

# **Merit System Protection Board Annual Report FY2013**

**Members:**

**Julie Martin-Korb, *Chair***  
**Rodella E. Berry, *Vice Chair***  
**Raul E. Chavera, Jr., *Associate Member***

***Executive Director:***

**Kathleen J. Taylor**

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



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**FY 2013**  
**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 2013 were:

Julie Martin-Korb - Chairperson  
Rodella E. Berry - Vice Chair  
Raul E. Chavera, Jr. - 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, July 27, 2010 and February 8, 2011).

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 action as set forth in Section 3-2 of these Regulations.

# **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, November 3, 2009, July 27, 2010 and February 8, 2011) 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 employee with an Appeal Form to be completed within 10 working days. Alternatively, the employee may complete the Appeal Form on-line. The Appeal Form is available at: <http://www2.montgomerycountymd.gov/MSPBAppealForm/>.

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 thirty (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.

During fiscal year 2013, the Board issued the following decisions on appeal concerning disciplinary actions; the Board also settled one disciplinary action appeal.

## **CASE NO. 13-03**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on (Appellant's) appeal from the determination of the Montgomery County, Maryland, Director of the Department of Liquor Control (DLC) to dismiss Appellant for possessing a loaded handgun while he was working in the County's White Oak Liquor Store on April 5, 2011. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant was a Liquor Store Clerk I at the County's White Oak Liquor Store (Liquor Store). See County's Exhibit (Ex.) 1; Hearing Transcript for March 26, 2013 (H.T. III) at 66-67. Appellant had been employed by the County since August 2007. H.T. III at 67.

During the afternoon of April 5, 2011, the Montgomery County Police Department's Special Assignment Team (Team), consisting of six officers, was dispatched to Appellant's place of work to place him under surveillance as they had an arrest warrant for him based on a traffic incident. Hearing Transcript for March 13, 2013 (H.T. II) at 16, 19, 25; H.T. III at 13, 27, 110-11; County's Ex. 9. One of the Team members was sent inside the Liquor Store to identify that Appellant was there. H.T. II at 16, 39; Hearing Transcript for April 23, 2013 (H.T. IV) at 13-14.<sup>1</sup> Having ascertained that Appellant was working in the Liquor Store, the Team placed him under surveillance. H.T. II at 16.

An Officer, part of the Team, was parked at the shopping center where the Liquor Store is located so as to be able to observe Appellant when he exited the Liquor Store. H.T. II at 27, 40. During the afternoon of April 5, the Officer saw Appellant exit the Liquor Store and walk toward the passage way in the shopping center, which permits vehicles and pedestrians to go to the rear of the shopping center. H.T. II at 27, 42, 44; H.T. IV at 14, 18. As Appellant came out of the Liquor Store, the Officer pulled out of his parking space and repositioned his car, following Appellant through the passage way so that he could continue to observe Appellant's actions. H.T. II at 44, 54-55, 58; H.T. IV at 17-18. Upon reaching the back of the shopping center, Appellant continued to walk between the retaining wall and the back of the shopping center until he reached a bus stop. H.T. II at 17, 45. While in his vehicle, the Officer testified that he was between twenty-five and fifty feet away from Appellant as he followed Appellant. H.T. II at 17, 40. Once Appellant reached the bus stop, the Officer parked his vehicle and got out of it so he could arrest Appellant. H.T. II at 28, 45, 46, 47; H.T. IV at 18, 19. As the Officer was approaching Appellant on foot, a bus pulled up and Appellant was arrested while he was entering the bus. H.T. II at 17, 29, 47-48.

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<sup>1</sup> The Officer testified that with the packet the Team received with the arrest warrant there was a picture of Appellant, which allowed the Team to visually identify Appellant. H.T. II at 39.

Upon placing Appellant under arrest, the Officer asked Appellant if he had any weapons on him. H.T. II at 19; H.T. IV at 16; County's Ex. 9. Appellant responded he did not. H.T. IV at 17; County's Ex. 9. The Officer conducted a pat down to search for weapons on Appellant and felt a hard object at Appellant's waistband. H.T. II at 19; County's Ex. 9. The Officer asked Appellant what the object was and Appellant responded: "Yeah, go ahead and get the gun." H.T. II at 19; H.T. IV at 17; County's Ex. 9. The Officer recovered a loaded 9 millimeter pistol from inside Appellant's waistband. H.T. II at 19, 35; County's Ex. 9.

The Officer testified that as he followed Appellant after Appellant exited the Liquor Store, Appellant was in plain view until he got on the bus; Appellant was under continual surveillance. H.T. II at 18; H.T. IV at 16, 20. There was no period where surveillance of Appellant was broken. H.T. II at 43, 61. At no time did Appellant enter another store after exiting the Liquor Store and heading to the bus stop; he remained in the open. H.T. II at 18. The Officer never witnessed Appellant trying to retrieve a gun behind a dumpster, while on his way to the bus stop; at no time while under surveillance did Appellant have an opportunity to pick up the gun he was carrying when arrested.<sup>2</sup> H.T. II at 48-49; H.T. IV at 16.

As part of conducting surveillance on an individual, the Officer testified that it is standard practice to conduct a criminal background check on the individual. H.T. II at 37. Upon doing the criminal background check, the Team discovered that Appellant had prior arrests and a prior felony conviction for armed robbery so Appellant was prohibited from having a gun. H.T. II at 37; H.T. III at 24; C. Ex. 9. Therefore, after Appellant was arrested and brought in to the police station, Appellant was charged with possession of a handgun by a prohibited person, possession of a handgun by a convicted felon, and wearing/carrying a handgun. County's Ex. 9; County's Ex. 4.

The Police Department notified the DLC of Appellant's arrest and indicated it would send the arrest documents to the Department. H.T. II at 77, 116. Once the DLC found out about Appellant's arrest, it placed him on administrative leave. County's Ex. 1 at 2; see also Appellant's Appeal Form. Subsequently, on April 13, 2012, the Director of DLC issued Appellant a Statement of Charges – Suspension Pending Investigation of Charges or Trial, indicating that he intended to place Appellant in a leave without pay status for an indefinite period while Appellant was awaiting trial on his criminal charges. County's Ex. 1. On April 29, 2011, Appellant received a Notice of Disciplinary Action – Suspension Pending Investigation of Charges or Trial (NODA) placing him in a leave without pay status for an indefinite period while he awaited trial on his criminal charges. County's Ex. 2.

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<sup>2</sup> This testimony is in marked contrast to Appellant's version of events. According to Appellant, he had taken the gun from an individual while on his lunch break, hidden the gun in a box next to a dumpster before returning to the Liquor Store, and then retrieved the gun while on his way to the bus stop after leaving the Liquor Store. H.T. III at 78-81. As will be discussed in greater detail infra, the Board finds the Officer's account of events on April 5, 2011 to be more credible than Appellant's.



On May 10, 2012, Appellant, who had pled guilty to the charge of wearing/carrying/transporting a handgun, was convicted of the offense. County's Ex. 4; H.T. III at 77, 158. The other charges were nolle prossed.<sup>3</sup> Appellant received a sentence of one day with credit for one day served and a \$250.00 fine. H.T. III at 161; County's Ex. 4.

Once Appellant pled guilty to the charge of illegal possession of a handgun and was convicted, the Director of DLC decided to initiate action to dismiss Appellant. H.T. II at 73. On June 5, 2012, Appellant was issued a Statement of Charges – Dismissal based on his possession of a handgun at his work site. County's Ex. 5; H.T. II at 66. On July 30, 2012, the Director of DLC issued Appellant a Notice of Disciplinary Action—Dismissal based on Appellant's possession of a handgun at his work site. County's Ex. 6; H.T. II at 67.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### County:

- Appellant was placed under uninterrupted surveillance after he exited the Liquor Store on April 5, 2011 until he entered onto the bus.
- Upon arresting Appellant, the Officer searched him and found a loaded 9 millimeter semi-automatic handgun containing twelve bullets. Since Appellant had been under continuous surveillance and arrested shortly after exiting the Liquor Store, he possessed the handgun during his shift at a County work site.
- Because Appellant was previously convicted of armed robbery, he is prohibited from carrying a gun. In July 2011, Appellant pleaded guilty to the charge of illegal possession of a handgun. He was convicted on May 10, 2012 of the offense.
- Appellant's explanation for possessing the handgun lacks credibility. For the first time since the incident, Appellant claims that during his lunch break he snatched the gun from a man with mental issues and placed it in a box by a dumpster. If his gun story were true, he never would have waited two years to disclose it.
- Appellant also now claims he retrieved the gun from the box after he left the Liquor Store. However, the Officer credibly testified that Appellant never retrieved the gun after leaving the Liquor Store at the end of his shift.
- Appellant's conduct on April 5, 2011 violated the DLC policy prohibiting the carrying of weapons on the job.
- The Director, DLC, having found that Appellant committed a serious violation of DLC policy, was correct to terminate Appellant.
- The Board lacks jurisdiction to hear Appellant's claim that the Union did not fairly represent him during the grievance process concerning his indefinite suspension.

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<sup>3</sup> According to Appellant, these charges were not prosecuted as they had to do with intent. H.T. III at 159-60.

Appellant:

- Appellant was denied the right to be heard with regard to the charges against him until his hearing before the Board. DLC unilaterally steered Appellant’s attempt to address the charges against him to the Union rather than acknowledge his timely request for a hearing on the day the Notice of Disciplinary Action Pending Investigation of Charges or Trial was issued.<sup>4</sup>
- Appellant was also denied the opportunity to speak with the Director of DLC after his conviction on May 10, 2012. After leaving the courthouse, Appellant went to his work site to see the Director of DLC to tell his side of the story but was removed from the premises.
- Appellant denies ever taking the gun into his work place. While the Officer testified that he had plain view of Appellant after he left the Liquor Store, it is more likely that he only had a generalized view of Appellant as the Officer had to drive his vehicle in a busy parking lot at the shopping center in order to follow Appellant. Thus, Appellant had plenty of time to proceed out of site and retrieve the gun.
- If Appellant did not have a gun on the premises of the Liquor Store, he could not have violated DLC policy.
- Appellant was never tried or convicted of a work-related offense. He was not involved in an activity that could have resulted in injury or been disruptive to DLC employees or operations.

**APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Section 2A**, *Administrative Procedures Act*, which states in applicable part:

**Section 2A-8. Hearings**

- (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; provided, however, where a governmental agency or an administrative authority is a party, such agency or administrative authority shall have the burden of going forward with the production of evidence at the hearing before the hearing authority. Such evidence shall be competent, material and relevant to all matters at issue and relief requested.

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<sup>4</sup> As the Board has previously ruled that it lacks jurisdiction over Appellant’s indefinite suspension, it will not address any further claims by the Appellant that the Union grieved his indefinite suspension without his input or that he was denied due process rights in connection with the handling of his indefinite suspension. Even though this issue is not before the Board, the Board does believe that the County should do a better job of ensuring an employee has the opportunity for an in-person oral reply if the employee chooses an oral reply rather than a written response.

**Section 2A-10. Decisions**

- (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.

**DLC Procedure No. 1-XIII, *Serious Infractions of Discipline***, which states in applicable part:

Policy:

2.1 A serious infraction of discipline is considered to be any act which may result in injury to any person, may bring discredit on the Montgomery County Government or the Department of Liquor Control, may result in damage to Montgomery County property or equipment, may be illegal or improper within the law or commonly accepted standards of conduct, may be disruptive to the effective operations of the Department of Liquor Control, or may be offensive to the general public or to fellow employees.

2.2 Some specific examples of serious infractions are listed herein for illustrative purpose only and are not intended to be all inclusive.

2.2-4 Carrying weapons on the job.

**ISSUE**

Has the County proven by a preponderance of the evidence that Appellant’s dismissal was consistent with applicable law and regulation?

**ANALYSIS AND CONCLUSIONS**

**The County Has The Burden Of Proving Appellant’s Dismissal By A Preponderance Of The Evidence.**

In a disciplinary matter, the County bears the burden of proving its action by a preponderance of the evidence. Montgomery County Code, Section 2A-10. The Supreme Court has defined this burden thusly:

The burden of showing something by a preponderance of evidence. . . simply requires the trier of the fact to believe that the existence of a fact is more probable than its nonexistence before [the trier of the fact] may find in favor of the party who has the burden to persuade the [trier of the fact] of the fact’s existence. . . . In other words, the preponderance standard goes to how convincing the evidence in favor of a fact must be in comparison with the

evidence against before that fact may be found but does not determine what facts must be proven as a substantive part of a claim or defense.

Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997) (citations omitted); see also Myers v. Department of Agriculture, 88 M.S.P.R. 565, 573 (2001). As the U.S. Merit Systems Protection Board has opined: “[P]reponderance of the evidence exists when such evidence has, when considered and compared to that opposed to it, more convincing force and produces in the mind of the trier of the fact a belief that such evidence is more likely true than not true.” Johnson v. Dep’t of Air Force, 13 M.S.P.R. 236, 238 (1982) (citing to United States v. Kansas Gas and Electric Co., 215 F. Supp. 532, 543 (D. Kan. 1963)).

**Where Testimony Of Witnesses Disagree On Important Points, The Board Must Determine The Credibility Of The Witnesses. The Board Finds In This Case Appellant’s Testimony Is Not Credible.**

As previously noted, Appellant’s testimony and that of other witnesses disagree on several key points in this case. Accordingly, the Board needs to determine the issue of credibility. 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)).

Moreover, in making a credibility determination, one factor to be considered is whether the witness’ story is implausible on its face so that a reasonable fact finder would not credit it. Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985). Furthermore, where a factual claim could have been raised to the deciding official which would have explained an appellant’s action is only raised for the first time on appeal to the Board, and where such a claim, if it had been made earlier, would have served as the basis for a very strong argument on behalf of the appellant, the credibility of the appellant making the belated claim is seriously undermined. Reynolds v. Dep’t of Justice, 63 M.S.P.R. 189, 195 (1994).

Appellant claims that he never brought the gun to his work site. H.T. III at 68, 79. According to Appellant’s version of events, while Appellant was on his lunch break at

Popeye's on April 5, 2011, he saw an individual who he knew and who had mental issues. H.T. III at 78, 117-18, 120, 125-26, 147. The individual was bragging about having a gun and Appellant believed this was a dangerous situation. H.T. III at 78, 126. Therefore, while leaving the restaurant, Appellant made a quick decision to snatch the gun from the individual. H.T. III at 78, 122, 125, 137. Appellant then crossed the street and took a path back to the Liquor Store behind the shopping center where dumpsters are located. H.T. III at 79, 122, 124. Appellant claims he put the gun in a box, slid it next to a dumpster, and went back to work, figuring that the box would be thrown away or moved soon. H.T. III at 79, 121, 124, 150. When Appellant left the Liquor Store at the end of his shift, he followed the same path he had taken at lunch time to check to see if the box where he placed the gun was still there. H.T. III at 80-81, 126. As the gun was still there in the box, Appellant decided it was not a good idea to leave it there. Id. at 81. Therefore, he picked the gun up, put it in his waistband and continued walking to the bus stop. Id. Then he was arrested and the Officer found the gun. Id.

As the County correctly points out, if Appellant's gun story were true, he never would have waited two years to tell it. County's Closing Statement at 2. Appellant acknowledged that when the Officer searched Appellant and found the gun, Appellant never told the Officer that Appellant had taken the gun from a mentally ill person. H.T. III at 147. Appellant never told the Union, which was representing him with regard to his indefinite suspension, about snatching the gun from an individual with mental issues. H.T. III at 127-28, 139. Appellant never put in writing to Director of DLC his explanation of how he came to possess the gun or told anyone at the DLC that he took the gun from a mentally ill person. H.T. III at 139, 154; H.T. IV at 23-24. According to Appellant, he did provide the explanation about the mentally ill person to the judge, prosecutor, his attorney and the Detective at the grand jury hearing. H.T. III at 147, 162. Significantly, the Detective credibly contradicted Appellant's testimony, denying that he ever heard any explanation from Appellant regarding how Appellant obtained the gun. H.T. IV at 11, 12. Therefore, the Board finds that Appellant's delay in relating his story until he came before the Board seriously undermines his credibility. Reynolds, 63 M.S.P.R. at 195.

The Board also finds that Appellant's story is not plausible. Appellant knew that because of his prior felony conviction he was prohibited from possessing and carrying a gun. H.T. III at 125, 149-50. Yet according to Appellant's story, twice he took custody of a gun knowing he was prohibited from doing so. H.T. III at 127, 150. Although Appellant claimed the mentally ill individual posed a dangerous situation, he never tried to call 911 or the police. H.T. III at 148-49. He wasn't even sure where the mentally ill person was when he went back to the Liquor Store. H.T. III at 150. He claims to have left the gun in a box by a dumpster in a high traffic area despite not knowing where the mentally ill individual was. H.T. III at 151. He alleges that he hoped someone would come by and pick it up so that it would be gone by the time he left work at the Liquor Store. H.T. III at 157. Even if one were to accept Appellant's tale of the dangerous situation that was created by the mentally ill individual who initially had possession of the gun, Appellant's subsequent actions make no sense. Having snatched the gun, which Appellant was prohibited from having, the reasonable course of action for Appellant, a convicted felon, would have been to ensure that he was not being followed by the mentally ill individual and to get rid of the gun as soon as

possible by throwing it in the dumpster instead of leaving it in a box for anyone, including the mentally ill individual, to access. Yet when asked why he didn't throw the gun in the dumpster, Appellant, while acknowledging it was a good question, could not provide a good answer. H.T. III at 157-58.

Accordingly, based on the foregoing analysis, the Board finds Appellant's testimony about the events of April 5, 2011 is not credible.

**Having Found That Appellant's Testimony Is Not Credible, The Board Concludes That The County Proved By A Preponderance Of The Evidence That Appellant's Dismissal Was Warranted.**

Having found that Appellant's version of the events of April 5, 2011 is not credible, the Board credits the testimony of the Officer that he kept Appellant under observation from the time Appellant exited the Liquor Store until his arrest as he entered the bus. The Board also credits the Officer's testimony that Appellant never retrieved the gun from a box by a dumpster. Therefore, having concluded that Appellant lacked any opportunity to retrieve the gun he purportedly stashed in a box by a dumpster, the Board finds that, based on the totality of evidence in the record, Appellant had the gun while at his work site. Accordingly, the County proved by a preponderance of the evidence that Appellant violated DLC Policy No. 1-XIII, which classifies carrying a gun at work as a serious infraction. DLC Policy No. 1-XIII, Section 2.2-4.

The Board also finds that Appellant's carrying a loaded weapon at work posed a safety risk to both his coworkers and the customers of the Liquor Store. Accordingly, the Board finds that Appellant was guilty of a serious infraction, which warranted his dismissal from employment.

**The Board Finds There Was No Violation Of Appellant's Due Process Rights In Connection With His Dismissal.**

Appellant claims he was denied the right to speak with Director of DLC on May 10, 2012, which violated his due process rights in connection with his dismissal. Significantly, Appellant's dismissal was not proposed until June 5, 2012, when the Statement of Charges (SOC) for his dismissal was issued. The SOC gave Appellant the right to reply to the charges either in person or in writing. County's Ex. 5 at 3; H. T. III at 129. However, there is no evidence in the record that Appellant elected to do either.<sup>5</sup> Therefore, the Board concludes Appellant was not denied any due process rights in connection with his dismissal.

**ORDER**

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

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<sup>5</sup> Appellant confirmed he had the opportunity to respond. H. T. III at 130. Director, DLC credibly testified that he never received any explanation from Appellant about the April 5 incident until the hearing in this case. H.T. IV at 23-24.

## **CASE NO. 13-04**

### **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 Montgomery County's Department of Correction and Rehabilitation (DOCR) Director to suspend Appellant for three days. The appeal was considered and decided by the Board.<sup>6</sup>

### **FINDINGS OF FACT**

Appellant is a Supply Technician II with DOCR. Hearing Transcript for March 7, 2013 (H.T. II) at 178; Hearing Transcript for February 21, 2013 (H.T. I) at 134. He has worked for DOCR for approximately twelve years. H.T. II at 178. His immediate supervisor for the past two and a half years has been the Deputy Warden for Operations (Deputy Warden). H.T. II at 180; H.T. I at 134. As a Supply Technician, Appellant is expected to transport inmate property, laundry, past records bags, office supplies, interoffice mail, and other materials between the Montgomery County Detention Center (MCDC) in Rockville, Maryland, and the Montgomery County Correctional Facility (MCCF), located in Clarksburg, Maryland. H.T. II at 180; see also Appellant's Exhibit (A. Ex.) 9.

On May 23, 2013, Appellant was moving laundry and supplies to MCDC. H.T. II at 188. He was using a large yellow truck to transport these materials. Id. at 195. Appellant parked the truck in the police loading dock area in the parking spot right in front of the sally port<sup>7</sup> door at MCDC. Id.

The Sheriff's Office received a request on May 23, 2013 to do a transport of a prisoner from MCDC to the crisis intervention unit at MCCF in Clarksburg. H.T. I at 20-21. The prisoner was HIV-positive and bi-polar. Id. at 22, 69; County's Exhibit (C. Ex.) 6(b). He had previously bitten a nurse and stated that he was trying to infect as many people as he possibly could with HIV. Id. Because of the threat of HIV infection, the Sheriff's Office dispatched four deputies to move the inmate instead of the usual two. H.T. I at 22. It was raining hard when the first two Deputy Sheriffs arrived at MCDC. Id. at 22, 69. They noted that the yellow truck was parked where they wanted to park – in front of the sally port door where there was a bit of shelter from the rain. H.T. I at 23, 65. They wanted to park in as

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<sup>6</sup> The Associate Board Member was not present for the last day of hearing held in this matter on March 13, 2013. Pursuant to the Administrative Procedures Act, Montgomery County Code Section 2A-10(c), the Associate Board Member has certified in writing that he has read the transcript for the last day of the hearing and reviewed the record of evidence in this matter. Therefore, he was able to participate in the vote on this matter. His Certification has been made part of the official record in this matter.

<sup>7</sup> The sally port is an enclosed area where inmates are taken into and out of MCDC. H.T. I at 23. As one door closes, another opens, so as to ensure that an inmate cannot escape. Id.

close proximity as they could to the sally port door as they were concerned that if the inmate became combative, they did not want to have to drag him through the rain. Id. at 23, 69.

Therefore, the deputies went to the window in the bubble, which is a command center, right off the sally port area. Id. at 24, 70. A Corporal was on duty in the bubble. H.T. II at 113; H.T. I at 24, 70. Deputy Sheriff D. asked the Corporal if the property truck could be moved since the Deputy Sheriffs had to move a problem inmate and wanted to be parked as close as possible to the sally port door. H.T. II at 114; H.T. I at 24, 70. The Corporal then radioed Appellant to call the intake control room. H.T. II at 114. When Appellant called back, the Corporal told Appellant that Deputy Sheriff D. wanted Appellant to move the yellow truck. H.T. II at 114, 189-190. Appellant refused to move the truck. H.T. I at 24, 70; H.T. II at 114, 119; Hearing Transcript for March 13, 2013 (H.T. III) at 49; C. Ex. 6(a); C. Ex. 6(b).

Subsequently, Deputy Sheriff D. sent an email to his supervisor, informing him about Appellant's refusal to move the property truck. H.T. I at 25; C. Ex. 6(a). After being notified about the incident by the Sheriff's Office, Appellant's supervisor, (the Deputy Warden) decided to investigate the matter and met with Appellant and his union representative on May 25. H.T. I at 140. During the meeting, Appellant acknowledged that he refused to move the truck when asked by the Corporal. Id.; C. Ex. 14 at 3.

On June 7, 2013, the Sheriff's Office was asked to respond to a call for emergency medical at MCDC. H.T. I at 26, 71. Deputy Sheriff D. and Deputy Sheriff C. responded. Id. A female prisoner, who was seven months pregnant, was going through withdrawal. H.T. II at 163; H.T. I at 26, 71-72; C. Ex. 6(b). Fire and Rescue, concerned that the inmate might lose her baby, decided to transport the inmate by ambulance to Shady Grove Adventist Hospital. H.T. II at 163-64; H.T. I at 26, 72; C. Ex. 6(b). The procedure for an emergency medical is for one of the two Deputy Sheriffs to go in the ambulance with the inmate, with the other Deputy Sheriff following the ambulance in the Sheriff's cruiser. H.T. I at 26-27, 38, 72. On this occasion, Deputy Sheriff D. had the responsibility to accompany the inmate in the ambulance and Deputy Sheriff C. was to follow in the cruiser. H.T. I at 26-27, 72.

Deputy Sheriff D. testified that when he and Deputy Sheriff C. arrived at MCDC the ambulance was already in the police loading dock, backed up to the sally port door. H.T. I at 27. Deputy Sheriff C. testified that Appellant's property van was not in the loading area when they arrived. H.T. I at 73. The two deputies went inside MCDC to assist Fire and Rescue with the inmate. H.T. I at 30, 72. Deputy Sheriff D. testified that he did not see Appellant's property van when he exited MCDC and entered the ambulance. H.T. I at 28, 30, 37, 53-54. Deputy Sheriff D. sat in the back of the ambulance by a window. H.T. I at 28. Deputy Sheriff C. testified that after he got into the Sheriff's cruiser, he saw Appellant pull up in a white property van to the MCDC gate. H.T. I at 82. The lights were flashing on both the ambulance and the cruiser as they waited for the MCDC gate to be opened.<sup>8</sup> H.T. I at 29, 48, 57, 74-75, 76, 81, 85, 102, 105, 108, 116; C. Ex. 6(b).

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<sup>8</sup> There was much discrepancy in the witnesses' testimony as to when the lights were turned on. Deputy Sheriff D. testified that when he and Deputy Sheriff C. arrived at MCDC



Sergeant H was working the intake control in the bubble. H.T. I at 101. He saw Appellant's van pull up to the gate and testified it was there for a few minutes. *Id.* at 105. However, Appellant never identified himself to Sergeant H. H.T. I at 110-11, 128. Sergeant H testified that he refused to open the gate while he was getting the emergency loaded, as the emergency had precedence over whoever was trying to enter MCDC. H.T. I at 105. In order to open the gate, Sergeant H waited until he had an indicator that he should do so. H.T. I at 102. When the ambulance's lights and the Sheriff's cruiser's lights came on, Sergeant H pressed the button to open the gate. H.T. I at 102, 103, 104, 105, 116; C. Ex. 9. As the gate slowly began to open, it made a continuous beeping noise. H.T. I at 47, 92, 93, 105, 123. The gate area only permits one vehicle to enter or leave at the same time; there is insufficient room for a vehicle to enter while another vehicle is exiting the police loading dock. H.T. I at 56, 76, 103.

