this interrogatory is relevant.

**Interrogatory No. 7:** Please identify any and all grievances filed by Appellant or on Appellant's behalf by a representative of the Montgomery County Government Employees Organization (MCGGEO) from January 1, 2005 to the present. For each grievance identified, please provide: 1) a description of the substance of the grievance; 2) a listing of any County officials named in the grievance; and 3) the status of the grievance including any resolution reached.

Appellant has failed to show good cause as to why this interrogatory is relevant.

**Interrogatory No. 9:** For each disciplinary or non-disciplinary action identified in Interrogatory No. 8, please state whether the employee was permitted to remain in his/her position pending adjudication of any charges against him/her, reassigned to another position, or placed on administrative leave.

Although Appellant still has failed to show good cause as to why this interrogatory is relevant, as the County has indicated it is willing to respond, the Board will permit the County to respond.

**Interrogatory No. 11:** Please identify each and every communication authored, transmitted, initiated or otherwise communicated either orally or in writing (including any electronic data as defined above) by Agency employees including but not limited to the Warden, Chief Investigator D, the Director, and Field Representative S regarding Appellant's performance and/or the facts and circumstances which led to either the June 16, 2009 Statement of Charges and the July 15, 2009 Notice of Disciplinary Action. For each person identified in response to this interrogatory, please state: 1) when the communication occurred; 2) whether any other individual(s) were present and 3) the nature and substance of the communication.

As the Board has already ordered the County to provide Appellant with all information relied upon to take disciplinary action against Appellant, Appellant has failed to show good cause as to why this interrogatory is relevant.

**Interrogatory No. 17:** Please identify any and all investigations, interview or other inquiry conducted into the facts or circumstances described in the June 16, 2009 Statement of Charges and July 15, 2009 Notice of Disciplinary Action conducted after July 15, 2009. For each investigation, interview or other inquiry, please identify: a) the reason for the additional

investigation, interview or other inquiry; b) the individual(s) responsible for conducting such an investigation, interview, or inquiry; c) the results of any such investigation, interview or inquiry; and d) whether Appellant was offered any opportunity prior to the filing of the instant appeal to review or respond to any information obtained.

Appellant has failed to show good cause as to why this interrogatory is relevant.

**B. Appellant's Document Requests**

**Request No. 10: (*With respect to the Appellant*)<sup>4</sup>**

- b. Any evidence of an exculpatory nature or which tends to negate the alleged "guilt" of the appellant.

Appellant has failed to show good cause as to why this interrogatory is relevant.

- c. Any evidence which would tend to aggravate or mitigate the degree of the alleged offenses.

Appellant has failed to show good cause as to why this interrogatory is relevant.

- e. Whether the appellant's conversations or premises have been subject to electronic or other surveillance. If so, the appellant requests copies of any warrants issued, used or unused.

Appellant has failed to show good cause as to why this interrogatory is relevant.

**Request No. 12: (*With respect to documentary reports*)**

- a. A complete copy of any and all investigations or laboratory reports, including any internal agency documents and data made in connection with this investigation prepared by any law enforcement agency, including copies of all attachments. This request includes all internal forms/documents, including witness reliability forms, internal data sheets, and other relevant forms and documents. The appellant further requests to be informed if any of the requested documents do not exist in the present case. In addition, we request to be informed specifically which documents fall into this category. This request also includes, but is not limited to, the following relevant documentation if applicable:

- (1) Complaint Initiation Form (including reverse and continuation sheets, if any);
- (2) Internal Data Pages;
- (3) Interview Logs;
- (4) Interview Records;
- (5) Source Dossier and any forms(s) related to any Confidential Informant(s);
- (6) Informants' Notes;
- (7) Informal Source Files;

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<sup>4</sup> Appellant has only asked the Board to reconsider its decision denying Request Nos. 10(b), 10(c), and 10(e). See Appellant's Request for Reconsideration at 6.

- (8) Any forms(s)/documents detailing any Disbursement from Confidential Funds;
- (9) Developmental Files;
- (10) Any Substantive Investigations Record Check Summary;
- (11) Any form(s) related to Consent for Search and Seizure;
- (12) Internal Communications Staff Summary Sheets, and E-Mail and/or electrical medium (message) documents used to brief, respond and/or request investigative activities in the investigation.
- (13) Results of any MCIC, DCII, LAC and Security Police 110 records checks;
- (14) All records reflecting the chain of custody on any evidence seized and/or tested; and
- (15) All Agent or Investigator notes.

Appellant has failed to show good cause as to why this request is relevant.

- b. Inspection and copies of all personal and business notes, memoranda and records, including all internal agency documents and data, kept by all agents, investigators, or witnesses, not formally made part of the reports referred to above. In addition to other uses, said papers are to be used prior to cross-examinations of said persons. We further request that all such notes and those made in the future be preserved and not destroyed and that the appropriate parties be directed to preserve the same. The appellant further requests to be given access to all classified notes and records.

Appellant has failed to show good cause as to why this request is relevant.

- c. The names and phone numbers of all investigators who have participated or are presently participating in the investigation of this case. In addition, the appellant requests copies of the following regarding each investigator involved in this case:

- (1) Any "On-the-Job" Training Record;
- (2) Training Test Score Results;
- (3) Evidence of Credentials Suspended or Revoked
- (4) Evidence of being a Subject or Suspect in any Internal Affairs Investigations, whether related to this matter or not;
- (5) Evidence of any adverse administrative or disciplinary actions, whether related to this matter or law enforcement activity or not.

Appellant has failed to show good cause as to why this request is relevant.

- d. A copy of any and all records of counseling from complaining witnesses, specifically including any and all records of formal and/or informal counseling that may exist including the decision making authorities.

Appellant has failed to show good cause as to why this request is relevant.

**Request No. 14: (With respect to physical evidence)**

- a. Disclosure of the existence of, and the opportunity to listen to any and all tapes made by and/or between any and all parties involved in this case.

The Board notes that the County's counsel has proffered that no videotaping or audio taping occurred during the police surveillance of Appellant or thereafter. Accordingly, Appellant has failed to show good cause as to why this request is relevant.

- b. Digital colored copies of any photographs taken of the alleged crime scene, if there is one, or any other photographs taken pursuant to this investigation.

Appellant has failed to show good cause as to why this request is relevant.

**Request No. 23:** Any and all documents or communications (including any electronic data as defined above) identified in response to Interrogatory No. 11.

Appellant has failed to show good cause as to why this request is relevant.

**Request No. 29:** Any and all documents or communications (including any electronic data as defined above) regarding, discussing or related to the processing of Appellant's termination including Appellant's final payroll timesheet.

The Board will order the County to produce Appellant's final payroll timesheet. The rest of this request is denied, as Appellant has failed to show good cause as to why this request is relevant.

### **ORDER**

Based on the foregoing, except for Interrogatory No. 9, which the County has offered to respond to, and the Board's decision to order the production of Appellant's final payroll time sheet, the Board denies Appellant's request for reconsideration of its Decision on County's Motions for Protective Orders. The County shall respond within **one week from the date of this decision.**

## **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, motions in limine (which are motions to exclude evidence from a proceeding), and motions to call witnesses or submit exhibits not contained in a party's Prehearing Submission. 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 or end of the hearing, rule on the motion.

During FY 2010, the Board issued the following two decisions: one concerning the parties' request for additional witnesses and/or additional exhibits; and the other concerning the County's motion seeking to limit what exhibits could be introduced at hearing and which witnesses could be called.

# **MOTION TO RESCIND CHARGES**

## **CASE NO. 09-11**

### **DECISION ON APPELLANT'S MOTION TO RESCIND**

On June 9, 2009, Appellant filed a Motion to Rescind Dismissal, Reinstate Employment, Including Back-Pay and Leave, Reimburse Attorney Fees and for Appropriate Relief (Appellant's Motion to Rescind) with the Montgomery County Merit System Protection Board (MSPB or Board). On June 23, 2009, the Board received the County's Submission in Response to Motion to Dismiss (County's Response). On June 25, 2009, Appellant filed Appellant's Reply to County's Response to Appellant's Motion to Rescind Dismissal, Reinstate Employment, Including Back-Pay and Leave, Reimburse Attorney Fees and for Appropriate Relief (Appellant's Reply).

After reviewing the above-referenced pleadings, the Board announced its decision to take Appellant's Motion to Rescind under advisement. The Board then proceeded to hear the evidence in this case on July 22, 2009 and August 1, 2009. In addition to making arguments to support Appellant's Motion during the hearing, Appellant's counsel added two new arguments not in the pleadings. Appellant's counsel asserted that the Interim Chief predetermined that the Interim Chief was going to dismiss Appellant before the Statement of Charges was issued. According to Appellant's counsel, this "predetermination" violated the County's personnel regulations, Department of Fire and Rescue Services' (DFRS') policies regarding disciplinary action, the 14<sup>th</sup> Amendment of the United States Constitution, and Article 23 of the Declaration of Rights to the Maryland Constitution. Hearing Transcript for August 1, 2009 (H.T. II) at 55. Appellant's counsel also argued for the first time during the hearing that Section 17-214 of the Health-General Article of the Annotated Code of Maryland does not permit breath testing for alcohol. *Id.* at 59.

Having now considered all of the evidence in this case, including the additional arguments made by both parties' counsel during the hearing, the Board will address Appellant's Motion to Rescind.

### **FINDINGS OF FACT**<sup>1</sup>

This appeal involves the decision of then-Interim Fire Chief,<sup>2</sup> Montgomery County Fire

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<sup>1</sup> For purposes of deciding Appellant's Motion to Rescind, the Findings of Fact have been limited to those facts germane to Appellant's arguments. A more detailed set of facts is contained in the Final Decision and Order of the Board, issued on the same day as this Decision on Appellant's Motion to Rescind.

<sup>2</sup> The Interim Fire Chief was subsequently appointed as Fire Chief in April 2009. Hearing Transcript for July 22, 2009 (H.T. I) at 356.

and Rescue Service (MCFRS),<sup>3</sup> to dismiss Appellant, effective March 31, 2009. At the time of the events germane to this case, Appellant was an Assistant Chief in MCFRS. The position of Assistant Chief is the third highest rank in MCFRS.<sup>4</sup>

The genesis for the charges in the dismissal action were the events surrounding Appellant's participation in the MCFRS Honor Guard, which occurred on November 30, 2008. Appellant, who was then the Officer-in-Charge of the MCFRS Honor Guard, had previously received a request for the Honor Guard to participate in a Washington Redskins pre-game ceremony at FedEx Field on November 30, 2008. H.T. II at 135; County Exhibit (C. Ex.) 5<sup>5</sup> at 130, 177.<sup>6</sup> On November 29, 2008, Appellant picked up the Honor Guard vehicle (an unmarked Ford Expedition), containing the equipment needed for the event at FedEx Field and drove it to Appellant's home. C. Ex. 5 at 131. On November 30, Appellant drove the Honor Guard vehicle to the Park-n-Ride in College Park to pick up three<sup>7</sup> of the four other Honor Guard personnel. H.T. II at 147. At the Park-n-Ride, one of the Honor Guard members, Captain A, loaded a cooler containing beer into the Honor Guard vehicle. H.T. I at 143, 173.

After some stops, the Honor Guard arrived at the stadium, met up with the fifth Honor Guard member, unloaded its equipment and took the equipment to an assigned dressing room. H.T. I at 144-45; C. Ex. 5 at 131. At approximately 12:45 p.m., the Honor Guard, in uniform, presented the colors at FedEx Field. C. Ex. 5 at 162. The Honor Guard then proceeded back to the dressing room, changed into street clothes, received tickets for the game, and returned the equipment to the Honor Guard vehicle. *Id.* at 132.

At this point, beer from Captain A's cooler was passed out. H.T. I at 148-49, 175-76, 193. Estimates were that 1-2 beers were consumed by each of the members of the Honor Guard,

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<sup>3</sup> Prior to becoming MCFRS in 1998, the County's fire and rescue services were designated as the Department of Fire and Rescue Services (DFRS). In 1998, DFRS became the Division of Fire and Rescue Services within MCFRS.

<sup>4</sup> The structure of MCFRS management is as follows: Fire Chief; Division Chiefs; Assistant Chiefs; and Battalion Chiefs.

<sup>5</sup> Appellant differentiated Appellant's exhibits by marking those exhibits to Appellant's Motion to Rescind as "Appellant's Attachment \_\_\_" and Appellant's exhibits introduced during the hearing as "Appellant's Exhibit \_\_\_." The County made no such differentiation. Therefore, for clarity, when this Decision refers to "C. Ex. \_\_\_" it is a reference to one of the County's exhibits introduced at the hearing. If this Decision cites to an exhibit submitted as part of the County's Response to Appellant's Motion to Rescind, it will be referred to as "C. Ex. \_\_\_ to County's Response."

<sup>6</sup> C. Ex. 5 is the report of the investigation conducted for MCFRS by the Firm. Appellant has challenged the legality of the investigation in Appellant's Motion to Rescind. Because the Board finds that the investigation was legal, it cites to the investigation, which consists largely of verbatim transcripts of taped employee interviews, where appropriate.

<sup>7</sup> The three members picked up by Appellant were: Captain A; Firefighter B; and Firefighter C. H.T. I at 142-43. The fourth member of the Honor Guard, Firefighter D, drove separately to FedEx Field. C. Ex. 5 at 131.

including Appellant,<sup>8</sup> before they returned to the stadium to watch the game. H.T. I at 176, 193. Once inside the stadium, the testimony reflects that the members bought rounds of beer for each other. H.T. I at 178, 179, 195, 196. Several rounds were consumed. Id. at 179, 196. At some point, the Honor Guard members, except for Fire Fighter D who had departed, decided to go to the restaurant and order some food. H.T. I at 152, 180, 199. Again, beer was also ordered. Id. Finally, approximately around 6:00-6:30 p.m., the four individuals returned to the Honor Guard vehicle, where they ate the sandwiches purchased that morning and some consumed more beer. H.T. I at 154, 180-81. According to Appellant, Appellant consumed Appellant's last beer at 6:30 p.m.<sup>9</sup> H.T. II at 34. Appellant testified that Appellant had eight beers that day, no larger than 12 ounces each. Id. at 35.

Appellant then drove the three remaining Honor Guard participants back to the Park-n-Ride, along with Captain A's cooler. H.T. I at 156. According to Captain A, some beer still remained in the cooler when Captain A returned home from the game. H.T. I at 156, 168; see also C. Ex. 5 at 20. After dropping the others off, Appellant proceeded to drive home. H.T. II at 35.

While on I-270, going north, Appellant began to merge from the local lanes to the main lanes. H.T. II at 155; C. Ex. 5 at 134. At approximately 8:01 p.m., Appellant collided with three vehicles (a Honda, a Montgomery County Police (MCP) car, and a BMW) on the main lanes of I-270. C. Ex. 5 at 134, 172. According to MCP Officer E, Appellant's Honor Guard vehicle was airborne at the time it hit Officer E's vehicle. H.T. I at 251; C. Ex. 5 at 43. All four vehicles sustained damage. C. Ex. 5 at 173-76.

The driver of the Honda, Mr. F, approached Appellant's vehicle after the collision. H.T. I at 29. He tapped on Appellant's window and Appellant opened the door. Id. Mr. F asked if Appellant hit him and Appellant replied that Appellant had hit something. Id. Appellant then came out of the Honor Guard vehicle and almost fell over. Id. at 29, 31. Mr. F grabbed Appellant and held Appellant for a second so Appellant would not fall. Id. Mr. F testified that he smelled alcohol on Appellant's breath. Id. at 30-31. Mr. F noticed that Appellant was wearing a jacket that had an emblem on it.<sup>10</sup> Id. at 29. Mr. F asked Appellant if Appellant was a Police Officer and Appellant replied that Appellant was a Firefighter. Id. Officer E subsequently asked Appellant whether Appellant was okay and who Appellant was, but

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<sup>8</sup> Appellant testified that Appellant had two beers from the cooler. H.T. II at 151.

<sup>9</sup> During Appellant's investigatory interview, Appellant first claimed Appellant had Appellant's last beer at 5:00 p.m. C. Ex. 5 at 135, 145, 146. Appellant subsequently claimed that Appellant had Appellant's last beer at 6:00 p.m. C. Ex. 5 at 147. However, during the hearing, Appellant stated that Appellant had Appellant's last beer at 6:30 p.m. H.T. II at 34.

<sup>10</sup> Officer E testified that Appellant had a Fire and Rescue jacket on. Specifically, Officer E saw the Fire and Rescue emblem. H.T. I at 253, 257; C. Ex. 5 at 45. Appellant, while acknowledging that Appellant wore a fleece pullover with the Fire and Rescue emblem on it, asserts that it was underneath Appellant's rain jacket all day and not visible. H.T. II at 149, 153, 176, 181-82.



Appellant failed to respond.<sup>11</sup> C. Ex. 5 at 45; H.T. I at 253.

Appellant subsequently contacted Assistant Chief (A/C ) G, who lives near Appellant, at 8:24 p.m., and asked A/C G whether A/C G could give Appellant a ride home. C. Ex. 6 (phone records for Appellant); H.T. II at 40; C. Ex. 5 at 136. Also, Appellant indicated that Appellant's head was spinning and Appellant needed a logical thinker at the time to pull it together for Appellant. C. Ex. 5 at 149. A/C G, who was off-duty, agreed to help Appellant. *Id.* at 102-03.

Prior to arriving at the scene of the collision, A/C G had several other discussions with Appellant. C. Ex. 6 (phone records for Appellant and A/C G). During one conversation, A/C G learned that Appellant had been driving a County vehicle. C. Ex. 5 at 104, 152, 153. Upon learning this, A/C G contacted the Duty Operations Chief (DOC), Mr. H, at approximately 8:58 p.m. C. Ex. 5 at 153; C. Ex. 6. According to DOC H, A/C G informed DOC H that Appellant had been involved in an accident, that four vehicles, including a County Police Officer's vehicle were involved, and that Appellant had been drinking.<sup>12</sup> H.T. I at 214, 216, 217. DOC H eventually determined to send the Safety Officer, Captain (Capt.) J, to do the investigation. C. Ex. 5 at 78; H.T. I at 220.

DOC H realized that because of the four vehicles involved in the crash, the \$2,500 threshold for ordering post-accident testing pursuant to MCFRS policy would be reached.<sup>13</sup> H.T. I at 222. DOC H decided to send Battalion Chief (B/C) M to take Appellant to the Fire and Rescue Service Occupational Medical Services (FROMS) for testing. *Id.* B/C M contacted a 24-

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<sup>11</sup> Appellant's version of events differs considerably. According to Appellant, Appellant "immediately hopped out and started checking on the welfare of everybody. Make sure there weren't any injuries." C. Ex. 5 at 135. As discussed in greater detail in the Board's Final Decision and Order in this case, because of the factual dispute as to what occurred at the scene of the collision, the Board has made credibility determinations with regard to the witnesses. The Board found Mr. F to be credible; it did not find Appellant's testimony credible.

<sup>12</sup> A/C G's version of events differs from DOC H. According to A/C G, A/C G did not learn about Appellant's drinking at the game until A/C G arrived at the scene of the collision. C. Ex. 5 at 108, 109. A/C G indicated A/C G may have told DOC H that Appellant sounded "a little off" but does not recall mentioning alcohol specifically. C. Ex. 5 at 109. When A/C G learned on A/C G's way to the scene that Appellant had the Honor Guard vehicle and had been at the game, A/C G testified: "So anyway, and I'm thinking to myself I know Appellant and Appellant probably had had a beer or two you know at the Redskin game. . . . In my mind that's what I was thinking. I didn't really have that conversation with Appellant and I don't know that I had that conversation with DOC H, although I may have." C. Ex. 5 at 116.

As A/C G was not called as a witness at the hearing, the Board is unable to ascertain A/C G's credibility. However, the Board had the chance to assess DOC H's demeanor during the hearing and finds DOC H to be credible.

<sup>13</sup> When Capt. J arrived at the scene, DOC H confirmed with Capt. J that there was at least \$2,500 in damages based on the collision. C. Ex. 5 at 80.

hour number to arrange for personnel from CMA Services<sup>14</sup> to come to FROMS to do the testing. C. Ex. 5 at 93. B/C M arranged to meet with CMA Services' personnel at 10:30 p.m.<sup>15</sup> at FROMS. Id.

A/C G arrived at the scene at approximately 8:45-9:00 p.m., C. Ex. 5 at 107, 155, and was told by a Police Officer that Appellant was going to be charged with failure to avoid a collision. Id. at 108. A/C G was also informed that there had been an implication of possible alcohol so the police had done a field sobriety test on Appellant, who had checked out fine.<sup>16</sup> Id.

At some point, Appellant was given a citation for failing to avoid a collision. C. Ex. 24. According to Appellant, the Police Officer told Appellant that the Police Officer had to give Appellant the citation. C. Ex. 5 at 141. Appellant responded, "I understand. You know, I made a mistake. . . I'm clearly at fault here. I take full responsibility." Id.