As the gate began to open, the ambulance began to roll forward. H.T. I at 47, 48, 74, 103, 105. Deputy Sheriff D. recalled hearing the beeping of the gate as it opened as the ambulance started rolling forward. H.T. I at 47. However, once the gate was opened, Appellant drove his van into the police loading dock area. H.T. I at 38, 83, 103, 105, 109; C. Ex. 9. This caused the ambulance to come to a quick halt. H.T. I at 27, 48, 56, 72; C. Ex. 9. Deputy Sheriff D. began to lose his balance and had to catch himself to keep from falling. H.T. I at 27, 47. Deputy Sheriff C., who witnessed what had happened, radioed Deputy Sheriff D., indicating that the "property guy just cut off the ambulance." H.T. I at 28, 56, 73. At that point, Deputy Sheriff D. looked out the window of the ambulance and saw the property van. H.T. I at 54, 55.

Deputy Sheriff D. wrote an email to his supervisor, detailing the events of June 7. H.T. I at 43-44; C. Ex. 8. Subsequently, his supervisor asked Deputy Sheriff D. to complete an Incident Report, detailing the events of both May 23 and June 7. H.T. I at 36, 43. Deputy Sheriff D. wrote the incident report at 4:13 p.m. on June 8, 2013. H.T. I at 36. The Incident Report was sent to the Deputy Warden of Operations. H.T. I at 156.

At some point during the evening of June 7, Sergeant H was called by Deputy Sheriff M. and asked to identify who was driving the white van that had cut off the ambulance. H.T. I at 107; H.T. III at 56; C. Ex. 6(b); see also C. Ex. 2. Sergeant H identified Appellant as the

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the ambulance emergency lights were on and the engine was running and the lights remained on. H.T. I at 28, 60, 61. Deputy Sheriff C. testified that he wasn't sure the ambulance lights were on when he initially arrived at MCDC with Deputy Sheriff D., but when Deputy Sheriff D. got into the ambulance the lights were on. H.T. I at 74, 81. Sergeant H testified that the ambulance did not have its lights on the whole time it was parked in the police loading dock area but did have its lights on when it was about to leave, as the lights served as an indicator that he should open the gate. H.T. I at 102, 108-09, 124, 125, 126. Appellant testified that at no time while he waited for the gate to open did the ambulance or the cruiser have on its lights. H.T. III at 8, 41; see also A. Ex. 7. The Board finds that Sergeant H had the most credible testimony on this issue, as it was his responsibility to open the gate and the turning on of the lights served as the indicator to him that the ambulance was ready to transport the inmate from MCDC.

driver. H.T. III at 56. When Sergeant H later saw Appellant, he informed Appellant that the Sheriffs' Office was upset about being cut off by the white van. H.T. III at 55-56. Sergeant H suggested to Appellant that he should call the Sheriff's Office to apologize to the two Deputy Sheriffs but Appellant refused to do so. H.T. I at 107; H.T. III at 56, 57, 58. Instead, Appellant indicated that he would send an email to his supervisor about the incident. H.T. III at 58.

Appellant sent the Deputy Warden an email about the events of June 7, with a copy to Captain L. at 10:45 p.m. on June 7. H.T. I at 155; C. Ex. 7. In the email, Appellant stated that he saw the ambulance and the Sheriff cruiser as he approached the gate. Id. The vehicles were parked with their engines off so as soon as the gate opened he drove in. Id. Subsequently, he saw individuals exit the sally port door, enter the ambulance and cruiser and drive off. According to Appellant, neither vehicle had its lights on. Id.

On June 8, at the MCDC morning managers' meeting, there was a discussion about the incident that had occurred the day before. H.T. II at 25. The Deputy Warden was informed that there had been a report from the Sheriff's Office. Id. She asked Captain L. if he had a copy of the report. Id. He indicated he did and he subsequently emailed her what he had received. Id. at 25-26; C. Ex. 8.

Subsequently, Sergeant H was asked by Captain L. to prepare an Incident Report. H.T. I at 106, 117, 122; see C. Ex. 9. In the report, Sergeant H indicated that Appellant failed to give the emergency vehicles the right-of-way. H.T. I at 106; C. Ex. 9.

After receiving the Incident Report from the Sheriff's Office, the Deputy Warden of Operations informed Appellant that what he had written in his email conflicted with the Sheriff's report. H.T. I at 156. Accordingly, she instructed Appellant to write his version of what happened. Id.

The Incident Report the Deputy Warden received from the Sheriff's Office also discussed Appellant's refusal to move the yellow truck on May 23, 2013. H.T. I at 150. As she had not had the Incident Report at the time she met with Appellant and his representative concerning the May 23 incident, the Deputy Warden sent Appellant an email on June 15, 2013, asking him to put in writing what happened on May 23. H.T. I at 150, 151; C. Ex. 10. Appellant responded back to her on June 19, 2013, indicating that when asked to move the truck he replied that he would rather not move it. C. Ex. 11.

Appellant was issued a Statement of Charges (SOC) for a Five-Day Suspension by the Warden, dated July 12, 2013. C. Ex. 3. The SOC detailed three incidents: 1) the May 23 refusal to move the yellow property truck; 2) the June 7 incident involving cutting off the ambulance; and 3) making false statements to his supervisor in his June 7<sup>th</sup> email to her. H.T. I at 162-63. Appellant responded to the SOC on July 26, 2013. C. Ex. 14; H.T. I at 162. DOCR Director issued Appellant a Notice of Disciplinary Action (NODA) for a Three-Day Suspension, dated 09/18/12, which was subsequently amended on 11/14/12. C. Ex. 2; C. Ex. 15. Appellant was suspended for three days, effective December 3-5, 2013. C. Ex. 15. The NODA detailed the same three incidents contained in the SOC as the basis for the

discipline. C. Ex. 15.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **County:**

- Appellant failed to perform his duties properly when he failed to move the large yellow property truck when requested to do so on May 23, 2013.
- Appellant failed to perform his duties properly when he failed to yield the right-of-way to two emergency vehicles on June 7, 2013.
- Appellant knowingly made a false statement to his supervisor when he sent her an email about the June 7, 2013 incident.
- Appellant has had other performance issues related to his failure to satisfactorily perform his duties.<sup>9</sup>
- The issuance of the SOC may be delayed under the personnel regulations if an investigation is being conducted. The Deputy Warden was in the process of collecting all the facts with regard to the incidents at issue. The delay in issuing the SOC was due to the fact that Appellant had been asked by the her to provide a written statement regarding the May 23 incident which he did not comply with until June 19.

#### **Appellant:**

- Appellant never received an order to move the yellow property truck; rather when asked to move it he asked if it was an emergency and upon learning that it was not, he assumed he did not need to move it.
- The ambulance did not have its sirens on and Appellant never saw it attempt to leave the facility on June 7 while he was entering MCDC.
- Appellant has been charged with being untruthful regarding whether the ambulance's lights were on; however, the County's own witnesses were inconsistent in their testimonies regarding this.

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<sup>9</sup> Appellant had filed a Motion in Limine, arguing that allowing evidence about his performance was irrelevant. The County responded to the Motion in Limine, arguing that pursuant to the collective bargaining agreement and the personnel regulations it was relevant. The Board sided with the County, based on this argument. See Decision and Order on Appellant's Motion in Limine. While the County spent a great deal of time during the three-day hearing putting on testimony about Appellant's purported other performance issues, see, e.g., H.T. I at 164-183; H.T. II at 78-82, 105-108, it turned out to be irrelevant to the discipline at issue in this case as DOCR Director testified that Appellant's work record did not influence his decision to impose a three-day suspension. H.T. II at 153. Moreover, he did not consider Appellant's past disciplinary record. H.T. II at 154. Therefore, this Final Decision will not address Appellant's other purported performance issues.

- Appellant’s supervisor, the Deputy Warden, does not like Appellant. Appellant has been a good employee for twelve years and never received any discipline or negative performance evaluations until the Deputy Warden of Operations became his supervisor.<sup>10</sup>
- The County failed to preserve video camera footage that would have shown that Appellant’s story regarding June 7 was correct.
- The personnel regulations indicate that a SOC should be issued within 30 calendar days after the date the supervisor becomes aware of the employee’s conduct. However, the SOC was issued 51 days after the May 23 event and 36 days after June 7 incident. The Board in case no. 11-02 characterized the lack of timeliness of an appeal as an affirmative defense.

**APPLICABLE LAW AND REGULATIONS**

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

...

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

...

(b) ***Prompt discipline***

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

...

- (c) violates an established policy or procedure;

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<sup>10</sup> As Director did not consider Appellant’s past disciplinary record, see supra note 4, this Final Decision will not further address these matters.

...

- (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;

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, STANDARDS OF CONDUCT/CODE OF ETHICS, effective March 26, 2007**, which states in applicable part:

**VII. DEPARTMENT RULES FOR EMPLOYEES**

D. Specific Departmental Rules:

...

10. Neglect of Duty/Unsatisfactory Performance:

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

...

14. Untruthful Statements:

Employees shall not make untruthful statements, either verbal or written.

**ISSUES**

1. Has the County proven its charges by a preponderance of the evidence?
2. Was harmful procedural error committed by the Department Director when the Department Director failed to issue the Statement of Charges as provided by MCPR Section 33-2(b)(1) within 30 days of when DOCR became aware of Appellant's misconduct?

3. Based on the charges sustained, is the penalty of a three-day suspension excessive?

### **ANALYSIS AND CONCLUSIONS**

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

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 their supervisor to advise that they will not be reporting to work, a day of absence without leave (AWOL) may appear in a SOC as an AWOL charge as well as a charge of failure of the employee to follow regulations by reporting the absence to the employee's 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, the County has set forth six charges,<sup>11</sup> several of which are duplicative and therefore, will be merged, as discussed below.

Moreover, in the instant case, several of the charges (i.e., Charges 2, 3, and 5) 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). For ease of reference, the Board has determined to label each separate act of misconduct under a particular charge as a Specification.

The NODA outlined the events of May 23 and June 7 and the email sent by Appellant to the Deputy Warden on June 7. It then stated that the actions described violated the following personnel and departmental provisions:

Charge 1: Section 33-5, Causes for Disciplinary Action, (c) "...violates an established policy or procedure": You violated established Policies and Procedures by not moving your vehicle on May 23, 2013, when asked to do so by a Correctional Officer and a Deputy Sheriff. You have worked in the Department for over eleven years and have received training and have a working knowledge of these established policies and procedures.

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<sup>11</sup> The NODA failed to number each charge. For ease of reference, the Board has done so.

Charge 2: Section 33-5, Causes for Disciplinary Action, (e) “fails to perform duties in a competent and acceptable manner”: You failed to perform your duties in a competent and acceptable manner on the two occasions listed above.

Specification A: First, when you refused to move your vehicle at the request of both a Correctional Officer and a Sheriff’s Deputy.

Specification B: Second, when you pulled your vehicle in front of an ambulance and Sheriff’s cruiser on June 7, 2013, as they were trying to exit the MCDC Police sally port area.

Charge 3: Section 33-5, Causes for Disciplinary Action, (h) “Is negligent or careless in performing duties”:

Specification A: You were negligent and careless in performing your duties when you did not come to the Police Loading Dock area on May 23<sup>rd</sup> to investigate the fact that a request had been made of you by a Correctional Officer and a Sheriff’s Deputy to move your vehicle. You simply ignored the situation and continued doing your paperwork. You showed no concern for the fact that there was a problem for the Sheriff’s [sic] and that you could have resolved a problem that might have caused them injury.

Specification B: You were also negligent and careless when you “cut off” an ambulance and Sheriff’s cruiser as they were attempting to transport a patient to the hospital. This could have resulted in an accident and put all public safety personnel at risk. Additionally, an accident would have jeopardized the safety and health of a female patient (in the ambulance) who was seven months pregnant. Your carelessness could have caused great harm in this situation.

Charge 4: Section 33-5, Causes for Disciplinary Action, (g) “knowingly makes a false statement or report in the course of employment.”: You knowingly made a false statement in writing to your supervisor, the Deputy Warden, in an attempt to mislead her and not acknowledge the fact that you did in fact “cut off” an ambulance and Sheriff’s cruiser with their emergency lights on as they attempted to exit the MCDC. This false statement was presented in the email that you sent to the Deputy Warden at 10:43 p.m. on June 7, 2013.

Charge 5: Department Policy and Procedure 3000-7, Standards of Conduct/Code of Ethics, VII. Department Rules for Employees, D. Specific Departmental Rules, 10. Neglect of Duty/Unsatisfactory Performance, “Employees shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Unsatisfactory performance is demonstrated by an inability or unwillingness to perform assigned tasks, or the failure to take appropriate action in a situation deserving attention, or failure to conform to work standards established for

the employee's rank, grade, or position.” You failed to exercise competency in your position:

Specification A: By not moving your truck when asked to do so by a Correctional Officer (who asked on behalf of a Deputy Sheriff) and

Specification B: By not yielding your vehicle to an ambulance and a Sheriff's cruiser as they exited MCDC.

As a Supply Technician, driving a County vehicle is a major responsibility. In both of these incidents you clearly showed that you are not maintaining sufficient competency to properly perform your duties and assume the responsibilities of your position. You did not take appropriate action in a situation deserving your attention when you did not investigate why the Sheriff's Deputy needed for you to move your vehicle on May 23<sup>rd</sup>. You instead showed an inability and unwillingness to do your job and take appropriate action in a situation deserving attention.

Charge 6: Department Policy and Procedure 3000-7, Standards of Conduct/Code of Ethics, VII. Department Rules for Employees, 14. Untruthful Statements, “Employees shall not make untruthful statements, either verbal or written”: Your written response to the Deputy Warden was purposely misleading and untruthful. You stated that both the ambulance and Sheriff's cruiser were unoccupied with their engines off and that no emergency lights were in operation. All of these statements were false. This is violation of the standards of conduct and the Department's Code of Ethics.

As the Board has previously opined, it views a charge of failure to perform in a competent manner and a charge of negligent performance of duties, where both charges deal with the same act of misconduct, to be nearly identical and will treat the two charges as one. See MSPB Case No. 07-10. In the instant case, Charge 2 deals with Appellant's failure to perform his duties in a competent manner on May 23 and June 7; Charge 3 deals with Appellant's negligence in performing his duties on May 23 and June 7; and Charge 5 deals with Appellant's failure to exercise competency in performing his duties on May 23 and June 7. As all three charges deal with Appellant's poor performance of his duties, the Board will merge them together and address Appellant's behavior as set forth in Charge 3.

Charges 4 and 6 both deal with Appellant making a false statement in his June 7, 2013 email to the Deputy Warden. The Board will merge these two charges and address Appellant's behavior as set forth in Charge 4.

Accordingly, the Board holds that the County set forth three basic charges: Charge 1, alleging a violation by Appellant of an established policy or procedure; Charge 3, dealing with Appellant's negligent performance of his duties, with two Specifications – Specification A addressing his negligence on May 23 and Specification B addressing his negligence on June 7; and Charge 4, dealing with Appellant's making a false statement to his supervisor in his email to her, dated June 7, 2013.



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

Charge 1 states that Appellant violated established Policies and Procedures by not moving his vehicle on May 23, 2013, when asked to do so by a Correctional Officer and a Deputy Sheriff. C. Ex. 2 at 5. However, the County never introduced an established policy or procedure to support this alleged violation. Moreover, when DOCR Director was asked if there was a written policy that indicated a request by an officer to a civilian employee constitutes a direct order, he could not answer the question. H.T. II at 158. Instead, he could only assert, without providing a citation to a specific policy, that there were policies that indicate staff is to assist each other. Id.

Accordingly, based on the lack of evidence, the Board finds the County did not prove this charge.

**The County Proved Both Specifications Of Charge 3 By A Preponderance Of The Evidence.**

A. Appellant's Version Of Events On May 23<sup>rd</sup> Is Simply Not Credible.

Specification A of Charge 3 states that Appellant was negligent and careless in performing his duties when he did not come to the Police Loading Dock area on May 23<sup>rd</sup> to investigate the fact that a request had been made of him by a Correctional Officer and a Sheriff's Deputy to move his vehicle. Rather, Appellant simply ignored the situation and continued doing his paperwork. In Appellant's response to this charge, he conceded that he did not move the truck when asked by the Corporal to do so. C. Ex. 14 at 3. On the stand, Appellant again acknowledged that he would not move the truck when asked to do so. H.T. III at 49.

Appellant originally alleged that he declined to move his truck because he first asked whether it was an emergency, and when told there was no emergency, did not want to move the truck because it was large and there was a high risk of having an accident in the bad weather. C. Ex. 14 at 2; A. Ex. 7. However, on the stand, Appellant changed his story, indicating that while he was concerned that he might have an accident when he moved the truck, he was working with two inmates on level six at the time he was called to move the truck and could not leave them unsupervised. H.T. II at 189-91; H.T. III at 50. Appellant stated he never told the Corporal that he was with the inmates, he just asked the Corporal if it was an emergency. H.T. III at 51-52.

The Board finds that Appellant was not credible with regard to his testimony. First, in his response to the Statement of Charges, Appellant stated:

On arriving at the police loading dock, I struggled to back the truck in because the giant generator standing there . . . occupied much space. After I and the inmate workers offloaded most of the supplies and took them to level six, I started to deliver the small packages I brought from MCCF to different offices

before I came back and remove[d] the rest of the supplies still in the truck. As I continued with my evening daily duty, I heard my name on the radio by a caller asking for my phone location which I gave him.

C. Ex. 14. Thus, Appellant's testimony conflicts with his response to the Statement of Charges, as his response indicates he had finished with the supplies on level six, and was in the process of delivering packages to different offices.

Moreover, the Board finds that the Corporal's version of events is more credible. According to the Corporal, he told Appellant that the Deputy Sheriff wanted Appellant to move his truck. H.T. II at 114. Appellant never asked him if it was an emergency; rather, the Corporal told him it was an emergency. H.T. II at 118. However, Appellant informed the Corporal that he was not going to move the truck. H.T. II at 119. The Corporal also denied that Appellant ever gave him a reason as to why he would not move the truck. H.T. III at 54.

Having found the Corporal's testimony to be the more credible version of events, the Board further finds that Appellant, upon being told it was an emergency and the Deputy Sheriff wanted his truck to be moved, was negligent when he failed to move his truck on May 23.

B. Appellant Was Negligent In His Duties When He Cut Off The Ambulance.

On June 7, 2013, the record of evidence establishes that Appellant pulled up to the gate of MCDC and waited a few minutes for the gate to open. H.T. I at 82, 103, 105, 114. Appellant could have radioed Sergeant H who was in charge of intake control to open the gate, which is normal procedure but he didn't and Sergeant H had no way of knowing it was Appellant in the van. H.T. II at 111, 127-28; H.T. III at 43-44.

The record of evidence also clearly establishes that Appellant saw both the ambulance and the Sheriff's cruiser inside the gate. H.T. III at 7-8; C. Ex. 14 at 3; A. Ex. 7. Further, Appellant acknowledged that upon observing the ambulance and Sheriff's cruiser he could have moved out of the way so they could leave but did not. H.T. III at 48-49.

Finally, the record of evidence clearly establishes that the ambulance began moving forward as the gate was opening, with its lights on but Appellant did not yield to the ambulance. H.T. I at 81-83, 96, 102-103, 105. Instead, he drove through the open gate and cut off the ambulance. H.T. I at 47, 57-58, 96-97; C. Ex. 6(b). The ambulance had to abruptly come to a halt, causing it to rock back and forth as it stopped. H.T. I at 27-28, 29, 47-48, 64-65, 82, 83-84, 97. Deputy Sheriff D., who was in the ambulance, began to lose his balance and had to catch himself to keep from falling. H.T. I at 27, 47.

Based on the record of evidence, the Board finds that Appellant had a duty to yield the right-of-way to the ambulance and Sheriff's cruiser on June 7 but failed to do so. Accordingly, the Board finds that Appellant was negligent in his duties when he cut off the ambulance.

**The County Failed To Prove That Appellant Knowingly Made A False Statement.**

Appellant was charged with knowingly making a false statement. As DOCR Director testified, this false statement charge revolves around Appellant's statement in his June 7 email to the Deputy Warden that neither the Sheriff's cruiser nor the ambulance had its lights on. H.T. II at 148; C. Ex. 7. As previously noted, there was much discrepancy in the witnesses' testimony as to when the lights were turned on. Deputy Sheriff D. testified that when he and Deputy Sheriff C. arrived at MCDC the ambulance emergency lights were on and the engine was running and the lights remained on. H.T. I at 28, 60, 61. Deputy Sheriff C. wasn't sure the ambulance lights were on when he initially arrived at MCDC with Deputy Sheriff D., but when Deputy Sheriff D. got into the ambulance the lights were on. H.T. I at 74, 81. Sergeant H testified that the ambulance did not have its lights on the whole time it was parked in the police loading dock area but did have its lights on when it was about to leave, as the lights served as an indicator that he should open the gate. H.T. I at 102, 108-09, 124, 125, 126. Appellant testified that at no time while he waited for the gate to open did the ambulance or the cruiser have on its lights. H.T. III at 8, 41; see also A. Ex. 7. The Board finds that Sergeant H had the most credible testimony on this issue, as it was his responsibility to open the gate and the turning on of the lights served as the indicator to him that the ambulance was ready to transport the inmate from MCDC.

Nevertheless, given the wide disparity of the testimony, and the fact that Sergeant H waited until he actually saw the lights begin to flash before he opened the gate, it is quite possible that at the time Appellant first saw the ambulance and cruiser getting ready to leave they did not have their lights on. Therefore, the Board cannot conclude that Appellant knowingly gave a false statement.

**As An Investigation Was Being Done Into The Events At Issue In This Case, The Statement Of Charges Was Issued In A Timely Manner.**

Appellant points to the provision in the personnel regulations that states a Department Director should issue a Statement of Charges within 30 calendar days after the date the supervisor became aware of the employee's conduct. H.T. III at 79. The County did not issue its SOC until 36 days after the alleged conduct of June 7 and 51 days after the alleged conduct of May 23. Id.

As the County correctly points out, the personnel regulations permit a delay in the issuance of the SOC if an investigation into the conduct at issue justifies a delay. MCPR, Section 33-2(b)(2). In the instant case, the Deputy Warden testified that she did not get the Incident Report from the Sheriff's Department until June 11, 2013. H.T. II at 26. Upon reviewing the Sheriff's description of the May 23, 2013 incident, the Deputy Warden, who had previously discussed the matter with Appellant and his union representative, decided to revisit the matter with Appellant based on the information she had received. H.T. I at 150. She wanted to give Appellant the opportunity to put into writing in his own words why he refused to move his truck. Id. Accordingly, she sent Appellant an email, asking him to

explain his refusal. Id. at 151; C. Ex. 10. Appellant did not respond back until June 19. H.T. I at 152-53; C. Ex. 11.

The Board finds that based on the totality of circumstances, the Statement of Charges, issued within 30 days after the Deputy Warden received Appellant's response, was issued in a timely manner.

**Based On The Charges Sustained By The Board, A Two-Day Suspension Is A Reasonable Penalty.**

The Board is particularly concerned about Appellant's negligent performance of his duties. His failure to move the truck on May 23 could have resulted in significant safety issues for the Deputy Sheriffs as they tried to transport an HIV-positive inmate, who had threatened to infect others by biting them, across a rainy parking lot. Moreover, the Appellant's refusal to provide the right-of-way to the ambulance and Sheriff's cruiser, as they were attempting to exit the police loading dock, significantly impacted on the potential safety of others, as the Deputy Sheriff lost his balance and almost fell. Had Fire and Rescue been treating the inmate at the time, said treatment could have been comprised by Appellant's actions resulting in a catastrophic outcome.

Nevertheless, the Board has only sustained two specifications of one of the three viable charges. Where, as here, the Board sustains fewer than all of the agency's charges, the Board may mitigate the agency's penalty to the maximum reasonable penalty. LaChance v. Devall, 178 F.3d 1246, 1260 (Fed. Cir. 1999). Therefore, despite the seriousness of Appellant's negligence, the Board is of the opinion that based on the totality of circumstances, mitigation of the penalty to a two-day suspension is warranted.

**ORDER**

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

1. The Board orders the Director to revoke the three-day suspension and, instead, issue a two-day suspension based solely on the two Specifications of Charge 2, dealing with Appellant's negligence.

2. Appellant shall be made whole for lost wages and benefits for one of the days of suspension.

3. Having mitigated the penalty,<sup>12</sup> the Department must pay reasonable attorney fees and costs. Appellant must submit a detailed request for attorney fees to the Board with a copy to the Office of the County Attorney within ten (10) calendar days from the date of this Final Decision. The County Attorney will have 10 days from receipt to respond. Fees will be

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<sup>12</sup> See, e.g., Shelton v. OPM, 42 M.S.P.R. 214, 224 (1989) (mitigation of penalty makes the appellant a prevailing party).

determined by the Board in accordance with the factors stated in Montgomery County Code, Section 33-14(c)(9).

## **CASE NO. 13-07**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on (Appellant's) appeal from the determination of the Montgomery County, Maryland, Director of General Services (DGS) to terminate Appellant for his failure to maintain a Commercial Driver's License (CDL), as required for his position of Mechanic Technician II with the County. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant had been employed with the County as a Mechanic Technician II since January 26, 2004. Hearing Transcript for April 23, 2013 (H.T.) at 273. As a Mechanic Technician II, Appellant was part of a bargaining unit covered by the collective bargaining agreement (CBA) between the County and the Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994 (MCGEO or Union). H.T. at 29-30; Appellant's Exhibit (Ex.) 40. At the time of his termination, Appellant was a merit employee, working in the Heavy Equipment Section of the Division of Fleet Management Services, DGS. H.T. at 19, 140; Appellant's Ex. 6. Appellant's immediate supervisor; his second-line supervisor. H.T. at 259, 277. The Division Chief for Fleet Management Services. H.T. at 17-18.

A Mechanic Technician II is the journeyman level mechanic position. Appellant's Ex. 8; H.T. at 21. As a Mechanic Technician II, Appellant was involved in the inspection, preventive maintenance and repair of a wide variety of heavy duty vehicles, to include dump trucks, back hoes, commercial motor vehicles, and snow plows, as well as other types of equipment, such as sanders, rollers, leafers, chippers and compressors. H.T. at 22, 271, 274. Approximately 50%-60% of the equipment worked on in the shop is heavy equipment which requires a commercial driver's license to operate. H.T. at 22, 262. The CDL requirement is contained in the class specification for Mechanic Technician II. H.T. at 174; Appellant's Ex. 8.

Appellant was considered to be a very good employee during his tenure with the County. He received a temporary promotion to Equipment Maintenance Crew Chief, effective October 12, 2008 until November 9, 2008. H.T. at 274; Appellant's Ex. 37; Appellant's Ex. 38. He consistently received performance evaluations indicating he was performing "above expectations". Appellant's Ex. 33; Appellant's Ex. 34; Appellant's Ex. 35; Appellant's Ex. 36. Appellant testified that he was moved to the top of his pay grade based on his exceptional work. H.T. at 276. Appellant's Division Chief testified that Appellant was a good mechanic and a good teammate; he was a valued member. H.T. at 62, 104; Appellant's Ex. 8. In 2008, Appellant was chosen to work on the leafer maintenance group and continued to be part of the leafer program until his termination. H.T. at 275-76.

The leafer program was seasonal, beginning in April and running through November. H.T. at 154, 261. During the time Appellant was serving on the leafer program, it was a full-time job. H.T. at 231, 232, 261.

On January 27, 2012, Appellant was charged with driving while under the influence of alcohol. H.T. at 277; Appellant's Ex. 15. The next morning, Appellant called his supervisor to inform him. H.T. at 277. On the following Monday, Appellant met with his lawyer. H.T. at 277-78. He then started going to Alcoholics Anonymous on a daily basis and enrolled in an alcohol and drug outpatient treatment program at White Flint Recovery Inc. H.T. at 276; Appellant's Ex. 11; Appellant's Ex. 12.

On April 26, 2012, the Maryland Motor Vehicle Administration (MVA) suspended Appellant's CDL and issued him a regular class "C" license with restrictions based on Appellant's agreement to participate in the MVA's Ignition Interlock Program. Appellant's Ex. 13; County's Ex. 4. Appellant agreed to have the ignition interlock on his vehicle for one year, commencing April 26, 2012. H.T. at 279. On June 11, 2012, Appellant was convicted of driving while under the influence. Appellant's Ex. 14; Appellant's Ex. 15. On September 14, 2012, Appellant had his CDL disqualified for one year, retroactive to April 26, 2012. Id. On November 15, 2012, Appellant's counsel was notified by the MVA that Appellant's disqualification would be withdrawn on April 26, 2013, at which time Appellant could apply for the re-issuance of his CDL. Appellant's Ex. 16.

On May 25, 2012 Division chief learned from his second line supervisor that Appellant had his CDL suspended. H.T. at 26. Division chief met with Appellant on May 25, 2012, at which time Appellant explained that his lawyer was working on trying to get his license back H.T. at 27; County's Ex. 15. On June 6, 2012, Appellant received the first Notice of Intent to Terminate. Appellant's Ex. 17. On June 25, 2012, Appellant requested that he be given additional time on his Notice of Intent to Terminate, while his lawyer tried to get his CDL license back. H.T. at 27; County's Ex. 5. Division chief agreed to give him thirty days, until July 25, 2012. County's Ex. 5. Appellant subsequently requested an additional extension of time and Division chief granted him until August 8, 2012. County's Ex. 12.

On August 29, 2012, an official with MCGEO sent an email to the County's Disability Program Manager, requesting that Appellant be given a reasonable accommodation as he was currently in treatment for alcoholism.<sup>13</sup> County's Ex. 13; H.T. at 205-06. Appellant was granted a sixty-day accommodation, during which time the "driving" component associated with his mechanic position would be temporarily removed. H.T. at 39-40, 207; County's Ex. 13. At the end of the sixty-day period, Division chief, along with the Human Resources Liaison for DGS, communicated to the County's Disability Program

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<sup>13</sup> Appellant had five previous driving while under the influence (DUI) violations. H.T. at 211-12. Appellant subsequently explained to Department Director his history with alcoholism, culminating in the most recent incident that resulted in the loss of his CDL. H.T. at 110.

Manager that the accommodation granted Appellant was creating an undue burden in terms of Fleet Management Services' operational workload.<sup>14</sup> H.T. at 95, 207.

Appellant was issued a second Notice of Intent to Terminate, dated October 29, 2012. Appellant's Ex. 19; H.T. at 86. Subsequent to the issuance of this Notice, Mr. M., union representative approached Division chief about keeping Appellant employed in the Division. H.T. at 37. Division chief worked with the Union to develop a Settlement Agreement that would keep Appellant on the rolls. Id.; County's Ex. 6. Under the terms of the Settlement Agreement worked out with the Union, Appellant would have his Notice of Intent to Terminate withdrawn. County's Ex. 6. Appellant would be demoted from a Mechanic II, Grade 18, to a Supply Technician, Grade 13, in the Parts Section and his salary would be reduced to the maximum salary for a grade 13. Id. If Appellant subsequently had his CDL reinstated, he would be reinstated to a Mechanic Technician I provided the Division had a vacancy. Id. If Appellant did not regain his CDL within a one-year period of the effective date of the Settlement Agreement, he would have to reapply for the next available Mechanic Technician vacancy. Id.

Both Division chief and Department Director testified that they believed the Settlement Agreement was a win-win for Appellant and the Division based on his experience. H.T. at 43, 112, 114, 131. The Supply Technician position was an excellent fit for Appellant as it dealt with parts for heavy equipment and Appellant understood heavy equipment. H.T. at 42-43, 112, 154-55. However, when both Division chief and Department Director had discussions with Appellant about the parts position, Appellant indicated he only wanted to make a temporary move until he got back his CDL, while the position being offered to Appellant was a permanent one. H.T. at 80, 113, 114, 133. On November 26, 2012, Mr. M. notified Division chief that Appellant was not interested in any settlement negotiated by the Union.<sup>15</sup> County's Ex. 14; Appellant's Ex. 23; H.T. at 41-42, 293.

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<sup>14</sup> Division chief explained that Fleet Management Services was able to accommodate Appellant during this period of time as the leafer program, which was full-time, was in progress. H.T. at 95. However, as the program was ending for the season and the winter season was approaching, he was concerned that Appellant's supervisor had to operate the equipment for him. Id. Appellant's Crew Chief, also testified that when the leafer program ended, if there were vehicles that Appellant worked on that required a CDL license, Appellant's Crew Chief would have to road test them. H.T. at 260. While this was not a burden to Appellant's Crew Chief, it still affected Appellant's ability to perform as a mechanic. H.T. at 260, 263. Appellant's Crew Chief explained that a mechanic could not completely diagnose a vehicle if he couldn't do a road test. H.T. at 263, 265. To properly repair a vehicle, the mechanic needs to personally test drive the vehicle. H.T. at 266. The Division Chief corroborated the Crew Chief's testimony, indicating that as part of the diagnostic process, a mechanic needs to be able to take the vehicle out on the road to validate the problem. H.T. at 24-25.

<sup>15</sup> Appellant confirmed at the hearing that he rejected the County's offer to move him to the Parts Section. H.T. at 293.

Accordingly, Appellant was issued a Notice of Termination, dated November 28, 2012, effecting his termination on December 5, 2012. Appellant's Ex. 27. Appellant was placed on administrative leave on November 28, 2012 until his termination date. County's Ex. 9. However, both the second Notice of Intent to Terminate and the Notice of Termination were defective as they were not signed by the Department Director.<sup>16</sup> H.T. at 120. Therefore, it was necessary to extend Appellant's administrative leave while a third Notice of Intent to Terminate and a second Notice of Termination were issued. County's Ex. 9; H.T. at 288. Appellant was issued his third Notice of Intent to Terminate on December 4, 2012, Appellant's Ex. 28, and his second Notice of Termination on January 4, 2013. Appellant's Ex. 30. His termination was effective January 11, 2013. Id.

Appellant appealed his termination to the Board.<sup>17</sup>

### **POSITIONS OF THE PARTIES**

#### County:

- Appellant was properly terminated pursuant to Section 29-2(a)(5), due to the loss of his CDL, which is required for the class specification of Mechanic Technician II. Termination is a non-disciplinary action taken on the basis of Appellant's loss of his CDL.
- Numerous DGS employees testified that a CDL is a vital part of the Mechanic Technician II position.
- Appellant's failure to hold a CDL necessitated other DGS employees who did possess a CDL to pick up the work Appellant was unable to perform.
- Appellant's disqualification from holding a CDL constituted an undue burden on Fleet Management Services. As a Mechanic Technician II, Appellant needed to test drive the vehicles he was assigned to work on in order to properly diagnose their problems.
- The leafer program that Appellant worked on was only a seasonal program which Appellant could work on without holding a CDL; this program would not serve as a full-time position for Appellant.
- The County tried to give Appellant every opportunity to obtain his CDL. When that failed, the County tried to reach a settlement that would have kept Appellant employed. Appellant testified that he was aware of the settlement terms and rejected them.

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<sup>16</sup> Pursuant to the Personnel Regulations, a Department Director must issue disciplinary and termination actions; however, the Director may delegate his/her authority. H.T. at 193. However, the Department Director failed to put such a delegation in writing as required under the Personnel Regulations. Id.

<sup>17</sup> Appellant originally appealed his termination to the Board after he received his first Notice of Termination. Appellant's Ex. 22. Upon being notified by the County that it was reissuing the Notice of Intent and Notice of Termination, the Board stayed the processing of this appeal until those actions were completed. Appellant's Ex. 31.



- Appellant was treated comparably to similarly situated employees. The Board heard testimony that when Crew Chiefs do not maintain their required certifications, they are subject to either termination or demotion to a mechanic position. Such treatment is similar to that given to Appellant, who failed to maintain his CDL and was offered a Supply Technician position.
- None of the individuals offered as comparables by Appellant, are in fact comparable as their situations differed greatly from Appellant's.
- MER 4, cited by Appellant, only stands for the proposition that a merit status employee must be given a statement of charges and an opportunity to respond. It does not require the County to go through the exact same steps and procedures as if the matter were disciplinary action. The Notice of Intent to Terminate provided Appellant with the right to respond and, therefore, served as a Statement of Charges.
- Appellant suffered no damage because the County had to reissue his Notice of Intent to Terminate and Notice of Termination.

Appellant:

- Appellant was denied his procedural rights when the County terminated him under the provisions of Montgomery County Personnel Regulation (MCPR), Section 29-2(a)(5), instead of following the procedures outlined in MCPR, Section 33, Disciplinary Actions, MER 4<sup>18</sup> and Administrative Procedure 4-11. The procedures applicable to this case would have required the County to consider Appellant's work record and his ability to be rehabilitated.
- The collective bargaining agreement which covers Appellant indicates that alcoholism is a disease and alcohol-related disciplinary problems be dealt with under the procedures set forth in Administrative Procedure 4-11.
- Ms. H. testified that Administrative Procedure 4-11 would only apply if Appellant drove drunk at work in a County vehicle; if Appellant drove drunk on his own time, in his own car, then he can be separated without consideration of Administrative Procedure 4-11. However, provisions of Administrative Procedure 4-11 make clear that it covers Appellant's situation.
- Appellant's loss of his CDL license did not create an undue burden on Fleet Services; both Mr. C. and Mr. K. testified that there was work that Appellant could do in the shop without his CDL.
- Appellant's one-year suspension of his license ran until April 26, 2013. Appellant is in the process of taking classes to obtain his CDL in about five to six weeks.
- There was testimony that other Mechanic Technicians lost their CDL but still remained employed by the County.
- Both Division Chief and Department Director testified that Appellant was an excellent employee.

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<sup>18</sup> Because, as discussed *infra*, the Board finds that the County should have followed the provisions of Administrative Procedure 4-11 in processing an action against Appellant, the Board will not address Appellant's argument that MER 4 should have been followed in processing an action against Appellant.

- Appellant believes that a reasonable action against him would be a 5% or 10% reduction in pay for one month, or until such time (up to 6 months) as he regains his CDL and endorsements, and reinstatement to his position on day shift. At the end of 6 months, if Appellant has not regained his CDL with endorsements, he agrees to accept a transfer, demotion, or other action as the Board deems appropriate.

**APPLICABLE LAW, REGULATIONS AND CONTRACTUAL PROVISION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of 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:
  - (2) Order change in position status, grade, work schedule, work conditions and work benefits;
  - (3) Order priority consideration be given to an employee found qualified before consideration is given to other candidates;
  - (4) Order reinstatement with or without back pay, although the Chief Administrative Officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility;
  - (5) Order cancellation of personnel actions found in violation of law or personnel regulation provided that such action may not without due process, adversely effect the employment rights of another employee;
  - (7) Order removal from administrative or personnel records any reference or document pertaining to an unwarranted disciplinary or adverse personnel action;
  - (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 October 21, 2008), Section 29, Termination**, which states in applicable part:

**29-2. Reasons for termination.**

- (a) A department director may terminate the employment of an employee:

- (5) who does not have a current license or certification required as a minimum qualification for the employee's occupational class;

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

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

- (a) ***Purpose of disciplinary actions.*** A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace.
- (b) ***Prompt discipline.***
  - (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.
  - (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.
- (c) ***Progressive discipline.***
  - (1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:
    - (A) the severity of the employee's misconduct and its actual or possible consequences; or
    - (B) the employee's continuing misconduct or attendance violations over time.
  - (2) Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department director progressive discipline and dismiss the employee or take another more severe disciplinary action.

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

**MER 4, dated July 24, 1987**, subject: *Disciplinary Actions and Changes Resulting from the Implementation of the Negotiated Agreement*, which states in applicable part:

3. Termination

Although termination is not a disciplinary action, if the employee to be terminated has merit system status (not a probationary or temporary employee), the same procedure must be followed as for a dismissal. The employee must be given a statement of charges and an opportunity to respond.

**Administrative Procedure 4-11 (MER 15), dated May 3, 1991**, *Employee Drug and Alcohol Abuse*, which states in applicable part:

Policy

- 3.3 Any employee who is required to maintain a commercial driver's license as a condition of County employment must not, while operating a vehicle, have alcohol in the body beyond the established cutoff level in a blood or urine test for the presence of alcohol. The established cutoff level is .02%.
- 3.20 Employees who are required to maintain a commercial driver's license as a condition of employment and who are charged with or convicted

of a drug/alcohol related offense must report any such charge or conviction to their supervisors within five calendar days. Conviction includes probation before judgment, a plea of nolo contendere, or any imposition of a sentence for being under the influence of, or for having manufactured, distributed, dispensed, used or possessed any controlled substance, including alcohol.

- 3.23 Employees who violate this policy may be subjected to disciplinary action up to, and including, termination or dismissal. Disciplinary actions will be taken in accordance with applicable laws and regulations, including the Personnel Regulations, collective bargaining agreements, and the Law Enforcement Officers' Bill of Rights.

### **General**

#### 4.1 **ADVERSE ACTIONS FOR VIOLATION OF THIS PROCEDURE**

D. An employee with merit system status who violates this procedure will be subject to appropriate disciplinary action, up to and including dismissal. In determining what disciplinary action is appropriate, the Department must take into consideration the following factors:

1. The nature and seriousness of the violation, including the actual harm caused and the potential harm that could have been caused by the violation.
2. The employee's position and the relationship of the violation to the employee's duties and responsibilities.
3. Whether other laws, regulations and policies, including Departmental regulations were violated.
4. The employee's work record and previous disciplinary actions.
5. Whether the employee has sought or is willing to seek treatment or rehabilitation.

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2012 through June 30, 2015 (MCGEO CBA), Article 34, which states in applicable part:**

- 34.2 Prevention of Substance Abuse/Employee Rehabilitation

- (a) Alcoholism shall be recognized and treated as a disease. Bargaining unit employees suffering from alcoholism shall be afforded the opportunity for counseling and rehabilitation through an appropriate County program. Alcohol-related disciplinary problems will not be exclusively dealt with in a punitive fashion. Incidents of apparent substance abuse by bargaining unit employees and/or the need for rehabilitation of bargaining unit employees shall be administered pursuant to Administrative Procedure 4-11, Employee Drug/Alcohol Abuse.

### ISSUE

Has the County proven by a preponderance of the evidence that Appellant's termination was consistent with applicable law and regulation?

### ANALYSIS AND CONCLUSIONS

#### **The County Committed Harmful Procedural Error When It Terminated Appellant Instead Of Subjecting Him To A Disciplinary Action.**

The collective bargaining agreement which covered Appellant while he was employed clearly states that alcoholism is a disease. MCGEO CBA, § 34.2(a); see also H.T. at 219, 222. It is also clear from the record of evidence in this case that Appellant has a history of alcoholism. H.T. at 31, 60, 101, 110, 211-12, 278; Appellant's Ex. 11. In fact, the Union specifically asked the County to give Appellant a reasonable accommodation for his alcoholism. County's Ex. 13. The collective bargaining agreement mandates that incidents of apparent substance abuse by bargaining unit employees are to be dealt with in accordance with Administrative Procedure 4-11. Appellant lost his CDL because he was driving while under the influence of alcohol, Appellant's Ex. 14 and Ex.15; clearly this constitutes an incident of apparent substance abuse by Appellant, a bargaining unit employee.

The County's witness testified that had Appellant been drinking while driving a County vehicle, the provisions of Administrative Procedure 4-11 would apply. H.T. at 186, 196. However, because Appellant was not driving a commercial motor vehicle on County time at the time of his arrest, there was no violation of Administrative Procedure 4-11. H.T. at 187. According to the witness, had Appellant been guilty of drinking on the job, he would have gotten all of the procedures of Administrative Procedure 4-11, which included the right to have his previous work record and disciplinary actions considered, as well as consideration of whether he was seeking treatment or rehabilitation. H.T. at 197-98. But he did not get these procedural rights as he was arrested in his own private vehicle for drinking while under the influence of alcohol. H.T. at 198.

The Board disagrees with the witness' position. Clearly, the provisions of Administrative Procedure 4-11 are applicable to Appellant's case. Section 3.20 of the Procedure specifically requires that an employee, such as Appellant, who is required to maintain a commercial driver's license as a condition of employment and who is charged

with or convicted of a drug/alcohol related offense, to report any such charge or conviction to their supervisors within five calendar days. Appellant clearly complied with this provision, by informing his supervisor the day after his arrest that he had been charged with an alcohol related offense. H.T. at 277. However, the Board finds that Appellant did not comply with Section 3.3 of the Administrative Procedure which mandates that an employee who is required to maintain a CDL as a condition of employment “must not, while operating a vehicle<sup>19</sup> have alcohol in the body beyond the established cutoff limit in a blood or urine test for the presence of alcohol.” Appellant’s Ex. 44, § 3.3.

Having found that Appellant violated Section 3.3 of Administrative Procedure 4-11, Appellant, who was a merit employee, was required to be afforded the procedural rights set forth in Section 4.1D of the Administrative Procedure. This, the County failed to do. Accordingly, the Board concludes that the County committed harmful procedural error.

**The Board Finds That The County Imposed A Disparate Penalty From That Given To Other Employees For Similar Misconduct.**

As previously noted, the County was required to process its action against Appellant in accordance with the provisions of Administrative Procedure 4-11. Administrative Procedure 4-11 indicates that when an employee violates its provisions, the employee may be subject to a disciplinary action, up to and including dismissal. Administrative Procedure 4-11, § 4.1D. Such a disciplinary action must be taken in accordance with the Personnel Regulations and the CBA. *Id.* As noted above, Administrative Procedure 4-11 requires the Department take into consideration the employee’s work record and whether he has sought treatment or rehabilitation. *Id.* In addition, Section 33-2(d) of the Personnel Regulations indicates the Department Director, in determining whether a disciplinary action is warranted as well as how severe an action should be taken, consider the employee’s work record and discipline given to other employees in the Department for similar behavior. MCPR, Section 33-2(d)(2) & Section 33-2(d)(3). The Board finds that in terminating Appellant instead of demoting him, the County imposed a disparate penalty on Appellant.

The Board heard testimony that a transit bus mechanic, had a driving while under the influence charge while employed with the County. H.T. at 158-59. The transit bus mechanic failed to report the incident to the County as required under Administrative Procedure 4-11, § 3.20. H.T. at 123, 159. The transit bus mechanic lost his CDL for nine months but continued to drive commercial vehicles for the County. H.T. at 123, 165. While Mr. S. testified that the transit bus mechanic did have charges brought against him by the County after learning of the incident, the transit bus mechanic remains a mechanic in transit. H.T. at 159-60. According to Mr. S., the County sought dismissal of the transit bus mechanic but finally just suspended him for a few days. H.T. at 165, 167-68.

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<sup>19</sup> The Board finds that this provision is applicable as it specifies “vehicle” not “County vehicle” as specified in Sections 3.1, 3.4, 3.5, 3.6, 3.7, and 3.19 of the Administrative Procedure.

The County agreed to a stipulation proffered by Appellant's counsel concerning a heavy equipment mechanic. H.T. 97. The heavy equipment mechanic was a heavy equipment mechanic with a CDL. H.T. at 52. He was diagnosed with diabetes, which immediately disqualified the heavy equipment mechanic from having a CDL. H.T. at 47-49, 52-53. The heavy equipment mechanic requested a reasonable accommodation under the Americans with Disabilities Act. H.T. at 52, 97. The County responded by transferring the heavy equipment mechanic to the Parts Section, as a Supply Technician II. H.T. at 53, 97, 162. While it was a demotion for the heavy equipment mechanic, he kept his salary of a Mechanic Technician II as his demotion was medically-based. H.T. at 53, 97, 200.

The County argues that the transit bus mechanic's situation is not comparable to Appellant's as the transit bus mechanic only had his CDL suspended for nine months, while Appellant has been disqualified from holding a CDL for a year. County's Closing Argument at 5. While this may be true, The transit bus mechanic, by his failure to tell the County of the loss of his CDL, put the County in jeopardy of serious liability had the transit bus mechanic had an accident in a County vehicle while not having his CDL. H.T. at 165. Yet, The transit bus mechanic only received a few days of suspension for his serious misconduct, while Appellant has been terminated despite telling the County immediately about his arrest for driving under the influence of alcohol and then abstaining from driving a County vehicle after the loss of his CDL. H.T. at 277, 283. In light of the transit bus mechanic's serious misconduct, Appellant's penalty for his misconduct is clearly unfair.

The Board finds Appellant's situation is quite comparable to the heavy equipment mechanic. The heavy equipment mechanic had a medical condition that caused him to lose his CDL permanently. Appellant has a disease – alcoholism – that caused him to be disqualified from holding a CDL for a year. The heavy equipment mechanic was demoted not terminated. Appellant should have received the same treatment. Because Appellant was not treated similarly to the heavy equipment mechanic, the penalty of termination cannot stand. See, e.g., Sims v. Dep't of Navy, 8 M.S.P.R. 680, 682 (1981) (mitigating removal to a 10-day suspension for fraudulent use of a government purchase document based on showing of similar suspensions of other employees for falsifying travel vouchers, attempted theft of government property and actual theft of government property).

**The Board Finds That The Appropriate Remedy In This Case Is To Order The County To Provide Appellant The Terms Of The Settlement Agreement Negotiated With The Union.**

The Board finds that the Settlement Agreement the County negotiated with the Union contained the proper penalty in this case, and is consistent with the penalty imposed on the heavy equipment mechanic when he lost his CDL based on his medical condition. The heavy equipment mechanic received a demotion to a Supply Technician II; Appellant, based on his expertise, was going to be offered a demotion to a Supply Technician III. H.T. at 199; County's Ex. 6.

The Board also finds that it was reasonable of the County to place Appellant in a permanent position of Supply Technician III instead of moving him temporarily, as the



County had no way of knowing when after Appellant's disqualification period was up, he would regain his CDL. H.T. at 113, 130, 211. Moreover, the record of evidence indicates that Appellant's leafer position was seasonal. H.T. at 154, 261. Therefore, the rest of the period of time Appellant was without his CDL, he would be unable to work on 50%-60% of the equipment in the shop which required a CDL to do road tests. H.T. at 262. Instead, his Crew Chief would have to perform the road tests for him. H.T. at 95, 260. As Mr. K. testified and Mr. G. corroborated, in order for a mechanic to diagnose the problem with a vehicle correctly, the mechanic needs to personally operate the vehicle. H.T. at 24-25, 263, 265, 266. Yet Appellant could not do so without his CDL. Clearly, this would adversely affect the day-to-day operations of Fleet Management Services. H.T. at 40, 95, 168, 207. The Board also finds that Appellant's proposed penalty, a temporary demotion to Mechanic I, with a 5%-10% reduction in pay, until such time as Appellant gains back his CDL so that he could be reinstated to a Mechanic II position is unreasonable, as the day-to-day operations of Fleet Management Services would still be adversely affected.

The Board further finds that the County's offer to reinstate Appellant to a Mechanic Technician I position if he regains his CDL within six months of the end of his disqualification was reasonable. The Board also approves of the provision in the Settlement Agreement that provides if Fleet Management Services does not have a vacancy at the time Appellant regains his CDL with applicable endorsements, Appellant will be given an additional 60 days from the expiration of the six months. The Board also finds appropriate the provision that states if Appellant does not receive reinstatement at the end of six months because he has failed to regain his CDL with applicable endorsements, Appellant will have to competitively apply for the next available mechanic vacancy for which is qualified. The Board, however, would add one more provision to the terms of the proposed Settlement Agreement. As there was ample evidence that Appellant was an excellent employee, Appellant's Ex. 8, Appellant's Ex. 33, Appellant's Ex. 34, Appellant's Ex. 35, Appellant's Ex. 36, Appellant's Ex. 37, H.T. at 62, 104, 274, 276, the Board has determined that if he should need to reapply for the Mechanic Technician position, he should receive priority consideration.