B/C M arrived on the scene and waited with Appellant and A/C G for the Honor Guard vehicle to be towed. H.T. I at 303. Approximately twenty minutes later, the Honor Guard vehicle was towed. Id. While waiting for the vehicle to be towed, Appellant told B/C M that Appellant needed to use the bathroom. H.T. I at 305-06. B/C M suggested that they stop at the 7-11 on Shady Grove Road. Id. at 305. A/C G left the scene before B/C M and Appellant and met them at the 7-11. C. Ex. 5 at 96-97; H.T. I at 305. B/C M remained in B/C M's vehicle while Appellant and A/C G went inside the 7-11. C. Ex. 5 at 96; H.T. I at 305. When Appellant returned, Appellant had a bottle of water. H.T. I at 306.

Appellant and B/C M arrived at FROMS at 10:50 p.m. H.T. I at 90, 228. DOC H was already there, waiting for them. Id. at 228. Appellant signed a consent form and then underwent a breathalyzer test and provided a urine sample. Id. at 93-94; C. Ex. 20. The CMA technician who performed the breathalyzer test could smell alcohol on Appellant, noted Appellant was off balance (i.e., not steady on Appellant's feet), and that Appellant's speech was slurred.<sup>17</sup> Id. at 94, 99.

The result of Appellant's first breath alcohol test (BAT) was a reading of .141. C. Ex. 14. Because the reading was greater than .02, protocol required that Appellant be given a second test. H.T. I at 53. The breathalyzer testing machine automatically locks for fifteen minutes between tests. Id. at 80, 95. Appellant was not permitted to eat or drink anything until Appellant was

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<sup>14</sup> The County contracts with CMA Services to perform drug and alcohol collection services. H.T. I at 39, 55.

<sup>15</sup> According to the CMA technician, the appointment was for 10:25 p.m. H.T. I at 87.

<sup>16</sup> According to Appellant's version of events, one of the police officers at the scene, a Sergeant, came up to Appellant and asked Appellant if Appellant had been drinking. Appellant testified that Appellant responded: "Absolutely. I had beer during the game. I was coming from the game." C. Ex. 5 at 141.

<sup>17</sup> DOC H also testified that Appellant smelled like alcohol when Appellant arrived at FROMS and looked as if "Appellant was trying to hold Appellant's self together." H.T. I at 228.

retested. Id. at 80. After fifteen minutes had elapsed, Appellant was retested and a reading of .143 resulted. Id. at 51-52. Under Maryland law, these readings indicated that Appellant was under the influence of alcohol. County's Response at 3 (citing to the Annotated Code of Maryland, Courts and Judicial Proceedings, § 10-305(a)). The breathalyzer machine printed out the results of the tests. H.T. I at 51; C. Ex. 14. After the machine printed out the results, the County has the technician transcribe the results onto the Step 3 part of the Alcohol Testing Form (Non-DOT).<sup>18</sup> H.T. I at 50-51.

Appellant also gave a urine sample at FROMS. Id. at 41. The urine sample was tested for drugs and came back negative. See C. Ex. 1 to County's Response. The lab that does the urine testing for the County also tests for alcohol. Id. This test came back positive. Appellant Attachment (Attach.) 9. However, as the County disregards the urine test for alcohol, it never notified MCFRS of the positive results of the test. C. Ex. 1 to County's Response.

The next morning, the then-Interim Fire Chief called a meeting to discuss the collision involving Appellant. H.T. I at 322. At that point in time, MCFRS did not have an Internal Affairs Officer as the Internal Affairs Officer had left County employment. H.T. I at 122, 322, 359-60. The Fire Chief reviewed the Fire Chief's alternatives for conducting an investigation. Id. at 360. The Office of Investigative Programs (formerly the Internal Affairs Office) had a Battalion Chief, who was at a lower rank than the Assistant Chief involved in the collision. Id. The Fire Chief indicated that it was not a good practice to have a lower ranking officer investigate a higher ranking official. Id.; see also H.T. I at 122. Also, the Fire Chief testified that the Fire Chief did not believe the Fire Department should be investigating itself with this high profile case, given that a high level Fire Department official was involved. H.T. I at 360. The decision was made to contract out the investigation to the Firm, which had done work for MCFRS in the past. Id. at 322, 361. The Fire Chief testified that the Fire Chief wanted an outside investigator to make sure the Fire Chief had all the facts and information so as to enable the Fire Chief to make "an informed" decision on any potential disciplinary action. Id. at 358-59.

The Firm conducted the investigation from December 16-23, 2008, and provided it to MCFRS on January 16, 2009. C. Ex. 5. The Interim Fire Chief reviewed the investigative report several times. H.T. I at 361. The Interim Fire Chief then had discussions with Assistant Chief L,<sup>19</sup> H.T. I at 334, regarding taking disciplinary action against Appellant. H.T. I at 333. Sometime prior to the Statement of Charges being prepared, the Interim Fire Chief informed A/C L that the Interim Fire Chief wanted to dismiss Appellant. H.T. I at 333-34. On February 9, 2009, Appellant received the Statement of Charges, containing eleven charges and proposing Appellant's dismissal. C. Ex. 1.

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<sup>18</sup> In the instant case, the CMA technician made an error in the transcription. H.T. I at 58-59. The CMA technician indicated that the reading at 22:53 was ".143". Id. at 58. In fact, the reading at 22:53 was ".141". C. Ex. 14. The subsequent reading at 23:10 was ".143". Id.

<sup>19</sup> Part of A/C L's duties is to oversee the drafting of a Statement of Charges. H.T. I at 334.

On March 6, 2009, Appellant responded to the Statement of Charges, denying most of the charges, asserting Appellant was not on duty during the events in question, and alleging that the results of the BAT were inaccurate. C. Ex. 2. In addition, Appellant requested Appellant be allowed to enter into a Memorandum of Understanding, like other Firefighters, and that no disciplinary action be taken against Appellant. Id.

On March 24, 2009, Appellant received a Notice of Disciplinary Action – Dismissal, dismissing Appellant from employment effective March 31, 2009. C. Ex. 3.

### **APPLICABLE LAWS AND REGULATION**

**Title 17 of the Health-General Article of the Annotated Code of Maryland**, which states in applicable part:

#### **§ 17-214. Controlled substance testing by employer**

##### **Definitions**

(a)(1) In this section the following words have the meanings indicated:

(11) “Specimen” means:

- (i) Blood derived from the human body;
- (ii) Urine derived from the human body;
- (iii) Hair derived from the human body as provided in subsection (b)(2) of this section; or
- (iv) Saliva derived from the human body.

##### **Positive test results**

(c)(1) An employer who requires any employee, contractor, or other person to be tested for job-related reasons for the use or abuse of any controlled dangerous substance or alcohol and who receives notice from the laboratory under subsection (b) of this section that an employee, contractor, or other person has tested positive for the use or abuse of any controlled dangerous substance or alcohol shall, after confirmation of the test result, provide the employee, contractor, or other person with:

- (i) A copy of the laboratory test indicating the test results;
- (ii) A copy of the employer’s written policy on the use or abuse of controlled dangerous substances or alcohol by employees, contractors, or other persons;

- (iii) If applicable, written notice of the employer's intent to take disciplinary action, terminate employment, or change the conditions of continued employment; and
  - (iv) A statement or copy of the provisions set forth in subsection (e) of this section permitting an employee to request independent testing of the same sample for verification of the test result.
- (2) The information required to be provided to the employee, contractor, or other person under paragraph (1) of this subsection shall be delivered to the employee, contractor, or other person:
- (i) Either in person or by certified mail; and
  - (ii) Within 30 days from the date the test was performed.

**Montgomery County Code, Chapter 21, Fire and Rescue Services, Section 21-3, Fire Chief; Division Chiefs**, which states in applicable part:

- (b) The Fire Chief is the uniformed department head of the Montgomery County Fire and Rescue Service, and has all the powers of a department director.
- (e) The Fire Chief must appoint an Internal Affairs Officer, after considering any recommendation by the Commission. The Officer must assist the Chief in monitoring compliance with County laws, regulations, policies, and procedures and investigate matters assigned by the Chief.

**Code of Maryland Regulations, Title 10, Department of Health and Mental Hygiene, Subtitle 10, Laboratories, Chapter 10, Job-Related Alcohol and Controlled Dangerous Substances Testing**, which states in applicable part:

**.06 Permissible Specimens.**

- A. General. An employer requiring job-related alcohol or controlled dangerous substances testing shall require that:
- (2) An employee or contractor provide only one or more of the following types of specimen:
    - (a) Blood;
    - (b) Saliva; and
    - (c) Urine.

**.08 Protections for Job Applicants, Employees, and Contractors.**

A. Notice of Positive Test Results.

(1) An employer who requires a job applicant, employee, or contractor to be tested for job-related reasons for the use or abuse of a controlled dangerous substance or alcohol and who receives notice that a job applicant, employee, or contractor has tested positive for a controlled dangerous substance or alcohol shall provide to the job applicant, employee, or contractor with a confirmed positive test result:

(a) A copy of the laboratory test indicating the test results;

(b) A copy or written summary of the employer's policy covering an employee, contractor, or job applicant with a confirmed positive test result;

(c) If applicable, written notice of the employer's intent to take disciplinary action, terminate employment, or change the conditions of continued employment; and

(d) A statement or copy of the provisions set forth in §B of this regulation permitting a job applicant, employee, or contractor to request independent testing of the same sample for verification of the test result.

**.09 Confidentiality.**

A. General. Except as otherwise provided in an employer's written drug testing policy, in this regulation, or in Health-General Article, §17-214, Annotated Code of Maryland, all information, interviews, reports, statements, memoranda, and test results received or produced as a result of job-related alcohol or controlled dangerous substances testing are confidential and may be released only under a lawful subpoena, court order, or a release signed by the individual tested, or, in the case of a minor, by the individual's parent or legal guardian.

**Montgomery County Personnel Regulations (MCPR), Section 33, Disciplinary Actions (as amended December 11, 2007, and October 21, 2008),** which states in applicable part:

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

(d) *Consideration of other factors.* A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:

- (1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
- (2) the employee's work record;
- (3) the discipline given to other employees in comparable positions in the department for similar behavior;
- (4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and
- (5) any other relevant factors.

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

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

**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;
- (1) uses, possesses, sells, or transfers alcohol or an illegal drug to another person while on duty, on County government property, or in a County vehicle unless the employee's County employment requires such conduct;

**33-6. Disciplinary process.**

- (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; . . .
  - (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 Department of Fire and Rescue Services, Policies and Procedures, No. 503, Disciplinary Action Procedures, dated 04/25/95**, which states in applicable part:

PROCEDURE

- 5.6 The Director will issue the statement of charges.
- 5.7 The employee responds in person or in writing to the charges within designated time limits.
- 5.8 The Director - reviews employee's response to the charges, and determines appropriate action.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 529, Internal Affairs, dated 09/09/97**, which states in applicable part:

POLICY

- 4.1 Incidents investigated by the Internal Affairs Section may include but are not limited to:
  - a. Those actions of an employee which appear to be in violation of law, Department policy and procedure or other statute which could result in suspension, demotion, or dismissal.
- 4.10 Employees are required to truthfully and promptly answer questions concerning performance of duty, adherence to Department procedures, or suspected misconduct.

RESPONSIBILITY

- 5.6 Director - The Director will have full and final authority and responsibility over all matters relating to the Internal Affairs Section.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, No. 809, Substance Abuse Testing and Rehabilitation, dated 05/08/94**, which states in applicable part:

DEFINITIONS

- 3.2 Collection Site – A location, either OMS or a site designated by OMS, where urine samples are collected for testing.



- 3.16 Post-Accident Testing – Substance abuse screening required when an employee is the operator of a vehicle involved in an accident resulting in personal injury or at least \$2500 in property damage.

## POLICY

- 4.0 The impairment of an employee due to drug abuse constitutes a danger to the employee, fellow employees, and the general public. As a result, the following policy, while safeguarding the employee’s fundamental rights to privacy will be instituted and administered by the County for the purpose of preventing drug and alcohol abuse and rehabilitating employees who are affected by drugs and alcohol. Nothing in this policy shall be construed to limit management’s authority to properly discipline employees.

### 4.21 Reasons for Testing.

- a. Reasonable Suspicion. The evidentiary standard which must be met before a “for cause” drug test is required of an employee in a public safety position. In order to meet this standard, the Director or designee must determine, based on specific objective facts and reasonable inferences drawn from these facts, that there is a reasonable basis to suspect that a test would show that the employee has drugs/alcohol in his/her body.
- b. Accidents:
  2. An employee who is the operator of a County or Corporation-owned vehicle that is involved in a property damage accident resulting in at least \$2,500 damage must be tested immediately after the police authority having jurisdiction over the accident authorize that the operator may leave the scene.

## PROCEDURE

- 6.0 When reasonable suspicion exists that an employee may be abusing drugs:
- i. If the confirmatory test is positive the employee will be placed on approved leave and will be allowed to use available sick leave, annual leave, compensatory leave, or leave without pay, pending conclusion of the matter.
  - j. After confirmation of the test result, the employee must be provided within 30 calendar days of specimen collection with:
    1. a copy of the laboratory test indicating the test result;

2. a copy of the Department's written policy on Substance Abuse Testing and Rehabilitation, #809;
  3. If applicable, written notice of the Department's intent to take disciplinary action, terminate employment, or change conditions of continued employment; and
  4. notice of the right to request independent testing of the same sample by a different certified laboratory.
- k. The Director or designee will be notified by the Employee Medical Examiner, in writing, of a confirmed positive or negative result as indicated on the consent form.
  - l. An employee may specify another laboratory for confirmatory testing of a positive specimen at his/her own expense. Upon request, OMS will provide the employee with a current list of certified laboratories.
- 6.1 Follow up Procedure of Confirmed Positive Test Results.
- b. If feasible, the Employee Medical Examiner will inform the employee of a confirmed positive test result prior to notifying the Director, Department of Fire and Rescue Services or designee. The employee will have the opportunity to discuss the test results with the Employee Medical Examiner.
  - d. If the employee has a confirmed positive drug test result, the Employee Medical Examiner will advise the individual of counseling and rehabilitation resources.
  - h. Within 30 days of the test, the Department must provide the employee with copies of this procedure; notice of intent to take action; and notice of the right to have an independent test of the same sample.

### **ANALYSIS AND CONCLUSIONS**

#### **The County Did Not Conduct An Illegal Investigation into Appellant's Conduct.**

Appellant notes that the Montgomery County Code requires the Fire Chief to appoint an Internal Affairs Officer. Appellant's Motion to Rescind at 14. Appellant further asserts that DFRS Policy No. 529 sets forth the procedures for investigations handled by Investigative Programs, under the auspices of the Internal Affairs Officer. *Id.* at 15, 16. Appellant argues that the Interim Fire Chief did not follow the Code and DFRS Policy No. 529 with respect to conducting an investigation into Appellant's collision. Rather, the Interim Fire Chief

impermissibly had the investigation contracted out to the Firm.<sup>20</sup> Id. at 22. Appellant argues that in order for the Interim Fire Chief to utilize an external investigator for the purposes of conducting an internal affairs investigation, the Interim Fire Chief had to amend the requirements of DFRS Policy No. 529. Id. at 22-23; Appellant’s Reply at 3.

Appellant further asserts that there was no need for MCFRS to contract out the investigation as it had B/C Z, a staff member of the Office of Investigative Programs, who could have done the investigation. Appellant’s Reply at 4. Moreover, Appellant notes that even though MCFRS opened Internal Affairs Case 33-8 regarding Appellant’s collision, the Firm failed to follow the procedures set forth in DFRS Policy No. 529. Id. at 5; Appellant’s Motion to Rescind at 22.

The County asserts that the hiring of the Firm to conduct the investigation did not violate DFRS Policy No. 529, as the position of Internal Affairs Officer was vacant at the time. County’s Response at 9. While the County acknowledges that it had B/C Z in the Office of Investigative Programs, it argues that it is not good practice for a subordinate officer to investigate a superior. Id. Finally, the County asserts that since the Firm is not a part of the Office of Investigative Programs, it was not required to follow DFRS Policy No. 529. Id.

Section 21-9 of the Montgomery County Code provides for the appointment of an Internal Affairs Officer by the Fire Chief. One of the duties established in the Code for the Internal Affairs Officer is to “investigate matters assigned by the Chief.” Indeed, as pointed out by Appellant’s own exhibit, the mission of the Office of Investigative Programs is to investigate matters assigned by the Fire Chief. See Appellant’s Attachment (Attach.) 17. Inherent in a manager’s authority to assign work to an individual is the right not to assign work to an individual. See National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553, 563 (D.C. Cir. 1982) (“Without a doubt, the right to determine what work will be done, and by whom and when it is to be done, is at the very core of successful management of the employer’s business, whether a private-sector enterprise or the public service operations of a federal agency.”). In the instant case, it is established that the position of Internal Affairs Officer

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<sup>20</sup> Appellant argues that the Interim Fire Chief entered into an unlawful agreement with the Firm and this also serves as a reason to invalidate the investigation. H.T. I at 130. Specifically, the Firm investigation exceeded \$5,000 (the threshold for a formal contract document) without MCFRS signing a contract with the Firm for the investigation. See Appellant’s Ex. 31. The issue of whether MCFS adhered to the procurement regulations is not an issue within the purview of this Board’s jurisdiction. The only issue before this Board is whether the then-Interim Fire Chief could assign the investigation of Appellant’s collision to someone other than an individual in the Office of Investigative Programs.

Similarly, Appellant argued during the hearing that as Mr. Y, the person who did the Firm’s inquiry, was not licensed as a private detective in Maryland, the Firm’s investigation was not in accordance with Maryland law. H.T. 1 at 106-12. Again, whether Mr. Y was in violation of Maryland law regarding the fact that he is licensed as a private investigator in the state of Virginia, H.T. I at 121, not Maryland, is beyond the Board’s purview. What matters is that the Interim Fire Chief had the authority to assign the investigation to Mr. Y.

was vacant. Given the fact that it was vacant, it was the right of the Interim Fire Chief to assign the investigation to whomever the Interim Fire Chief chose. The Interim Fire Chief could have chosen to assign it to Investigative Programs. However, the Interim Fire Chief also had the right to choose to have someone else conduct the investigation, which the Interim Fire Chief did.

Appellant also argues that in order for then-Interim Fire Chief to assign the investigation to the Firm, the Interim Fire Chief had to amend DFRS Policy No. 529. The Board notes that DFRS Policy No. 529 is an internal policy which sets forth the procedures for investigations conducted by Internal Affairs (now the Office of Investigative Programs). See Appellant's Attach. 15. As the Interim Fire Chief chose not to assign the investigation to Investigative Programs, there was no need for the Interim Fire Chief to amend DFRS Policy No. 529.

While it is true that Investigative Programs opened a file on the investigation of Appellant's collision, this would appear to have been done solely for administrative convenience to allow MCFRS to have a file containing the various forms generated by an investigation to include the Investigation Acknowledgement Form, the Interview Form and the various executed employee memoranda attesting to the truth of the testimony provided during the investigation. See Appellant's Ex. 30. Simply because MCFRS opened a file on the matter for administrative convenience, this did not require that the Firm follow the procedures of DFRS Policy No. 529. As already noted, DFRS Policy No. 529 is an internal policy, governing how the Office of Investigative Programs does investigations. It is certainly not controlling on how an outside entity, such as the Firm, conducts an investigation. While the Interim Fire Chief could have required the Firm to follow the procedures in DFRS Policy No. 529, there was no requirement that the Interim Fire Chief do so.

Accordingly, based on the record of evidence before the Board, it finds that the investigation conducted by the Firm was not illegal.

**The County's Failure To Adhere To Section 6.0 And 6.1 Of DFRS Policy 809 Has No Relevance To The Outcome Of This Case.**

Appellant argues that pursuant to DFRS Policy No. 809, Appellant was entitled to certain due process procedures in connection with the testing of Appellant's urine specimen which Appellant was denied. Appellant's Motion to Rescind at 24-26. Appellant notes that while the urine sample tested negative for drugs, it tested positive for alcohol. See Appellant's Motion to Rescind at 10; Appellant's Attach. 9. Specifically, Appellant asserts that because Appellant's urine tested positive for alcohol, Appellant should have been provided within thirty days of the test with a copy of the laboratory test, a copy of DFRS Policy No. 809, written notice of MCFRS's intent to take disciplinary action and a notice of the right to request independent testing of Appellant's urine sample by a different certified laboratory. See Appellant's Motion to Rescind at 24-26; Appellant's Attach. 4.