### **ORDER**

Based on the foregoing, the Board sustains Appellant's appeal and hereby orders the County to do the following:

1. The County shall reinstate Appellant, albeit demoting him to the permanent position of Supply Technician III, effective January 11, 2013;
2. Appellant will be placed at the top of the Grade 13 pay scale and receive back pay for lost wages;
3. Appellant shall be provided six months from the end of his CDL disqualification on April 26, 2013 to obtain the necessary license requirements for a Mechanic Technician position;

4. If Appellant obtains his CDL with applicable endorsements within the six-month period provided for above, Appellant will be reinstated to a Mechanic Technician I position;

5. If Appellant obtains his CDL within the six-month period provided for above but the Division does not have a vacancy, Appellant will be given an additional sixty-day period to be reinstated to a Mechanic Technician I position;

6. If Appellant obtains his CDL after the end of the six-month period provided for above, then he will have to competitively reapply for the next available vacancy for which he is qualified, but shall have priority consideration for said vacancy;

7. If Appellant obtains his CDL within the six-month period provided for above but the Division does not have a vacancy at that time or for sixty days thereafter, then Appellant will have to competitively reapply for the next available vacancy for which he is qualified, but shall have priority consideration for said vacancy; and

8. Having mitigated Appellant's penalty,<sup>20</sup> the Department must pay reasonable attorney fees and costs. Appellant must submit a detailed request for attorney fees to the Board with a copy to the Office of the County Attorney within ten (10) calendar days from the date of this Final Decision. The County Attorney will have 10 days from receipt to respond. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code, Section 33-14(c)(9).

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<sup>20</sup> See, e.g., Shelton v. OPM, 42 M.S.P.R. 214, 224 (1989) (mitigation of penalty makes the appellant a prevailing party).

# **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, July 20, 2010, and July 12, 2011), 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 nonmerit 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 10 working days. Alternatively, the employee may complete the Appeal Form on-line. The Appeal Form is available at: <http://www2.montgomerycountymd.gov/MSPBAppealForm/>.

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 2013, the Board issued the following decisions on appeals concerning the denial of employment.

# **EMPLOYMENT DECISIONS**

## **CASE NO. 13-01**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) 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 medical evaluation, which included a psychological examination. The County filed its response to the appeal (County's Response) on October 16, 2012. On November 5, 2012, Appellant declined to make any additional statements regarding his appeal. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant applied for the position of 911 Call-Taker 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 medical and psychological examination.

On June 25, 2012, Appellant was given a psychological examination at the Special Psychological Services Group (SPSG) in Fairfax, Virginia. SPSG is an independent contractor for the County. Based on its examination of Appellant, the Special Psychological Services Group recommended Appellant with reservation. In the Special Psychological Service Group's cover letter to the County, transmitting Appellant's psychological examination results, Appellant was "estimated to have low average psychological suitability."

The County's Medical Examiner reviewed the results of Appellant's psychological examination and made the determination that Appellant was not medically fit to perform the duties of a 911 Call-Taker. The County's Medical Examiner met with Appellant to explain the psychological evaluation and recommendations. On July 17, 2012, the OHR Director, notified Appellant that he had been found medically not acceptable to perform the duties of 911 Call-Taker.

This appeal followed.

## POSITIONS OF THE PARTIES

### Appellant:

- The results of Appellant's psychological examination were cited as the reason for his disqualification by the Medical Examiner even though he was "recommended with reservation".
- One issue reported from his psychological examination was low stress tolerance, which Appellant believes is untrue.
- Appellant believes that any positive qualities he has are being marginalized because of the disclosure of his disability. This is because during his psychological interview, he referenced events in his past, where issues that would have made him unfit for duty were more pronounced.
- Appellant believes that currently he is physically, intellectually, and psychologically capable of handling the rigors of the work of a 911 Call-Taker.

### County:

- Appellant reported having Asperger's Syndrome, which manifested itself while he was in school with various moods (e.g., crying, emotional outburst) and obsessive-compulsive traits.
- Psychological testing of Appellant revealed his self-confidence and stress tolerance were in the low average range.
- The position of 911 Call-Taker is a high stress position; therefore, the Medical Examiner, after reviewing Appellant's psychological examination results, determined he was medically unfit for duty in this position.
- County management should be afforded substantial latitude to assess the impact of a particular medical condition on the duties of a specific position.

## 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>21</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 October 22, 2002, December 11, 2007, October 21, 2008 and July 24, 2012), 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’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

**ANALYSIS AND CONCLUSIONS**

The incumbent of the 911 Call-Taker position performs public safety communications work in an emergency communications center. See Class Specification, Public Safety 911 Call-Taker I on the Office of Human Resources’ website which is available at <http://www6.montgomerycountymd.gov/content/ohr/download/3099.htm>. As the occupational class description indicates, one of the minimum qualifications for the position is the “[a]bility to perform multi-tasking functions necessary to prioritize emergency response to multiple events simultaneously with emphasis on ensuring emergency responder and public safety.” *Id.* Thus, there is no doubt that a 911 Call-Taker is a very stressful position.

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<sup>21</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.

While Appellant believes that the diagnosis of low stress tolerance made by the SPSG is untrue, nevertheless that was the diagnosis presented to the County's Medical Examiner. Given the fact that the 911 Call-Taker position is very stressful and the incumbent performs public safety communications work, the Medical Examiner determined that Appellant should not be medically cleared for the position.

As the County has noted, it is the Board's position that the County should be afforded substantial latitude when assessing the impact of a particular medical or psychological condition on the ability of an individual to perform the duties of a position. See, e.g., MSPB Case No. 03-01 (2003). As there is no evidence that the County's determination with regard to Appellant's qualifications to perform the position of 911 Call-Taker was arbitrary, capricious, illegal, or based on any other non-merit factor, the Board will not overturn it.

### **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 911 Call-Taker.

## **CASE NO. 13-06**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging her nonselection for the position of Administrative Specialist II (Contract Manager), with the Contract Management Team (CMT) in the Department of Health and Human Services (HHS). The County filed its response (County's Response) to the appeal on November 27, 2012, which included several attachments.<sup>22</sup> Appellant filed a response (Appellant's Reply) on December 21, 2012, which included several attachments.<sup>23</sup> The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

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<sup>22</sup> The County's attachments were: Attachment 1 – Job Vacancy Announcement for the Administrative Specialist II position; Attachment 2a – Selection Panel Consensus Evaluation Form for the Selectee; Attachment 2b – Selection Panel Consensus Evaluation Form for Appellant; Attachment 3 – Appellant's resume; and Attachment 4 – Selectee's resume.

<sup>23</sup> Appellant's attachments were: Attachment A – Job Announcement for Administrative Specialist II position; Attachment B – Resume for the Selectee; Attachment C – November 15, 2012 email from Appellant to Ms. G; Attachment D – Job Announcement for Administrative Specialist III position; and Attachment E – Letter of Recommendation for Appellant.

Appellant, an Office Services Coordinator, Grade 16 in HHS, submitted her application for the Administrative Specialist II (Contract Manager) position in August 2012. Appellant's Reply at 1; County's Response at 1. The Office of Human Resources (OHR) received one hundred and twenty-five applications for this position. County's Response at 1. According to the County, OHR reviewed the applications to determine which applicants met the minimum qualifications for the position.<sup>24</sup> Id. at 1. Those applicants who met the minimum qualifications were then rated by two subject matter experts chosen by HHS using the preferred criteria listed in the job vacancy announcement.<sup>25</sup> Id. at 1-2. A total of nine applicants, including Appellant, were rated as "Well Qualified." Id. at 2.

The County states that all nine of the "Well Qualified" applicants were subsequently interviewed for the position.<sup>26</sup> County's Response at 2. According to the County, the structured interviews were conducted at HHS by a three-member panel of managers. Id. All of the candidates were given time to review a copy of the questions prior to their interview and all were asked the same questions. Id. The three panel members individually rated the applicants based on their responses to the questions. Id. The panel then caucused and unanimously recommended the Selectee for the position. Id.

Appellant was notified of her nonselection for the position and this appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant is the best qualified applicant for the Administrative Specialist II position as she has worked in the CMT unit for more than four years and contributed to the team's success.
- The rating process for this position was not properly conducted. The second

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<sup>24</sup> The minimum qualifications for the position were: 1) experience – two years of administrative experience in procurement/contracting and 2) education – graduation from an accredited college or university with a Bachelor's Degree. An equivalent combination of education and experience could be substituted to meet the minimum qualifications. County's Response, Attachment (Attach.) 1; Appellant's Reply, Attach. A.

<sup>25</sup> The preferred criteria for the position were: 1) Experience with and ability to effectively utilize software programs such as Microsoft Word, Oracle e-business, Excel, Power Point, Access, Adobe Acrobat reader and Writer, and experience in data entry and data management; 2) Experience designing and maintaining websites by using software such as Web Edit Pro or other web design software; 3) Experience communicating effectively both orally and in writing (i.e., preparing requisition requests, drafting and finalizing contracts, contract amendments, letters and memoranda, reports, etc.); and 4) Experience with governmental procurement (purchasing) regulations. County's Response, Attach. 1; Appellant's Reply, Attach. A.

<sup>26</sup> The County also indicates that one transfer line candidate who had been rated as "Qualified" was also interviewed. County's Response at 2.



- of the preferred criteria for the position was experience designing and maintaining Web sites. The Selectee’s resume does not include any experience designing or maintaining Web sites.
- The job announcement stated that one of the position’s duties would be creating and updating essential internet and intranet contract-related websites. On November 15, 2012, Appellant was told by Ms. G. that she would continue to be responsible for this duty.
  - During the Selectee’s time in CMT, Appellant has witnessed his work and the quality of his work is substandard and inferior to Appellant’s.
  - The interview ratings Appellant received are not an accurate representation of her knowledge, skills and abilities.
  - On the same day the interviews were conducted, the Selectee praised one of the interview panel members by telling her how pretty her hair was.

County:

- The Personnel Regulations provide that a selecting official may choose any individual from the highest rating category for a position. The Selectee was rated “Well Qualified”.
- The Selectee performed significantly better than Appellant and the other “Well Qualified” applicants in the structured interview process, receiving a rating of “Above Average” in all four of the questions asked. Appellant received a rating of “Average” for two of the questions asked and “Above Average” for two questions.
- Appellant cannot meet her burden of proof under the Personnel Regulations to show that the County’s decision on her application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.
- In assessing a challenge to a selection decision as arbitrary and capricious, the Board generally does not substitute its judgment for that of the selecting official unless an appellant demonstrates that her qualifications were plainly superior to those of the individual selected for appointment. This Appellant has failed to do.

**APPLICABLE LAW AND REGULATIONS**

**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, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012 and December 11, 2012), Section 6, *Recruitment and Application Rating Procedures*, which states in applicable part:**

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

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-7 or 27-2(b) of these Regulations.
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, and March 9, 2010), 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, or announced examination and scoring procedures that were not followed?

**ANALYSIS AND CONCLUSIONS**

The MCPR provides that a selecting official may choose any individual from the highest rating category. Thus, management was free to select anyone in the "Well Qualified" category, including Appellant, as long as the selection process is consistent with law or regulation and not otherwise improper. See MSPB Case No. 06-02 (2006); MSPB Case No. 09-01 (2009); MSPB Case No. 10-11 (2010).

Appellant alleges that the rating process for the position of Administrative Specialist II was not properly conducted. To support her position, Appellant notes that the second of the preferred criteria for the position was experience designing and maintaining Web sites. According to Appellant, the Selectee's resume does not include any experience designing or maintaining Web sites. Because the Selectee did not meet this preferred criterion, Appellant asserts that he should not have been placed on the "Well Qualified" list.

The Board has carefully reviewed the job vacancy announcement. No where in the announcement is there any indication that a candidate must meet all of the preferred criteria in order to be placed in the "Well Qualified" category. Instead, what the announcement states is that

All applicants who meet minimum qualifications will be reviewed and rated by subject matter experts based on the Preferred Criteria. Based on the results of [the] Preferred Criteria evaluation, applicants will be placed on the Eligible List as either ["Qualified"] or ["Well Qualified"]. The highest rated applicants will be placed on the Eligible List and may be considered for interview.

County's Response, Attach. 1; Appellant's Reply, Attach. A. Therefore, the Board concludes that there was no requirement that an individual meet all the preferred criteria listed in the announcement in order to be placed on the "Well Qualified" list.

Appellant also challenges how she was rated during the structured interview and indicates the ratings she received are not an accurate representation of her knowledge, skills and abilities. The Board has previously held that the use of subjective criteria, such as performance during a structured interview, is acceptable as part of the selection process. See MSPB Case No. 12-01 (2011). It is clear from the evidence submitted by the County that the Selectee did far better in the interview than Appellant.

Appellant also claims that the Selectee inappropriately tried to influence one of the interview panel members by complimenting her on her hair. The Board notes that there were three panel members and they all unanimously recommended the Selectee not Appellant for the position.

There is no doubt that Appellant has considerable experience and expertise, but so does the Selectee. Both individuals have college degrees and years of experience. 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 (10th Cir. 1981). An employer has the discretion to choose among equally qualified candidates. See Canham v. Oberlin College, 666 F.2d 1057, 1061 (6th Cir. 1981), cert. denied, 456 U.S. 977 (1982).

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); MSPB Case No. 09-01; MSPB Case No. 10-11; see also Bauer v. Bailar, 647 F.2d at 1048. This Appellant has not done. Accordingly, having reviewed the record of evidence in this case, the Board concludes that Appellant has failed to meet her 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 nonmerit factors.

### **ORDER**

Based on the above, the Board denies Appellant's appeal of her nonselection for the position of Administrative Specialist II (Contract Manager) in the Department of Health and Human Services.

## **CASE NO. 13-10**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) 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 background investigation. The County provided a response to the appeal (County's Response) with fifteen attachments. Appellant replied to the County's Response (Appellant's Reply) with fifteen exhibits. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant applied for the position of Accountant/Auditor II (grade 21) with the Montgomery County Department of Fire and Rescue Service (FRS). County's Response at 1. The position is part of the Emergency Medical Services (EMS) reimbursement program responsible for billing and collecting fees for EMS transportation to hospitals. Id. In an email dated December 10, 2012 from the Office of Human Resources (OHR) staffing specialist handling the recruitment, Appellant was extended a conditional offer of employment; the offer was contingent upon Appellant's medical fitness for employment as well as a satisfactory background check. Id.

On December 11, 2012, Appellant completed a background investigation booklet (Booklet) and certified that the information provided therein was true, complete and correct. County's Response at 3; County Attachment (C. Attach.) 6. In the completed Booklet, Appellant stated he had not used any other names, never been arrested, had resigned from the Internal Revenue Service (IRS) to attend to an ailing parent; had never been discharged/terminated/fired or disciplined by any employer; never resigned while anticipating that an employer intended to discipline or discharge him; and had never stolen anything from any employer. Id.

Appellant did not pass the background investigation performed by FRS' Office of

Internal Affairs. County's Response at 2. In reviewing the Booklet completed by Appellant, Investigator noted that Appellant had not put a middle name on the document. County's Response at 3. When allegedly asked about this, Appellant indicated he did not use his middle name. Id. When then purportedly asked what his middle name is, Appellant allegedly replied "Y". Id. When pressed further about this matter, Appellant allegedly indicated his middle name was Yemoh but he never used it. Id.; C. Attach. 7.

Appellant had previously worked for the IRS beginning on April 13, 2009 until January 29, 2011. County's Response at 2; see C. Attach. 14. Apparently, upon doing a "Google search", C. Attach. 7, the investigator, purportedly discovered that Appellant was terminated from the IRS due to a Treasury Inspector General's investigation of allegations that Appellant had submitted a fraudulent travel voucher. County's Response at 3; C. Attach. 5; C. Attach. 7.

When Appellant was told that Investigator had uncovered information that he was terminated from the IRS, Appellant responded to OHR staffing specialist, indicating that the information regarding his termination from the IRS was untrue. C. Attach. 12. According to Appellant, he resigned based on an Equal Employment Opportunity Commission (EEOC) complaint against the IRS which resulted in him receiving a financial settlement and opting to resign. Id.; Appellant's Reply at 2; Appellant's Exhibit (A. Ex.) 14. Because of a confidentiality clause contained in the settlement, Appellant could not provide further detail. Id. However, Appellant did provide the investigator with a copy of Standard Form 50 (SF-50), Notification of Personnel Action, dated 01/29/11, showing he resigned from the IRS to care for an immediate family member. Appellant's Reply at 2; C. Attach. 14. He also provided his resignation letter, Appellant's Reply at 2; C. Attach. 13, as well as a reference letter from the IRS, dated 02/07/11. Appellant's Reply at 2; C. Attach. 15.

In addition, the investigation found that Appellant had used his middle name on several legal documents – i.e., as Plaintiff in a court action and on his passport. County's Response at 4, C. Attach. 5; C. Attach. 8. Also, on one document purportedly obtained regarding Appellant's criminal history, Appellant apparently used the middle name of Thomas. County's Response at 4; C. Attach. 9.

The investigation uncovered that Appellant filed for bankruptcy in 2003 but failed to reveal this, C. Attach. 11, thus purportedly raising a credibility issue. C. Attach. 10. However, it does not appear that the investigator followed up with Appellant concerning this.

The investigation revealed that Appellant had been arrested in 2007 and had a suspended driver's license.<sup>27</sup> County's Response at 3; C. Attach. 7; C. Attach. 10. When contacted by the investigator regarding these two matters, Appellant responded that he had answered the arrest question in the Booklet in the negative because his arrest record was expunged. Appellant's Reply at 1-2; A. Ex. 12; see also C. Attach. 7. With regard to the matter of his suspended driver's license, Appellant indicated it had been suspended but had

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<sup>27</sup> According to the investigation notes, the license suspension raised a credibility issue, see C. Attach. 10, but this conclusion was never explained in greater detail.

been reinstated after he completed a driver improvement program. Appellant' Reply at 2; A. Ex. 8.

Despite Appellant providing explanations for the various purported discrepancies found by the investigation, the investigator informed Appellant on January 7, 2013, that he did not pass his background investigation. C. Attach. 12. By letter dated January 4, 2013, the OHR Director, withdrew Appellant's conditional offer of employment. C. Attach. 3.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant explained that he answered the question about his arrest record in the negative as his arrest was expunged and his lawyer had informed him he could answer in the negative.
- Appellant explained that his license was suspended due to a failure to attend a driving improvement course after he received a speeding ticket, but provided proof that he had completed the necessary course to have his license reinstated.
- Appellant explained that his departure from employment with the IRS was based on an EEOC settlement and due to the confidentiality of the terms of the agreement he could not divulge information surrounding his resignation. He did, however, provide a SF-50, documenting his resignation, his resignation letter, and a reference letter from the IRS.
- The County's decision to withdraw the conditional offer of employment is arbitrary and capricious.

#### **County:**

- The conditional offer of employment to Appellant indicated it was contingent on a satisfactory background check. The background check done by FRS proved to be unfavorable and the information uncovered bears on Appellant's suitability for employment as an Accountant/Auditor II.
- At best, Appellant was evasive and less than candid in his Booklet responses; at worst he provided inaccurate information. In either case, his actions impact his reliability, veracity, trustworthiness and fitness for employment.
- The position of Accountant/Auditor is one where honesty, integrity and trust are of critical importance.
- Appellant was terminated from his employment with the IRS based on the Inspector General's report into allegations that he falsified a travel voucher. Moreover, the Inspector General's report indicated that Appellant had previously been arrested.
- Appellant was not forthcoming with regard to the use of his middle name and never revealed that he had used "Thomas" as a middle name.
- Appellant never mentioned his bankruptcy case.
- Appellant did not disclose his prior arrest.

- The Board has repeatedly held that making false statements is serious misconduct which affects an individual's reliability, veracity, trustworthiness and fitness for employment.

### **APPLICABLE LAW AND REGULATION**

**Maryland Criminal Procedure Code Annotated, Title 10, Criminal Records,** which states in applicable part,

#### **§ 10-109. Prohibited acts.**

- (a) Applications for employment or admission.
  - (1) Disclosure of expunged information about criminal charges in an application, interview, or other means may not be required:
    - (i) by an employer or educational institution of a person who applies for employment or admission; or
    - (ii) by a unit, official, or employee of the State or political subdivision of the State of a person who applies for a license, permit, registration, or governmental service.
  - (2) A person need not refer to or give information concerning an expunged charge when answering a question concerning:
    - (i) a criminal charge that did not result in a conviction;
  - (3) Refusal by a person to disclose information about criminal charges that have been expunged may not be the sole reason for:
    - (i) an employer to discharge or refuse to hire a person; or
    - (ii) a unit, official, or employee of the State or political subdivision of the State to deny the person's application.

**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>28</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 Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of 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:
  - (7) Order removal from administrative or personnel records by reference or document pertaining to an unwarranted disciplinary or adverse personnel action;
  - (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 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, or based on political affiliation or other non-merit factors?

**ANALYSIS AND CONCLUSIONS**

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<sup>28</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.



The County has offered a variety of reasons for rejecting Appellant. As discussed in greater detail infra, the Board does not find any of the reasons valid for denying Appellant employment with the County.

**Appellant Did Not Have To Disclose His Expunged Arrest.**

Appellant has provided proof that his arrest in 2007 was expunged by the District Court of Maryland on November 16, 2011. A. Ex. 12. Pursuant to the Maryland Code, Appellant does not need to provide information concerning an expunged charge. Maryland Criminal Procedure Code Annotated, § 10-109(2). Moreover, the County is prohibited from denying Appellant employment based solely on his refusal to disclose his expunged arrest. Maryland Criminal Procedure Code Annotated, § 10-109(3)(ii). Accordingly, the Board finds that the County cannot use Appellant’s failure to disclose his expunged arrest as a reason to deny him employment.<sup>29</sup>

**Appellant Did Not Need To Disclose His Bankruptcy.**

The Booklet Appellant had to complete asked about his education, college/universities attended, criminal history and employment background. Significantly, no where in the Booklet is there a question as to whether Appellant had ever filed for bankruptcy. Therefore, the Board concludes that Appellant did not need to disclose his bankruptcy and his failure to do so cannot be used by the County to question his credibility.

**The County Has Failed To Prove That Appellant Was Evasive About Providing His Middle Name.**

In support of the County’s argument that Appellant was less than candid when he failed to put a middle name in the Booklet,<sup>30</sup> the County cites to a purported conversation between Investigator and Appellant. However, as the Board has previously informed the County statements made by a representative in a pleading are not evidence. MSPB Case No. 08-13 (2008); MSPB Case No. 12-11 (2012); see, e.g., Joos v. Department of Treasury, 79 M.S.P.R. 342, 348 (1998); Leaton v. Department of Interior, 65 M.S.P.R. 331, 337 (1994); Perez v. Railroad Retirement Board, 65 M.S.P.R. 287, 289 (1994); Rickels v. Department of Treasury, 42 M.S.P.R. 596, 603 (1989); Vincent v. Department of Justice, 32 M.S.P.R. 263,

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<sup>29</sup> The Board urges the County to amend its background investigation Booklet to indicate that applicants do not have to disclose expunged arrest information. The Board also urges the County to review its “Authorization for the Release of Information” section of the Booklet as it appears to be extremely broad and apparently requires an applicant to waive attorney-client privilege, psychiatrist-patient privilege and doctor-patient privilege.

<sup>30</sup> The Board notes that in the copy of the Booklet provided by the County as Attach. 6 to its Response, a middle name is written on the line for the Applicant’s Name – Yenoh – with Thomas written above it. There is no indication in the record as to whether Appellant wrote his middle name or someone else did so. If someone else did, obviously Appellant’s background Booklet was altered.

268-69 (1987); Enos v. USPS, 8 M.S.P.R. 59, 63 (1981). The Board notes that the County has submitted no affidavit or other probative evidence to support the alleged conversation between Appellant and Investigator.<sup>31</sup> The County points to several documents where Appellant used his middle name of Yemoh – his passport, C. Attach. 8, and a legal document, C. Attach. 5. The County also argues that Appellant failed to reveal he used an alias and points to two documents – C. Attach. 9 and C. Attach. 10. County Attachment 9 appears to be some type of print out. However, there is no indication as to the origin or authenticity of this document. Therefore, it lacks any probative value. County Attachment 10, a handwritten, unsigned document, as previously noted, does not constitute acceptable evidence. The Board notes that in several other documents provided by the County as attachments, Appellant used his middle initial “Y” (C. Attach. 14) or did not use a middle name at all (see, e.g., C. Attach 12, C. Attach. 13).

Accordingly, the Board finds that the County has failed to prove that Appellant was evasive about providing his middle name.

#### **Appellant’s Failure To Mention His Suspended License Does Not Raise A Credibility Issue.**

In the document marked “Credibility Issues”, C. Attach. 6, it is noted that Appellant’s driver’s license was suspended based on his failure to attend a driver’s improvement program. The Booklet Appellant had to complete asked about his education, college/universities attended, criminal history and employment background. Significantly, no where in the Booklet is there a question as to whether Appellant had ever had his driver’s license suspended. Moreover, since the position Appellant applied for does not require that Appellant have a driver’s license, there was no need for Appellant to inform the County that his driver’s license had been suspended.

#### **The Board Finds Appellant Was Truthful When He Informed The County That He Resigned From His Position At The IRS.**

The County relies heavily on the allegations set forth in the Memorandum & Order, C. Attach. 5, issued by the U.S. District Court for the District of Maryland to support its claim that Appellant was terminated from his employment with the IRS. See County’s Response at 2-3. The Board would point out to the County that the District Court carefully discussed in its decision “allegations” not proven facts – e.g., “TIFTA agents investigated allegations that Plaintiff had falsified a travel voucher”; “Ms. H. allegedly ordered that Plaintiff’s employment with the IRS be terminated based on the information in his ROI.” C. Attach. 5 at 1, 2.

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<sup>31</sup> While the County did provide as an attachment an unsigned, unsworn document entitled “Notes to file of Appellant”, C. Attach. 7, which purportedly constituted the investigator’s notes, see County’s Response at 3, this does not constitute acceptable evidence. Likewise, the handwritten, unsigned, unsworn document, C. Attach. 10, entitled “Credibility Issues”, does not constitute acceptable evidence.

The County completely ignored the credible, probative evidence supplied by Appellant to explain why he had left employment with the IRS. First, Appellant supplied a copy of his resignation SF-50, which indicated he resigned to care for an immediate family member. C. Attach. 14. He also provided a copy of his signed resignation letter, C. Attach. 13, which also indicated he was resigning to provide care for an immediate family member. Finally, he provided a letter of reference from the IRS, indicating Appellant resigned from the IRS. C. Attach. 15.

In addition, Appellant supplied information establishing that he had filed an EEOC complaint against the IRS and had settled the complaint. A. Ex. 14. As Appellant's exhibit establishes, the settlement agreement specifically provides for how Appellant is to respond to questions regarding his separation from employment with the IRS. *Id.* Appellant explained that he was precluded from discussing the terms of the settlement agreement he had entered into with the IRS due to a confidentiality provision. Appellant's Reply at 5; A. Ex. 14.