While it is true that DFRS Policy No. 809 provides certain rights if a urine sample tests positive, the County argues that it never relied upon the positive urine results for alcohol. County's Response at 5. Rather, the County states that since 2003, its Occupational Medical Section (OMS), which oversees the drug and alcohol testing programs for the County, has solely

relied on the breathalyzer test to determine employee alcohol levels. See C. Ex. 1 to County's Response. The OMS contract laboratory that performs the urine testing continues to test for ethanol (alcohol) in the urine as well as drugs but OMS disregards that portion of the report. Id. Therefore, when OMS received Appellant's test results back from the laboratory, it notified MCFRS that the urine results were negative for drugs and disregarded the test results for alcohol. Id. The County argues that Appellant was not prejudiced by the lack of notice regarding the positive urine test for alcohol as nothing happened to Appellant because of the positive urine test. County's Response at 5.

The Board notes that Appellant's urine and breathalyzer testing took place pursuant to Section 4.21b, Accidents, of DFRS Policy No. 809, which requires testing of an employee who operates a vehicle that is involved in a property damage accident resulting in at least \$2,500 of damage. The procedures Appellant claims were denied to Appellant are set forth in Section 6.0. Appellant's Motion to Rescind at 26. As the County points out, Section 6.0 specifically governs reasonable suspicion of abusing drugs testing not post-accident testing. County's Response at 6. Therefore, Section 6.0 and its procedures are not applicable to the instant case.

Assuming *arguendo* that the procedures in Section 6.0 govern post-accident testing, it is clear that the failure of the County to adhere to these procedures did not prejudice Appellant, as Appellant was not dismissed based on the results of the positive urine test. Rather, Appellant was dismissed based on the results of the breathalyzer test showing Appellant was under the influence of alcohol and by Appellant's own admission that Appellant consumed alcohol within four hours of operating a County vehicle. Thus, the County's failure to adhere to Section 6.0 has no relevance to the outcome of this case.

Appellant asserts that the County did not comply with Section 6.1 of DFRS Policy No. 809, as it did not advise Appellant of counseling and rehabilitation resources and the right to have Appellant's urine sample retested. Appellant's Motion to Rescind at 26. As noted above, since Appellant was not dismissed based on the results of the positive urine sample, the County's failure to abide by Section 6.1 has no relevance to this case. Appellant also complains that the County's Medical Examiner failed to advise Appellant of counseling and rehabilitation resources as required by Section 6.1. Id. While the County's Medical Examiner may have failed to advise Appellant, Appellant nevertheless received information on counseling and rehabilitation resources. On December 15, 2008, Appellant met with the Interim Fire Chief who suggested that Appellant make an appointment to see Ms. X, who had provided alcohol training at the Public Services Training Academy. Appellant's Attach. 4 at 2-3. Appellant subsequently received assistance from Ms. X, meeting with her on at least six occasions. Id. at 3.

Accordingly, based on the record of evidence in this case, the Board finds that the County's failure to adhere to Sections 6.0 and 6.1 of the DFRS Policy has no relevance to the outcome of this case.<sup>21</sup>

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<sup>21</sup> As the County does not rely on the results of a urine test to determine alcohol usage, the Board would urge the County to order its contract laboratory – Atlantic Diagnostic Laboratories – to cease and desist from testing County-provided urine samples for alcohol.

**The County's Failure To Adhere To § 17-214 Of The Health-General Article Of The Annotated Code Of Maryland Has No Relevance To The Outcome Of This Case.**

Appellant arguments with regard to the County's failure to adhere to § 17-214 of the Health-General Article of the Annotated Code of Maryland are similar to the ones Appellant made regarding the County's failure to adhere to DFRS Policy No. 809.<sup>22</sup> Specifically, Appellant asserts that Appellant was entitled to certain due process procedures in connection with the testing of Appellant's urine specimen which Appellant was denied. Appellant's Motion to Rescind at 30-32. Appellant notes that while the urine sample tested negative for drugs, it tested positive for alcohol. See Appellant's Motion to Rescind at 10; Appellant's Attach. 9. Specifically, Appellant asserts that because Appellant's urine tested positive for alcohol, Appellant should have been provided within thirty days of the test with a copy of the laboratory test, a copy of DFRS Policy No. 809, written notice of MCFRS's intent to take disciplinary action and a notice of the right to request independent testing of Appellant's urine sample by a different certified laboratory. See Appellant's Motion to Rescind at 24-26; Appellant's Attach. 4.

As previously noted, Appellant was not dismissed based on the results of the positive urine test. Rather, Appellant was dismissed based on the results of the breathalyzer test showing Appellant was under the influence of alcohol and by Appellant's own admission that Appellant consumed alcohol within four hours of operating a County vehicle. Accordingly, the Board concludes that the County's failure to adhere to § 17-214 of the Health-General Article of the Annotated Code of Maryland has no relevance to the outcome of this case.

**The County Did Not Violate Appellant's Equal Protection Right Under The 14<sup>th</sup> Amendment To The Constitution When It Did Not Allow Appellant A Rehabilitation Opportunity As Opposed To Dismissing Appellant.**

Appellant argues that the County did not afford Appellant an opportunity to participate in an appropriate rehabilitation program as provided for in Section 6.3 of DFRS Policy No. 809. Appellant's Motion to Rescind at 33. Specifically, Appellant notes that Appellant is aware of four other circumstances where other employees of MCFRS violated DFRS Policy No. 809 with respect to alcohol or drug/related incidents. Id. at 36. In all four cases, Appellant asserts that each individual was afforded the opportunity to enter into a memorandum of understanding without having disciplinary action taken against them. Appellant's Attach. 4 at 3-4. Appellant states Appellant was not afforded the opportunity to enter into such a memorandum without

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<sup>22</sup> Appellant also notes that the failure to comply with § 17-214 is a crime. See Appellant's Motion to Rescind at 33. The County argues that while there may have been a technical violation of § 17-214 it constitutes harmless error as Appellant was not prejudiced by it. County's Response at 8. In support of its argument, the County notes that Appellant requested the State's Attorney Office to investigate and prosecute the County individual responsible for failing to provide Appellant the information required by § 17-214. Id.; see C. Ex. 7 to County's Response. The State's Attorney Office declined to open a criminal investigation, stating the matter did not require prosecution. See County's Response at 8; C. Ex. 8 to County's Response.

having disciplinary action taken against Appellant and thus, Appellant's right to equal protection under the state and federal constitutions was denied. Appellant's Motion to Rescind at 36-38.

The County argues that DFRS Policy No. 809 specifically states that nothing in the policy is meant to prevent the Fire Chief from imposing discipline. County's Response at 6. The County also notes that it is reasonable for MCFRS to expect its Assistant Chiefs to reflect the highest level of personal comportment and to lead by example. Id.

The Supreme Court has held that "[t]he employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." Butz v. Glover Livestock Commission, Inc., 411 U.S. 182, 187 (1973) (citations omitted); Jones v. United States, 223 Cl. Ct. 138, 617 F.2d 233, 238 (1980). In assessing whether Appellant has been treated disparately, Appellant must show that a similarly situated employee received a different penalty. Social Security Administration v. Mills, 73 M.S.P.R. 463, 472 (1996), aff'd 124 F.3d 228 (Fed. Cir. 1997). To be deemed similarly situated, the employee must be in the same work unit, have the same supervisor and the misconduct must be substantially similar. Wentz v. USPS, 91 M.S.P.R. 176, 187 (2002). Where as here, an employee holds a position of trust and responsibility, comparison must be made to those employees holding equivalent positions of trust and responsibility. See Baracker v. Dep't of Interior, 70 M.S.P.R. 594, 606 (1996) (Senior Executive Service (SES) employee could not compare his penalty to that of lesser graded employees); Holliman v. USPS, 75 M.S.P.R. 372, 376 (1997).

Appellant was given ample opportunity during the hearing to demonstrate Appellant's disparate treatment claim but failed to do so. The Office of Human Resources (OHR) Director, was asked whether the OHR Director was aware of any similarly situated employee to Appellant who was involved in an auto accident with a County vehicle and was accused of alcohol consumption and not fired. H.T. I at 273. The OHR Director indicated the OHR Director would have to check the OHR Director's records. Id. The OHR Director subsequently sent an email to the Board's Executive Director indicating OHR had reviewed its files and did not find any instance where a similarly situated employee was involved in an auto accident involving a County vehicle and was accused of alcohol consumption and not fired. C. Ex. 32. A/C L, who prepares Statement of Charges for MCFRS, testified that there was no other employee in the past two years who had been involved in an alcohol-related collision while on duty of the same or higher pay grade than Appellant. H.T. I at 346.

Accordingly, the Board finds that the County did not violate Appellant's equal protection rights under the 14<sup>th</sup> Amendment to the Constitution when it decided to dismiss Appellant rather than offer Appellant the opportunity to enter into a Memorandum of Understanding.

**The County's Post-Accident Testing Procedure Has No Relevance To The Outcome Of This Case.**

Appellant argues that the Supreme Court has recognized that subjecting a person to a breathalyzer test is deemed to be a search for Fourth Amendment purposes. Appellant's Motion to Rescind at 38-39. Citing to Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989),

Appellant asserts that the Supreme Court has established a balancing test which is used in order to balance governmental interest which would be served by post-accident testing regulations and the rights of employees to have the protections under the Fourth Amendment. Appellant's Motion to Rescind at 39. Appellant also cites to Connelly v. Newman, 753 F. Supp. 293 (N.D. Calif. 1990), wherein the court granted partial summary judgment to government employees with respect to post-accident testing. Appellant's Motion to Rescind at 39. The policy at issue in Connelly required only \$1,000 in property damages and did not contain a causation requirement for post accident testing to occur. Id. Because DFRS Policy No. 809, although requiring \$2,500 in damage, contains no causation requirement, Appellant asserts the policy is overly broad and unconstitutional. Appellant's Motion to Rescind at 41. Therefore, Appellant asserts that the breathalyzer test performed on Appellant violated Appellant's Fourth Amendment right to be free from unlawful search and seizure. Id. at 42.

The County failed to address Appellant's arguments in the County's Response to Appellant's Motion to Rescind.

The Board notes that, at the time DOC H arranged for Appellant to go to FROMS to be tested, DOC H was aware that there was more than \$2,500 in property damage. C. Ex. 5 at 80. DOC H also was aware that Appellant had been drinking at the Redskins game. H.T. I at 216, 218. Prior to going to FROMS, Appellant received a citation for failure to avoid a collision. C. Ex. 24. Upon receiving the citation, Appellant told the Police Officer who issued the ticket that Appellant completely understood why Appellant was getting the ticket as "I'm clearly at fault here. I take full responsibility." C. Ex. 5 at 141. Appellant also acknowledged to a Police Officer at the scene of the accident that Appellant had been drinking. Id. at 142. Given the circumstances of this case, clearly the causation requirement for testing Appellant was present prior to Appellant's being given a breathalyzer test.

However, the Board does not need to determine whether DFRS Policy No. 809 is overly broad as it has not relied on the subsequent breathalyzer test to uphold Appellant's dismissal.<sup>23</sup> See Final Decision and Order, MSPB Case No. 09-11.

### **The "Predetermination" By The Chief To Dismiss Appellant Did Not Violate Appellant's Constitutional Right To Due Process.**

Appellant's counsel argued during the hearing that then-Interim Fire Chief wrongly predetermined to dismiss Appellant in violation of the personnel regulations, the DFRS policies governing disciplinary action, the 14<sup>th</sup> Amendment of the United States Constitution, and Article 23 of the Declaration of Rights to the Maryland Constitution. H.T. II at 55. Specifically, Appellant's counsel bases this argument on the fact that A/C L testified that the Interim Fire Chief first notified A/C L that the Interim Fire Chief was going to dismiss Appellant prior to the Statement of Charges being issued in this case. H.T. II at 58; H.T. I at 333-34.

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<sup>23</sup> The Board does agree with Appellant that DFRS Policy No. 809 should be amended to contain a causation requirement.



The Board would note at the outset that the personnel regulations require a department director to issue an employee a Statement of Charges. MCPR, Section 33-6(b)(1). The Fire Chief, as head of MCFRS, has all the powers of a department director. Montgomery County Code, Section 21-3(b). The personnel regulations also require that a Statement of Charges inform the employee of the disciplinary action that is being proposed. MCPR, Section 33-6(b)(1)(A). As A/C L testified, the A/C L oversees the drafting of the Statement of Charges. H.T. I at 334. Thus, in order for A/C L to accomplish the A/C L's mission to draft Appellant's Statement of Charges for the Interim Fire Chief to issue, the A/C L would need to know from the Interim Fire Chief what penalty the Interim Fire Chief wanted to impose on Appellant. Accordingly, the Board finds that there was no violation of the personnel regulations or DFRS Policy No. 503,<sup>24</sup> governing disciplinary actions, when the Interim Fire Chief informed A/C L that the Interim Fire Chief wanted to dismiss Appellant.

Nor were Appellant's constitutional rights violated. The Board notes that the federal sector permits the same individual to be both a proposing official (i.e., an issuer of a Statement of Charges) and the deciding official. See John B. Desarno, et al. v. Department of Commerce, 761 F.2d 657 (Fed. Cir. 1985); Hanley v. General Services Administration, 829 F.2d 23 (Fed. Cir. 1987). In permitting such a practice, the Federal Circuit explained:

The law does not presume that a supervisor who proposes to remove an employee is incapable of changing his or her mind upon hearing the employee's side of the case.

761 F.2d at 660.<sup>25</sup>

Moreover, the Federal Circuit in DiMasso v. Department of Transportation, 735 F.2d 526

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<sup>24</sup> As Appellant's counsel noted, DFRS Policy No. 503 mirrors the personnel regulations. H.T. II at 56-57.

<sup>25</sup> The Federal Circuit noted in Desarno that the Supreme Court, in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), set forth the process due a public employee before removal:

The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement . . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story . . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

761 F.2d at 660 (citations omitted). In the instant case, it is clear from the record of evidence that Appellant was afforded these due process rights.

(1984), held that “there is ‘nothing improper’ about an agency’s predetermining the penalty of removal, provided that the employee has full opportunity to present facts rebutting the charges.” 735 F.2d at 528 (citing to Pascal v. United States, 543 F.2d 1284 (Ct. Cl. 1976)).

Thus, just because the Interim Fire Chief proposed to remove Appellant does not mean the Interim Fire Chief was incapable of changing the Interim Fire Chief’s mind. Appellant clearly had a full opportunity to present facts rebutting the charges. The Fire Chief credibly testified that the Fire Chief thoroughly reviewed Appellant’s response, and discussed the charges with Appellant. H.T. I at 370. The Fire Chief testified that the Fire Chief also considered Appellant’s work record which was impeccable. Id. at 369-70. The Fire Chief noted that Appellant was very knowledgeable, very skilled, and had the ability to get things done. Id. at 396. The Fire Chief also considered the possibility of the rehabilitation of Appellant. Id. at 388-89. The Fire Chief testified that the Fire Chief was concerned about Appellant’s welfare, had served with Appellant during the Fire Chief’s career, and had been friends with Appellant, so that in making the Fire Chief’s determination about what disciplinary action to impose, factored many things into the decision. Id. at 394-95. Accordingly, based on the record of evidence in this case, the Board concludes that Appellant received all of the due process required under the U.S. Constitution and Maryland Constitution.<sup>26</sup>

**Whether § 17-214 Of The Health-General Article Of The Annotated Code Of Maryland Does Or Does Not Permit Breath Alcohol Testing Has No Relevance To The Outcome Of This Case.**

Appellant argued for the first time during the hearing that § 17-214 of the Health-General Article of the Annotated Code of Maryland does not permit breath alcohol testing. H.T. II at 59. In support of this argument, Appellant provided an unsigned memorandum purportedly written by Mr. McDonald. Appellant Attach. 28. This unsigned memorandum deals with whether § 17-214 bars an employer from using a breath test to detect alcohol use by employees.<sup>27</sup> The memorandum notes that the Maryland Department of Health and Mental Hygiene (DHMH), which is charged with administering § 17-214, has construed both the statute and its implementing regulations to bar employment-related breath alcohol testing. Id. at 2, 7. The memorandum also notes that while the DHMH regulations appear to bar breath testing for employment purposes, “they are not free from ambiguity on this score.” Id. at 10. The memorandum further states that “an interpretation that the statute generally bars breath testing of employees should be clearly and formally stated by the agency in its regulation.” Id. at 2. The memorandum also notes that in a letter of advice, the Office of the State Attorney General concluded the year before that although the issue was not free from doubt, the statute did not prevent an employer from using breath testing equipment to test employees for alcohol. Id. at 1;

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<sup>26</sup> Appellant did not assert that the Maryland Constitution provides Appellant with any greater rights than the U.S. Constitution.

<sup>27</sup> During the hearing, Appellant’s counsel referred to this document as the Attorney General’s opinion. See H.T. II at 63, 64. Significantly, this memorandum is not an “opinion” available on-line at the State Attorney General’s website. See generally <http://www.oag.state.md.us/Opinions/index.htm>.

see C. Ex. 5 to County's Response.

Significantly, the County submitted nothing at the hearing in response to Appellant's argument.<sup>28</sup> The County had previously argued in its Response that Maryland law only permits testing for an individual's alcohol concentration by breath or blood, citing to the Annotated Code of Maryland, Courts and Judicial Proceedings, § 10-305(a).<sup>29</sup> County's Response at 3. In response to this argument, Appellant asserted that § 10-305(a) did not apply to Appellant as it specifically deals with intoxication tests administered to a defendant and Appellant is not a defendant. Appellant's Reply at 10.

The Board also notes that the County had previously submitted the letter of advice from the Attorney General's office as an exhibit to its Response, in support of its argument that § 17-214 is only intended to regulate specimens sent out for testing and does not impact breath testing. County's Response at 8; C. Ex. 5 to County's Response. The Board finds that the letter of advice submitted by the County is on official letterhead, addressed to State Senator Paula C. Hollinger, and is signed by Assistant Attorney General Kathryn M. Rowe. In stark contrast, the memorandum submitted by Appellant is addressed to no one, is not on official letterhead, and bears no signature by its purported author, Robert N. McDonald.<sup>30</sup> Accordingly, the Board gives more weight to the signed letter of advice than the unsigned memorandum. The Board is unwilling to conclude that § 17-214 of the Health-General Article of the Annotated Code of Maryland proscribes breath testing based solely on Appellant's submission.

The issue of whether § 17-214 of the Health-General Article of the Annotated Code of Maryland permits breath alcohol testing is beyond the purview of the Board's expertise. More importantly, the issue of whether § 17-214 permits breath testing has no relevance to this case<sup>31</sup>

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<sup>28</sup> The Board recognizes that the County's counsel was caught off-guard by this last minute argument by Appellant's counsel. See H.T. II at 70 (noting that the County's counsel has not had a chance to read Appellant's Attach. 28). Had counsel asked, the Board would have granted the County's counsel an opportunity to review the memorandum and additional time to do research and provide argument to the Board concerning its validity.

<sup>29</sup> The McDonald memorandum submitted by Appellant as discussed supra, notes that the state law (i.e., § 10-305(a)) governing tests of persons suspected of driving while intoxicated currently states a preference for a breath test over a blood test to detect alcohol. Appellant's Attach. 28 at 2.

<sup>30</sup> The Board notes that Robert N. McDonald is the Chief Counsel for Opinions and Advice within the Attorney General's office. The Board is not aware of whether the Chief Counsel can in fact override the advice provided by an Assistant Attorney General within the Attorney General's office.

<sup>31</sup> While concluding that whether § 17-214 of the Health-General Article of the Annotated Code of Maryland permits breath testing is not relevant to the outcome of this case, the Board would urge the County to seek a definitive ruling on the matter.

because the Board has concluded, as detailed in its Final Decision and Order, that Appellant's dismissal was warranted based on Appellant's own admission that Appellant consumed alcohol within four hours of operating a County vehicle.<sup>32</sup>

**ORDER**

Based on the foregoing analysis, the Board denies Appellant's Motion to Rescind.

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<sup>32</sup> The Board also determined that Appellant's dismissal was warranted as Appellant was under the influence of alcohol when Appellant operated the Honor Guard vehicle. In making this determination that Appellant was under the influence, the Board did not rely on the breathalyzer test results.

# **MOTIONS TO QUASH SUBPOENAS**

## **CASE NO. 10-04**

### **DECISION ON NON-PARTY MOTION TO QUASH SUBPOENA FOR SGT. R**

On January 11, 2010, counsel for the United Food & Commercial Workers Union, Local 1994, Municipal and County Government Employees Organization (MCGEO), filed a Notice of Appearance on behalf of MCGEO.<sup>1</sup> Counsel also filed a Motion to Quash Subpoena of Sergeant (Sgt.) R,<sup>2</sup> asserting that the information Sgt. R possesses is irrelevant to this case. Counsel for Appellant filed an Opposition to the Motion. Counsel for the County indicated that he would be filing nothing in regard to MCGEO's Motion.

#### **BACKGROUND**

On June 16, 2009, Appellant received a Statement of Charges – Dismissal (SOC) from the Warden of the Department of Correction and Rehabilitation (DOCR), based on Appellant's alleged misconduct, which included a charge of having a relationship with an ex-inmate. MCGEO served as Appellant's exclusive representative<sup>3</sup> during the processing of this disciplinary matter. See, e.g., Joint Exhibit (Jt. Ex.) 70 (email from MCGEO Field Representative S, to Chief Investigator D, subject: Appellant's Phone Records). After the NODA was issued in this case, Appellant was permitted to seek representation by counsel of Appellant's own choosing, which Appellant did.

Appellant, through Appellant's counsel, filed the instant appeal with this Board. Consistent with the Board's Prehearing Procedures, Appellant and the County filed Prehearing Submissions, which contained, inter alia, copies of all exhibits to be introduced at hearing and a list of all witnesses. During the Prehearing Conference, the parties were given the opportunity to inform the Board of any objections they might have to each others' witnesses and/or exhibits. Based on the discussion held at the Prehearing Conference, the Board agreed to issue a subpoena

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<sup>1</sup> MCGEO is not a party to the instant appeal.

<sup>2</sup> According to MCGEO, Sgt. R is a MCGEO Executive Board member and shop steward. See Non-Party Motion to Quash Subpoena of Sgt. R at 1.

<sup>3</sup> In fact, Appellant sought to be represented by Appellant's present attorney throughout the initial processing of Appellant's disciplinary matter, see Joint Exhibit 3, but was informed by the County that only MCGEO could represent Appellant at that stage of the proceedings. Appellant was only free to be represented by counsel of Appellant's own choosing after DOCR issued Appellant a Notice of Disciplinary Action – Dismissal (NODA).

on behalf of Appellant for the attendance of Sgt. R<sup>4</sup> at the hearing in this matter.

### **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, 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), 2001, Section 33, Disciplinary Actions**, which states in applicable part: **33-2. Policy on disciplinary actions.**

- (d) ***Consideration of other factors*** A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:
- (3) the discipline given to other employees in comparable positions in the department for similar behavior; . . .

### **ANALYSIS AND CONCLUSIONS**

Significantly, MCGEO, although not a party to the instant appeal before this Board, chose to be a party in the underlying proceedings. MCGEO insisted upon representing Appellant through ADR and its representatives discussed the case with the Warden during the processing of the disciplinary matter.<sup>5</sup> Accordingly, MCGEO cannot now claim that its representatives have no relevant information to offer regarding the issues and penalty in this case. If MCGEO is going to insist on being the exclusive representative during the processing of disciplinary actions

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<sup>4</sup> Appellant asserted in Appellant's Prehearing Submission that Sgt. R has knowledge of similar instances of DOCR employees being subject to disciplinary action regarding inappropriate contact with a current or former inmate. See Appellant's Prehearing Submission at 6.

<sup>5</sup> See Appellant's Opposition to Motions to Quash Subpoenas at 3-4.

against its bargaining unit members, MCGEO must be prepared to provide relevant information to this Board when their unit members appeal the disciplinary actions taken against them.

While MCGEO claims that Sgt. R was not involved with Appellant's disciplinary action and did not have any interaction with Appellant in any capacity, MCGEO does concede that Sgt. R does have knowledge of disciplinary action taken against other officers. See Non-Party Motion to Quash Subpoena of Sgt. R at 1. Thus, it appears that Sgt. R has relevant information concerning the issue of whether Appellant's penalty was appropriate. Moreover, the Board notes that the County did not object to Sgt. R being called as a witness. Accordingly, the Board, having considered all the pleadings in this matter, finds that there is no basis for quashing Sgt. R's subpoena.

### **ORDER**

Based on the foregoing, the Board denies the Motion to Quash Subpoena of Sgt. R.

### **DECISION ON NON-PARTY MOTION TO QUASH SUBPOENA FOR FIELD REPRESENTATIVE S**

On January 11, 2010, counsel for the United Food & Commercial Workers Union, Local 1994, Municipal and County Government Employees Organization (MCGEO), filed a Notice of Appearance on behalf of MCGEO.<sup>1</sup> Counsel also filed a Motion to Quash Subpoena of Field Representative S,<sup>2</sup> asserting that the information Field Representative S possesses is irrelevant to this case. Counsel for Appellant filed an Opposition to the Motion. Counsel for the County indicated that counsel would be filing nothing in regard to MCGEO's Motion.

### **BACKGROUND**

On June 16, 2009, Appellant received a Statement of Charges – Dismissal (SOC) from the Warden of the Department of Correction and Rehabilitation (DOCR), based on Appellant's alleged misconduct. MCGEO served as Appellant's exclusive representative<sup>3</sup> during the processing of this disciplinary matter. See, e.g., Joint Exhibit (Jt. Ex.) 70 (email from MCGEO Field Representative S to Investigator D, subject: Appellant's Phone Records). After the NODA

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<sup>1</sup> MCGEO is not a party to the instant appeal.

<sup>2</sup> According to MCGEO, Field Representative S is a MCGEO representative. See Non-Party Motion to Quash Subpoena of Field Representative S at 1. The Board notes that Field Representative S indicated in an email concerning Appellant (Joint Exhibit 70) that Field Representative S works for MCGEO.

<sup>3</sup> In fact, Appellant sought to be represented by Appellant's present attorney throughout the initial processing of Appellant's disciplinary matter, see Joint Exhibit 3, but was informed by the County that only MCGEO could represent Appellant at that stage of the proceedings. Appellant was only free to be represented by counsel of Appellant's own choosing after DOCR issued Appellant a Notice of Disciplinary Action – Dismissal (NODA).

was issued in this case, Appellant was permitted to seek representation by counsel of Appellant's own choosing, which Appellant did.

Appellant, through Appellant's counsel, filed the instant appeal with this Board. Consistent with the Board's Prehearing Procedures, Appellant and the County filed Prehearing Submissions, which contained, *inter alia*, copies of all exhibits to be introduced at hearing and a list of all witnesses. During the Prehearing Conference, the parties were given the opportunity to inform the Board of any objections they might have to each others' witnesses and/or exhibits. Based on the discussion held at the Prehearing Conference, the Board agreed to issue a subpoena on behalf of Appellant for the attendance of Field Representative S<sup>4</sup> at the hearing in this matter.

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

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

- (d) **Consideration of other factors** A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:
  - (3) the discipline given to other employees in comparable positions in

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<sup>4</sup> Appellant asserted in Appellant's Prehearing Submission that Field Representative S communicated with the Warden and Department Director regarding the investigation of Appellant and potential discipline against Appellant. *See* Appellant's Prehearing Submission at 6. Appellant also indicated that Field Representative S had knowledge of Appellant's grievance over the delay in DOCR completing its investigation into Appellant's conduct. *Id.* at 7. Finally, Appellant indicated that Field Representative S participated in the Alternative Dispute Resolution proceeding with Appellant and the County. *Id.*



the department for similar behavior; . . .

### **ANALYSIS AND CONCLUSIONS**

Significantly, MCGEO, although not a party to the instant appeal before this Board, chose to be a party in the underlying proceedings. MCGEO insisted upon representing Appellant through ADR and its representatives discussed the case with the Green during the processing of the disciplinary matter.<sup>5</sup> Accordingly, MCGEO cannot now claim that its representatives have no relevant information to offer regarding the issues and penalty in this case.<sup>6</sup> If MCGEO is going to insist on being the exclusive representative during the processing of disciplinary actions against its bargaining unit members, MCGEO must be prepared to provide relevant information to this Board when their unit members appeal the disciplinary actions taken against them.

While MCGEO claims that Field Representative S does not possess information relevant to this case, MCGEO concedes that Field Representative S does have information concerning investigations involving other officers.<sup>7</sup> See Non-Party Motion to Quash Subpoena of Field Representative S at 1. Moreover, it is evident that Field Representative S actively represented Appellant during the processing of Appellant's disciplinary matter. Indeed, Appellant asserts in Appellant's Opposition to this motion that Field Representative S will be able to testify regarding a meeting between Appellant, the Warden and Field Representative S during which the facts of the case as well as the proposed penalty were discussed. Appellant's Opposition to Motions to Quash Subpoenas at 3-4. Accordingly, Field Representative S will be able to provide relevant testimony regarding whether Appellant's disciplinary matter was handled differently than other Correctional Officers. Moreover, the Board notes that the County did not object to Field Representative S being called as a witness. Accordingly, the Board, having considered all the pleadings in this matter, finds that there is no basis for quashing Field Representative S' subpoena.

### **ORDER**

Based on the foregoing, the Board denies the Motion to Quash Subpoena of Field Representative S.

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<sup>5</sup> See Appellant's Opposition to Motions to Quash Subpoenas at 3-4.

<sup>6</sup> As it is clear that MCGEO represents Correctional Officers during the processing of disciplinary matters against them, it is evident that MCGEO's representatives would have relevant information concerning penalties that have been meted out for misconduct similar to the misconduct Appellant is alleged to have committed.

<sup>7</sup> MCGEO argues that Field Representative S lacks direct knowledge to form any opinion about how Appellant's case compares to others in which Field Representative S was involved as a MCGEO representative as MCGEO did not conduct an investigation into Appellant's termination. See Non-Party Motion to Quash Subpoena of Field Representative S at 1.

**DECISION ON NON-PARTY MOTION TO QUASH SUBPOENA  
FOR SGT. U**

On January 11, 2010, counsel for the United Food & Commercial Workers Union, Local 1994, Municipal and County Government Employees Organization (MCGEO), filed a Notice of Appearance on behalf of MCGEO.<sup>1</sup> Counsel also filed a Motion to Quash Subpoena of Sergeant (Sgt.) U,<sup>2</sup> asserting that the information Sgt. U possesses is irrelevant to this case. Counsel for Appellant filed an Opposition to the Motion. Counsel for the County indicated that Counsel would be filing nothing in regard to MCGEO's Motion.

**BACKGROUND**

On June 16, 2009, Appellant received a Statement of Charges – Dismissal (SOC) from the Warden of the Department of Correction and Rehabilitation (DOCR), based on Appellant's alleged misconduct. MCGEO served as Appellant's exclusive representative<sup>3</sup> during the processing of this disciplinary matter. *See, e.g.*, Joint Exhibit (Jt. Ex.) 70 (email from MCGEO Field Representative S to Investigator D, subject: Appellant's Phone Records). After the NODA was issued in this case, Appellant was permitted to seek representation by counsel of Appellant's own choosing, which Appellant did.

Appellant, through Appellant's counsel, filed the instant appeal with this Board. Consistent with the Board's Prehearing Procedures, Appellant and the County filed Prehearing Submissions, which contained, *inter alia*, copies of all exhibits to be introduced at hearing and a list of all witnesses. During the Prehearing Conference, the parties were given the opportunity to inform the Board of any objections they might have to each others' witnesses and/or exhibits. Based on the discussion held at the Prehearing Conference, the Board agreed to issue a subpoena on behalf of Appellant for the attendance of Sgt. U<sup>4</sup> at the hearing in this matter.

**APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section**

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<sup>1</sup> MCGEO is not a party to the instant appeal.

<sup>2</sup> According to MCGEO, Sgt. U is MCGEO's lead shop steward. *See* Non-Party Motion to Quash Subpoena of Sgt. U at 1.

<sup>3</sup> In fact, Appellant sought to be represented by Appellant's present attorney throughout the initial processing of Appellant's disciplinary matter, *see* Joint Exhibit 3, but was informed by the County that only MCGEO could represent Appellant at that stage of the proceedings. Appellant was only free to be represented by counsel of Appellant's own choosing after DOCR issued Appellant a Notice of Disciplinary Action – Dismissal (NODA).

<sup>4</sup> Appellant asserted in Appellant's Prehearing Submission that Sgt. U communicated with the Warden regarding the investigation of Appellant and potential discipline against Appellant. *See* Appellant's Prehearing Submission at 7.

**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, 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), 2001, Section 33, Disciplinary Actions**, which states in applicable part: **33-2. Policy on disciplinary actions.**

- (d) **Consideration of other factors** A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:
- (3) the discipline given to other employees in comparable positions in the department for similar behavior; . . .

**ANALYSIS AND CONCLUSIONS**

Significantly, MCGEO, although not a party to the instant appeal before this Board, chose to be a party in the underlying proceedings. MCGEO insisted upon representing Appellant through ADR and its representatives discussed the case with the Warden during the processing of the disciplinary matter.<sup>5</sup> Accordingly, MCGEO cannot now claim that its representatives have no relevant information to offer regarding the issues and penalty in this case.<sup>6</sup> If MCGEO is going to insist on being the exclusive representative during the processing of disciplinary actions against its bargaining unit members, MCGEO must be prepared to provide relevant information to this Board when their unit members appeal the disciplinary actions taken against them.

While MCGEO claims that Sgt. U does not possess information relevant to this case, MCGEO concedes that Appellant initially contacted Sgt. U about Appellant's discipline and Sgt. U counseled Appellant. See Non-Party Motion to Quash Subpoena of Sgt. U at 1. MCGEO also acknowledges that Sgt. U has knowledge of what Appellant told him, his advice to Appellant,

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<sup>5</sup> See Appellant's Opposition to Motions to Quash Subpoenas at 3-4.

<sup>6</sup> As it is clear that MCGEO represents Correctional Officers during the processing of disciplinary matters against them, it is evident that MCGEO's representatives would have relevant information concerning penalties that have been meted out for misconduct similar to the misconduct Appellant is alleged to have committed.

and disciplinary action taken against other officers. Id. Thus, it appears that Sgt. U has relevant information concerning the issue of whether Appellant's penalty was appropriate. Moreover, the Board notes that the County did not object to Sgt. U being called as a witness. Accordingly, the Board, having considered all the pleadings in this matter, finds that there is no basis for quashing Sgt. U's subpoena.

**ORDER**

Based on the foregoing, the Board denies the Motion to Quash Subpoena of Sgt. U.

# **MOTIONS FOR PROTECTIVE ORDERS**

## **CASE NO. 10-04**

### **DECISION ON COUNTY'S MOTIONS FOR PROTECTIVE ORDERS**

On October 12, 2009, the County filed a Motion for Protective Order, and Memorandum in Support thereof, seeking to have the Merit System Protection Board (MSPB or Board) quash Interrogatories served by Appellant (Interrogatory Motion and Memorandum). On October 13, 2009, the County filed a Motion for Protective Order, and Memorandum in Support thereof, seeking to have the Board quash Appellant's Request for Production of Documents (Production Motion and Memorandum). On October 15, 2009, the County filed a Motion for Protective Order, and Memorandum in Support thereof, seeking to have the Board quash Appellant's Notices of Deposition (Deposition Motion and Memorandum). On October 21, 2009, Appellant filed with the Board a Consolidated Opposition to Employer's Motions for Protective Order (Opposition).

### **BACKGROUND**

This appeal involves the dismissal of Appellant from Appellant's position as a Correction Supervisor-Sergeant, with the Department of Correction and Rehabilitation (DOCR). According to the Statement of Charges, on the evening of February 11, 2009, Appellant's car was stopped by the police and Appellant was found to be in the company of Ms. B,<sup>1</sup> a former female inmate of DOCR. See County Exhibit (C. Ex.) 1 at 1.<sup>2</sup> Appellant was subsequently placed on administrative leave with pay by DOCR while it launched an investigation into Appellant's conduct. Appellant was thereafter charged with making false statements during the DOCR investigation, having a relationship with a former inmate, contacting Ms. B by phone while Appellant was on duty<sup>3</sup> and wearing a part of the DOCR uniform while being in contact with a former inmate. *Id.* at 7-9.

### **APPLICABLE LAW AND REGULATION**

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

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<sup>1</sup> According to the Statement of Charges, the County police were conducting an undercover surveillance of Ms. B, who was wanted in connection with a felony bank robbery that occurred in the County. During the stop, Appellant was questioned and permitted to leave the scene, and Ms. B was taken into custody. See C. Ex. 1 at 2-3.

<sup>2</sup> The County filed its Prehearing Submission, along with fifty-five proposed exhibits, with the Board on September 15, 2009. Appellant was granted an extension of time to file Appellant's Prehearing Submission, so as to permit the parties to engage in discovery.

<sup>3</sup> According to the Statement of Charges, some of these phone calls exceeded the time in which a security round should have been conducted. C. Ex. 1 at 8.

- (b) **Discovery.** Subject to the provisions of the state public information law:
- (1) Any party shall have the right to review at reasonable hours and locations and to copy at its own expense documents, statements or other investigative reports or portions thereof pertaining to the charging document to the extent that they will be relied upon at the hearing or to question the charging party or agency personnel at reasonable times on matters relevant to the appeal, provided such discovery is not otherwise precluded by law.
  - (3) The provisions contained herein shall not infringe upon any attorney-client privilege and shall not include the work product of counsel to any party to the proceedings.
  - (4) Where it appears that a party possesses information or evidence necessary or helpful in developing a complete factual picture of a case, a hearing authority may order such party to answer interrogatories or submit itself or its witnesses to depositions upon its own motion or for good cause shown by any other party. . . .

**Montgomery County Personnel Regulations (MCPR), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations** (as amended February 15, 2008, and October 21, 2008), which states in applicable part:

**35-2. Right of appeal to MSPB.**

- (d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

**35-12. Testimony of witnesses at hearing; interrogatories and depositions.**

- (b) ***Interrogatories and depositions.*** The MSPB or hearing officer may accept a statement of a witness taken by written interrogatory or a deposition made under oath. This does not preclude a party from taking a deposition or interrogatory of a witness prior to the hearing for impeachment or discovery purposes. A party must file a true copy of an interrogatory, answer, or deposition with the MSPB or hearing officer.

**ANALYSIS AND CONCLUSIONS**

The Board would note at the outset its concern with regard to the County's recalcitrance as to Appellant's discovery requests. As Appellant notes, the Board encourages the parties to

commence discovery once the Board has noted an appeal. It has been the Board's experience that the majority of discovery requests are amicably resolved between the parties without the need to resort to the Board for a determination. See, e.g., MSPB Case No. 07-08 (wherein the discovery dispute only involved two interrogatories, as the County responded to two other interrogatories, three production of document requests and three depositions) available at <http://www.montgomerycountymd.gov/content/council/pdf/Merit/2007.pdf>. The Board is dismayed that the County has refused to engage in "formal" discovery without an order from the Board. The Board also rejects the County's reading into the APA the requirement for "informal questioning" of agency personnel before resorting to the use of formal interrogatories or formal depositions.<sup>4</sup> See Interrogatory Motion at 3; Deposition Motion at 4. Likewise, the Board rejects the County's assertion that the APA requires a party to arrange to visit the County agency's offices to review documents pertaining to the charging document (to the extent that they will be relied upon at hearing)<sup>5</sup> before proffering a formal request to produce documents. Production Motion at 3. To preclude such conduct in the future, the Board may henceforth, in accordance with the Administrative Procedures Act, issue an order to the County upon noting an appeal, to respond to any and all discovery that would provide information or evidence helpful to the Appellant in developing a complete factual picture of the case.

While the Board believes Appellant is entitled to engage in discovery to obtain information that is helpful in developing a complete factual picture, the Board agrees with the County that Appellant is not entitled to engage in a fishing expedition. Production Memorandum at 31-32. The Board notes that the appeal pending before it is an administrative appeal not a criminal matter. Likewise, the appeal does not deal with the union or alternative dispute resolution process. And as the County points out, the Board is not empowered to hear claims of discrimination prohibited by Chapter 27 of the Montgomery County Code.<sup>6</sup> See MCPR, Section 35-2(d). Moreover, as the County notes, the APA does not permit discovery of the work product of counsel nor may such discovery infringe upon the attorney-client privilege. Interrogatory Memorandum at 41-46. Accordingly, based on the foregoing parameters, unless it is evident that the discovery sought is relevant or that Appellant has shown good cause for Appellant's discovery request, the Board will not grant it.

**A. Appellant's Interrogatory Requests**<sup>7</sup>

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<sup>4</sup> If one were to accept the County's contorted reading of the APA, Appellant would be able to obtain two separate questioning sessions with a witness prior to the hearing – one "informal" and the other "formal". Such an interpretation would be unduly burdensome on an agency as it seeks to execute its governmental business.

<sup>5</sup> The Board finds that the County's view that only documents that are to be relied upon at hearing are discoverable is likewise a distorted view of the breath of discovery permitted under the APA.

<sup>6</sup> Montgomery County Code, Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, marital status, age, sex, sexual orientation, disability, genetic status, and family responsibilities.

<sup>7</sup> To the extent the County may be able to respond to an interrogatory by referencing a document, it may do so and provide Appellant with a copy of the document if it has not otherwise been provided. See Fed. R. Civ. P. No. 33(d).

**Interrogatory No. 1:** Please identify each and every individual who responded or assisted in responding to the following interrogatories and requests for production of documents. With regard to each individual please identify the interrogatories and/or discovery requests that the individual was involved in responding to and the extent of their involvement.