It is well established that in the federal sector, agencies often enter into settlement agreements with their employees where the agency, in return for the employee's agreement to resign for personal reasons, drop his/her complaint or appeal against the agency, and keep confidential the terms of the settlement agreement, will cancel the adverse action taken against the employee, clean up the employee's record and provide a neutral reference. *See, e.g., Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439 (Fed. Cir. 1997); *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368 (Fed. Cir. 1999). It is also well established that the parties to a settlement agreement are bound by the terms of the agreement. *Mahoney v. U.S. Postal Service*, 37 M.S.P.R. 146, 149 (1988); *Patterson v. Department of Agriculture*, 55 M.S.P.R. 499 (1992).

The U.S. Merit System Protection Board has viewed violations of a nondisclosure clause in a settlement agreement seriously, "because condoning such violations would have a chilling effect on attempts to settle appeals by providing appellants with clean records and neutral, or, positive employment records." *Vallad v. United States Postal Service*, 75 M.S.P.R. 529, 532-33 (1997); *Sena v. Department of Defense*, 66 M.S.P.R. 458, 466 (1995); *Diehl v. United States Postal Service*, 82 M.S.P.R. 620, 624-25 (1999). Thus, because Appellant's settlement agreement with the IRS included a nondisclosure clause, Appellant was obliged to abide by it.

The Board finds that based on Appellant's settlement agreement with the IRS, Appellant was truthful when he indicated to the County that he had resigned from his position with the IRS and had never been discharged or terminated from employment. Accordingly, the Board concludes that the County lacked any basis to withdraw Appellant's conditional offer of employment.<sup>32</sup>

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<sup>32</sup> Given the fact that the Board found that Appellant did not need to disclose his expunged arrest record, did not need to disclose his bankruptcy, was not evasive about disclosing his middle name, did not need to disclose his suspended driver's license and was truthful when he indicated he resigned from the IRS, the Board strongly urges the County to consider providing background investigators and human resources personnel additional

## ORDER

Based on the above, the Board sustains Appellant's appeal from OHR's determination to rescind Appellant's conditional offer of employment as an Accountant/Auditor II and hereby orders the County to do the following:

1. Offer Appellant employment as an Accountant/Auditor II commencing the pay period beginning after the January 4, 2013 offer withdrawal letter was issued;<sup>33</sup>
2. Make Appellant whole for any lost wages and benefits; and
3. Expunge from Appellant's employment record the investigation conducted by FRS. Any reference to the investigation shall merely indicate that the background check was satisfactory.

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training in appropriate investigative techniques and the use of information acquired during a background investigation.

<sup>33</sup> The Board notes that Appellant indicated in his Reply that he has accepted employment with a Federal agency. Appellant's Reply at 9. If the Appellant is currently employed and does not wish to accept employment with the County, then the County shall pay Appellant back pay commencing from the first pay period after January 4, 2013 up until the date Appellant entered onto the rolls of the Federal agency.

## **CASE NO. 13-12**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on (Appellant's) appeal challenging the determination by the Office of Human Resources (OHR) that he did not meet the minimum qualifications for the permanent position of Transit Information Systems Technician in Transit Services, Department of Transportation (DOT). The County filed its response (County's Response) to the appeal, which included five attachments.<sup>1</sup> Appellant filed a reply (Appellant's Reply) to the County's Response. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant, while serving as an Acting Transit Information Systems Technician (Transit Technician),<sup>2</sup> submitted his application for the permanent position of Transit Information Systems Technician on March 29, 2013. County's Response at 1. He had been serving in an acting capacity in the Transit Technician position since May 6, 2012. *Id.* at 1-2; Appellant's Appeal. Prior to serving in an acting capacity, Appellant served in a PACE<sup>3</sup> assignment as a Transit Technician. County's Response, Attach. 3; Appellant's Appeal. At the time Appellant was temporarily promoted to the Acting Transit Technician position, he was found to have met the minimum qualifications for the temporary promotion by Ms. P. in OHR who handles DOT positions. County's Response at 2.

The Office of Human Resources (OHR) received forty applications for the permanent Transit Technician position.<sup>4</sup> *Id.* at 2. As Ms. P. was allegedly on vacation at the time the

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<sup>1</sup> The County's attachments were: Attachment 1 – Appellant's Resume which he submitted for his temporary promotion to the Transit Information Systems Technician position; Attachment 2 – Job Vacancy Announcement for the permanent Transit Information Systems Technician position; Attachment 3 – Appellant's Resume which he submitted for the permanent Transit Information Systems Technician position; Attachment 4 – Affidavit of Ms. P.(the staffing specialist); and Attachment 5 – OHR Equivalencies for Education and Experience.

<sup>2</sup> The incumbent of the position of Transit Information Systems Technician performs bench and field repairs to the networked SmartCard system, digital video system and WiFi support. County's Response, Attachment (Attach.) 2 at 1. The incumbent performs daily operations of the SmartCard system, to include the resolution of system hardware, software and communication problems. *Id.*

<sup>3</sup> PACE stands for Position and Career Education System. See PACE Contract on OHR's website available at <http://www.montgomerycountymd.gov/ohr/staffing/staffing.html>.

<sup>4</sup> The job vacancy announcement for the permanent Transit Technician position indicates the recruitment will establish an eligible list to fill current and/or future vacancies for the three depots in Silver Spring, Gaithersburg and Nicholson Court. County's Response, Attach. 2.

job announcement closed, Ms. G., a former member of the Recruitment and Selection team in OHR, reviewed the applications. Id. at 2 & n.2. Based on Ms. G.'s purported review of the resume submitted by Appellant, Ms. G. allegedly determined that Appellant did not meet the minimum qualifications for the position.<sup>5</sup> County's Response at 2. Purportedly, when Ms. P. returned from vacation, she reviewed Appellant's resume and agreed with Ms. G.'s determination that he failed to meet the minimum qualifications for the permanent Transit Technician position.<sup>6</sup> Id. at 2 n.2. Appellant was notified on April 23, 2013 by OHR that he did not meet the minimum qualifications for this position. County's Response at 1.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant has been serving in an acting capacity in the Transit Technician position since May 2012. Appellant was found to meet the minimum qualifications for the Transit Technician position when he was temporarily promoted in 2012.
- Appellant did not submit the same resume that he submitted for the temporary promotion as OHR already had that resume and Appellant did not want to bombard OHR with material he already knew OHR had.

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<sup>5</sup> The minimum qualifications for the position were three years of journey level experience in the troubleshooting and installation of microprocessor based electronic systems, revenue handling equipment and communication systems. County's Response, Attach. 2. In addition, the position required an Associate of Arts Degree in Electronics technology with coursework in computer networking, database management and communication systems or a related field. Id. An equivalent combination of education and experience could be substituted. Id.

<sup>6</sup> As the Board has previously informed the County, statements made by a representative in a pleading are not evidence. MSPB Case No. 08-13 (2008); MSPB Case No. 12-11 (2012); MSPB Case No. 13-10 (2013); see, e.g., Joos v. Department of Treasury, 79 M.S.P.R. 342, 348 (1998); Leaton v. Department of Interior, 65 M.S.P.R. 331, 337 (1994); Perez v. Railroad Retirement Board, 65 M.S.P.R. 287, 289 (1994); Rickels v. Department of Treasury, 42 M.S.P.R. 596, 603 (1989); Vincent v. Department of Justice, 32 M.S.P.R. 263, 268-69 (1987); Enos v. USPS, 8 M.S.P.R. 59, 63 (1981). While the County did submit a document labeled "Affidavit of Ms. P.", the Board notes that the document does not meet the requirements of Maryland Rule 1-304. Specifically, under the rule, an affiant must make her statement before an officer authorized to administer an oath or affirmation and must affirm under penalties of perjury that the contents of her statement are true. Md. R. 1-304. The Board notes that in lieu of a notarized affidavit, it will accept as evidence a declaration under penalty of perjury as authorized by 28 U.S.C. § 1746. As the "Affidavit of Ms. P." is neither notarized nor made under penalty of perjury, the Board finds it does not constitute acceptable evidence in this matter.

- It is clear that OHR still had Appellant’s resume that he submitted for the temporary promotion as it has been submitted by the County as an exhibit to justify its decision that Appellant did not meet the minimum qualifications for the permanent Transit Technician position.

County:

- Appellant submitted a “bare bones”, deficient resume for the permanent Transit Technician position rather than the updated resume he had submitted earlier in connection with the temporary promotion.
- Appellant cannot meet his burden of proof under the personnel regulations and County Code to show that the County’s decision on his application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.
- OHR has a longstanding policy of not accepting additional information in support of an application after the deadline. It is the responsibility of the applicant to read and follow the instructions of the announcement.

**APPLICABLE LAW AND REGULATIONS**

**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 33, Personnel and Human Resources, Section 33-14, Hearing authority of 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:
  - (3) Order priority consideration is given to an employee found qualified before consideration is given to other candidates; . . .

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended March**

5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, and December 11, 2012), Section 1, *Definitions*, which states in applicable part:

**1-56. Priority consideration:** Consideration of a candidate for appointment, reassignment, or promotion to a vacant position before others is considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, and March 9, 2010), 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.

**Montgomery County Personnel Regulations (MCPR), 2001, Section 27, *Promotion***, which states in applicable part:

**27-1. Policy on promotion.**

(d) A department director must not give a temporary promotion to an employee unless the employee:

(2) meets the minimum qualifications for the vacant position.

### **ISSUE**

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

### **ANALYSIS AND CONCLUSIONS**

A. The County's Decision on Appellant's Application Was Arbitrary and Capricious.

The County asserts that the reason that Appellant was found not to meet the minimum qualifications for the permanent Transit Technician position some eleven months after he was found qualified for a temporary promotion to the Transit Technician position was



because of his “bare bones” resume which did not reflect the additional information he had previously submitted. County’s Response at 2. The County appears to improperly be exalting form over substance. See Lengacher v. Dep’t of Justice, 80 M.S.P.R. 328 (1998) (Slavet, B. dissenting) (noting that the Board has long adhered to the principle that form will not be exalted over substance (citing to McPartland v. Dep’t of Transportation, 14 M.S.P.R. 506, 510 (1983), aff’d, 795 F.2d 1017 (Fed. Cir. 1986); Strope v. U.S. Postal Service, 71 M.S.P.R. 429, 437 (1996)).

Significantly, as the County acknowledges, in order to receive the temporary promotion to the Transit Technician position, Appellant had to meet the minimum qualifications for the position, as this was a requirement for a temporary promotion.<sup>7</sup> County’s Response at 2. Moreover, the County concedes OHR approved Appellant’s temporary promotion. Id.

While it is true that Appellant’s resume for the Acting Transit Technician position was more detailed than the one he submitted for the permanent Transit Technician position,<sup>8</sup> the Board finds that the resume Appellant submitted for the permanent position contained enough information to establish that he met the minimum qualifications for the position. Specifically, Appellant’s resume indicated that he was serving as an Acting Transit Information Systems Technician.<sup>9</sup> See County’s Response, Attach. 3. As Appellant was serving on a temporary promotion and, in accordance with the personnel regulations had to

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<sup>7</sup> The Board would note that based on the material submitted by Appellant for the temporary promotion, he was well qualified for the position. See County’s Response, Attach. 3.

<sup>8</sup> The Board’s holding in this case, as discussed infra, is that Appellant should have been found to meet the minimum qualifications of the permanent Transit Technician position based on his OHR-approved temporary promotion. However, the Board would be remiss if it did not point out the other error made by OHR in assessing Appellant’s credentials. While the County gave no credit to Appellant for his work as a Repair Technician when assessing his qualifications for the permanent Transit Technician position, see County’s Response at 3 & Attach. 3, a review of his resume indicates that he worked on revenue generating equipment, i.e., Xerox coin operated and non-coin operated units and had a familiarity with operating systems such as SCO Unix, Windows NT and DOS 6.22. County’s Response, Attach. 3. The job vacancy announcement indicated experience in the troubleshooting of inter alia revenue handling equipment was required. County’s Response, Attach. 2. Thus, his experience as a Repair Technician should have been credited by OHR.

<sup>9</sup> While Ms. G. may not have understood by looking at Appellant’s resume that he was on a temporary promotion, Ms. P., who had qualified him for the temporary promotion, County’s Response at 2, would have known this fact. Accordingly, if, as the County alleges in its response, Ms. P. reviewed Ms. G.’s determination, County’s Response at 2, Ms. P. should have recognized that Appellant, because he was serving on a temporary promotion, by definition met the minimum qualifications for the permanent Transit Technician position, especially as she previously qualified him for the temporary promotion.

meet the minimum qualifications of the position to be temporarily promoted,<sup>10</sup> MCPR, Section 27-1(d)(2), there was no need for any further evaluation of Appellant's resume to determine if he met the minimum qualifications. Instead, Appellant's resume should have been reviewed to determine if he met the preferred qualifications of the position.<sup>11</sup>

Accordingly, based on the fact that Appellant met the minimum qualifications for the position of Transit Technician when he was temporarily promoted to the position, the Board finds that the County acted arbitrarily and capriciously when it failed to find that Appellant met the minimum qualifications for the permanent Transit Technician position.

B. The Appropriate Remedy For The Flaw In The Rating Process Is To Accord The Appellant Priority Consideration.

Having established that there was a flaw in the rating process, the Board must now determine the appropriate remedy. In the instant case, Appellant was one of forty candidates that applied for the position. The personnel regulations indicate that management is free to select anyone from the highest rating category.

It is longstanding Board precedent that retroactive promotion as a remedy for a flaw in a promotional process is only appropriate where it can be shown that "but for" the flaw, the appellant would have been the selectee. See MSPB Case No. 04-12 (citing to Hennessey v. Montgomery County, MSPB Case No. 02-15, aff'd, No. 597 (Md. Ct. Spec. App. Apr. 20 2004)); MSPB Case No. 02-04 (2002); MSPB Case No. 00-09 (2002). In the instant case, Appellant, as one of forty applicants, cannot demonstrate that "but for" the flaw in the rating process he would have been selected. Therefore, the Board concludes that the appropriate remedy is to order priority consideration for Appellant. Id.

**ORDER**

Based on the above analysis, the Board grants Appellant's appeal from his nonselection for the position of permanent Transit Technician in the Department of

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<sup>10</sup> As the County acknowledges in its response, it found Appellant clearly met the educational requirement for the Acting Transit Technician position based on his 53 credits earned at the Computer Learning Centers, when combined with some education equivalency credit based on the experience he gained while a Repair Technician. See County's Response at 3. Also, as the County acknowledges, Appellant had the required journey level experience for the Transit Technician position at the time he was temporarily promoted. See County's Response at 4.

<sup>11</sup> The three preferred criteria listed in the job announcement were: 1) Experience interpreting operating manuals and/or manufacturer's maintenance instructions and trouble shooting; 2) Experience solving technical problems concerning systems and equipment; and 3) Experience with server support and network equipment. County's Response, Attach. 2. The Board notes that Appellant addressed all three preferred criteria in the resume he submitted for the permanent Transit Technician position and demonstrated he met these criteria.

Transportation and orders the following:

1. Appellant is to be placed on the eligible list for the Transit Information Systems Technician; and
2. Appellant is to be granted priority consideration for the next Transit Information Systems Technician vacancy.

### **DISSENTING OPINION OF BOARD CHAIR**

For the reasons given below, I do not agree with my colleagues that the County acted arbitrarily and capriciously when it failed to qualify Appellant for the position of Transit Information Systems Technician.

### **BACKGROUND**

Appellant was serving on a temporary promotion to the position of Transit Information Systems Technician (Transit Technician)<sup>12</sup> in the Department of Transportation (DOT), when he applied for the permanent position of Transit Technician. Appellant's Appeal; County's Response at 1. In order to receive the temporary promotion, Appellant had to meet the minimum qualifications of the position. County's Response at 2. To demonstrate his qualifications for the temporary promotion, Appellant had submitted a resume, a description of his duties serving in the PACE<sup>13</sup> position of Transit Technician, and an official transcript from the Computer Learning Centers, indicating his grade point average was 4.00 and that he earned 53 credit hours. Appellant's Reply<sup>14</sup> at 1; County's Response, Attachment (Attach.) 1. While Appellant did not have an Associate of Arts Degree in Electronics,<sup>15</sup> Ms. P., in OHR who handled DOT recruitment actions, gave him some educational equivalency credit for his experience as a Repair Technician. County's

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<sup>12</sup> As noted in the majority decision, the incumbent of the position of Transit Information Systems Technician performs bench and field repairs to the networked SmartCard system, digital video system and WiFi support. County's Response, Attach. 2 at 1. The incumbent performs daily operations of the SmartCard system, to include the resolution of system hardware, software and communication problems. Id.

<sup>13</sup> PACE stands for Position and Career Education System. See PACE Contract on OHR's website available at <http://www.montgomerycountymd.gov/ohr/staffing/staffing.html>.

<sup>14</sup> In his Reply, Appellant acknowledges that the material the County labeled as Attachment 1 was the material he had previously submitted. Appellant's Reply at 1.

<sup>15</sup> The minimum qualifications for the Transit Technician position were three years of journey level experience in the troubleshooting and installation of microprocessor based electronic systems, revenue handling equipment and communication systems. County's Response, Attach. 2. In addition, the position required an Associate of Arts Degree in Electronics technology with coursework in computer networking, database management and communication systems or a related field. Id. An equivalent combination of education and experience could be substituted. Id.

Response at 3. Appellant also received credit towards the experience requirement of the position based on his work as Repair Technician from 1999-2003. Id. at 4.

In sharp contrast, when Appellant applied for the permanent position of Transit Technician, he submitted a much less detailed resume, compare County's Response, Attach. 1 with County's Response, Attach. 3. Instead of including a copy of his official transcript from the Computer Learning Centers, Appellant submitted his diploma and a Certificate of Distinction he received from the Computer Learning Centers. County's Response, Attach. 3. Significantly, Appellant concedes that he submitted less material for the permanent position than he had for the temporary promotion. Appellant's Reply at 1. According to Appellant, he believed that the information already existed in his file and he did not resubmit it as he did not want to bombard OHR with material which was already in his file. Id.

As Ms. P. was allegedly on vacation at the time the vacancy announcement for the permanent Transit Technician position closed, Ms. G., a former member of the Recruitment and Selection team in OHR, purportedly reviewed the forty applications received to determine which applicants met the minimum qualifications for the position. County's Response at 2 & n.2. Based on her alleged review of the material submitted by Appellant, Ms. G. determined that he failed to meet the minimum qualifications for the permanent position of Transit Technician. Id. Purportedly, when Ms. P. returned from vacation,<sup>16</sup> she reviewed Appellant's resume and agreed with Ms. G's finding that he did not meet the minimum qualifications. County's Response at 2 n.2. Accordingly, OHR notified Appellant that he failed to meet the minimum qualifications for the permanent Transit Technician position and this appeal followed.

### ANALYSIS

As the County correctly notes, Appellant bears the burden of proving to the Board that the County's action with regard to his application was arbitrary and capricious. Montgomery County Code, Section 33-9(c). Appellant failed to meet this burden; therefore, I respectfully dissent from the majority's opinion.

It is clear from a review of Appellant's resume submitted for the permanent Transit Technician position that he did not meet the education requirement. Appellant's resume indicates he has a diploma<sup>17</sup> from the Computer Learning Centers. County's Response, Attach. 3. Simply stating that one has a diploma does not establish how much education one

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<sup>16</sup> As the majority noted in their Final Decision, the County submitted a document labeled "Affidavit of Ms. P." which did not meet the requirements of Maryland Rule 1-304. See Final Decision at 2-3 n.6. I therefore concur in their determination that this document did not constitute acceptable evidence.

<sup>17</sup> While Appellant also submitted a copy of his diploma, it only indicates that he satisfactorily completed a prescribed course of study. See County's Response, Attach. 3. It fails to give any indication of credits earned.

has received. It is certainly not OHR's job to track down<sup>18</sup> what Appellant's diploma connotes as far as education, particularly as it comes from an institution that is not an accredited college. Appellant was clearly aware when he applied for the temporary promotion that he needed to demonstrate he had the requisite education. This he did by submitting a transcript showing he had earned 53 credits. See County's Response, Attach. 3.

It is also clear from a review of Appellant's resume submitted for the permanent Transit Technician position that he did not meet the experience requirement. Appellant apparently was credited by OHR with 1.2 years of experience for his service in the Acting Transit Technician position, 1 year of experience for his service in the PACE Transit Technician position and no credit for his service as a Bus Driver or as a Repair Technician.<sup>19</sup> See County's Response, Attach. 3. Thus, his 2.2 years of credited experience fell short of the 3 years of experience required by the job vacancy announcement. See County's Response, Attach. 2.

Significantly, Appellant admitted he did not submit all the information he had previously submitted. Appellant's Reply at 1. Instead, Appellant mistakenly assumed that OHR would also consider information he had previously submitted to obtain the temporary promotion to the Transit Technician position. That assumption was unwarranted. As we have previously held, applicants are responsible for assuring that their applications are complete. See MSPB Case No. 12-02; MSPB Case No. 10-13. OHR was only required to assess the application Appellant submitted for the permanent Transit Technician position. That application, as discussed above, was deficient. Therefore, the process OHR used to screen Appellant out was fair.

Accordingly, based on the above analysis, I would deny the instant appeal.<sup>20</sup>

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<sup>18</sup> As noted in the County's Response, OHR received over 41,000 applications for positions last year. County's Response at 4. Given this workload, OHR cannot be expected to contact applicants to obtain additional information in order to qualify them for a job.

<sup>19</sup> It is certainly understandable why OHR did not credit Appellant's experience as a Repair Technician given the fact that he only provided a few sentences to describe his duties, which included repair of various Xerox copiers and maintenance of an inventory of parts for copier repair. See County's Response, Attach. 3. In sharp contrast, when applying for the temporary promotion to Transit Technician, Appellant explained in his resume that his duties included diagnosing problems, troubleshooting reported problems and making needed repairs. See County's Response, Attach. 1. Appellant went on to explain in this resume that the operating systems of the copiers were controlled by boards which contained microprocessors, micro chips, macro chips, transformers, capacitors, resistors and various other parts that frequently required replacement such as mother boards, driver boards, optics assembly boards, and sorting bin boards. Id.

<sup>20</sup> I would also note that I believe that we are setting a very disturbing precedent of micromanaging OHR decisions instead of reviewing the recruitment process to ensure the legality and fairness of the process. It is my opinion that the majority decision constitutes arbitrary and capricious action by the Board and will not withstand judicial review.

# **APPEALS PROCESS**

## **GRIEVANCES**

In accordance with Section 34-10(a) of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, July 21, 2008, and July 12, 2011), 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, October 21, 2008, November 3, 2009, July 27, 2010, and February 8, 2011) 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 10 working days. Alternatively, the employee may complete the Appeal Form on-line. The Appeal Form is available at: <http://www2.montgomerycountymd.gov/MSPBAppealForm/>.

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 2013, the Board issued the following decisions on appeals concerning grievance decisions.

# **GRIEVANCE DECISIONS**

## **CASE NO. 12-13**

### **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 Chief Administrative Officer (CAO) that Appellant's retirement benefit from the County would be reduced beginning on the first month following his 65<sup>th</sup> birthday. The appeal was considered and decided by the Board.<sup>1</sup>

### **FINDINGS OF FACT**

Appellant was employed by the County as a Police Officer and participated in the Employees' Retirement System (ERS). County's Prehearing Submission at 1; County's Exhibit (Ex.) 1 at 1; Appellant's Prehearing Submission at 1. Appellant was injured on duty and subsequently retired from County employment on November 7, 1996 on a service connected disability. See Appellant's Prehearing Submission at 1; County's Ex. 1 at 1. Appellant and his wife met twice with Ms. R., an employee in the Office of Human Resources (OHR), regarding his retirement and Appellant was given the choice of electing which benefit payment option he desired. Appellant's Prehearing Submission at 1; Hearing Transcript for December 4, 2012 (H.T. I) at 55. At the first meeting on November 18, 1996, Ms. R. explained the various options available to Appellant. H.T. I at 55-56. She presented Appellant and his wife with various documents, including one entitled "Disability Options – Service Connected". Id. at 56; Appellant's Ex. 8. This document indicated that Appellant's Social Security normal retirement age is 66. Id. It also indicated that his Social Security normal retirement date was 05/01/2016. Id. Ms. R. advised Appellant and his wife that their payment option choice would be irrevocable so they should consult with a financial advisor before deciding which option to elect. H.T. I at 66.

Appellant's wife testified that she and her husband followed Ms. R.'s advice. H.T. I at 69. They consulted with a financial advisor, reviewed the documents provided to them by Ms. R. and also reviewed the Employees' Retirement System Handbook (ERS Handbook), July 1989, which was then in effect. Id. Pursuant to the definition of "Social Security Retirement Age" found in Section 33-35 of the ERS Handbook, Appellant's normal retirement age for Social Security is 66. Id.; see also Appellant's Ex. 1.

At the second meeting with Ms. R., on December 3, 1996, Appellant executed his

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<sup>1</sup> The Associate Member was not present for the first day of hearing held in this matter on December 4, 2012. Pursuant to the Administrative Procedures Act, Montgomery County Code Section 2A-10(c), he has certified in writing that he has read the transcript for the first day of the hearing and reviewed the record of evidence in this matter. Therefore, he was able to participate in the vote on this matter. His Certification has been made part of the official record in this matter.

Application for Retirement Benefits. H.T. I at 67-68, 106. Appellant elected the Social Security Adjustment Option.<sup>2</sup> According to both Appellant and his wife, Ms. R. had completed most of the Application for Retirement Benefits prior to the meeting.<sup>3</sup> H.T. I at 77, 91-92, 106. The only part of the application that was completed by Appellant was his phone number, his initialing the Social Security Adjustment Option, and his signature at the bottom of the form. Id. Even the date of his signature had been filled in by Ms. R. Id.

The Social Security Adjustment Option is set forth in Section 33-44(b) of the County Code. See County's Response to Appellant's Motion for Summary Judgment at 3. The Code provides that a retiree may elect to receive an actuarial benefit of a certain level of pension payments until normal Social Security benefits begin and an adjusted level of payments after Social Security payments begin. Montgomery County Code, Section 33-44(b)(1). Both the County and Appellant agree that Appellant's Social Security normal retirement age is 66. County's Ex. 3; Appellant's Ex. 8; H.T. II at 66.