The Board finds that this is a standard discovery request and therefore will deny the County's request to quash it.

**Interrogatory No. 2:** Please identify each and every individual with knowledge of the facts and circumstances which formed the basis of the June 16, 2009 Statement of Charges-Dismissal issued to Appellant by the Warden and the July 15, 2009 Notice of Disciplinary Action-Dismissal issued to Appellant by the Department Director. For each individual, please describe the nature and extent of their knowledge and/or participation in the events at issue.

This interrogatory is clearly relevant to the instant appeal and therefore the County will be ordered to respond.

**Interrogatory No. 3:** Please state each and every reason why the Warden proposed Appellant's termination on June 16, 2009.

This interrogatory is clearly relevant to the instant appeal and therefore the County will be ordered to respond.

**Interrogatory No. 4:** Please state each and every reason why the Director sustained the charges alleged in the June 16, 2009 Statement of Charges and imposed a penalty of termination.

This interrogatory is clearly relevant to the instant appeal and therefore the County will be ordered to respond.

**Interrogatory No. 5:**<sup>8</sup>

- A. Please identify any applicable Employer policy, directive or any other written rule or guidance allegedly violated by Appellant.

This interrogatory is clearly relevant to the instant appeal and therefore the County will be ordered to respond.

- B. Please identify each and every communication between the Warden, the Chief Investigator and the Department Director regarding the facts and circumstances contained in the June 16, 2009 Statement of Charges and the July 15, 2009 Notice of Disciplinary Action. For each communication state: the date on which the

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<sup>8</sup> Appellant submitted two Interrogatories numbered 5. For ease of reference, the Board has labeled the first Interrogatory 5 as Interrogatory 5A, and the second Interrogatory 5 as Interrogatory 5B.



communication occurred, whether any other person(s) were present and the nature and content of the communication.

This interrogatory is clearly relevant to the instant appeal and therefore the County will be ordered to respond.

**Interrogatory No. 6:** Please identify each and every communication between any employee of the Employer and any representative of the Municipal and County Government Employees Organization, including but not limited to Field Representative S, Steward T, Steward U and Steward Y, regarding: a) the facts and circumstances contained in the June 16, 2009 Statement of Charges and the July 15, 2009 Notice of Disciplinary Action; and b) Appellant's alternative dispute resolution hearing and Appellant's decision to forgo union representation. For each communication state: the date on which the communication occurred; whether any other person(s) were present; and the nature and content of the communication.

This interrogatory seeks communications between the County and the Union. Appellant has failed to show good cause as to why this interrogatory is relevant.

**Interrogatory No. 7:** Please identify any and all grievances filed by Appellant or on Appellant's behalf by a representative of the Montgomery County Government Employees Organization (MCGEO) from January 1, 2005 to the present. For each grievance identified, please provide: 1) a description of the substance of the grievance; 2) a listing of any County officials named in the grievance; and 3) the status of the grievance including any resolution reached.

Appellant has failed to show good cause as to why the County should respond to this interrogatory.

**Interrogatory No. 8:** Please identify any and all disciplinary actions and non-disciplinary letters of counseling, letters of warning or any other document advising Agency employees regarding: a) violations of Department of Corrections and Rehabilitation Policy and Procedure 3000-7, Section V, "Association of Personnel with An Inmate/Resident/Participant or with an Inmate's/Resident's/Participant's family and friends; and/or b) violation of Montgomery County Personnel Regulations Section 33-5(g) "knowingly makes a false statement or report in the course of employment"; and/or c) Department of Correction and Rehabilitation Policy and Procedure 3000-7, Section VI, Departmental Rules for Employees D(1), D(9), D(10), D(14) in which the Warden, or the Department Director served as either the proposing or deciding official from January 1, 2004 to the present. For each employee subject to such an action, please identify the employee by race and list the proposed penalty identified in any Statement of Charges, if applicable and the final decision rendered.

This interrogatory seeks information about how other DOCR employees, who committed similar offenses as those Appellant is purported to have committed, were disciplined. This information is clearly relevant to the instant appeal and therefore the County will be ordered to respond to the extent that other DOCR employees are similarly situated to Appellant. However, the County will not be ordered to identify the employee by race, as the Board is not empowered to hear claims of discrimination based on race.

**Interrogatory No. 9:** For each disciplinary or non-disciplinary action identified in Interrogatory No. 8, please state whether the employee was permitted to remain in his/her position pending adjudication of any charges against him/her, reassigned to another position, or placed on administrative leave.

Appellant has failed to show good cause as to why the County should respond to this interrogatory.

**Interrogatory No. 10:** Identify any and all equal employment opportunity complaints filed naming either the Warden or the Department Director as a responsible management official. For each complaint: (a) identify the appellant by race and prior EEO activity; (b) identify the basis for the complaint (i.e. race, sex, disability, etc.); and (c) describe the status of the complaint as of the date of your response to this interrogatory.

As the Board is not empowered to hear claims of discrimination based on race, sex, disability or EEO activity, Appellant has failed to show good cause as to why this interrogatory is relevant to Appellant's appeal.

**Interrogatory No. 11:** Please identify each and every communication authored, transmitted, initiated or otherwise communicated either orally or in writing (including any electronic data as defined above) by Agency employees including but not limited to the Warden, the Chief Investigator, the Department Director, and the Field Representative regarding Appellant's performance and/or the facts and circumstances which led to either the June 16, 2009 Statement of Charges and the July 15, 2009 Notice of Disciplinary Action. For each person identified in response to this interrogatory, please state: 1) when the communication occurred; 2) whether any other individual(s) were present; and 3) the nature and substance of the communication.

Appellant has failed to show good cause as to why the County should respond to this interrogatory.

**Interrogatory No. 12:** Please identify any and all investigations, inquiries, or any other communications (either oral or written including electronic data as defined above) or actions taken by the Agency in response to allegations that Appellant engaged in an improper relationship with a former inmate.

This interrogatory is clearly relevant to the instant appeal and therefore the County will be ordered to respond. The County does not have to provide any information covered by the attorney-client or work product privileges.

**Interrogatory No. 13:** Please state when and how the Agency became aware of the facts and circumstances of the events that led to the June 16, 2009 statement of charges issued to Appellant.

This interrogatory is clearly relevant to the instant appeal and therefore the County will be ordered to respond.

**Interrogatory No. 14:** Please state each and every reason why progressive discipline was not utilized with regard to the penalty imposed for Appellant's alleged conduct.

This interrogatory is clearly relevant to the instant appeal and therefore the County will be ordered to respond.

**Interrogatory No. 15:** Please identify each and every communication between the Chief Investigator and any employee of the Montgomery County Police Department, including but not limited to Police Detective E, regarding the subpoena or other request for Appellant's personal phone records in connection with the investigation into alleged misconduct by Appellant.

This interrogatory is clearly relevant to the instant appeal and therefore the County will be ordered to respond.

**Interrogatory No. 16:** Please identify each and every communication between the Warden and the Department Director and/or any employees operating under their direction or control regarding a delegation of authority to the Warden to issue the June 16, 2009 Statement of Charges to Appellant.

This interrogatory is clearly relevant to the instant appeal and therefore the County will be ordered to respond.

**Interrogatory No. 17:** Please identify any and all investigations, interview or other inquiry conducted into the facts or circumstances described in the June 16, 2009 Statement of Charges and July 15, 2009 Notice of Disciplinary Action conducted after July 15, 2009. For each investigation, interview or other inquiry, please identify: a) the reason for the additional investigation, interview or other inquiry; b) the individual(s) responsible for conduction such an investigation, interview, or inquiry; c) the results of any such investigation, interview or inquiry; and d) whether Appellant was offered any opportunity prior to the filing of the instant appeal to review or respond to any information obtained.

Appellant has failed to show good cause as to why the County should respond to this interrogatory.

## **B. Appellant's Document Requests**

**Request No. 1:** All documents or communications (including any electronic data as defined above) authored, received or transmitted by Agency employees regarding Appellant's removal from County employment or any of the facts and circumstances underlying the removal action against Appellant.

This request for production of documents is clearly relevant and the County is ordered to produce all relevant documents which have not previously been provided to Appellant.

**Request No. 2:** A listing of all current employees in the Montgomery County Correctional Facility (MCCF) by race, sex, disability EEO activity and duration of employment with the Agency.

This request for production of documents is clearly not relevant to the instant appeal.

**Request No. 3:** Any and all documents and communications (including any electronic data as defined above) relied upon to support the Agency's Notice of Disciplinary Action and Statement of Charges issued to Appellant, including but not limited to any documents relied upon to illustrate that Appellant's conduct, performance, general character traits or capacity did not meet the requirements for satisfactory service.

This request for production of documents is clearly relevant and the County is ordered to produce all relevant documents which have not previously been provided to Appellant.

**Request No. 5:**<sup>9</sup> Any and all documents or communications relating to any Miranda warnings or other procedural protections afforded Appellant as they relate to Appellant's right to remain silent or orders to produce incriminating information.

This request for production of documents is clearly not relevant to the instant appeal.

**Request No. 6:** Any and all documents or communications, including but not limited to Appellant's official position description, that identify, describe, relate or pertain to Appellant's duties, responsibilities, performance objectives, or expected conduct.

This request for production of documents is clearly relevant and the County is ordered to produce all relevant documents which have not previously been provided to Appellant.

**Request No. 7:** Any and all documents or communications including any electronic data as defined above, regarding, relating or pertaining to Appellant's performance or conduct, including but not limited to any documents or communications authored by, received or transmitted as between the deciding official, wardens and all other Agency employees and union representative.

Appellant has failed to show good cause as to why the County should respond to this request.

**Request No. 8:** A copy of Appellant's Official Personnel File, any performance appraisals (including any drafts or revised versions) and performance plans issued to Appellant, and any other files regarding Appellant maintained by Appellant's supervisors and/or by the Warden.

This request for production of documents is clearly relevant and the County is ordered to produce all relevant documents (which are not drafts) which have not previously been provided to Appellant.

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<sup>9</sup> Appellant did not propound a Request No. 4.

**Request No. 9:** Any and all documents or communications (including any electronic data as defined above) regarding any survey, assessment, report or any other evaluation of the work environment within the MCCF during Appellant’s tenure of service.

Appellant has failed to show good cause as to why the County should respond to this request.

**Request No. 10:** (*With respect to the Appellant*)

- a. The text of any statements or confessions made by the Appellant, oral or written, made by the Appellant that are, or may in any way become, relevant to the case.

Appellant has failed to show good cause as to why the County should respond to this request.

- b. Any evidence of an exculpatory nature or which tends to negate the alleged “guilt” of the Appellant.

Appellant has failed to show good cause as to why the County should respond to this request.

- c. Any evidence which would tend to aggravate or mitigate the degree of the alleged offenses.

Appellant has failed to show good cause as to why the County should respond to this request.

- d. Disclosure of any evidence seized from the Appellant’s person or property, or believed to be owned by Appellant, that the government intends to offer into evidence against my client. Also, any warrants, affidavits, consent forms, or other documents authorizing or related to the initiation of a search or seizure of evidence from the Appellant’s person or property.

Appellant has failed to show good cause as to why the County should respond to this request.

- e. Whether the Appellant’s conversations or premises have been subject to electronic or other surveillance. If so, the Appellant requests copies of any warrants issued, used or unused.

Appellant has failed to show good cause as to why the County should respond to this request.

- f. Copies of any favorable or derogatory data regarding the Appellant. Copies of relevant information contained in any of the Appellant’s personal information files.

Appellant has failed to show good cause as to why the County should respond to this request.

- g. Copies of all documents including electronic communications related to any reassignment of the Appellant as a result of, or contemporaneous with, the investigation of this case.

Appellant has failed to show good cause as to why the County should respond to this request.

**Request No. 12:**<sup>10</sup> (*With respect to documentary reports*)

- a. A complete copy of any and all investigations or laboratory reports, including any internal agency documents and data made in connection with this investigation prepared by any law enforcement agency, including copies of all attachments. This request includes all internal forms/documents, including witness reliability forms, internal data sheets, and other relevant forms and documents. The Appellant further requests to be informed if any of the requested documents do not exist in the present case. In addition, we request to be informed specifically which documents fall into this category. This request also includes, but is not limited to, the following relevant documentation if applicable:

- (1) Complaint Initiation Form (including reverse and continuation sheets, if any);
- (2) Internal Data Pages;
- (3) Interview Logs;
- (4) Interview Records;
- (5) Source Dossier and any forms(s) related to any Confidential Informant(s);
- (6) Informants' Notes;
- (7) Informal Source Files;
- (8) Any forms(s)/documents detailing any Disbursement from Confidential Funds;
- (9) Developmental Files;
- (10) Any Substantive Investigations Record Check Summary;
- (11) Any form(s) related to Consent for Search and Seizure;
- (12) Internal Communications Staff Summary Sheets, and E-Mail and/or electrical medium (message) documents used to brief, respond and/or request investigative activities in the investigation.
- (13) Results of any MCIC, DCII, LAC and Security Police 110 records checks;
- (14) All records reflecting the chain of custody on any evidence seized and/or tested; and
- (15) All Agent or Investigator notes.

Appellant has failed to show good cause as to why the County should respond to this request.

- b. Inspection and copies of all personal and business notes, memoranda and records, including all internal agency documents and data, kept by all agents, investigators, or witnesses, not formally made part of the reports referred to above. In addition to other uses, said papers are to be used prior to cross-examinations of said persons. We further request that all such notes and those made in the future be preserved and not destroyed and that the appropriate parties

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<sup>10</sup> Appellant did not propound a Request No. 11.

be directed to preserve the same. The Appellant further requests to be given access to all classified notes and records.

Appellant has failed to show good cause as to why the County should respond to this request.

c. The names and phone numbers of all investigators who have participated or are presently participating in the investigation of this case. In addition, the Appellant requests copies of the following regarding each investigator involved in this case:

- (1) Any "On-the-Job" Training Record;
- (2) Training Test Score Results;
- (3) Evidence of Credentials Suspended or Revoked
- (4) Evidence of being a Subject or Suspect in any Internal Affairs Investigations, whether related to this matter or not;
- (5) Evidence of any adverse administrative or disciplinary actions, whether related to this matter or law enforcement activity or not.

Appellant has failed to show good cause as to why the County should respond to this request.

d. A copy of any and all records of counseling from complaining witnesses, specifically including any and all records of formal and/or informal counseling that may exist including the decision making authorities.

Appellant has failed to show good cause as to why the County should respond to this request.

**Request No. 13: (With respect to witnesses)**

a. The names and duty phone or business addresses of all witnesses and potential witnesses used in developing the case against the Appellant, including any potential rebuttal witnesses together with their relevant statements, including those made during polygraph examination(s). If any of the statements contain classified or confidential information, the Appellant requests full access to the statements or forms. If any of the statements contain "privileged" information the Appellant requests to be so notified and further requests to be informed of the specific privilege the government claims for the document or statement.

This request for production is clearly relevant with regard to any statements relied upon in taking disciplinary action against Appellant. Accordingly, the Board will order the County to produce any such written statements by any potential witness identified in the County's Prehearing Submission. As to the other information sought in this request, Appellant has failed to show good cause as to why the County should respond.

b. Any known evidence tending to diminish the credibility of all potential witnesses. This request includes any information regarding prior civil or military convictions, and evidence

of other character, conduct, or bias bearing on witness credibility including letters of counseling, letters of reprimand, memoranda or other information concerning the existence of oral counseling's or reprimands, investigative reports, and adverse administrative actions in the government's possession or reasonably obtainable.

Appellant has failed to show good cause as to why the County should respond to this request.

- c. The Appellant specifically requests all derogatory actions regardless of whether the Agency believes it is relevant to witness credibility or bias. Further, the Appellant requests any evidence that the testimony of any prospective witness is inconsistent with any statement of any other person or prospective witness. Finally, the Appellant requests any evidence that any prospective government witness is biased or prejudiced against the Appellant or has a motive to falsify or distort his/her testimony.

Appellant has failed to show good cause as to why the County should respond to this request.

- d. The text or other evidence of any promises of immunity or leniency made to the Appellant or to any of Employer's witnesses. The Appellant further requests notification if any County agent or representative of any County agency offered to assist or "help out" any witness in return for their cooperation.

Appellant has failed to show good cause as to why the County should respond to this request.

- e. Any writing or document used by a witness to prepare his/her testimony.

Appellant has failed to show good cause as to why the County should respond to this request.

- f. The names, addresses and phone numbers of all confidential witnesses, including, but not limited to, undercover informants and/or agents.

Appellant has failed to show good cause as to why the County should respond to this request.

- g. If any relevant witness in this case has been subject to a polygraph or other "truth detecting" examination, request to be provided with the results of this testing, together with all relevant charts, graphs, questions and other documents.

Appellant has failed to show good cause as to why the County should respond to this request.

**Request No. 14: (With respect to physical evidence)**

- a. Disclosure of the existence of, and the opportunity to listen to any and all tapes made by



and/or between any and all parties involved in this case.

Appellant has failed to show good cause as to why the County should respond to this request.

- b. Digital colored copies of any photographs taken of the alleged crime scene, if there is one, or any other photographs taken pursuant to this investigation.

Appellant has failed to show good cause as to why the County should respond to this request.

**Request No. 15:** Any subpoena duces tecum issued by the Employer.

Appellant has failed to show good cause as to why the County should respond to this request.

**Request No. 16:** Copies of all of Appellant's post assignments worked from March 1, 2008 through February 27, 2009.

This request for production of documents is clearly relevant and the County is ordered to produce all relevant documents which have not previously been provided to Appellant.

**Request No. 17:** Any and all documents and communications (including any electronic data as defined above) used by the Agency to support its contention that Appellant's performance of Appellant's duties was in any way affected by any phone calls made or received by Appellant as alleged in the July 15, 2009 Notice of Disciplinary Action, page 6, paragraph 8.

This request for production of documents is clearly relevant and the County is ordered to produce all relevant documents which have not previously been provided to Appellant.

**Request No. 18:** Any and all communications (including any electronic data as defined above) between the Investigator and any employee of the Montgomery County Police Department regarding Appellant.

This request for production of documents is clearly relevant and the County is ordered to produce all relevant documents dealing with the Investigator's contacts with the Montgomery County Police Department regarding the misconduct with which Appellant is charged and which have not previously been provided to Appellant.

**Request No. 19:** Any documents or communications discussing, describing or in any way related to permission being given by the Department Director to the Warden to issue the June 16, 2009 Statement of Charges to Appellant.

This request for production of documents is clearly relevant and the County is ordered to produce all relevant documents which have not previously been provided to Appellant.

**Request No. 20:** Any and all documents or communications (including any electronic data as defined above) regarding, discussing or related to allegations that Appellant neglected Appellant's duties and any videotapes of the posts worked by Appellant from January 22, 2009 to February 27, 2009 that illustrate Appellant's alleged neglect of or failure to perform Appellant's duties.

This request for production of documents is clearly relevant and the County is ordered to produce all relevant documents which have not previously been provided to Appellant.

**Request No. 21:** Any and all documents or communications (including any electronic data as defined above) regarding any disciplinary actions identified in response to Interrogatory No. 8.

This information is clearly relevant to the instant appeal and therefore the County will be ordered to provide responsive documents regarding similarly situated DOCR employees. However, the County will redact any identifying information in the documents before releasing them.

**Request No. 22:** Any and all documents or communications (including any electronic data as defined above) regarding any EEO complaints identified in response to Interrogatory No. 10.

As the Board is not empowered to hear EEO complaints, Appellant has failed to show good cause as to why this request is relevant.

**Request No. 23:** Any and all documents or communications (including any electronic data as defined above) identified in response to Interrogatory No. 11.

Appellant has failed to show good cause as to why the County should respond to this request.

**Request No. 24:** Any and all documents or communications (including any electronic data as defined above) identified in response to Interrogatory No. 12.

This request for production of documents is clearly relevant and the County is ordered to produce all relevant documents which have not previously been provided to Appellant.

**Request No. 25:** Any and all documents or communications (including any electronic data as defined above) regarding any EEO complaints identified in response to Interrogatory No. 13.

As the Board is not empowered to hear EEO complaints, Appellant has failed to show good cause as to why this request is relevant.

**Request No. 26:** Any and all documents or communications (including any electronic data as defined above) regarding any EEO complaints identified in response to Interrogatory No. 15.

As the Board is not empowered to hear EEO complaints, Appellant has failed to show good cause as to why this request is relevant.

**Request No. 27:** Any and all documents or communications (including any electronic data as defined above) regarding any EEO complaints identified in response to Interrogatory No. 17.<sup>11</sup>

Appellant has failed to show good cause as to why the County should respond to this request.

**Request No. 28:** Any and all documents or communications (including any electronic data as defined above) between any employee of Employer and Police Detective V regarding Appellant or any of the facts and circumstances that gave rise to the June 16, 2009 Statement of Charges and July 15, 2009 Notice of Disciplinary Action.

The Board has already ordered the County to produce documents regarding the facts that gave rise to Appellant's discipline. Appellant has failed to show good cause as to why the County should respond to the rest of this request.

**Request No. 29:** Any and all documents or communications (including any electronic data as defined above) regarding, discussing or related to the processing of Appellant's termination including Appellant's final payroll timesheet.

Appellant has failed to show good cause as to why the County should respond to this request.

**C. Appellant's Deposition Requests**

1. Investigator

As indicated in the County's Prehearing Submission, Mr. D is the Investigator. County Prehearing Submission at 21. The County has indicated it intends to call Mr. D as a witness and that his proposed testimony will cover his investigation into Appellant's alleged misconduct. Id. at 21-24. Accordingly, the Board finds that Mr. D has information helpful in developing a complete factual picture of the instant case. Therefore, the County is ordered to produce Mr. D for deposition at a time and date to be designated by Appellant. Said deposition will take place at a location<sup>12</sup> within the County as arranged for by the County.

2. The Warden

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<sup>11</sup> Although this request discusses EEO information, in Appellant's Opposition to the County's Protective Orders, Appellant indicated that this Request is seeking all documents identified in Interrogatory No. 17 which deal with any investigation or inquiry conducted after the Notice of Disciplinary Action was issued on July 15, 2009. See Opposition at 10.

<sup>12</sup> The Board notes that its subpoena power is enforceable by the Circuit Court of Montgomery County, Maryland. Accordingly, the Board agrees with the County's position that the proper venue for a deposition in a proceeding with the Board is Montgomery County. See Deposition Motion at 5.

As indicated in the County's Prehearing Submission, Mr. P is the Warden of the correctional facility where Appellant worked, and issued the Statement of Charges to Appellant. County's Prehearing Submission at 26, 28. The County has indicated it intends to call the Warden as a witness and that the Warden's proposed testimony will cover, *inter alia*, the Warden's placing Appellant on administrative leave, the Warden's discussion with Mr. D concerning his investigation and his request, after reading Mr. D's internal investigation report, to continue and broaden the investigation, his review of the revised investigative report, his drafting and issuing of the Statement of Charges, and his drafting of the Notice of Disciplinary Action. *Id.* at 26-30. Accordingly, the Board finds that the Warden has information helpful in developing a complete factual picture of the instant case. Therefore, the County is ordered to produce the Warden for deposition at a time and date to be designated by Appellant. Said deposition will take place at a location within the County as arranged for by the County.

3. Police Detective E

As indicated in the County's Prehearing Submission, Ms. E is a Police Detective with the County. County's Prehearing Submission at 20. The County has indicated it intends to call Ms. E as a witness and that her proposed testimony will cover, *inter alia*, her knowledge concerning the events of the evening of February 11, 2009 and early morning of February 12, 2009, including her participation in the arrest of Ms. B on the charge of armed robbery, her participation in the serving of a search warrant on a residence and the recovery of approximately half a pound of marijuana from Ms. B's bedroom in said residence, her discussion with Ms. I,<sup>13</sup> who attempted to enter the residence while the police were executing the search, her seizure of Ms. B's cellular telephone, her conversation with Ms. B concerning Appellant, and her subsequent conversation with Appellant when she interviewed Appellant in connection with the events of February 11, 2009. County's Prehearing Submission at 20-21. Accordingly, the Board finds that Ms. E has information helpful in developing a complete factual picture of the instant case. Therefore, the County is ordered to produce<sup>14</sup> Ms. E for deposition at a time and date to be designated by Appellant. Said deposition will take place at a location within the County as arranged for by the County.

4. Police Officer A

As indicated in the County's Prehearing Submission, Mr. A is a Police Officer with the County. County's Prehearing Submission at 17. The County had indicated it intends to call Mr. A to testify about his knowledge concerning the events of February 11, 2009, including his participation in the surveillance of Ms. B, his observation of Appellant permitting Ms. B to get into Appellant's car, the subsequent blocking of Appellant's car by the police, his discussion

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<sup>13</sup> According to the Statement of Charges, Appellant admitted having phone conversations with Ms. I but denied having phone conversations with Ms. B. *See* C. Ex. 1 at 6, 7, 8.

<sup>14</sup> Should the County believe a subpoena is necessary in order to produce this witness, the County shall notify the Board's Executive Director and the Board will issue a subpoena to the County for this witness' appearance at deposition.

with Appellant regarding Ms. B, and Ms. B's removal from Appellant's car and her placement in police custody. County's Prehearing Submission at 17-19. Accordingly, the Board finds that Mr. A has information helpful in developing a complete factual picture of the instant case. Therefore, the County is ordered to produce<sup>15</sup> Mr. A for deposition at a time and date to be designated by Appellant. Said deposition will take place at a location within the County as arranged for by the County.

5. Police Detective C

As indicated in the County's Prehearing Submission, Mr. C is a Police Detective with the County. County's Prehearing Submission at 19. The County has indicated it intends to call Mr. C to testify about his knowledge of the events of February 11 and early morning of February 12, 2009, including his participation in the surveillance of Ms. B, his observation of Appellant permitting Ms. B to get into Appellant's car, the subsequent blocking of Appellant's car by the police, his discussion with Appellant regarding Ms. B, and Ms. B's removal from Appellant's car and her placement in police custody. County's Prehearing Submission at 19-20. Accordingly, the Board finds that Mr. C has information helpful in developing a complete factual picture of the instant case. Therefore, the County is ordered to produce<sup>16</sup> Mr. C for deposition at a time and date to be designated by Appellant. Said deposition will take place at a location within the County as arranged for by the County.

6. Department Director

As indicated in the County's Prehearing Submission, Mr. M is the Director and issued the Notice of Disciplinary Action, dismissing Appellant from Appellant's employment. County's Prehearing Submission at 30, 32. The County has indicated that it intends to call Mr. M to testify, inter alia, about his knowledge of the factual bases for the Appellant's disciplinary action, why dismissal was the appropriate level of discipline, and the policy underpinnings of DOCR's policy against staff fraternization with inmates or recently released ex-inmates. County's Prehearing Submission at 30-33. Accordingly, the Board finds that Director M has information helpful in developing a complete factual picture of the instant case. Therefore, the County is ordered to produce Director M for deposition at a time and date to be designated by Appellant. Said deposition will take place at a location within the County as arranged for by the County.

**ORDER**

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<sup>15</sup> Should the County believe a subpoena is necessary in order to produce this witness, the County shall notify the Board's Executive Director and the Board will issue a subpoena to the County for this witness' appearance at deposition.

<sup>16</sup> Should the County believe a subpoena is necessary in order to produce this witness, the County shall notify the Board's Executive Director and the Board will issue a subpoena to the County for this witness' appearance at deposition.

Based on the foregoing, the County's Motions for Protective Orders are denied. The Board hereby orders the following actions:

1. The County shall respond to Interrogatory Nos. 1, 2, 3, 4, 5A, 5B, 8, 12, 13, 14, 15, and 16 within **five days from the date of this Decision.**
2. The County shall produce documents responsive to Request for Document Nos. 1, 3, 6, 8, part of 13a, 16, 17, 18, 19, 20, 21, and 24 within **five days from the date of this Decision.**
3. The County shall produce all six individuals the Appellant seeks to depose for deposition at a time and date to be determined by Appellant's counsel. The County will arrange for a location within the County for these depositions.

All remaining discovery requests of Appellant are hereby denied.

# **MOTION IN LIMINE**

## **CASE NO. 10-04**

### **DECISION ON APPELLANT'S MOTION IN LIMINE**

Appellant has filed a Motion in Limine, seeking to exclude the introduction of County Exhibits (C. Ex.) 44-48, 50, 53, and 56-60.<sup>1</sup> Appellant's Motion in Limine is based on three arguments: 1) any exhibits produced after the issuance of the Notice of Disciplinary Action are irrelevant and their admission would violate Appellant's due process rights (i.e., C. Ex. 44-48, 53, 56-60); 2) one exhibit is overly prejudicial and should be excluded (i.e., C. Ex. 50); and 3) the County failed to show good cause as to why its Second Supplemental Prehearing Submission was not timely submitted (i.e., C. Ex. 57-60). The County filed a Response to the Appellant's Motion in Limine, indicating it was withdrawing Exhibit 48, and arguing that the other exhibits at issue should be allowed in as they are relevant and their admission does not violate Appellant's due process rights. Most of the exhibits at issue (all but C. Ex. 50 and C. Ex. 60), according to the County, are being proffered to refute Appellant's contention that Appellant was talking on the phone with Ms. I rather than former inmate Ms. B.<sup>2</sup>

### **BACKGROUND**

This appeal involves the dismissal of Appellant based on Appellant's alleged misconduct. At the time of the events at issue in this case, Appellant was a Correctional Officer – Sergeant with the Department of Correction and Rehabilitation (DOCR). Appellant was assigned to the Montgomery County Correctional Facility (MCCF). Appellant was dismissed based on the events of February 11, 2009 and the investigation that occurred thereafter.

During the evening of February 11, 2009, the Montgomery County Police (MCP) Department was conducting an undercover surveillance of Ms. B. She was wanted in connection

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<sup>1</sup> After the parties submitted their Prehearing Submissions, they agreed to designate certain of their exhibits as Joint Exhibits. Based on this agreement, the County's exhibits were renumbered. Accordingly, C. Ex. 44 is now C. Ex. 10; C. Ex. 45 is now C. Ex. 11; C. Ex. 46 is now C. Ex. 12; C. Ex. 47 is now C. Ex. 13; C. Ex. 48 is now C. Ex. 14; C. Ex. 50 is now C. Ex. 15; C. Ex. 53 is now C. Ex. 16; C. Ex. 56 is now C. Ex. 17; C. Ex. 57 is now C. Ex. 18; C. Ex. 58 is now C. Ex. 19; C. Ex. 59 is now C. Ex. 20; and C. Ex. 60 is now C. Ex. 21. Because both Appellant, in Appellant's Motion in Limine, and the County, in its Response, reference the old numbering system used by the County to number its exhibits, this Decision will do likewise.

<sup>2</sup> The Statement of Charges issued to Appellant contains ten charges. Several of the charges allege that Appellant established a relationship with a former inmate, Ms. B, and rely on telephone records to establish that Appellant had contact with Ms. B. During the investigation into Appellant's alleged misconduct, Appellant purportedly told the investigator that Appellant had no contact with Ms. B until the night of February 11, 2009. Rather, Appellant claimed Appellant's communications were with Ms. I.

with a felony bank robbery which had occurred in the County. The MCP knew she had a criminal history with the County.

On that evening, Ms. B allegedly exited a residence and walked toward a vehicle which was driving slowly toward the residence. She was purportedly talking on a cell phone while walking toward the vehicle. The vehicle stopped, Ms. B got into the car, and the car drove away. The car was Appellant's.<sup>3</sup>

Appellant drove to a pharmacy. Appellant exited the vehicle leaving Ms. B in it. MCP then executed a blocking maneuver to prevent the vehicle from leaving. Appellant exited the pharmacy and approached Appellant's vehicle. Appellant was asked to provide identification by a MCP Officer.

At the time Appellant was stopped by the MCP Officer, Appellant was wearing a recognizable part of Appellant's DOCR issued uniform (i.e., pants), with a Ravens sweatshirt. Upon being questioned by the MCP Officer, Appellant admitted Appellant worked at the jail.

According to the DOCR Investigative Report, Appellant allegedly asked the MCP Officer what was going on. The MCP Officer purportedly informed Appellant that Appellant's passenger, Ms. B, was a suspect in a bank robbery.<sup>4</sup> The MCP Officer allegedly questioned Appellant about whether Appellant knew she had a criminal past. Appellant purportedly responded that Appellant knew nothing about her criminal past.

Appellant observed the MCP take Ms. B into custody and place her in a police cruiser. Appellant was permitted to leave the scene.

Subsequently, during the DOCR investigation by Mr. D, Appellant allegedly told Mr. D that Appellant was never told what was going on by the MCP Officer. Appellant did purportedly advise Mr. D that Appellant was aware that Ms. B had been incarcerated at the Montgomery County Correctional Facility in the past and that Appellant used bad judgment in giving her a ride to the pharmacy.

### **APPLICABLE LAW**

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-8. Hearings**, which states in applicable part,

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<sup>3</sup> According to Investigator D, Appellant told him that Appellant had gone to the residence to pick up Ms. I. Appellant indicated that Appellant was approached by Ms. B and told that Ms. I was not there yet. Ms. B then asked Appellant to take her to the store. Once at the store, Appellant got out and went into the store and left Ms. B in the car.

<sup>4</sup> According to Investigator D, Appellant allegedly told him that Appellant "was never told what was going on" regarding Ms. B. Appellant also allegedly stated, "I didn't ask and they didn't tell me." See Joint Exhibit (Jt. Ex.) 22 at 3-4.



- (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, 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.

### **ANALYSIS AND CONCLUSIONS**

Under Section 2A-8(e) of the Administrative Procedures Act, the Board may exclude evidence if it is not relevant. The Board will admit evidence if it is relevant to the issues in the case and tends to establish or disprove them. Cook v. State, 118 Md. App. 404, 416, 702 A.2d 971, 976 (1997), cert. denied, 349 Md. 234, 707 A.2d 1328 (1998) (citing to Md. Rules 5-401 to 402; Dorsey v. State, 276 Md. 638, 643 (1976)); Parker v. State, 156 Md. App. 252, 268, 846 A.2d 485, 498, cert. denied, 382 Md. 347, 855 A.2d 350 (2004) (same).

#### **County Exhibits 44-47, 53, And 56-60 Are Relevant And Their Admission Into Evidence Does Not Violate Appellant's Due Process Rights.**

County Exhibit 60 demonstrates that at the time the Warden issued the Statement of Charges (SOC) to Appellant, the Warden had delegated authority to do so. Clearly, this exhibit is relevant as to whether the County followed the personnel regulations in issuing Appellant the SOC. Accordingly, the Board will admit this exhibit.<sup>5</sup>

The County asserts that County Exhibits 44-47, 53, and 56-59 present evidence to refute Appellant's contention that Appellant was not talking to Ms. B prior to February 11, 2009 but rather to Ms. I. See County Response at 17, 22. While it is true that the deciding official did not have the information in these exhibits before him when he made his decision to dismiss Appellant, these exhibits are clearly relevant to this case as they address the issue of whether Appellant had a relationship with Ms. B as charged.

Appellant argues that if these exhibits are admitted they would violate Appellant's due process rights. The County counters, correctly, that Appellant's due process rights consist of the right to notice of the charges against Appellant, an explanation of the evidence against Appellant, and the opportunity to present Appellant side of the story. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985). Appellant was afforded all of these rights – the SOC contained the charges and discussed the evidence to support the charges. See Jt. Ex. 1.

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<sup>5</sup> As both documents which constitute C. Ex. 60 have dates before the date of the NODA (the memorandum is dated June 30, 2008, and the string of emails has dates of May 20-21, 2009), Appellant's due process argument does not apply to this exhibit.

Appellant was afforded the opportunity to present Appellant's side of the story but Appellant chose to waive this right. See Jt. Ex. 3.

There is nothing in the Constitution that precludes the County from continuing its investigation into Appellant's conduct even after having dismissed Appellant to determine whether mitigating evidence exists. Appellant purportedly proffered during the investigation into Appellant's alleged misconduct that Appellant never had contact with Ms. B but only Ms. I. The County has the right to investigate this assertion so as to attempt to impeach Appellant's credibility during the hearing in this matter.

**County Exhibit 50 Will Be Allowed In For The Limited Purpose Of Demonstrating The Impact Of Fraternization.**

Appellant argues that County Exhibit 50 is overly prejudicial and should be excluded. County Exhibit 50 is a written statement from an inmate to MCCF correctional staff, indicating that Appellant was involved in the smuggling of illegal drugs into MCCF until Appellant was caught dealing with an ex-inmate. Appellant argues that the statement was never considered by the deciding official in this case and, therefore, is irrelevant. Moreover, Appellant notes that this unsworn document which suggests Appellant was involved in smuggling illegal drugs is grossly prejudicial to Appellant's fitness for continued employment with the County.

The County indicates in its Response to Appellant's Motion in Limine that the exhibit is not being offered to establish the truth of the statements made in the document. See County Response at 22-23. Rather, it is being offered for the sole purpose of establishing the negative consequences that may flow from the establishment of a relationship between a correctional ex-inmate and correctional staff. Id.

The Board will permit the introduction of County Exhibit 50 for the sole purpose of demonstrating the impact of fraternization. The allegations regarding Appellant which are contained in the document will be ignored by the Board as Appellant was never charged with such misconduct and has not had the opportunity to challenge the veracity of the document.

**The Board Does Not Permit The Supplementation Of A Prehearing Submission Absent Good Cause So As To Ensure That Neither Party Is Prejudiced At The Last Minute By The Introduction Of New Evidence. In The Instant Case, Appellant Has Not Been Prejudiced By The Timing Of The County's Second Supplemental Submission.**

Appellant argues that because the County's Prehearing Submission was due to the Board on September 15, 2009, the Second Supplemental Prehearing Submission filed by the County with the Board on November 17, 2009, was not timely and should be stricken.<sup>6</sup> The Board notes that Appellant was originally required to file Appellant's Prehearing Submission by October 6, 2009. Appellant was given an extension of time to submit Appellant's Prehearing Submission

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<sup>6</sup> Appellant notes that the County filed a Supplemental Prehearing Submission on September 23, 2009, but does not seek to have that Submission struck.

until November 24, 2009.<sup>7</sup> Appellant subsequently filed a Supplemental Prehearing Submission on December 8, 2009, the date of the Prehearing Conference.<sup>8</sup>

Under the Board's Hearing Procedures, the parties must establish good cause if they seek to add witnesses and/or exhibits not included in their Prehearing Submission. The Board requires a showing of good cause as otherwise a party could wait to the eve of a hearing to introduce new evidence. This could be prejudicial to the other party as that party would not have sufficient time to counter the impact of the new evidence before the commencement of the hearing.

The Board notes that in the instant case the County submitted its Second Supplemental Prehearing Submission three weeks **before** the Prehearing Conference. In the Second Supplemental Prehearing Submission, the County explained why it was augmenting its Prehearing Submission at that time. Thus, Appellant had sufficient time prior to submitting Appellant's Prehearing Submission to analyze the exhibits included in the County's Second Supplemental Submission and to determine what, if anything, Appellant needed to add to Appellant's Prehearing Submission. Thus, Appellant was not prejudiced by the timing of the Second Supplemental Submission. Accordingly, the Board will not strike County Exhibits 57-60 from the record.

### **ORDER**

Based on the foregoing analysis, the Board denies Appellant's Motion in Limine in its entirety. County Exhibits 44-47, 50, 53, and 56-60 will be admitted into evidence.<sup>9</sup>

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<sup>7</sup> Although dated November 23, 2009, the Submission was not received by the Board until November 24, 2009.

<sup>8</sup> Appellant actually provided the Supplemental Prehearing Submission to the Board during the course of the Prehearing Conference.

<sup>9</sup> As noted in footnote 1 supra, these exhibits will be admitted into the record as C. Ex. 10-13, C. Ex. 15, C. Ex. 16 and C. Ex. 17-21.

# **MOTION TO EXTEND TIME LIMITS**

## **CASE NO. 10-04**

### **DECISION ON JOINT MOTION TO EXTEND THE PREHEARING CONFERENCE DATE AND TAKE DEPOSITION OUTSIDE THE DISCOVERY PERIOD**

On November 18, 2009, Appellant filed a Joint Motion to Extend the Prehearing Conference Date and Take Deposition Outside the Discovery Period (Joint Motion). The County's representative, in an email to the Executive Director of the Merit System Protection Board (MSPB or Board), confirmed that Appellant's motion was a joint motion. The parties seek to have the date of the Prehearing Conference changed from December 1, 2009 to December 8, 2009. The parties also seek to continue discovery until sometime after January 1, 2010 in order for Appellant to take the deposition of Police Officer A.

#### **BACKGROUND**

This appeal involves the dismissal of Appellant from Appellant's position as a Correction Supervisor-Sergeant, with the Department of Correction and Rehabilitation (DOCR). According to the Statement of Charges, on the evening of February 11, 2009, Appellant's car was stopped by the police<sup>1</sup> and Appellant was found to be in the company of Ms. B,<sup>2</sup> a former female inmate of DOCR. See County Exhibit (C. Ex.) 1 at 1.<sup>3</sup> Appellant was subsequently placed on administrative leave with pay by DOCR while it launched an investigation into Appellant's conduct. Appellant was later charged with making false statements during the DOCR investigation, having a relationship with a former inmate, contacting Ms. B by phone while Appellant was on duty<sup>4</sup> and wearing a part of the DOCR uniform while being in contact with a former inmate. Id. at 7-9.