Appellant received a letter from OHR, dated January 2, 1997, enclosing his first retirement check. County's Ex. 4; Appellant's Ex. 3. The letter also indicated that under the Social Security Adjustment Option for Age 65, he would receive payments in the amount of \$3,897.09 each month, which would reduce to \$2,820.09 on May 1, 2016. Id.

Appellant testified that he made certain financial decisions over the years based on the correspondence he received from the County and from Aetna, which administered the pension plan for the County at the time of Appellant's retirement, H.T. II at 52, indicating his benefit would not reduce until May 1, 2016. H.T. I at 105; H.T. II at 100; see also Appellant's Prehearing Submission at 2. For example, Appellant purchased a life insurance policy with the additional money from the option he selected. H.T. I at 105; Appellant's Prehearing Submission at 2. He also purchased a home and refinanced property based on verification from Aetna of the amount of his pension benefit. Id.; see also Appellant's Ex. 4; Appellant's Ex. 5.

By letter dated March 29, 2012, OHR informed Appellant that as he had elected the Social Security Adjustment Option for age 65, his benefit was scheduled to be reduced effective May 1, 2015, the first of the month following his 65<sup>th</sup> birthday. Appellant's Ex. 13. In the letter, OHR apologized to Appellant for any previous miscommunication regarding when his benefit would be reduced. Id. Appellant wrote back to OHR, challenging the reduction of benefits starting in 2015 and the Chief Administrative Officer (CAO), responded to Appellant's letter to OHR. See Appellant's Appeal, enclosing as Exhibit A the letter from the CAO to Appellant (CAO Letter). The CAO noted that while the information provided to Appellant indicated that he would receive a larger monthly benefit "until Social Security

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<sup>2</sup> Appellant's Application for Retirement Benefits, Appellant's Ex. 6, shows he elected Social Security Adjustment Option for age 66. The County's copy of Appellant's Application for Retirement Benefits, County's Ex. 2, shows Appellant elected Social Security Adjustment Option for age 65.

<sup>3</sup> The County's witness agreed that handwriting on most of the form appeared to be that of Ms. R. Hearing Transcript for January 30, 2013 (H.T. II) at 67.



retirement benefits begin”, Appellant’s election form asked Appellant to elect when his benefit would be reduced and, according to the CAO, Appellant completed and initialed age 65. Id. Therefore, according to the CAO, Appellant’s benefit had to be reduced pursuant to the terms of the ERS. Id.

This appeal followed. After the Board reviewed the parties’ submissions, the Board determined that there was a material issue of fact concerning whether the form Appellant completed and signed on December 3, 1996 indicated that he was applying for a retirement benefit payment option of Social Security Adjustment beginning at age 65 or 66. Therefore, the Board determined to hold a hearing on this factual dispute and ordered the parties to file Prehearing Submissions with the Board.

During the hearing in this matter, the County called a witness. The County’s witness testified that she was a benefits manager on the benefits team with the County’s OHR at the time of Appellant’s retirement. H.T. II at 35-36. The County’s witness stated that when calculating the Social Security Adjustment Option only the ages 62 and 65 were used. Id. at 50, 88-89. According to The County’s witness, at the time this option was instituted the normal social security retirement age was 65 with the ability for individuals to elect to draw benefits early at age 62. Id. at 50. Over the years, while Social Security has changed the ages for retirement so that now some individuals are not eligible to draw normal benefits until age 66 or 67, the County never changed its payment options. Id. They always stayed at ages 62 and 65. Id. at 50, 88-89. The County’s witness, when asked if OHR could do a Social Security Adjustment Option for age 66, indicated that OHR lacked the ability to do so; it would need to get the information from actuaries. Id. at 89-90. The County’s witness was asked if she was aware of any law, rule or regulation that precluded OHR from doing a Social Security Adjustment Option for age 66 and replied that she was not aware of anything. Id. at 90.

The County’s witness was shown Appellant’s Ex. 6 and asked if she recognized the handwriting on the document, other than Appellant’s phone number, initials and signature which he placed on the form. H.T. II at 67. The County’s witness indicated that the handwriting on the form was that of Ms. R. Id. The County’s witness was then shown County’s Ex. 2, which contained annotations not on Appellant’s Ex. 6. The County’s witness was asked if she recognized the handwritings for the annotations. Id. The County’s witness testified that she had annotated the document by placing the Z16218 number on the top left portion of the document. Id. She also indicated that a team member, who had worked on the benefits team, had placed the annotation “reduces 5/1/15” on the document. Id. The County’s witness was asked if she knew when that team member might have written the annotation on the document and she testified that it was “[w]ithin the last year or so.” H.T. II at 69. The County’s witness was asked if she knew who might have changed the 66 which appears on Appellant’s Ex. 6 to 65 which appears on County’s Ex. 2. Id. at 68. She indicated she did not know. Id. She was then asked if the team member could have changed the 66 to 65. Id. at 69. She replied that she had no way of knowing. Id.

## POSITIONS OF THE PARTIES

### Appellant:

- Appellant and his wife were specifically told that his benefits under the Social Security Adjustment Option would not decrease until age 66.
- The County’s own documents show that Appellant’s normal Social Security retirement age is 66.
- Letters from Aetna, who administered the Social Security retirement option for the County for many years, indicated Appellant’s benefits would not be reduced until age 66.
- The County has no law or regulation that indicates that Appellant’s Social Security option must be reduced at age 65.
- The County altered Appellant’s application for retirement to change 66 to 65.

### County:

- While the Social Security Adjustment Option description does indicate that Appellant would receive a larger monthly benefit until Social Security retirement benefits begin, the option, as administered by the County, is based on the benefit reducing at age 62 or 65.
- The ERS must be administered in accordance with its terms. Appellant elected the Social Security Adjustment Option with a reduction at age 65 and the ERS cannot pay benefits which a member is not entitled to receive.
- The election form completed by Appellant was stored electronically since 1997 and only under very limited circumstances could the file change. The election form shows Appellant elected the Social Security Adjustment Option with a reduction at age 65.
- When Appellant’s benefit was calculated, the actuarial factor for age 65 was applied, not age 66. While it is true that other ages could be used to calculate a benefit, this could only occur if the proper actuarial factor was applied.

## APPLICABLE LAW AND REGULATIONS

**Montgomery County Code, Section 33-35, *Definitions***, which states in applicable part:

In this Article, the following words and phrases have the following meanings:

*Social security retirement age*: The age used as the retirement age for full (unreduced) benefits under the Federal Social Security Act as follows:

- (a) Age 65 with respect to an employee who attains age 62 before January 1, 2000;

- (b) Age 66 with respect to an employee who attains age 62 after December 31, 1999 and before January 1, 2017; and
- (c) Age 67 with respect to an employee who attains age 62 after December 31, 2016.

**Montgomery County Code, Section 33-44.** *Pension payment options and cost-of-living adjustments*, which states in applicable part:

- (b) *Voluntary adjustment of pension payment by a member who retires before qualifying to receive social security benefits.*
  - (1) A member may elect to receive an actuarial equivalent benefit of a certain level of pension payments until normal social security payments begin and an adjusted level of payments after normal social security payments begin. A member may elect these adjustments to receive a more uniform total income from both sources.

**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.
- (b) The Chief Administrative Officer's decision on a disability application under Section 33-43 may be appealed under subsection 33-43(l).
- (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.

### **ISSUE**

Is the County's determination to reduce Appellant's retirement benefit in accordance with applicable law?

### **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 his 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, 376 (Md. Ct. Spec. App. 1995); MSPB Case No. 11-03 (2010); MSPB Case No. 11-04 (2010).

The CAO, in denying Appellant's challenge to the reduction in his benefits, held that Appellant's benefits had to be reduced because "the ERS must be administered according to its terms." CAO Letter. However, as the County itself conceded during the presentation of its case, there is no law or regulation that specifies that the County only use ages 62 or 65 to calculate the benefits rather than calculating the Social Security Adjustment Option so as to end it when Appellant reaches 66. H.T. II at 90, 102. Indeed, the County's representative stated that using other ages than 62 or 65 to calculate the benefit could be done so long as the proper actuarial factors were applied. Id. at 102.

**Appellant Is Entitled To Receive The Social Security Adjustment Option Without Any Reduction Until Age 66.**

While the County has claimed that it has always administered the Social Security Adjustment Option using only two ages – 62 and 65 – the record of evidence in this case is abundantly clear that OHR gave Appellant erroneous information about his retirement options when he needed to make an election. The Disability Options – Service Connected document given to Appellant on November 18, 1996, clearly indicates that Appellant's normal Social Security retirement age is 66 and his normal retirement date is May 1, 2016. Appellant's Ex. 8. In addition, the ERS Handbook in effect at the time Appellant retired indicated his normal Social Security retirement age is 66. Appellant's Ex. 1.

Significantly, the retirement application executed by Appellant was primarily filled out by Ms. R. H.T. I at 77, 106; H.T. II at 67. Having reviewed Appellant's Ex. 6 and the County's Ex. 2, the Board finds that Appellant's Ex. 6 is the form that was executed by Appellant on December 3, 1996. The Board further finds that the "66" entered by Ms. R. as the age the option would run until is consistent with Ms. R.'s handwriting. OHR's follow-up letter to Appellant in January 1997 from Ms. R., albeit signed for her by the team member, assured Appellant that he would not receive a reduction in his benefit until May 1, 2016, which was his normal Social Security retirement date. County's Ex. 4; Appellant's Ex. 3. The Board concludes that the County at some point altered Appellant's retirement application by changing the "66" to "65" so as to correct its mistake.

The Board has carefully considered the application of the Supreme Court's ruling in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) to this matter. The Supreme Court in that case held that erroneous advice given by a Government employee to a retiree could not stop the Government from denying benefits not otherwise permitted by law. Id. In the Richmond case, a disability retiree had asked a Navy employee relations specialist how much he could earn as he did not want to exceed the 80% cap on earnings which would result in the termination of his disability annuity. 496 U.S. at 417. The Navy employee gave him erroneous information as the law had changed since the appellant had retired (the law

had previously required termination of the annuity if the appellant's income equaled or exceeded the 80% cap in each of two succeeding calendar years and then changed to termination of the annuity if the appellant's income equaled or exceeded the 80% cap in any calendar year). Id. The appellant, relying on the erroneous advice, took on extra work and his income exceeded the statutory limit. Id. at 418. The Office of Personnel Management discontinued the appellant's annuity for six months because he had exceeded the statutory limit. Id. The retiree appealed the denial of benefits. Id. The Supreme Court held that to give the appellant the monies he sought would be in direct contravention of the federal statute upon which his claim to the funds existed. Id. at 432.

The instant case, however, is distinguishable from the Richmond case, as the County concedes that the applicable law does not provide the ages for adjustment if a retiree elects the Social Security Adjustment Option. H.T. II at 90. Rather, it is the County's practice to only provide options for the adjustment based on ages 62 and ages 65. Id. at 50, 88-89. It is clear that Appellant received erroneous advice from Ms. R., based on the County's practice. However, the Board finds that the County's practice of using only two ages – 62 and 65 – to calculate the Social Security Adjustment Option does not comport with the County statute. The statute clearly states that a retiree “may elect to receive an actuarial equivalent benefit of a certain level of pension payments until normal social security payments begin and an adjusted level of payments after normal social security payments begin.” Montgomery County Code, Section 33-44(b) (1). As the County has conceded that Appellant's normal Social Security retirement age is 66, County Ex. 3; H.T. II at 66, the Board finds that the CAO erred in concluding that Appellant's retirement benefit should be reduced beginning May 1, 2015.

### **ORDER**

Based on the above, the Board grants Appellant's appeal from the determination of the CAO to reduce his retirement benefits beginning May 1, 2015. The County is hereby ordered to correct its retirement records to reflect that Appellant's Social Security Adjustment Option benefits will not be reduced until May 1, 2016.

## **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, the appellant's appeal is untimely, or the appellant fails to comply with a Board order or rule.

The Board also may dismiss an appeal if it lacks jurisdiction over the appeal, if the case becomes moot, if there is no actual (i.e., justiciable) controversy between the parties, or if the employee fails to exhaust administrative remedies.

During FY 2013, the Board issued the following dismissal decisions.

# **DISMISSALS**

## **CASE NO. 13-05**

### **FINAL DECISION AND ORDER ON DISMISSAL BASED ON UNTIMELINESS**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) Appellant's appeal concerning the decision by the Department of General Services (DGS) to eliminate his position as a Maintenance Renovation & Inspection Supervisor (grade 24) as part of a reduction-in-force (RIF) in July 2011. The County filed its response to the appeal (County's Response) on November 1, 2012. On November 14, 2012, Appellant submitted his reply (Appellant's Reply) to the County's Response. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Because of budgetary shortfalls, the County conducted a reduction-in-force in 2011. Each department of the County along with the Office of Management and Budget determined the number of positions that had to be abolished. County's Response at 2. Each department director then determined which positions within his/her department would be abolished. Id. The Department of General Services eliminated two positions – Appellant's and the position of Planning Specialist III. Id.; FY 12 Position Reductions, Attachment (Attach.) 2 to County's Response.

Rather than being terminated from County employment because of the elimination of his position, Appellant accepted a demotion to the position of Permitting and Code Enforcement Inspector II (grade 21) in the Department of Environmental Protection. County's Response at 1. As a displaced employee<sup>1</sup> with merit status, Appellant has priority consideration for announced vacancies at or below his original grade for two years. Id.

On or about June 2011, Appellant applied for the position of Program Manager I (grade 23) with DGS. Appellant's Appeal. He was rated "Well Qualified" and was interviewed for the position. Id. He was not hired for the position, despite his priority consideration; instead it was left vacant. Id. On or about July 24, 2012, Appellant applied for the position of Senior Planning Specialist (grade 25) with the Department of Housing and Community Affairs. Id. He was rated "Well Qualified" and was interviewed for the position. Id. He was not hired for the position; it remains vacant. Id.

According to Appellant, he recently found out that an individual at a grade 27 has been moved into his old office to take on part of his old responsibilities. Appellant's Reply at 1. Appellant asserts that having a higher ranking employee take over his old duties reveals that his

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<sup>1</sup> In accordance with the Montgomery County Personnel Regulations (MCPR), 2001, a "displaced employee" is defined as an "employee who is demoted or whose County government employment is terminated because of a RIF." MCPR, 2001 (as amended), Section 30-1(g).

RIF was not legitimate. Appellant's Appeal. Appellant also alleges that in January 2011 he was told by his supervisor, that higher ranking officials were "out to get [him]." Appellant's Reply at 1.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant was subject to a RIF because he was the only person in DGS in the position of Maintenance Renovation & Inspection Supervisor. This was due to the fact that DGS violated County procedures by improperly moving two other Maintenance Renovation & Inspection Specialists (grade 23) to Property Manager II positions. Had these two individuals remained, one of them with the least seniority would have been subject to RIF instead of Appellant.
- In 2009-2010, Appellant repeatedly sought to be reclassified to possibly a Program Manager or a MIII<sup>2</sup>. Had he been reclassified to a generic titled position it would have protected him as a twenty-year employee from being subject to a RIF. Instead, his reclassification requests were "buried".
- Appellant was told by his supervisor that high ranking officials in DGS were apparently "out to get" him in January 2011.
- While DGS insisted that Appellant's RIF was necessary due to financial conditions, its recent action in reassigning a higher graded employee to take on part of his old responsibilities demonstrates that the DGS' financial concerns were false.
- Appellant, after being subject to RIF, applied for and was rated well qualified for two positions – Program Manager I (grade 23) and Senior Planning Specialist (grade 25). However, he has not been offered either position.

#### **County:**

- Appellant had 10 working days pursuant to the personnel regulations to file an appeal with the MSPB challenging his RIF. The RIF occurred in July 2011 and his appeal was filed in October 2012, more than 15 months later. His appeal is not timely.
- To the extent Appellant is challenging his non-selection for certain positions, his appeal is also untimely as he applied for the positions in 2011 and mid-2012.
- The reclassification study which resulted in the two Maintenance & Renovation Inspection Specialists being moved to Property Manager II positions occurred in May 2008, three years before the RIF in question. The same reclassification study also resulted in upgrading Appellant's Supervisor position to a grade 24. Appellant's Supervisor position was never in the same occupational class as the two Maintenance & Renovation Inspection Specialist positions. Thus, what occurred with regard to the Specialist positions in 2008 had no bearing on Appellant being subject to RIF in 2011.

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<sup>2</sup> "MIII" refers to a Manager III in the Management Leadership Service. See MCPR, 2001, Appendix F, Section 2(a)(1).



- While Appellant complains that a co-worker at DGS, a grade 27 employee, has taken over some of his former Maintenance & Renovation Inspector Supervisor duties and Appellant has more seniority than this worker, this is not a violation of RIF procedures.
- Appellant contends that had his position been reviewed in 2009, he would have been upgraded to a position with a generic title. This is speculative and extremely unlikely since his position had just been reviewed and upgraded a year earlier.

**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, “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 February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, and February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations**, which states in applicable part:

**35-3. Appeal period.**

- (a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:
  - (1) receives a notice of disciplinary action over an involuntary demotion, suspension or dismissal;
  - (2) receives a notice of termination;
  - (3) receives a written final decision on a grievance;
  - (4) resigns involuntarily; or
  - (5) knows or should have known of a personnel action.
- (b) An applicant has 10 working days to file an appeal with the MSPB in

writing after the applicant receives notice that the applicant will not be appointed to a County position.

**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.

**ISSUES**

1. Is Appellant's appeal to the Board concerning his RIF timely?
2. Is Appellant's appeal concerning his nonselections for two County positions timely?

**ANALYSIS AND CONCLUSIONS**

As the County correctly points out, under applicable personnel regulations, Appellant had ten (10) working days to file an appeal challenging his reduction-in-force. The RIF took place in July 2011. However, it was not until October 15, 2012, see Appellant's Appeal, over a year after the RIF, that Appellant filed his appeal.

In his appeal, Appellant points two various events which he believes supports his theory that his RIF was not legitimate. Appellant claims that his position was eliminated because it was unique. He alleges that two individuals who held positions as Maintenance Renovation & Inspection Specialists were improperly moved to Property Manager positions. According to Appellant, had they remained he would not have been subject to RIF as he had more seniority. As these two individuals were moved to Property Manager positions in 2008, see County's Response, Attach. 2, Appellant was well aware of this fact at the time his RIF occurred in July 2011.

Appellant also alleges that he was told by his supervisor, that high level officials of DGS were "out to get" him. In support of this allegation, Appellant has supplied an email he wrote to himself, purportedly documenting the conversation he had with his supervisor. Appellant's Reply, Attach. 2. The email is dated January 21, 2011. Thus, Appellant was aware of this at the time his RIF occurred in July 2011.

Appellant also theorizes that had his request to be reclassified in 2009 been acted upon, he would have been upgraded to a generic titled position and he would not have been subject to RIF. Again, Appellant was aware of the fact that he was not granted a reclassification to a higher position at the time his RIF occurred in July 2011.

In support of his late appeal of his RIF, Appellant states that he only recently found out that a grade 27 employee had been moved into his old office to take on part of his responsibilities. Appellant has provided no information as to when exactly he found out about this move. Moreover, the assigning of someone to perform Appellant's duties over a year after

Appellant was subject to RIF has no relevance on the merits of Appellant's RIF in July 2011.

Accordingly, based upon the foregoing analysis, the Board finds that Appellant's appeal concerning his July 2011 RIF is untimely.

Appellant has also challenged his failure to be selected for two positions. Again, as the County correctly points out, Appellant had ten (10) working days to file an appeal with the Board regarding his failure to be selected. The first nonselection, to the position of Program Manager I, occurred in 2011. Clearly, Appellant's appeal concerning this nonselection is untimely. With regard to the second position, that of Senior Planning Specialist, Appellant states that he applied for the position on July 24, 2012. He offers no details about when he learned of his nonselection. Absent evidence that Appellant filed his appeal with regard to this position within ten working days after he became aware of his nonselection, the Board must conclude that Appellant has failed to file his appeal in a timely manner.

### **ORDER**

Based on the above, the Board dismisses Appellant's appeal regarding his RIF as untimely. Likewise, the Board dismisses Appellant's appeal regarding his nonselection for the Program Manager I and Senior Planning Specialists positions as untimely.

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

### **FINAL DECISION AND ORDER ON DISMISSAL FOR LACK OF JURISDICTION**

On August 15, 2013, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (MSPB or Board) challenging the decision of the Director, Department of Correction and Rehabilitation, to impose a ten (10) day suspension to be taken as a 10 percent within-grade reduction for 800 working hours. The County filed a Motion to Dismiss the appeal arguing that Appellant was a temporary employee<sup>3</sup> who has no right to appeal a disciplinary action to the Board. The County also argued in the alternative that because Appellant participated in the Alternative Dispute Resolution (ADR) process concerning her disciplinary action, she waived her right of appeal to the Board.

Appellant, through counsel, responded to the County's Motion (Appellant's Opposition), asserting that the Board has jurisdiction over this appeal as Appellant is not a temporary employee, having been employed with the County for more than six years. Moreover, Appellant argued she has merit status, which permits her to appeal her disciplinary action to the Board. Finally, Appellant asserted that she did not agree to participate in ADR, and provided a signed form indicating that she declined to participate. This is the Final Decision of the Board on Appellant's appeal concerning her disciplinary action. The appeal was considered and decided

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<sup>3</sup> Although a temporary employee, Appellant is part of a bargaining unit covered by the agreement between the Municipal and County Government Employees Organization (MCGEO) and the County. County's Motion to Dismiss at 1; see also Appellant's Opposition, Exhibit (Ex.) 1.

by the Board.

### **FINDINGS OF FACT**

Appellant is a Licensed Practical Nurse, Grade 18, with the Department of Correction and Rehabilitation (DOCR). County's Motion to Dismiss, Attachment (Attach.) 1. She is a part-time temporary employee. Id. As a temporary employee, Appellant was part of a bargaining unit covered by the Collective Bargaining Agreement (CBA) between MCGEO and the County. County's Motion to Dismiss at 1.

On September 28, 2013, the Warden, issued Appellant a Statement of Charges for a Ten (10) Day Suspension.<sup>4</sup> County's Prehearing Submission, Ex. 3. On November 1, 2013, a meeting was held to determine whether Appellant would participate in the ADR process as part of the informal resolution process of the contract grievance procedure.<sup>5</sup> See County's Motion to Dismiss at 1; Appellant's Opposition at 4. As part of this meeting, Appellant had to complete a form with regard to the ADR process, indicating that she either agreed to participate in the process, thus waiving her right to file an appeal with the Board over the subject matter of the process, or declined to participate. See County's Motion to Dismiss, Attach. 2; Appellant's Opposition, Ex. 2. The County provided a signed<sup>6</sup> copy of the Employee Acknowledgment for Participation in the ADR Process (ADR Form), which indicated that Appellant voluntarily agreed to participate in ADR. County's Motion to Dismiss, Attach. 2. Appellant provided a signed copy of the ADR Form, indicating that Appellant declined to participate in ADR. Appellant's Opposition, Ex. 2.

Subsequently, on December 6, 2013, the DOCR Director issued Appellant a Notice of Disciplinary Action – Ten (10) Day Suspension Served/Taken as a 10 Percent Within-Grade Salary Reduction for 800 Working Hours. County's Prehearing Submission, Ex. 2; Appellant's Opposition, Ex. 1. The NODA informed Appellant she could appeal the action directly to the Board or the Union could file a grievance on her behalf. Id. This appeal followed.

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<sup>4</sup> Appellant had previously been disciplined, receiving a one-day suspension in the form of a within-grade salary reduction, County's Prehearing Submission, Ex. 7, and a three-day suspension in the form of a ten percent within-grade pay reduction for 240 hours, County's Prehearing Submission, Ex. 8.

<sup>5</sup> The contract between MCGEO and the County provides under the section governing ADR for a Pre-discipline Settlement Conference after a Statement of Charges is issued but before a Notice of Disciplinary Action issued. County's Prehearing Submission, Ex. 1, § 10.12(a).

<sup>6</sup> The ADR Form requires the signatures of the employee, the Union Representative, and the OHR Representative. See County's Motion to Dismiss, Attach. 2; Appellant's Opposition, Ex. 2.

## POSITIONS OF THE PARTIES

### County:

- Appellant is a temporary employee. As a temporary employee, Appellant is a bargaining unit member covered by the CBA between MCGEO and the County.
- Pursuant to the CBA, an employee’s participation in the ADR process waives the right of appeal to the Board. As Appellant participated in the ADR process with regard to her suspension action, she waived the right of appealing it to the Board.<sup>7</sup>
- As a temporary employee, Appellant lacks merit status.
- The County Charter gives the Council the right to exclude temporary employees from the merit system.
- The language concerning the right to appeal to the MSPB was mistakenly placed in Appellant’s NODA.<sup>8</sup>
- Appellant could have filed a grievance challenging her suspension but failed to do so.

### Appellant:

- Appellant’s NODA informed her of her right to file an appeal with the Board. She followed the instructions of the NODA and even waived her right to participate in ADR so as to file an appeal with the Board.
- Appellant is not a temporary employee as she has worked for the County for more than six years.
- The Appellant has merit system status as the statute defining merit system employees does not exclude employees who are labeled “temporary”.
- Contrary to the County’s assertion that Appellant participated in ADR, she in fact refused to do so and, therefore, did not waive her right to appeal to the Board.

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<sup>7</sup> As discussed infra, the Board finds that it lacks jurisdiction over this appeal based on Appellant’s lack of merit system status. Therefore, there is no need for the Board to address the County’s ADR waiver argument. Nevertheless, the Board would be remiss if it did not register its dismay over the fact that apparently during the ADR process two ADR Forms were completed by all three signatories and yet only one of the Forms – “the yes to ADR” – was submitted by the County without any indication of the existence of the other Form – “the no to ADR”.

<sup>8</sup> The Board is deeply disturbed over the County misleading Appellant with regard to her right to challenge her suspension action by filing an appeal with the Board. What is even more egregious is the fact that this is not the first time that the County has informed Appellant about her right of appeal to the Board. See County’s Prehearing Submission, Ex. 7 at 4; County’s Motion to Dismiss, Attach. 1. Had Appellant been aware of her correct due process rights, she could have brought a grievance under the CBA. Now, however, her grievance would be deemed untimely. The Board urges the County to waive any timeliness issue with regard to a contractual grievance file by Appellant, should she elect this course of action after receiving this decision, so as to ensure Appellant receives her due process rights.

## **APPLICABLE LAW, CONTRACTUAL PROVISIONS AND REGULATIONS**

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

The Council by law may exempt probationary employees, temporary employees, and term employees from some or all of the provisions of the law governing the merit system, but the law shall require these employees to be recruited, selected and promoted on the basis of demonstrated fitness and merit.

**Montgomery County Charter, Section 404, Duties of the Merit System Protection Board**, which states in applicable part:

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 . . . .

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-6, Definitions**, which states in applicable part,

*Merit system employees:* All persons who are employed by the county in full-time or part-time year-round permanent career positions in any department/office/agency of the executive and legislative branches of the county government or in any other position specifically so designated by law.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-12, Appeals of disciplinary actions; grievance procedures**, which states in applicable part,

- (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 administrative review of the appeal by the Chief Administrative Officer or a designee.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 22, 2002, December 11, 2007, October 21, 2008 and July 24, 2013), Section 1, Definitions**, which states in applicable part:

**1-8. Career position:** A full-time, part-time, or term merit system position.

**1-38. Merit system employee:** A person employed by the County in a full-time or part time career position, except those excluded by Section 2-2 of these Regulations.

**1-39. Merit system position:** A career position in the executive or legislative branch of the County government, the Office of the County Sheriff, or another position designated by County or State statute, except those excluded by Section 2-2 of these Regulations.

**1-40. Merit system status:** The condition achieved by a merit system employee who satisfactorily completes the required probationary period and is entitled to the rights and privileges described in these Regulations.

**1-74. Temporary employee:** An incumbent of a temporary position.

**1-75. Temporary position:** A non-career position classified and filled under merit system principles.

### 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 Appellant's Suspension Because, Pursuant To Statute, She Is Not A Merit System Employee.**

The Montgomery County Charter clearly provides the County Council with the right to exempt various categories of employees, to include temporary employees, from some or all of the provisions of law governing the merit system. Montgomery County Charter, Section 401. Moreover, pursuant to Section 404 of the Charter, only merit system employees have the right to appeal a suspension action to the Board.

The County Council defined merit system employees in the County Code as employees in "permanent career positions". County Code, Section 33-6. Clearly, Appellant, who occupies a temporary position, albeit for six years,<sup>9</sup> is not in a permanent career position. See, e.g.,

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<sup>9</sup> While the Board lacks the authority to expand its jurisdiction beyond what has been granted by the County Charter and Code, the Board is extremely troubled about the County's

MCPR, Section 1-75. Accordingly, the Board concludes Appellant lacks merit system status and, therefore, lacks appeal rights to the Board.

Thus, the Board is dismissing Appellant's appeal dealing with her suspension based on a lack of jurisdiction.

### **ORDER**

On the basis of the above, the Board hereby denies Appellant's appeal of her suspension based on lack of jurisdiction over the appeal.

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practice of permitting the use of "temporary" employees indefinitely. See MCPR, Section 7-3(a) (3). Such a practice of keeping an employee in a temporary status for many years may constitute an abuse of the County's authority to hire temporary employees, particularly since the result is that a long-term County employee lacks MSPB appeal rights. A similar practice in the Federal Government was criticized by the U.S. Merit System Protection Board. See *TEMPORARY FEDERAL EMPLOYMENT: In Search of Flexibility and Fairness, A Report Concerning Significant Actions of the U.S. Office of Personnel Management, A Report to the President and the Congress of the United States by the U.S. Merit Systems Protection Board (Sept. 1994)*, available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253664&version=253951&application=ACROBAT> .



# **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). The Board's Hearing Procedures require that any preliminary reconsideration request be filed within five (5) calendar days from the date the ruling being challenged was received.

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 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 fiscal year 2013, the Board issued two Reconsideration Decisions with regard to Final Decisions.

# **RECONSIDERATION REQUESTS** **INVOLVING FINAL DECISIONS**

## **CASE NO. 12-13**

### **DECISION ON COUNTY'S REQUEST FOR RECONSIDERATION**

(Appellant) filed an appeal with the Montgomery County Merit System Protection Board (MSPB or Board) from the determination of the Chief Administrative Officer (CAO) that Appellant's retirement benefit from the County would be reduced beginning on the first month following his 65<sup>th</sup> birthday. Appellant challenged the CAO's determination, asserting that he had been assured that his retirement benefit would not be reduced until he reached age 66. See Appellant's Appeal.

After reviewing the parties' written submissions, the Board determined that there was a material issue of fact concerning whether the form Appellant completed and signed indicated that he was applying for a retirement benefit payment option of Social Security Adjustment beginning at age 65 or age 66.<sup>1</sup> Therefore, the Board held a hearing on this factual dispute. Based on the evidence adduced at the hearing, the Board issued a Final Decision and Order on March 26, 2013, which upheld the appeal and ordered the County to correct its retirement records to reflect that Appellant's Social Security Adjustment Option benefits would not be reduced until May 1, 2016, which is what the County had informed Appellant would occur seventeen years ago when Appellant retired. See Final Decision at 4; County's Exhibit (Ex.) 4; Appellant's Ex. 3.

On May 14, 2013, the County filed a memorandum<sup>2</sup> with the Board seeking guidance

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<sup>1</sup> Appellant's Application for Retirement Benefits, Appellant's Exhibit (Ex. 6), showed he elected Social Security Adjustment Option for age 66. The County's copy of Appellant's Application for Retirement Benefits, County's Ex. 2, showed Appellant elected Social Security Adjustment Option for age 65. The Board concluded in its Final Decision that the County at some point altered Appellant's retirement application by changing the "66" to "65" on his retirement application so as to correct its mistake. Final Decision at 7.

<sup>2</sup> Attached to the signed memorandum from the Office of the County Attorney is an unsigned memorandum from the Executive Director, Montgomery County Employee Retirement Plans Office (MCERP Memorandum), along with a one page spreadsheet, which purportedly represents an actuarial recalculation of Appellant's benefits. The Board has previously instructed the County that statements made by a representative in a pleading are not evidence. MSPB Case No. 08-13 (2008); MSPB Case No. 12-11 (2012); MSPB Case 13-10 (2013); see, e.g., Joos v. Department of Treasury, 79 M.S.P.R. 342, 348 (1998); Leaton v. Department of Interior, 65 M.S.P.R. 331, 337 (1994); Perez v. Railroad Retirement Board, 65 M.S.P.R. 287, 289 (1994); Rickels v. Department of Treasury, 42 M.S.P.R. 596, 603 (1989);

with regard to how it should proceed (hereinafter “County’s Request for Reconsideration”).<sup>3</sup> In the County’s Request for Reconsideration, the County indicated that pursuant to the Board’s order, the Montgomery County Employee Retirement Office (MCERP) recalculated Appellant’s benefit<sup>4</sup> to reflect a Social Security Adjustment Option which reduces at age 66 and, based on this recalculation, determined that Appellant has been overpaid. County’s Request for Reconsideration at 1. The County requested guidance on which of two methods should be used to collect the overpayment. Id.

Appellant was provided with the opportunity to reply to the County’s Request for Reconsideration and on May 22, 2013 filed a reply (Appellant’s Reply) with the Board. In Appellant’s Reply, he asserted that the County, through its Request for Reconsideration, was attempting to retry the case and noted that the County could have challenged the Board’s Final Decision by filing an appeal in Circuit Court but failed to do so. Appellant’s Reply at 1.

### **THE PARTIES’ ARGUMENTS**

In the County’s Request for Reconsideration, the County asserts that because the Board ordered it to “correct its retirement records to reflect Appellant’s retirement benefits would not be reduced until May 1, 2016” in accordance with the Board’s Decision, see Final Decision at 8, it had to do a recalculation of Appellant’s retirement benefits which results in the need to reduce Appellant’s monthly benefit either now or in the future when Appellant reaches age 66. County’s Request for Reconsideration at 1 and attached documents.

Appellant challenges the County’s submission of an unverified memorandum and spreadsheet. Appellant’s Reply at 1. Appellant also points out that the County failed to challenge the Board’s Final Decision in Circuit Court and should not now be allowed to relitigate the matter. Id. Appellant also notes that the County never sought to submit an actuarial report during the hearing in this matter to demonstrate a mistake had been made. Id. at 1-2.

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Vincent v. Department of Justice, 32 M.S.P.R. 263, 268-69 (1987); Enos v. USPS, 8 M.S.P.R. 59, 63 (1981). The Board notes that the County has submitted no affidavit or other verified evidence to support its allegations that it has overpaid Appellant and that the spreadsheet is an accurate actuarial recalculation.

<sup>3</sup> As there is no provision in the Board’s regulations or the County’s Administrative Procedures Act which indicates the Board is empowered to issue advisory opinions, the Board deems the County’s request as seeking reconsideration since the County clearly does not want to abide by the Board’s decision, as discussed infra.

<sup>4</sup> The Board would note that no where in its Final Decision and Order did it instruct the County to recalculate Appellant’s benefit. The Board ordered the County **not** to reduce Appellant’s pension but rather to continue to pay Appellant what it told him seventeen years ago it would pay him until he turned age 66.

## APPLICABLE LAWS

**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. . . .A request for reconsideration or rehearing shall not stay the operation of any order unless the hearing authority so states.

**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.
- (b) The Chief Administrative Officer's decision on a disability application under Section 33-43 may be appealed under subsection 33-43(l).
- (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.

## ISSUE

Should the Board grant the County's Request for Reconsideration?

## ANALYSIS AND CONCLUSIONS

### **The County Failed To File A Timely Request For Reconsideration.**

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. In the instant case, the Board issued its Final Decision and Order on March 26, 2013. However, the County did not file its Request for Reconsideration until seven weeks after the Board issued its Final Decision. Clearly, under the County Code, the Request for Reconsideration is not timely.

The Code does provide for a request for reconsideration without time limit in the case of fraud, mistake or irregularity. Accordingly, the Board will now consider whether the County has demonstrated fraud, mistake or irregularity.

**The County Has Failed To Demonstrate Fraud, Mistake, Or Irregularity.**

As the Board has previously ruled, the standard for demonstrating “fraud, mistake, or irregularity” in Maryland is high. See, e.g., MSPB Case No. 09-10 (2009). 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). In the instant case, the County was represented by counsel at the hearing, was allowed to present counsel’s legal arguments, call witnesses on the County’s behalf, and cross-examine Appellant’s witnesses. Thus, as there clearly was an adversarial trial in the instant case, the County is unable to demonstrate 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 33-56(c) of the Montgomery County Code clearly vests the Board with jurisdiction over appeals from determinations of the CAO regarding retirement benefits. Thus, the County 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). The County has cited no irregularity of process or procedure in the instant case nor can it.

In sum, it is clear from the case law cited above that “fraud, mistake, and irregularity” goes to whether the Board’s process was fair, not whether a legal or factual error has been made. The Board finds that the only fraud, mistake or irregularity that has been proven in this case was that the County changed a document Appellant had signed, some seventeen years after he signed it, because the County made a mistake. See Final Decision at 7. Based on the case law previously cited, this does not constitute “fraud, mistake or irregularity” as indicated in the County’s Administrative Procedures Act (APA).

Accordingly, the County must abide by the Board’s Final Order, which did not include recalculating Appellant’s retirement benefit. If the County believed it needed to recalculate the benefit, it should have presented such evidence at the hearing. Alternatively, the County could have moved for rehearing or reconsideration within the ten-day time frame set forth in the County’s APA. The County did neither. Therefore, the Board’s Final Order stands. The County must continue to pay Appellant his current retirement benefit until age 66 at which time it may reduce the payment based on the formula it conveyed to Appellant seventeen years ago. The Board hereby prohibits the County from making any reduction in

Appellant's retirement benefits based on its totally unsupported allegation of an overpayment.

### **ORDER**

Based on the above analysis, the Board denies the County's Request for Reconsideration. The County is hereby ordered to correct its retirement records to reflect that Appellant's Social Security Adjustment Option benefits will not be reduced until May 1, 2016. Moreover, the County is prohibited from making any reduction in the benefit when Appellant reaches age 66 other than the one communicated to Appellant seventeen years ago.

## **CASE NO. 13-10**

### **DECISION ON COUNTY'S REQUEST FOR RECONSIDERATION**

On May 9, 2013, the County filed a Request for Reconsideration,<sup>5</sup> with two attachments,<sup>6</sup> seeking to have the Merit System Protection Board (MSPB or Board) reconsider its Final Decision and Order dated April 30, 2013. In its Final Decision and Order, the Board granted 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 background investigation. On May 15, 2013, Appellant filed a response (Appellant's Response) to the Request for Reconsideration, indicating that Appellant believed the Final Decision of the Board was appropriate. In his response, Appellant also amended his request for relief, indicating that he wishes to accept employment with the County. Appellant's Response at 2.

### **FINDINGS OF FACT<sup>7</sup>**

Appellant applied for the position of Accountant/Auditor II (grade 21) with the Montgomery County Department of Fire and Rescue Service (FRS). County's Response at 1. The position is part of the Emergency Medical Services (EMS) reimbursement program responsible for billing and collecting fees for EMS transportation to hospitals. Id. In an email dated December 10, 2012 from Ms. H., the Office of Human Resources (OHR) staffing specialist handling the recruitment, Appellant was extended a conditional offer of employment; the offer was contingent upon Appellant's medical fitness for employment as well as a satisfactory background check. Id.

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<sup>5</sup> Pursuant to the Administrative Procedures Act, the Board has ten (10) days following the receipt of a request for reconsideration to issue a decision. If the Board fails to act within ten days from receipt of the request, the request is deemed denied. Montgomery County Code, Section 2A-10(f).

<sup>6</sup> County Attachment 16 is the Privacy Act Complaint Appellant filed in court. County Attachment 17 is the Settlement Agreement between Appellant and his former employer, the Internal Revenue Service.

<sup>7</sup> The Board incorporates by reference its Findings of Fact in the Final Decision in this matter and will only set forth those findings relevant to the Request for Reconsideration.

On December 11, 2012, Appellant completed a background investigation booklet (Booklet) and certified that the information provided therein was true, complete and correct. County's Response at 3; County Attachment (C. Attach.) 6. In the completed Booklet, Appellant stated he had resigned from the Internal Revenue Service (IRS) to attend to an ailing parent; had never been discharged/terminated/fired or disciplined by any employer; never resigned while anticipating that an employer intended to discipline or discharge him; and had never resigned (quit) from a job by mutual agreement following allegations of misconduct. Id.

Appellant did not pass the background investigation performed by the investigator of FRS' Office of Internal Affairs. County's Response at 2. Appellant had previously worked for the IRS beginning on April 13, 2009 until January 29, 2011. County's Response at 2; see C. Attach. 14. Apparently, upon doing a "Google search", C. Attach. 7, the investigator purportedly discovered that Appellant was terminated from the IRS due to a Treasury Inspector General's investigation of allegations that Appellant had submitted a fraudulent travel voucher. County's Response at 3; C. Attach. 5; C. Attach. 7.

When Appellant was told that the investigator had uncovered information that he was terminated from the IRS, Appellant responded to Ms. H., indicating that the information regarding his termination from the IRS was untrue. C. Attach. 12. According to Appellant, he resigned based on an Equal Employment Opportunity Commission (EEOC) complaint against the IRS which resulted in him receiving a financial settlement and opting to resign. Id.; Appellant's Reply at 2; Appellant's Exhibit (A. Ex.) 14. Because of a confidentiality clause contained in the settlement, Appellant could not provide further detail. Id. However, Appellant did provide the investigator with a copy of Standard Form 50 (SF-50), Notification of Personnel Action, dated 01/29/11, showing he resigned from the IRS to care for an immediate family member. Appellant's Reply at 2; C. Attach. 14. He also provided his resignation letter, Appellant's Reply at 2; C. Attach. 13, as well as a reference letter from the IRS, dated 02/07/11. Appellant's Reply at 2; C. Attach. 15.

Despite Appellant providing explanations for the various purported discrepancies found by the investigation, the investigator informed Appellant on January 7, 2013, that he did not pass his background investigation. C. Attach. 12. By letter dated January 4, 2013, the OHR Director withdrew Appellant's conditional offer of employment. C. Attach. 3.

### **ARGUMENTS OF THE PARTIES**

In its Request for Reconsideration, the County, as the Appellant correctly notes, has abandoned most of its reasons for retracting its offer of employment. Appellant's Response at 1. The County now focuses on the fact that Appellant responded "no" to two questions in his Booklet: "Have you ever resigned (quit) while anticipating that your employer intended to take any form of disciplinary action against you?"; and "Have your ever resigned (quit) from a job by mutual agreement following allegations of misconduct?" Request for Reconsideration at 1. According to the County, its background check revealed that Appellant entered into a settlement agreement with his prior employer, the IRS, permitting him to resign following an investigation into allegations of his misconduct and in the face of

anticipated termination. Id. Therefore, the County concluded that Appellant was untruthful when he answered “no” to the two questions set forth above. Id. at 3. According to the County the issue is Appellant’s honesty during the background check process. Id. at 4. The County argues that Appellant’s settlement agreement with the IRS, despite containing a confidentiality provision, does not shield Appellant from truthfully answering the County’s background questions about his prior employment. Id. at 4-5. The County notes that the Federal Circuit has questioned the policy behind agreements which provide for neutral references as they don’t serve the public interest. Id. at 5 n.6.

Appellant responds that his resignation from the IRS and the circumstances surrounding his resignation are not mutually exclusive from the Settlement Agreement he signed. Appellant’s Response at 2. Appellant argues that it was impossible to disclose the circumstances surrounding his resignation without violating the confidentiality clause of the Settlement Agreement. Id.

### **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>8</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 Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of 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:

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<sup>8</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.



- (7) Order removal from administrative or personnel records any reference or document pertaining to an unwarranted disciplinary or adverse personnel action;
- (10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

### ISSUE

Has the County shown good cause as to why the Board should reconsider its Final Decision and Order in this case?

### **ANALYSIS AND CONCLUSIONS: The Board Concludes That The County Has Failed To Show Good Cause As To Why The Board Should Reconsider Its Final Decision.**

- A. In Support Of A Request For Reconsideration, The Board Will Only Consider New And Material Evidence That Was Not Available When The Record Closed.

The Board is charged under the Personnel Regulations with making a decision based on the written record before it. Montgomery County Personnel Regulations (2001) (as amended) (MCPR), Section 35-10(a)(2). The Board did that in this case. Now, somewhat belatedly, the County seeks to supplement the record with the addition of two more exhibits. The Board has previously had the occasion to consider the issue of whether it should accept additional evidence at the reconsideration stage from the County that was not presented to it during the processing of the case up until the issuance of the Final Decision. In MSPB Case No. 12-11 (2012), the Board held that it would only consider new and material evidence that was not available when the record closed.

In so holding, the Board noted that the U.S. Merit System Protection Board will grant a petition for review of an administrative judge's decision when "new and material evidence is available that, despite due diligence, was not available when the record closed." 5 C.F.R. § 1201.115(d)(1). Under the Federal Rules of Civil Procedure, Rule 60(b), a court may grant relief from a "final judgment, order, or proceeding", when a party establishes, *inter alia*, that there exists "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." See *Avansino v. USPS*, 3 M.S.P.R. 211, 214 (1980). In interpreting Rule 60(b), the courts have required the party offering the new evidence to provide a reasonable explanation as to why the additional material could not have been supplied earlier. *Id.* (citing to *United Medical Laboratories, Inc. v. Colombia Broadcasting System, Inc.*, 258 F. Supp. 735, 747 (D. Or. 1966), *aff'd*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969)).

The Board reasoned in MSPB Case No. 12-11 that there is a sound policy rationale for permitting the introduction of only new evidence at the reconsideration stage. The Fourth Circuit in *Springer v. Fairfax County School Board*, 134 F.3d 659, 667 (1998), reviewed the

Individuals with Disabilities Education Act, which permitted the district court to hear additional evidence not put before the administrative agency during its processing of the matter. The Fourth Circuit held that such evidence should be limited to that which could not have been presented before the administrative agency. The Fourth Circuit explained its rationale for this rule thusly: “[A] lax interpretation of ‘additional evidence’ would reduce the proceedings before the state agency to a mere dress rehearsal . . . .” Id. (quoting Roland M. v. Concord Sch. Comm., 910 F.2d 983, 997 (1<sup>st</sup> Cir. 1990)). The Board found the Fourth Circuit’s rationale persuasive. The Board therefore declined to allow the County to conduct a dress rehearsal before the Board and when that failed, plug the holes in its case by relitigating the case at the reconsideration stage. See MSPB Case No. 12-11.

In holding in MSPB Case No. 12-11 that the Board would only consider evidence at the reconsideration stage which could not have been presented to the Board during the proceedings leading up to the issuance of a Final Decision, the Board instructed the County that to constitute new and material evidence, the information contained in a document submitted during the reconsideration stage, not just the document itself, must have been unavailable despite due diligence when the record closed. Conway v. USPS, 93 M.S.P.R. 6, 14 n.6 (2002); Salaz v. OPM, 91 M.S.P.R. 300, 302 (2002). Moreover, to be considered material evidence, the evidence provided must be of sufficient weight to warrant a finding different from the Board’s initial decision. Russo v. VA, 3 M.S.P.R. 345, 349 (1980); Fealhaber v. OPM, 93 M.S.P.R. 143, 146 (2002).

B. The County Has Failed To Provide Any New Evidence To Support Its Position.

We now will examine the additional evidence proffered by the County in its Request for Reconsideration to see if it meets the standard for new and material evidence. County Attachment 16 is Appellant’s Privacy Act Complaint which, as the County notes is “publicly available from the court’s files.” Request for Reconsideration at 3. Obviously, if it is publicly available, the County could have submitted the document before the record closed in this matter. Accordingly, the Board concludes this does not constitute new and material evidence.

County Attachment 17 is the Settlement Agreement entered into between Appellant and his prior employer, the IRS. According to the County, it obtained this document from the IRS as a result of the release Appellant provided the County. Request for Reconsideration at 4 n.2. As there is no indication that the County did not possess this document before the record of evidence closed in this matter, the Board concludes this does not constitute new and material evidence.

C. While The Federal Circuit Has Criticized Settlement Agreements Which Provide For A Neutral Reference For An Employee, It Nevertheless Enforces Such Agreements.

The County is correct in its observation that the Federal Circuit has questioned the policy behind settlement agreements which provide for neutral references. Request for

Reconsideration at 5 n.6. However, the Federal Circuit has enforced these agreements. See, e.g., Pagan v. Dep't of Veterans Affairs, 170 F.3d 1368 (Fed. Cir. 1999). In Pagan, the Federal Circuit expressed its concern over a settlement agreement that let an employee facing removal resign in exchange for a personnel record clear of all charges. 170 F.3d at 1372. Nevertheless, the court held in Pagan: “The Board has a difficult job sorting through some of these enforcement agreements, particularly those that are not well-drafted, but as long as agencies continue to sweep their personnel problems under a rug with holes in it, it is the Board’s job to see to it that the parties receive that for which they bargained.” Id.; see also Godwin v. Dep't of Defense, 228 F.3d 1332, 1336 (2000) (noting that although the court has commented on the difficulties created by settlement agreements that include a provision not to give negative recommendations regarding a former employee, it has upheld the validity of such agreements).

D. Appellant’s Settlement Agreement Is A Contract Between Appellant And The IRS And He Is Bound By Its Provisions.

A settlement agreement is a contract between the parties. Greene v. USPS, 79 M.S.P.R. 164, 168 (1998) (citing to Harris v. Dep't of Veterans Affairs, 142 F.3d 1463 (Fed. Cir. 1998) and Greco v. Dep't of Army, 852 F.2d 558, 560 (Fed. Cir. 1988)); Mahboob v. Dep't of Navy, 928 F.2d 1126, 1128 (Fed. Cir. 1991). “It is well settled that implicit in any settlement agreement, as under other contracts, is a requirement that the parties fulfill their respective contractual obligations in good faith.” Greene, 79 M.S.P.R. at 169 (citing to Link v. Dep't of Treasury, 51 F.3d 1577, 1582 (Fed. Cir. 1995)); see also Gard v. Dep't of Education, 180 Fed. Appx. 921 (Fed. Cir. 2006 nonprecedential); Sweeney v. USPS, 159 F.3d 1342, 1344 (Fed. Cir. 1998). As the U.S. Merit System Protection Board explained: “Good faith performance or enforcement of a contract emphasizes faithfulness to a common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.” Greene, 79 M.S.P.R. at 169 (quoting Restatement (Second) of Contracts, § 205 cmt. a (1979)).

As the Board noted in its Final Decision in this matter, it is well established that the parties to a settlement agreement are bound by the terms of the agreement. Mahoney v. U.S. Postal Service, 37 M.S.P.R. 146, 149 (1988); Patterson v. Department of Agriculture, 55 M.S.P.R. 499, 502 (1992). Because Appellant’s Settlement Agreement with the IRS included a nondisclosure clause, Appellant was obliged to abide by it whether the County likes it or not. Specifically that clause stated: “The parties agree that they will maintain the confidentiality of the terms of this Settlement, **and the events leading to the Settlement**, except those terms and events, which may be disclosed to implement the Settlement.” County’s Attachment 17, ¶ 5 (emphasis added). Thus, Appellant was contractually bound not to disclose he resigned by mutual agreement with the IRS or that he resigned while misconduct charges were pending against him.

The Board finds that based on Appellant’s Settlement Agreement with the IRS, Appellant was truthful when he indicated to the County that he had resigned from his position with the IRS and had never been discharged or terminated from employment as he

was precluded from discussing any of the events leading to his settlement with the IRS. Accordingly, the Board concludes that the County lacked any basis to withdraw Appellant's conditional offer of employment.

**Because The County Acted To Fill The Position At Issue After Appellant Filed His Appeal, The County Must Bear The Responsibility For Its Actions.**

The County argues that it has no position available to offer the Appellant as it filled the position during the pendency of this appeal. Request for Reconsideration at 6. The County notes that Appellant failed to seek a stay request from the Board and the Board did not issue one on its own motion. Id. Therefore, there is no position available to offer the Appellant. Id.

As the County is well aware, the Board's standard for granting a stay is "irreparable harm". See MSPB Case No. 05-07 (2005), 08-12 (2008), 09-10 (2009), 11-10 (2011). Where monetary relief will make an individual whole, no irreparable harm will be found. Id. (citing to In re Frazier, 1 M.S.P.R. 280 (1979)). Therefore, in the instant case the Board would not have initially granted a stay.