Appellant was dismissed from employment effective August 15, 2009. Appellant filed

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<sup>1</sup> It would appear from the County's Prehearing Submission that the two policemen at the scene were Police Detective C and Police Officer A. See County Prehearing Submission at 17-20; C. Ex. 21 at 2.

<sup>2</sup> According to the Statement of Charges, the County police were conducting an undercover surveillance of Ms. B, who was wanted in connection with a felony bank robbery that occurred in the County. During the stop, Appellant was questioned and permitted to leave the scene, and Ms. B was taken into custody. See C. Ex. 1 at 2-3.

<sup>3</sup> The County filed its Prehearing Submission, along with fifty-five proposed exhibits, with the Board on September 15, 2009. Appellant was granted an extension of time to file Appellant's Prehearing Submission, so as to permit the parties to engage in discovery.

<sup>4</sup> According to the Statement of Charges, some of these phone calls exceeded the time in which a security round should have been conducted. C. Ex. 1 at 8.

the instant appeal with the Board on August 20, 2009. The Board then set deadlines for the parties to file their Prehearing Submissions. The County's Prehearing Submission was due on September 15, 2009. Appellant's Prehearing Submission was due on October 6, 2009.

On September 23, 2009, the Board received via fax Appellant's Motion for Extension of Time to Submit Appellant's Prehearing Statement.<sup>5</sup> In Appellant's Motion, Appellant's counsel indicated Appellant needed an additional 30-day time period to engage in discovery. The County responded, indicating it did not oppose the extension of time but that it believed that Appellant did not have the right to engage in broad prehearing discovery. The Board granted an extension until November 5, 2009.

Subsequently, on October 12, 2009, the County filed a Motion for Protective Order, and Memorandum in Support thereof, seeking to have the Board quash Interrogatories served by Appellant. On October 13, 2009, the County filed a Motion for Protective Order, and Memorandum in Support thereof, seeking to have the Board quash Appellant's Request for Production of Documents. On October 15, 2009, the County filed a Motion for Protective Order, and Memorandum in Support thereof, seeking to have the Board quash Appellant's Notices of Deposition. On October 21, 2009, Appellant filed with the Board a Consolidated Opposition to Employer's Motions for Protective Order.<sup>6</sup> After reviewing the pleadings, the Board determined not to grant the County's Motions for Protective Orders. By decision dated October 28, 2009, the Board ordered the County to respond to portions of Appellant's discovery requests, and granted Appellant the right to take depositions of six of the County's proposed witnesses. See County Prehearing Submission at 17-33.<sup>7</sup>

On November 2, 2009, Appellant filed a Motion for Reconsideration of the Board's determinations regarding Appellant's discovery requests. On November 3, 2009, the County emailed the Board a brief response to Appellant's Motion for Reconsideration. On November 4, 2009, one day before Appellant's Prehearing Submission was due, Appellant's counsel faxed to the Board a request for a 30-day extension of time to submit his Prehearing Submission. The County indicated by email that it did not object to this extension. By email dated November 4, 2009, the Board's Executive Director indicated that the Board had granted Appellant an extension but only until November 23, 2009 to file Appellant's Prehearing Submission and that the Board had scheduled a Prehearing Conference in this case for December 1, 2009. On November 10, 2009, the Board issued its decision on Appellant's Motion for Reconsideration, denying most of Appellant's discovery requests.

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<sup>5</sup> Appellant faxed this motion to the Board on September 22, 2009 at 16:35 (4:35 p.m.), well after the time the Board's office closed. The Board's hours of operations are Monday-Thursday, 9:30 a.m. to 3:00 p.m.

<sup>6</sup> Appellant was granted an extension of time to respond to the County's Motions for Protective Orders.

<sup>7</sup> The six witnesses are: the Director, DOCR, the Warden, Mr. D, the Investigator, Ms. E, a Police Detective, Police Detective C and Police Officer A.

On November 16, 2009, counsel for both parties contacted the Board's Executive Director about rescheduling the Prehearing Conference from December 1 to December 8. Counsel were advised to put their request in writing. On November 18, 2009, Appellant's counsel filed the Joint Motion.

### **APPLICABLE LAW AND REGULATION**

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

- (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.

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-8. Hearings**, which states in applicable part,

- (h) **Powers of the hearing authority.** In addition to any other power granted by this article, a hearing authority is empowered:
  - (4) To rule upon motions, offers of proof and receive relevant and probative evidence, to exclude incompetent, irrelevant, immaterial or unduly repetitious evidence and to give effect to the rules of privilege recognized by law.

### **ANALYSIS AND CONCLUSIONS**

In support of the Joint Motion, the parties indicate that they have scheduled three of the six witnesses for deposition.<sup>8</sup> They aver that the depositions of Police Detective E and Police Detective C will occur between November 30, 2009 and December 7, 2009. Accordingly, they would like to postpone the Prehearing Conference until December 8, 2009 to complete this discovery. Appellant indicates Appellant's willingness to file Appellant's Prehearing Submission by November 23, 2009, despite the fact that Appellant will not have completed this discovery. Joint Motion at 2. The Board has determined that good cause has been shown for the delay in the Prehearing Conference and grants the request to reschedule the Prehearing

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<sup>8</sup> The Investigator has been scheduled for deposition on November 19, 2009, the Director, DOCR, has been scheduled for deposition on November 20, 2009, and the Warden has been scheduled for deposition on November 30, 2009. See Joint Motion at 1-2.

Conference.<sup>9</sup>

The parties also note in the Joint Motion that Police Officer A had reconstructive surgery on Police Officer's foot on October 9, 2009. At the time of Police Officer's surgery, the County indicates it was anticipated that Police Officer A would return to work and be available for deposition in mid-November. Joint Motion at 2. Counsel for the County indicates that he was informed by Police Officer A on November 3, 2009 that he had been instructed by his doctor to remain out of work until January 1, 2010. Appellant's counsel indicates that Appellant's counsel offered to take Police Officer A's deposition at his home but Police Officer A rejected this offer.<sup>10</sup> Accordingly, the Joint Motion requests that the parties be given permission to take Police Officer A's deposition outside the discovery period.<sup>11</sup>

While the Joint Motion indicates that the parties hope to take Police Officer A's deposition sometime after January 1, 2010, no date has been set for the taking of said deposition. Nor is there any assurance that Police Officer A will in fact return to work on or after January 1, 2010, as he was originally expected to return to work in mid-November. Because this case involves a dismissal action, the Board is extremely reluctant to delay this matter any further. The Board's policy is to hold hearings promptly unless extraordinary circumstances have been shown. Delays are particularly troublesome in dismissal cases because they adversely affect employees who might be unemployed while their appeals are pending. See, e.g., Dickerson v. District of Columbia Government, 3 M.S.P.R. 181, 185 (1980).

The Board notes that Police Officer A was one of two officers at the scene on February 11, 2009 when Appellant's car was stopped, Appellant was questioned, and Ms. B was taken into custody. See County Prehearing Submission at 17-20; C. Ex. 21 at 2. The parties have indicated in their Joint Motion that the other policeman at the scene, Police Detective C will have his deposition taken before the rescheduled Prehearing Conference. As it would appear to the Board that Police Officer A's testimony would merely be redundant of that offered by Police Detective C who was also at the scene when the events at issue took place, the Board finds that good cause has not been established as to why the Board should extend the period of discovery beyond the Prehearing Conference.

### **ORDER**

Based on the foregoing, the Board grants in part and denies in part the Joint Motion. The Prehearing Conference will be rescheduled to December 8, 2009. The Board denies the request to extend the period of discovery beyond December 8, 2009.

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<sup>9</sup> The Board instructed the Executive Director to notify the parties on November 18, 2009 of its decision on this aspect of the Joint Motion.

<sup>10</sup> The parties do not indicate whether they attempted to take Police Officer A's deposition by telephone.

<sup>11</sup> In accordance with the Board's Hearing Procedures, the period for discovery ends on the date of the Prehearing Conference. See MSPB Hearing Procedures, Section III.

# **ENFORCEMENT OF BOARD DECISIONS** **AND ORDERS**

If an appellant settles a case with the County while in proceedings before the Board, the parties may enter the settlement agreement into the record, which permits the Board to enforce the settlement agreement should a disagreement arise between the parties regarding the settlement agreement provisions. During FY10, one agreement was entered into the record.

The Board may also be asked to ensure enforcement of its Final Decisions by a party. The Board, where appropriate, will seek enforcement of its Decisions by certifying the matter to the County Attorney, who is required to initiate proceedings in the Circuit Court on the Board's behalf. See Montgomery County Code, Section 33-15(d). Prior to certifying a matter for enforcement, the Board may issue a Show Cause Order to the party that allegedly has failed to comply with its Decision to determine whether there is a basis for seeking enforcement. During FY 10, the Board decided two requests for enforcement of a Decision.



# **ACCEPTANCE OF SETTLEMENT AGREEMENT INTO THE RECORD**

## **CASE NO. 10-13**

### **DECISION TO ACCEPT SETTLEMENT AGREEMENT INTO THE RECORD**

On April 6, 2010, the parties jointly filed a Settlement Agreement with the Merit System Protection Board (Board or MSPB) in this case. The parties requested the Board approve the Settlement Agreement and retain jurisdiction to enforce the Settlement Agreement.

This appeal involved the dismissal of Appellant from Appellant's position as a Bus Operator, Grade 15, with the County, based on an incident which occurred on October 26, 2009, while Appellant was on duty. Pursuant to the terms of the Settlement Agreement, Appellant will be voluntarily demoted to a Motor Pool Attendant, Grade 8, in the County's Department of Transportation. Appellant will receive a salary of approximately \$42,500 which the County represents is at the "top-of-grade". The County does not guarantee the location of Appellant's work site. In lieu of dismissal, Appellant will receive a five-day suspension, which Appellant has already served. Appellant's personnel file will be purged of the Notice of Disciplinary Action – Dismissal.

As this case involves a dismissal action, the Board finds that it has jurisdiction to accept the Settlement Agreement into the record. Pleshaw v. OPM, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the Settlement Agreement carefully. The Board notes that Appellant is represented by counsel, the Settlement Agreement is lawful on its face, and freely entered into by the parties. Id.; McGann v. Dep't of Housing and Urban Development, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the Settlement Agreement into the record.

### **ORDER**

Based on the foregoing, the Board accepts the Settlement Agreement into the record and dismisses this case as being settled. The Board will retain jurisdiction over this case for purposes of enforcement.

# **ENFORCEMENT REQUEST DECISIONS**

## **CASE NO. 10-14**

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

On January 28, 2010, Appellant filed a Request for Enforcement (Appellant's Enforcement Request) with the Merit System Protection Board (Board or MSPB), alleging that the County had failed to enforce the Board's Final Decision in Appellant v. Montgomery County, MSPB Case No. 09-03 (January 14, 2009) (Final Decision). See Appellant's Enforcement Request. Specifically, in MSPB Case No. 09-03, the Board ordered the County "to change Appellant's disciplinary demotion to a voluntary demotion one year from the date of this Final Decision, so long as Appellant is not charged with any misconduct during the one-year period following the date of this Final Decision." See Final Decision at 20. Appellant asserted Appellant has not been charged with misconduct and, therefore, Appellant's disciplinary demotion should have been converted to a voluntary demotion. Appellant further asserted that the County refused to convert Appellant's demotion. See Appellant's Enforcement Request.

Before making a determination regarding the need to seek enforcement of the Final Decision in MSPB Case No. 09-03, the Board provided the County with the opportunity to respond to Appellant's Enforcement Request. The County responded on February 22, 2010, asserting that Appellant had been charged with misconduct during the one-year period following the Board's Final Decision and, therefore, the County did not fail to comply with the Board's Final Decision when it refused to convert Appellant's disciplinary demotion to a voluntary demotion on or after January 13, 2010.

Thereafter, on March 25, 2010, Appellant, through counsel, filed a response to the County's Response (hereinafter Appellant's Response). Appellant's Response also included four documents, Appellant's Declaration, hereinafter Appellant's Exhibit (Ex.) 1, a memorandum from Appellant to the Warden responding to the June 8, 2009 Statement of Charges, hereinafter Appellant's Ex. 2,<sup>1</sup> a letter from Appellant's Doctor, dated June 19, 2009, hereinafter Appellant's Ex. 3, and an article about Appellant's pain medicine from Drugs.com, hereinafter Appellant's Ex. 4. Appellant asserted in Appellant's Response that the County had denied Appellant Appellant's due process rights when it failed to inform Appellant of Department of Correction and Rehabilitation's (DOCR's) practice of assisting or accommodating injured Correctional Officers or Correctional Officers on prescribed medication.

### **FINDINGS OF FACT**

Appellant previously appealed to the Merit System Protection Board (Board) from the determination of the Montgomery County, Maryland, DOCR Director to demote Appellant from the position of Residential Supervisor I to the position of Correctional Officer II. After holding a hearing on the matter, the Board determined to uphold the demotion. However, because of the Board's concern over the poor training provided Appellant when Appellant became a Residential

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<sup>1</sup> Although this document is labeled Exhibit (Ex.) No. 1, it has been relabeled Ex. 2 by the Board for ease of reference.

Supervisor, the Board ordered that the County change Appellant's personnel records to reflect a "voluntary" demotion after a period of one year from the date of the Board's Final Decision,<sup>2</sup> so long as Appellant was not charged with any further misconduct during the one-year period.

The record of evidence in this case indicates that by memorandum dated June 3, 2009, Appellant's supervisor noted that Appellant had been verbally counseled on April 12, 2009,<sup>3</sup> about sleeping on duty.<sup>4</sup> County's Response, Ex. 1. On May 23, 2009, Appellant received a letter of concern about Appellant's sleeping on duty on May 22, 2009. County's Response, Ex. 2. On June 13, 2009, Appellant received a Statement of Charges from the Warden, proposing that Appellant be suspended for three days for sleeping on duty. County's Response, Ex. 3.

During the disciplinary process following the issuance of the Statement of Charges, Appellant was represented by the Union, the Municipal and County Government Employees Organization (MCGEO or Union). MCGEO requested an Alternative Dispute Resolution (ADR) Settlement Conference. See County's Response, Ex. 4. In lieu of the ADR session, DOCR met with Appellant's Union in a settlement negotiation. Id. Appellant indicates that the three-day suspension was subsequently reduced after the Union negotiated a lesser penalty on Appellant's behalf. Appellant's Response, Ex. 1 ¶ 3; see also County's Response, Ex. 4. As a result of the agreement reached, Appellant received a Written Reprimand on July 23, 2009. County's Response, Ex. 4.

### **POSITIONS OF THE PARTIES**

#### County:

- The County has not failed to comply with the Board's Final Decision. Appellant's disciplinary demotion was only to be changed to a voluntary one if Appellant was not charged with misconduct within a one-year period from the date of the Final Decision. Appellant was charged with misconduct during that period.
- Appellant was issued a Statement of Charges for a three-day suspension on June 8, 2009. Subsequently, after Appellant participated in ADR, the penalty was lowered to a written reprimand which Appellant received on July 23, 2009.

#### Appellant:

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<sup>2</sup> The Board issued its Final Decision on January 14, 2009. Thus, pursuant to the Board's Order, Appellant's disciplinary demotion was to be changed to a voluntary demotion so long as Appellant was not charged with misconduct during the period January 14, 2009-January 13, 2010.

<sup>3</sup> Appellant denies that Appellant ever fell asleep on the job on April 12, 2009, or was ever verbally counseled about sleeping on the job on April 12, 2009. Appellant's Response, Ex. 1 ¶ 2.

<sup>4</sup> This memorandum indicates that Lieutenant B was informing Appellant that Lieutenant B was going to recommend a written reprimand for Appellant's sleeping on duty on May 31, 2009. According to Appellant, Appellant never received this memorandum. Appellant's Response, Ex. 1 ¶ 1.

- The County incorrectly relies on three incidents of alleged misconduct occurring on April 12, 2009, May 22, 2009, and May 31, 2009.
- The June 3, 2009 Statement of Charges, containing all three incidents, was never issued to Appellant. In addition, the June 3, 2009 Statement of Charges violated Appellant's due process rights.
- The June 8, 2009 Statement of Charges, which Appellant did receive, only cited two incidents of misconduct – May 22, 2009 and May 31, 2009.
- The June 8, 2009 Statement of Charges, and the resulting Written Reprimand are not proper charges of misconduct as they violate the Department's practice of assisting injured Correctional Officers or those on prescribed medication which might affect job performance.
- The June 8, 2009 Statement of Charges violated Appellant's due process rights.

### **APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 33, Merit System Law, Section 33-14. Hearing Authority of Board**, which states in applicable part,

- (c) **Decisions.** . . . The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:
  - (8) Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale; . . .
  - (10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

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

**35-16. MSPB decisions.**

- (a) The MSPB may decide an appeal in any manner deemed necessary and appropriate, under County Code Section 33-14(c), *Hearing Authority of MSPB*. The MSPB may order appropriate relief, which includes but is not limited to the following:
  - (7) removal from administrative or personnel records of any reference or document pertaining to an unwarranted disciplinary or personnel action;
  - (8) corrective measures regarding any management procedure adversely affecting employee pay, status, working conditions, leave, or morale; . . .

## **ISSUE**

Is the County in noncompliance with the Board's Final Decision?

## **ANALYSIS AND CONCLUSIONS**

Appellant argues that Appellant never was verbally counseled about sleeping on duty on April 12, 2009. Appellant also asserts that Appellant never received the Statement of Charges, dated June 3, 2009. However, Appellant does acknowledge receiving the Statement of Charges, dated June 8, 2009, which proposed Appellant be suspended for three days.

Appellant also acknowledges that Appellant was represented by MCGEO during the disciplinary process. As part of that process, MCGEO, on Appellant's behalf, negotiated a lesser penalty. Appellant could have refused to accept the lesser penalty but Appellant did not. While Appellant alleges that Appellant was not aware of DOCR's practice of accommodating injured Correctional Officers or those on prescribed medication, it is clear from the record of evidence that Appellant made DOCR aware of Appellant's condition in Appellant's response to the Statement of Charges. See Appellant's Response, Ex. 2. Appellant's representative could have raised this issue during the disciplinary process. What is clear is that Appellant, through Appellant's representative, entered into negotiations with DOCR and received a substantially lesser penalty.

Appellant now argues that Appellant was denied Appellant's due process rights to a fair investigation and the opportunity to be heard. This argument simply is unavailing. Appellant could have refused to enter into a settlement agreement and come back to this Board for a hearing on Appellant's suspension. During such a hearing, Appellant would have been able to raise Appellant's procedural due process issues. However, Appellant did not choose this course of action; instead, Appellant' chose to settle the matter and accept discipline for the charges levied against Appellant.

Accordingly, the Board concludes based on the evidence of record before it that Appellant was charged with misconduct during the one-year period following the Board's Final Decision. Therefore, the County had the right to refuse to change Appellant's disciplinary demotion to a voluntary one.

## **ORDER**

Based upon the foregoing analysis, Appellant's request for enforcement of the Board's Final Decision is denied.

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

### **DECISION ON APPELLANTS' PETITION FOR OVERSIGHT AND RELIEF**

On June 1, 2010, Appellants filed a Petition for Oversight and Relief (Oversight Petition), seeking to have the Merit System Protection Board (MSPB or Board) intervene and oversee the process being followed by the County to comply with the Board's Supplemental Final Decision and Order in this case. In addition, Appellants also request that the Board award them six percent (6%) interest on their back pay calculations. The County responded to the Oversight Petition (County's Petition Response), arguing that Appellants failed to timely request reconsideration<sup>1</sup> of the Board's Supplemental Final Decision and Order with regard to the issue of interest. On June 3, 2010, Appellants filed a Notice of Protest, arguing that the County acted wrongly in continuing the process set in motion to reimburse Appellants for the back pay owed them while their Oversight Petition was pending before the Board.

### **FINDINGS OF FACT**

On April 26, 2010, the Board issued its Supplemental Final Decision and Order in this case. The Board ordered the County to retroactively adjust the salaries of the seven Appellants in this case. On May 12, 2010, the County's counsel sent Appellants' counsel and the Board's Executive Director an email, indicating that the County expected to have final payout amounts for the Appellants on or before May 20, 2010. See Tab BU.<sup>2</sup> On May 13, 2010, the County's counsel sent Appellants' counsel and the Board's Executive Director a follow-up email, indicating that Payroll intended to issue the back pay in the Appellants' June 4 pay checks. Tab BV. The County's counsel also indicated the County anticipated having the final payout schedule soon.

On May 25, 2010, the County's counsel emailed Appellants' counsel and the Board's Executive Director information concerning the payout details for six of the Appellants.<sup>3</sup> Tab BX. Included in the email were detailed spreadsheets providing the calculations of back pay for each of the six Appellants. See Tab BX-1-BX-6. Again, the County's counsel indicated that the payouts would be in the Appellants' June 4 pay checks. On May 27, 2010, the County's counsel emailed Appellants' counsel and the Board's Executive Director, providing the information for the seventh Appellant – Lt. F. Tab BY. Included as an attachment to the email was a spreadsheet providing information on the calculation of back pay for Lt. F. Tab BY-1. Again, the County's counsel stated that the back pay for all of the Appellants would be included in the

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

<sup>2</sup> Because of the numerous pleadings filed in this case, the pleadings have been indexed for ease of reference. Reference to a particular Tab indicates the location of the pleading in the Pleadings File.

<sup>3</sup> The six Appellants were: Lt. B, Lt. A, Lt. C, Lt. E, Lt. H, and Lt. K.

June 4 pay checks.

On June 1, 2010, Appellants' counsel sent the Board an email, with a copy to the County's counsel. Tab CA. Included in the email was an attachment, Tab CA-1, entitled Petition for Oversight and Relief. In the Oversight Petition, Appellants sought 6% interest on the awards of back pay and asked the Board to: 1) order the County to provide an employee of Payroll to meet with each Lieutenant to explain the preparation of the spreadsheets; 2) require that each Appellant sign off on their acceptance of the calculations; and 3) order the County to pay the back pay only upon the acceptance by the Appellants of the County's back pay calculations.

Noting that the Oversight Petition was not provided for in statute or regulation, the County's counsel contacted the Board regarding how to respond. Tab CB. The Board's Executive Director responded to the County's counsel, indicating that the County's counsel would have five days from June 1 to respond on behalf of the County.<sup>4</sup> Tab CC. The County provided a response, arguing that the Appellants raised the issue of interest on back pay too late. County's Petition Response at 1.

On June 3, 2010, Appellants' counsel sent an email to the Board and County's counsel. Tab CE. Included in the email was an attachment, entitled Notice of Protest. Tab CE-1. In the Notice of Protest, Appellants argued that the County should have halted its decision to payout back pay to the Appellants once they filed their Petition for Oversight and Relief. Appellants also requested that the Board exercise its authority to require the Lieutenants to deposit into some escrow account the full balance of their back pay awards pending a ruling by the Board on their Oversight Petition. They further requested the Board respond swiftly to their Oversight Petition and reprimand the County's counsel for the County's counsel's behavior in unilaterally acting before the Board issued a decision on the Oversight Petition.<sup>5</sup>

### **APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 2A, Administrative Procedures Act**, which states in applicable part,

#### **Sec. 2A-10. Decisions.**

- (f) **Rehearing and reconsideration.** Where otherwise permitted by law, any request for rehearing or reconsideration shall be filed within ten (10) days from a final

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<sup>4</sup> The Board's regulations generally provide five calendar days from the date of a motion for the opposing party to respond to said motion before the Board rules on the matter. Montgomery County Personnel Regulations (MCPR), 2001, Section 35-11(a)(4). Moreover, the Board's regulations provide five calendar days from receipt of a request for reconsideration for the opposing party to file a response. MCPR, 2001, Section 35-17(b).

<sup>5</sup> The Board will not address this request given the fact that it does not find the County's counsel's behavior to be unethical or unprofessional as alleged by Appellants.

decision. Thereafter a rehearing or reconsideration may be approved only in case of fraud, mistake or irregularity.

**Montgomery County Code, Chapter 33, Merit System Law**, which states in applicable part,

**Section 33-14. Hearing authority of Board.**

- (c) **Decisions.** Final decision by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, . . .

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

**35-6. Appeal does not act as an automatic stay of action.**

- (a) The filing of an appeal does not automatically stay the action at issue in the appeal.
- (b) The MSPB on its own motion may stay the action or grant a stay requested by the appellant based on reasons that the MSPB believes are proper and just.
- (c) If the MSPB orders a stay, it must give written notice of its action to all parties.

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

**35-17. Request for rehearing or reconsideration of MSPB final decisions.**

- (a) A party may submit a written request to the MSPB for rehearing or reconsideration of a final decision within 10 calendar days after the MSPB's final decision is issued. After the 10-day period, the MSPB must not grant reconsideration except in a case of fraud, mistake, or irregularity.

**ISSUES**

1. Have Appellants filed a timely request for reconsideration with regard to the issue of an award of interest on their back pay?



2. Have Appellants shown good cause as to why the Board should intervene with regard to the County's award of back pay pursuant to the Board's Supplemental Final Decision and Order?

### ANALYSIS AND CONCLUSIONS

#### The Board Concludes That Appellants Have Failed To Timely File A Request For Reconsideration Of The Board's Final Decision.

Although entitled a Petition for Oversight and Relief, Appellants seek to have the Board reconsider its Supplemental Final Decision, as it "is silent as to the Lieutenants[']s request for 6% interest to be accrued in the calculations of back pay." Oversight Petition at 2. Pursuant to Section 2A-10(f) of the Administrative Procedures Act (Chapter 2A of the Montgomery County Code), any request for reconsideration is to be filed within ten days from a final decision. The Board's Supplemental Final Decision in this matter was issued on April 26, 2010. While Appellants timely filed a request for reconsideration with regard to the Board's determination in the Supplemental Final Decision that Lt. L was not a proper party to this case, Appellants did not in that request for reconsideration raise the issue of an award of interest on their back pay calculations. Instead, they waited over a month from the date of the Board's Supplemental Final Decision to raise the issue. The Board agrees with the County that Appellants are too late.

Pursuant to Section 2A-10(f) of the Administrative Procedures Act, after the ten day period has passed, the Board may only reconsider its Supplemental Final Decision upon a finding of "fraud, mistake or irregularity." As the County rightly points out, nowhere in Appellants' Oversight Petition do they argue that there was fraud, mistake or irregularity. County Petition Response at 1.

The Court of Appeals for Maryland has held that the terms "fraud, mistake, and irregularity," a finding of any of which allows a court to revise a judgment once it has become final, are to be narrowly defined and strictly applied. See Tandra S. v. Tyrone W., 336 Md. 303, 313-15, 648 A.2d 439 (1994). To vacate a final judgment, extrinsic fraud must be shown. Id. at 315. Fraud is extrinsic if it prevents the actual dispute from being submitted to the fact finder at all so that no adversarial proceeding occurs.<sup>6</sup> Hresko v. Hresko, 83 Md. App. 228, 232, 574 A.2d 24 (1990). In the instant case, both parties were given ample opportunity to present their legal arguments before the Board ruled on the matter. Thus, as there clearly was an adversarial proceeding in the instant case, Appellant is unable to show extrinsic fraud.

A "mistake" is defined as a jurisdictional mistake where the court has no power to enter the judgment. Tandra S., 336 Md. at 317 (citing Hamilos v. Hamilos, 297 Md. 99, 107, 465 A.2d 445 (1983)). In the instant case, Section 33-12(b) of the Montgomery County Code vests the

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<sup>6</sup> In Schwartz v. Merchants Mortgage Company, 272 Md. 305 (1974), the Court of Appeals cited the following examples of extrinsic fraud: where an unsuccessful party has been prevented from exhibiting fully his case; and where the defendant never had knowledge of the suit. 272 Md. at 309 (citing to United States v. Throckmorton, 98 U.S. 61, 95 (1878)).

Board with jurisdiction over appeals of grievances of County employees. Thus, Appellants cannot establish “mistake”.

Finally, the term “irregularity” connotes irregularity of process or procedure. Weitz v. MacKenzie, 273 Md. 628, 631, 331 A.2d 291 (1975). Appellants have cited no irregularity of process or procedure in the instant case nor could they.<sup>7</sup>

Accordingly, based on the foregoing, the Board denies Appellants’ request for an award of interest on their back pay calculations.

**Appellants Have Failed To Show Good Cause As To Why The Board Should Intervene With Regard To The County’s Payment Of Back Pay To Appellants.**

Appellants seek the Board’s intervention to halt the payment of back pay to them until such time as they are satisfied that the County has correctly calculated their back pay entitlement. Appellants allege that the County should have halted its payout once they filed their Oversight Petition. The Board disagrees.

In the instant case, Appellants’ counsel was notified by the County’s attorney on May 13, 2010, that the County was in the process of calculating the pay due Appellants and that the payouts would occur on June 4 in their pay checks. Tab BV. Again on May 25 and May 27, the County’s counsel reiterated the payouts would occur on June 4. Tabs BX, BY.

Although clearly on notice since mid-May that the payouts would occur on June 4, 2010, Appellants waited to the eleventh hour to file their Oversight Petition. As the Board’s rules make clear, an appeal to the Board does not automatically stay the action at issue in the appeal. Under the Board’s rules, the County had five days to respond to the Oversight Petition. Absent the issuance of a stay by the Board, the County had every right to continue the process to pay Appellants the back pay due them pursuant to the Board’s Order.

Appellants argue that the County should have stopped the payouts as the spreadsheets provided to them by the County contain “a massive amount of information, and the Lieutenants have numerous questions and concerns pertaining to their individual spreadsheets, questions that

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<sup>7</sup> The only procedural issue Appellants raise is the Board’s silence in its Supplemental Final Decision on their request for an award of interest. Significantly Appellants concede that the award of pre-judgment interest by the Board is discretionary. However, they assert that the Board’s silence on the matter constitutes a failure to exercise discretion, which they assert constitutes an abuse of discretion. The Board did consider Appellants request for interest before rendering its Final Supplemental Decision. The Board however determined that the County took substantial steps to rectify the pay compression at issue in this case when it made equity payouts to the Appellants on or after July 2007. See Tab BN, Supplemental Final Decision at 6 (Chart 3). Because of these efforts by the County, the Board determined to exercise its discretion to deny Appellants’ request for an award of interest. The Board’s failure to articulate its rationale for not awarding interest does not rise to the level of “irregularity” required by the Court of Appeals.

can be answered solely by the preparer of the spreadsheets.” Oversight Petition at 2. Appellants assert that they will not be “railroaded into accepting a payment they’ve pursued for over 5 years without any opportunity to review, discuss and agree to it.” Notice of Protest at 2.

It is well established law that there is a “presumption that public officials perform their duties correctly, fairly, in good faith, and in accordance with laws and governing regulations. . . .And this presumption stands unless there is ‘irrefragable proof to the contrary.’” LaChance v. White, 174 F.3d 1378, 1381 (quoting Alaska Airlines v. Johnson, 8 F.3d 791, 795 (Fed. Cir. 1993)). In the instant case, Appellants have not alleged that the payouts are incorrect, merely that the County has given them too much information. The Board commends the County for providing the Appellants with the spreadsheet information as to how their back pay was calculated and for making the payments to Appellants in an expeditious manner. Accordingly, the Board denies Appellants’ request to intervene in this matter.

### **ORDER**

On the basis of the above, the Board denies Appellants’ Petition for Oversight and Relief in its entirety.

# **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 2010.

# **ATTORNEY FEE DECISION**

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

### **DECISION ON ATTORNEY FEE REQUEST**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the request of Appellants for reimbursement of itemized attorney fees and costs related to the above-referenced case. Appellants seek reimbursement for fees paid to their current attorney, and their previous attorney. The County responded (County Response), indicating it has no objection to the fees sought for representation by the current attorney but does object to reimbursement of fees paid to the previous attorney, as no evidence has been submitted establishing the reasonableness of the previous attorney's fees pursuant to Section 33-14(c)(9) of the Montgomery County Code.<sup>1</sup>

The Appellants have submitted a request for attorney fees and costs in the amount of \$15,144.50. See Petition for Attorney's Fees (Fee Petition) at 3. Of this \$15,144.50, \$8,844.50 is attributable to representation by Appellants' present counsel, Mr. U. The remaining \$6,300.00 represents the amount that Appellants paid their previous counsel, Mr. T.<sup>2</sup>

### **THE PARTIES' POSITIONS ON THE AMOUNT OF ATTORNEY FEES IN THE INSTANT CASE**

Appellants' seek reimbursement for Mr. U's representation of them before the Court of Special Appeals and upon remand from the Court. Appellants' counsel charged a flat fee of \$4,500.00 to represent eight Lieutenants on appeal to the Court of Special Appeals. When the case was remanded to the Board, the Board subsequently ruled that only seven of the Lieutenants were proper parties to the matter before the Board. Appellants' counsel thereafter adjusted the amount of reimbursement sought to exclude the amount paid by Lieutenant L, whom the Board found was not a proper party to this matter. Accordingly, Appellants seek \$3,937.50 for Mr. U's representation before the Court of Special Appeals.

Appellants' counsel charged a flat rate of \$185.00 for his representation after the case was remanded to the Board. With regard to his hourly rate, Appellants' counsel asserts that \$185.00 is well within the customary range of legal fees in the state of Maryland. Appellants'

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<sup>1</sup> The County notes that pursuant to the Board's Final Decision in this matter in 2006, the County paid Mr. T \$2,502.50 in attorney fees.

<sup>2</sup> Mr. T represented Appellants in the grievance process and before the Board in 2006. He also filed suit, challenging the Board's decision in the Circuit Court for Montgomery County. He apparently then appealed to the Court of Special Appeals on behalf of Appellants. Subsequently, he withdrew his appearance on Appellants' behalf and Mr. U entered his appearance on Appellants' behalf on or about September 11, 2008. Fee Petition at 1.

counsel states he is unaware of awards in similar cases by this Board.<sup>3</sup>

The County, in its Response, does not object to Appellants' counsel's hourly rate or the total amount of fees sought for representation by Mr. U.

Appellants also seek reimbursement of \$6,300.00 paid to Mr. T for his representation of them in this case. See Fee Petition at 2 & Attachment (Attach.) C. The County does object to payment of these fees, asserting that the reasonableness of the fees has not been established. The County asserts that Appellants are not entitled to attorney's fees simply because they paid an attorney for his services. County's Response at 1.

### **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;
- 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. Appropriate Hourly Rate For Mr. U

Mr. U charged a flat rate of \$4,500.00 for his work on the appellate portion of this case.

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<sup>3</sup> Counsel states that he does not have the requisite knowledge as to the attorney fee awards granted in other cases decided by the Board. Petition for Attorney's Fees at 3. The Board would note that beginning in 2005, the Board began publishing, in redacted form, its decisions on attorney fee requests. See <http://www.montgomerycountymd.gov/cs!tmpl.asp?url=/content/council/mspb/annualreport.asp>

After reducing this fee proportionally, based on the fact that Lieutenant L is not a proper party to this case, he seeks \$3,937.50. Mr. U's invoice for this work indicates he spent a total of 39.75 hours on representation in connection with the Court of Special Appeals portion of the case. Thus, Mr. U charged approximately \$100.00 an hour to the seven Appellants for the work done at the appellate stage. As the Board finds that \$185.00 an hour is reasonable under the Code's factors for Mr. U's hourly rate, as discussed infra, the Board has determined that the flat fee charged to Appellants represents a reasonable hourly rate for the appellate work done on behalf of the Appellants.

As previously noted, Mr. U seeks compensation at the rate of \$185.00 per hour for all post-appellate work. In MSPB Case No. 07-17 (2008), the Board looked to the Maryland Local Rules for guidance with regard to what a relevant hourly rate would be for various attorneys who had represented the appellant during phases of that case. In the instant case, Mr. U indicates he has twenty-eight years of appellate experience. Fee Petition at 3. The Board has considered the nature and complexity of the instant case, the experience of counsel, the tasks necessary in presenting the case, the customary fees charged in these type cases as indicated in the Maryland Local Rules, and finds that \$185.00 is reasonable under the Code's factors.

B. Appropriate Hourly Rate For Mr. T And Other Lawyers In The Firm Of Mr. T.

There has been no submission to this Board regarding Mr. T's hourly rate. It appears from the unverified Client Ledger of Mr. T's Firm submitted by Appellants, that several lawyers worked on this matter with the following initials: DD (Fee Petition, Attach. C at 1, 2); Mr. T<sup>4</sup> (Fee Petition, Attach. C. at 1, 2, 3, 4, 5, 6, 7); par (Fee Petition, Attach. C. at 5, 6); jat (Fee Petition, Attach. C. at 4). No information concerning the experience, reputation and ability of these attorneys, their customary fee, the possible preclusion of other employment, and any time limitations imposed by their clients has been submitted to the Board. Accordingly, the Board is unable to determine what a reasonable hourly rate would be each individual's services.

C. The Amount Of Time Billed – Mr. U

Appellants' counsel indicates that he spent approximately 39.75 hours on representing Appellants in connection with their appeal to the Court of Special Appeals. The County does not challenge the amount of hours billed. Having reviewed the spreadsheet submitted by Mr. U in connection with his representation of Appellants, Fee Petition, Attach. B, the Board finds that 39.75 hours are reasonable for the appellate phase of the litigation. Therefore, the Board will award \$3,937.50 for Mr. U's representation in connection with the appeal to the Court of Special Appeals.

During the post-appellate phase of this case, Mr. U indicates that he billed a total of 24.42

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<sup>4</sup> Based on a previous submission by Mr. T in this case, seeking reimbursement of certain fees in connection with his representation of Appellants before this Board, see Pleadings File, Tabs E, E-2, the initials stand for Mr. T.

hours during 2009.<sup>5</sup> The County does not object to the number of hours billed by Mr. U. Mr. U also indicates that the seven Appellants paid him a total of \$3,612.00 in connection with this representation. Fee Petition at 1. The Board finds these fees are reasonable.

After the Board's Supplemental Final Decision was issued, Mr. U indicates he expended 11.58 hours in connection with the petition for fees, of which he waived 4.58 hours, for a total of 7 hours billed. Again, the County does not object to the amount of time billed in this regard. Mr. U indicates that \$1,295.00 is owed to him by Appellants for this representation. The Board finds that this fee to be reasonable.

Accordingly, having reviewed the total number of hours expended by Appellant's counsel in this matter, the Board finds they are reasonable. Therefore, the Board will order the County to reimburse \$8,844.50 in fees in connection with Mr. U's representation

D. The Amount of Time Billed – Mr. T And His Firm

As previously noted, there was no submission to the Board from Mr. T concerning the amount of time billed. Appellants did submit an unverified Client Ledger from Mr. T's Firm. See Fee Petition, Attach. C. Appellants also submitted a document entitled "Opinion and Award" in an arbitration between Appellants and Mr. T.<sup>6</sup> See Fee Petition, Attach. A. The Board notes the Opinion and Award is unsigned so that the Board has no proof of its authenticity.

The Opinion and Award document is noteworthy as it calls into question various time entries on a document submitted by Mr. T. See Fee Petition, Attach. A at 11. It also rejects a series of Client Ledger forms submitted by Mr. T as another exhibit. Id. Finally, it calls into question the amount of time Mr. T claimed to spend on various matters. See, e.g., 75 hours spent on speaking with Mr. AA ("This is an incomprehensible amount of time."); 22.25 hours spent speaking with Mr. BB ("[T]his amount of time is simply unbelievable."). Attach. A at 17.

Because the Board has no verified ledger, reflecting the time spent in this matter by Mr. T and his associates, and is also unable to determine an appropriate hourly rate for the time expended by Mr. T and his staff on this matter, the Board is unable to conclude what a reasonable attorney fees would be in connection with Mr. T's representation of Appellants as

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<sup>5</sup> Specifically, Mr. U's billing invoices show that he spent 20.17 hours on this matter during the period May 1-July 24, 2009, of which he waived 4.25 hours. Fee Petition, Attach. D. Thus, he billed a total of 15.92 hours. For the period July 25, 2009-October 7, 2009, Mr. U indicates he expended 9.09 hours on representation of Appellants, of which he waived .59 hours. Thus, he billed a total of 8.50 hours. Id.

<sup>6</sup> This document makes reference to thirty exhibits, none of which were submitted by Appellants to the Board with the decision. While the Board has seen certain exhibits, e.g., Opinion of the Court of Special Appeals in Carroll v. Montgomery County, Maryland, many of the exhibits are totally unfamiliar to the Board, e.g., Letter to Payroll Department for Montgomery County.



required by the Code. Accordingly, the Board concludes that no reimbursement of fees for Mr. T's representation is warranted.<sup>7</sup>

### **ORDER**

Based on the foregoing, the Board concludes the following:

1. The County is ordered to reimburse attorney fees in the amount of \$8,844.50 for Mr. U's representation of Appellants; and
2. No reimbursement of Mr. T's or his Firm's fees shall be made.

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<sup>7</sup> The Code governing the reimbursement of attorney fees does not indicate that Appellants are to be reimbursed for all that they have expended. Rather, the Board is to determine a reasonable attorney fee based on the factors set forth in the Code.

# 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 October 22, 2002, April 27, 2004, July 12, 2005, June 27, 2006, December 11, 2007, and October 21, 2008) 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 10, the Board reviewed and where appropriate provided comments on the following new class creations:

- 1) Customer Service Representative Trainee, Grade 11;
- 2) Police Aide, Grade 15;
- 3) Supervisory Legal Secretary, Grade 19; and
- 4) Imaging Operator II, Grade 11.