However, the County cannot ignore the pendency of an appeal challenging its hiring actions, proceed to fill the vacancy during the pendency of the appeal, and then assert that it can't provide the relief ordered by the Board because it chose to take the risk that the Board would not overturn its decision not to hire Appellant. The Board is empowered by its statute to order appropriate remedial relief to accomplish the objectives of its statute. Therefore, the Board orders the County to create an Accountant/Auditor II (grade 21) position and offer it to Appellant within 10 calendar days from the date of this decision.<sup>9</sup>

The County also indicates that it should not have to offer Appellant the position retroactive to January 4, 2013, as it never completed a medical review. Request for Reconsideration at 7. The County argues that such a review could take between one week (if there were no medical issues revealed) and two months (if there was a need to obtain additional information and medical records from an applicant's physician). Id. Therefore, Appellant would not have begun work with the County on January 4, 2013. Id.

With regard to the need for a medical review, the Board has real concerns that such reviews run afoul of the Americans with Disabilities Act (ADA) prohibition on pre-employment medical testing. See, e.g., [http://www.eeoc.gov/laws/practices/inquiries\\_medical.cfm](http://www.eeoc.gov/laws/practices/inquiries_medical.cfm). While the Board need not decide this issue now, it finds that the appropriate relief in this matter is that which it ordered in its

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<sup>9</sup> The Board notes that pursuant to Section 2A-10(f) of the Administrative Procedures Act, the County's Request for Reconsideration does not stay the operation of the Board's Order in its Final Decision.

Final Decision – i.e., to appoint Appellant to the position of Accountant/Auditor II (grade 21) retroactive to the first pay period after January 4, 2013.<sup>10</sup>

**ORDER**

Based on the above, the Board denies the County's Request for Reconsideration and again orders the County to do the following.

1. Offer Appellant employment as an Accountant/Auditor II commencing the pay period beginning after the January 4, 2013 offer withdrawal letter was issued within **ten days of the date of this decision**;
2. Make Appellant whole for any lost wages and benefits; and
3. Expunge from Appellant's employment record the investigation conducted by FRS. Any reference to the investigation shall merely indicate that the background check was satisfactory.

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<sup>10</sup> The Board notes that the first pay period beginning after January 4, 2013 is the pay period which commenced January 13, 2013. See 2013 Payday/Holiday Calendar on OHR's website available at [http://www6.montgomerycountymd.gov/content/pio/Overtimes/2012/novdec/2013\\_calendar.pdf](http://www6.montgomerycountymd.gov/content/pio/Overtimes/2012/novdec/2013_calendar.pdf). Thus, within this time frame, Appellant would have had sufficient time to complete the medical review and be ready to commence work had the County not withdrawn his conditional offer of employment.

# **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 dismiss a party and substitute another, 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 fiscal year 2013, the Board issued the following decisions on various motions filed during the course of an appeal proceeding.

# **MOTIONS IN CASES**

## **CASE NO. 13-03**

### **FINAL DECISION AND ORDER ON COUNTY'S MOTION TO DISMISS APPELLANT'S INDEFINITE SUSPENSION APPEAL**

On August 15, 2012, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (MSPB or Board) challenging the decision of the Department of Liquor (DLC) Director, to place Appellant on an indefinite suspension pending investigation of charges or trial and then subsequently dismissing Appellant from employment. The County filed a Motion to Dismiss the portion of the appeal dealing with Appellant's indefinite suspension, arguing that Appellant was in a bargaining unit represented by the Municipal and County Government Employees Organization (MCGEO) and MCGEO filed a grievance with regard to the County placing Appellant on an indefinite suspension. According to the County, when MCGEO filed a grievance on Appellant's behalf over the indefinite suspension, it deprived the Board of jurisdiction over this matter. Appellant, through counsel, responded to the County's Motion, asserting that pursuant to the Board's statute, it has jurisdiction over suspensions. This is the Final Decision of the Board on Appellant's appeal concerning his indefinite suspension. The appeal was considered and decided by Board.

### **FINDINGS OF FACT**

Appellant was a Liquor Store Clerk I at the County's White Oak Liquor Store. See County's Exhibit (Ex.) 1.<sup>1</sup> As a Liquor Store Clerk, Appellant was part of a bargaining unit covered by the Collective Bargaining Agreement (CBA) between MCGEO and the County. County's Ex. 1.

According to the County, on the evening of April 5, 2011, after Appellant completed his work shift at the White Oak Liquor Store, he was arrested at a bus stop nearby his work site based on outstanding bench warrants. County's Ex. 1; County's Ex. 9. The Police Report of Appellant's arrest indicates that he was asked whether he had any weapons and denied he had any. County's Ex. 9. However, upon the police examining Appellant for weapons, it was discovered that he had a gun in his waistband. Id. Appellant was subsequently charged with possession of a handgun by a prohibited person, possession of a handgun by a convicted felon, and wearing/carrying a handgun. Id.; County's Ex. 4.

Once the DLC found out about Appellant's arrest, it placed him on administrative leave. County's Ex. 1 at 2; see also Appellant's Appeal Form. Subsequently, on April 13, 2012, the Director of DLC issued Appellant a Statement of Charges – Suspension Pending Investigation of Charges or Trial, indicating that he intended to place Appellant in a leave

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<sup>1</sup> All references to exhibits are to those filed by the County as part of its Prehearing Submission and the exhibits filed by Appellant as part of his Prehearing Submission.

without pay status for an indefinite period while Appellant was awaiting trial on his criminal charges. County's Ex. 1. On April 29, 2011, Appellant received a Notice of Disciplinary Action – Suspension Pending Investigation of Charges or Trial (NODA) placing him in a leave without pay status for an indefinite period while he awaited trial on his criminal charges. County's Ex. 2. The NODA also informed Appellant that he could appeal the Suspension Pending Trial within ten (10) working days of the date on which he received the notice to the Board or the Union could file a grievance on Appellant's behalf under the provisions of the CBA within thirty (30) calendar days of the date on which he received the notice. Id. Finally, the NODA informed Appellant that if he elected to file a grievance, he would waive his right to an appeal with the Board and if he instead elected to file an appeal with the Board he would waive his right to file a grievance. Id.

On May 19, 2011, the Union filed a grievance on behalf of Appellant regarding his indefinite suspension without pay. County's Ex. 3(a). On May 26, 2011, the Director of DLC denied the Union's grievance. County's Ex. 3(b). MCGEO appealed the grievance to the Chief Administrative Officer (CAO). Appellant's Ex. 3. On September 12, 2011, the CAO denied the grievance. Id. MCGEO, by letter dated September 12, 2011, provided Appellant with a copy of the CAO's decision and indicated that the Union would not pursue Appellant's case any further. Id.

On July 21, 2011, Appellant entered a plea of guilty to count one of the indictment, wearing/carrying a handgun, and was found guilty by the judge. County's Ex. 4 at 6. On May 10, 2012, Appellant was sentenced to one day of imprisonment and fined \$250.00. County's Ex. 4 at 8.

On June 5, 2012, the DLC Director issued a Statement of Charges – Dismissal to Appellant. County's Ex. 5. On July 30, 2012, Appellant was issued a NODA – Dismissal. County's Ex. 6. Appellant was informed in the NODA that he could appeal his dismissal to the Board within ten (10) working days of the date on which he received the notice or the Union could file a grievance on Appellant's behalf under the CBA within thirty (30) calendar days of the date on which he received the notice. Id.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **County:**

- Article 28(f) of the MCGEO CBA deals with Suspension Pending Investigation of Charges or Trial.
- 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.
- The Board has previously ruled in MSPB Case No. 10-16 that it lacks jurisdiction in cases where the grievant is appealing a provision of the MCGEO CBA.



- The Union filed a grievance over Appellant's Suspension Pending Trial under the CBA.

Appellant:

- The Board clearly has jurisdiction over suspensions, to include Appellant's indefinite suspension.
- The County's Motion to Dismiss is based on factual assertions that are unsupported.
- After the Director of DLC denied the grievance the Union filed on behalf of Appellant, the Union never pursued the matter further.
- The case cited by the County to support its Motion to Dismiss dealt with stand-by pay; the instant case deals with an indefinite suspension.
- Appellant should be given the chance to state his case.

**APPLICABLE LAW, CONTRACTUAL PROVISIONS AND REGULATIONS**

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

Officers and employees subject to a collective bargaining agreement may be excluded from provisions of law governing the merit system only to the extent that the applicability of those provisions is made subject to collective bargaining by legislation enacted under Section 510, Section 510A, or Section 511 of this Charter.

**Montgomery County Charter, Section 404, Duties of the Merit System Protection Board**, which states in applicable part:

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 . . . .

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, Office, Professional, and Technical (OPT) and Service, Labor, and Trades (SLT) Bargaining Units, For the Years July 1, 2011 through June 30, 2012, 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, including disputes arising over changes in existing work rules and working conditions referenced in Article 31, Maintenance of Standards/Retention of Benefits and Conditions.

All future work rules or practices governing terms and conditions of employment shall be subject to the grievance procedure should the employee or the certified employee organization believe that they are in conflict with any provisions of this Agreement.

#### 10.2 Discipline Grievances

Oral admonishments and written reprimands are not subject to review under this procedure. Any employee initiating a grievance under this procedure regarding suspension, demotion, or removal waives any right to have that action reviewed by the Montgomery County Merit System Protection Board.

#### 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.

#### 10.4 Granting of Relief

Relief that is granted at any level of this procedure, as stated in any formal grievance, shall end further processing of the grievance.

#### 10.5 Procedure

Step 1 A written grievance must be presented to the immediate supervisor and Department Director by the Union within 30 calendar days from the date of the event giving rise to the grievance or the date on which the employee knew or should have known of the event giving rise to the grievance. The immediate supervisor/Department Director shall provide a written response within **15 working** days of receipt of the grievance. If the Union is not satisfied with the response or no response is given, the grievance may be appealed to Step 2 to the Office of Human Resource in writing within 10 calendar days of receipt of the written response from the immediate supervisor.

Step 2 Upon receipt of a written appeal from Step 1, the CAO or designee shall meet with the Union and the Department within thirty (30) working days. The purpose of the meeting is to attempt to resolve the grievance. If the grievance is not settled at this meeting, the CAO or designee shall respond in writing to the grievance within forty-five (45) calendar days after the meeting.

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, Office, Professional, and**

**Technical (OPT) and Service, Labor, and Trades (SLT) Bargaining Units, For the Years July 1, 2011 through June 30, 2012, Article 28, *Disciplinary Actions***, which states in applicable part:

28.2 Types of Disciplinary Actions

Disciplinary actions shall include but are not limited to:

(f) Suspension-Pending Investigation of Charges or Trial

(1) The department director may place an employee in a leave without pay status during investigation as follows:

(C) While the employee is waiting to be tried for a civil or criminal offense, the suspension may be indefinite.

**ISSUES**

1. Does the Board have jurisdiction over the instant appeal?
2. Is the Appellant's appeal with regard to his indefinite suspension timely?

**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 Appellant's Indefinite Suspension, As He Elected To Challenge It Through The Grievance Process of the Collective Bargaining Agreement.**

As Appellant's counsel correctly points out, the Board has jurisdiction over suspension actions. Montgomery County Charter, Section 404. The right of a merit employee to have an opportunity for a hearing before the Board concerning a suspension, demotion or dismissal action is granted by the Montgomery County Charter. *Id.* Significantly, however, the Charter also provides that employees subject to a collective bargaining agreement may be excluded from provisions of law governing the merit system to

the extent those provisions are made subject to collective bargaining. Montgomery County Charter, Section 401. The MCGEO CBA allows an employee who wishes to challenge a suspension action to elect between filing a grievance under the CBA grievance procedure or appealing the suspension to the Board. CBA, § 10.2.

The record of evidence is clear that Appellant elected to challenge his indefinite suspension through the grievance process of the CBA. Appellant's Ex. 1, Ex. 2, Ex. 3, Ex. 4, Ex. 5. While Appellant may not be in agreement with how his grievance was handled by the Union, see, e.g., Appellant's Ex. 4, it is clear that he was on notice that his election to file a grievance through the CBA waived his right to file an appeal with the Board. County's Ex. 2 at 3.

Accordingly, the Board is dismissing that portion of Appellant's appeal dealing with his indefinite suspension based on a lack of timeliness.

### **Appellant's Appeal Concerning His Indefinite Suspension Is Untimely.**

Although the County did not raise the issue of timeliness of Appellant's appeal, the Board has the authority to sua sponte consider the issue of adherence to its rules governing the filing of an appeal. See, e.g., Munson v. Dep't of Commerce, 90 M.S.P.R. 583 (2002) (holding that the Administrative Judge did not err when raising and addressing sua sponte the issue of timeliness of the appeal).

The NODA issued to Appellant, affecting his indefinite suspension, clearly addressed the options Appellant had for challenging the indefinite suspension. He could file an appeal with the Board within ten (10) working days of receipt of the NODA or the Union could file a grievance on his behalf within thirty (30) calendar days. County's Ex. 2 at 3-4. The NODA was dated April 29, 2011. Id. at 1. It appears that Appellant contacted the Union about his indefinite suspension on or about May 18, 2011. Appellant's Ex. 1. Thus, he was in possession of the NODA by May 18, 2011.

Appellant's appeal to the Board regarding the indefinite suspension is dated August 15, 2012. See Appellant's Appeal Form. Thus, he filed his appeal over a year and two months from the date he received the NODA. As the NODA correctly pointed out to him, he had ten working days from receipt of the NODA to file an appeal with the Board. County's Ex. 2 at 3. Pursuant to the Board's regulations, it can dismiss an appeal that is not filed within the time limits specified in the regulations.

Accordingly, the Board finds that, assuming arguendo, the Board had jurisdiction over Appellant's appeal with regard to his indefinite suspension, the appeal would need to be dismissed based on a lack of timeliness.

## ORDER

On the basis of the above, the Board hereby denies Appellant's appeal of his indefinite suspension based on lack of jurisdiction over the appeal. In the alternative, the Board denies Appellant's appeal of his indefinite suspension based lack of timeliness.

### CASE NO. 13-04

#### DECISION ON APPELLANT'S MOTION IN LIMINE

On February 5, 2013, Appellant filed a Motion in Limine, seeking to have the Merit System Protection Board (MSPB or Board) exclude seventeen of the County's proposed witnesses,<sup>2</sup> as well as County Exhibit (Ex.) 13. Appellant argued that the witnesses and exhibit are not relevant to the adjudication of this case. The County responded to the Motion in Limine (County's Response) on February 15, 2013, asserting that County Ex. 13<sup>3</sup> is probative and that sixteen of the witnesses are relevant.<sup>4</sup>

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<sup>1</sup> Four of the witnesses Appellant seeks to exclude were named as witnesses in the County's Prehearing Submission: DOCR Director; DOCR Warden, and two Sheriff Deputies. See County's Prehearing Submission at 2-3. The other thirteen witnesses that Appellant seeks to exclude were named as witnesses in the County's Supplemental Prehearing Submission: Lt. W; Captain D; Mr. V; Mr. S.; Ms. K.; Ms. D.; Ms. W.; Cpl. P; Mr. B; Ms. T.; Mr. P.; Cpl. S and Sgt. C. See County's Supplemental Prehearing Submission at 1-4.

<sup>2</sup> County Exhibit 13 consists of forty-three pages of various emails and notes regarding Appellant: 1) Notes by Lt. W., undated; 2) Email from Ms. D., dated 12/20/11, subject: Appellant; 3) Email from Cpt. L., dated 12/20/11, subject: FW: Eke; 4) Email from Ms. M., dated 12/21/11, subject: RE: library books; 5) Email from Mr. V., dated 12/21/11, subject: RE: Interoffice Mail Between MCDC and MCCF; 6) Email from Ms. M., dated 12/22/11, subject: RE: Past Records Bags; 7) Email from Ms. D., dated 12/21/11, subject: RE: Interoffice Mail Between MCDC and MCCF; 8) Email from Ms. D., dated 12/21/11, subject: RE: Shelter; 9) Email from Ms. J., dated 12/28/11, subject: FW: inmate jumpsuit and linen exchanges; 10) Email from Ms. W., dated 12/28/11, subject: FW: Past Records Bags; 11) Email from Mr. B., dated 12/30/11, subject: RE: your deliveries; 12) Email from Ms. J., dated 01/04/12, subject: RE: Past Records bag; 13) Email from Ms. T., dated 01/04/12, subject: RE: Calendars; 14) Supervisory Note from Ms. D., dated 01/09/12, subject: Conversation with Appellant; 15) Email from C., dated 01/10/12, subject: RE: Eke; 16) Email from Ms. W., dated 01/11/12, subject: Past Records; 17) Incident Report from Mr. A., dated 01/12/12; 18) Email from Ms. W., dated 01/12/12, subject: Past Records; 19) Incident Report from Mr. A., dated 01/13/12; 20) Email from Ms. J., dated 01/17/12, subject: complaint from Medical Dept. at MCDC; 21) Incident Report from Mr. A., dated 01/18/12; 22) Incident Report from Mr. A., dated 01/19/12; 23) Incident Report from Mr. A., dated 01/23/12; 24) Incident Report from Mr. A., dated 01/24/12; 25) Incident Report from Mr. A., dated 01/26/12; 26) Email from Ms. W., dated 01/27/12, subject: Appellant; 27) Email from Ms. W., dated 03/06/12, subject: RE: Past Records Paperwork; 28) Email from Ms. J., dated 03/08/12, subject: RE: Confirmation of some of the instructions concerning the number of

## **BACKGROUND**

This appeal involves the three-day suspension of Appellant, a Supply Technician II with the Department of Correction and Rehabilitation (DOCR), based on his purported failure to perform his duties in a competent manner, his alleged negligence and carelessness in performing his duties, and his purportedly knowingly making a false statement in writing to his supervisor. See County Supplemental Prehearing Submission, Ex. 15, Notice of Disciplinary Action (amended on November 14, 2012). The disciplinary action was based on an incident which occurred on May 23, 2012 involving Appellant's purported refusal to move a large yellow maintenance truck, an incident on June 7, 2012 involving Appellant's allegedly cutting off an ambulance that was leaving the Police Loading Dock, and an Incident Report, dated June 19, 2012, submitted by Appellant to Deputy Warden, concerning the May 23 incident. Id.

Appellant was issued a Statement of Charges for a Five Day Suspension by Warden, dated July 12, 2012. See County's Prehearing Submission, Ex. 3. DOCR Director issued Appellant a Notice of Disciplinary Action for a Three Day Suspension, dated 09/18/12, which was subsequently amended on 11/14/12. See County's Prehearing Submission, Ex. 2; County's Supplemental Prehearing Submission, Ex. 15.

## **APPLICABLE LAW, REGULATION, AND CONTRACTUAL PROVISION**

**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

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workers to use at MCDC, optional supply of laundry and to check my E-mail first at work; 29) Email from Ms. J., dated 03/08/12, subject: Past Records problems; 30) Email from Ms. S., dated 03/13/12, subject: Appellant Property Custody & Security Issue; 31) Email from Ms. W., dated 03/13/12, subject: Past Records Bag; 32) Email from Mr. C., dated 03/20/12, subject: truck; 33) Email from Ms. J., dated 4/19/12, subject: RE: leaving property on floor; 34) Note from Ms. J., undated; 35) Email from Mr. A., dated 05/07/12, subject: Appellant & Red Bag Property Incident; and 36) Email from Ms. J., dated 05/15/12, subject: Circuit Court Inmate bags.

<sup>3</sup> The County withdrew the Warden as a witness in this matter. County's Response at 3.

and material so noticed while the record in the case is open and shall be afforded an opportunity to contest the facts so noticed.

- (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.

**Montgomery County Personnel Regulations (MCPR), Section 35, Merit System Protection Board Appeals, Hearings and Investigations** (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011), which states in applicable part:

**35-12. Testimony of witnesses at hearing; interrogatories and depositions.**

- (a) ***Testimony of witnesses at hearing.***
  - (1) All witnesses must testify under oath and only witnesses having direct knowledge of the facts on which the charges are based will be heard. The MSPB or hearing officer will hear testimony:
    - (A) directly related to the charges;
    - (B) indirectly related to the charges, provided a relevant relationship has been established; and
    - (C) of past work record, but only for the purpose of determining degree of penalty, if any.

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1664, and Montgomery County Government, Montgomery County, Maryland – Office, Professional, and Technical (OPT) and Service, Labor and Trades (SLT) Bargaining Units, for the Years July 1, 2011 to June 30, 2012, Article 28, Disciplinary Actions**, which states in applicable part:

28.1 Policy

A disciplinary action against an employee must be initiated promptly when it is evident that the action is necessary to maintain an orderly and productive work environment. 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. However, the Employer reserves the right to impose discipline at any level based on cause. 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.

### **ANALYSIS AND CONCLUSIONS**

As Appellant points out, the Administrative Procedures Act governs proceedings in this matter. Appellant's Motion in Limine at 1-2. 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, 350 A.2d 665, 669 (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).

#### **The Relevancy of the County's Witnesses**

Appellant seeks to exclude the DOCR Director as a witness, arguing that as he does not directly supervise Appellant, he has no direct or indirect knowledge of any of the events at issue in this matter. Significantly, the DOCR Director issued the Notice of Disciplinary Action (NODA) which is at issue in this case and which reduced the proposed five-day suspension to a three-day suspension. See County's Response at 2. The Board therefore finds that the DOCR Director will be able to provide relevant testimony in this matter.

Appellant also seeks to exclude the Warden as a witness, arguing that as he does not directly supervise Appellant, he has no direct or indirect knowledge of any of the events at issue in this matter. The County has indicated that it is withdrawing the Warden as a witness. County's Response at 3. Accordingly, this matter is moot.

Appellant seeks to exclude Sheriff Deputy C. as a witness, arguing that this witness does not directly supervise Appellant and therefore has no direct or indirect knowledge of any of the events in this matter. However, according to the NODA, Deputy C. was present at the scene during the incident of May 23, 2012, involving Appellant's purported refusal to move a large yellow maintenance truck. County's Supplemental Prehearing Submission, Ex. 15 at 2; see also County's Response at 2. Moreover, according to the NODA, Sheriff Deputy C. was present during the incident on June 7, 2012, when Appellant allegedly cut off an ambulance trying to leave the Police Loading Dock. County's Supplemental Prehearing Submission, Ex. 15 at 4; see also County's Response at 2. Therefore, the Board finds that Sheriff Deputy C. will be able to provide relevant testimony in this matter.

Appellant also seeks to exclude Sheriff Deputy G. as a witness, arguing that this witness does not directly supervise Appellant and therefore has no direct or indirect knowledge of any of the events in this matter. However, according to the NODA, Deputy G. was present at the scene during the incident of May 23, 2012, involving Appellant's purported refusal to move a large yellow maintenance truck. County's Supplemental Prehearing Submission, Ex. 15 at 2; see also County's Response at 2. Accordingly, the Board finds that Sheriff Deputy G. will be able to provide relevant testimony in this matter.



Appellant also seeks to exclude thirteen additional witnesses named in the County's Supplemental Prehearing Submission, arguing that none of the witnesses have personal knowledge regarding any of the facts that are at issue in this matter. Appellant notes that each of the witnesses sent an email at some time in the past to Appellant's supervisor about Appellant. Appellant's Motion in Limine at 2. Appellant argues that it is not necessary to call any of these witnesses as his supervisor is competent to testify about her perception of Appellant's performance. *Id.* The County asserts that each of the thirteen witnesses will be able to testify concerning complaints about Appellant's non-performance of his work duties and incidents where he was lax in performing his duties. County's Supplemental Prehearing Submission at 1-4; see also County's Response at 2.

The Board's regulations provide that the Board may hear testimony from witnesses regarding Appellant's past work performance, for the purpose of determining the degree of penalty warranted in this case. The applicable contractual provision governing discipline of employees also indicates that an employee's work record should be considered when assessing a penalty. The Board notes that the NODA issued to Appellant states: "Your performance of your job duties since December 2011 has been poor, has not shown improvement, and has not met the expectations of your direct supervisor. There have been numerous complaints about your non-performance of your duties from other staff members (documented in writing to your supervisor), and reports of incidents where you were lax in your duties." County's Supplemental Prehearing Submission, Ex. 15 at 7; see also County's Response at 1. Thus, it is evident that Appellant's past work performance was a consideration in the penalty imposed. As the charges against Appellant include his failure to perform his duties in a competent manner and his alleged negligence and carelessness in performing his duties, information provided by these thirteen witnesses concerning Appellant's past work record is relevant.

### The Relevancy of County Exhibit 13

Appellant charges that County Ex. 13, composed of thirty-five documents "is a hodgepodge of emails and other unsigned documents which were sent to his supervisor at random points between 2011 and May 2012". Appellant's Motion in Limine at 2-3. Appellant asserts that as none of the documents constitute discipline they are not probative of Appellant's job performance. *Id.* at 3. The County argues that Appellant has had significant on-going work performance issues and it is required under the applicable labor contract to take Appellant's work record into consideration when assessing a penalty against him. County's Response at 2.

The Board finds that pursuant to its regulations and the applicable contractual provision, County Exhibit 13 is admissible for the objective of establishing Appellant's past work record for the purpose of determining whether the penalty assessed in this matter was warranted.

## ORDER

Based on the above, the Board hereby denies Appellant's Motion in Limine to exclude sixteen of the County's witnesses and County Exhibit 13.

## CASE NO. 13-07

### DECISION ON APPELLANT'S STAY REQUEST AND ORDER

On September 28, 2012, the Montgomery County Merit System Protection Board (MSPB or Board) received an appeal of the decision of the Director, Department of Correction and Rehabilitation (DOCR), to suspend Appellant for three days, effective October 8, 2012. The Board sent out an acknowledgement letter to the parties and set dates for the filing of Prehearing Submissions in this matter.

On November 30, 2012, the Board received Appellant's Request for Stay of Suspension (Appellant's Request). In Appellant's Request, he noted that he had not served his three-day suspension, effective October 8, 2012, as he had a worker's compensation doctor's appointment on October 8 and his supervisor advised him to attend the doctor's appointment and forego the suspension from work. Appellant's Request at 1; see also Appellant's Exhibit A,<sup>5</sup> Amended Notice of Disciplinary Action (Amended NODA) at 1. According to the Amended NODA, Appellant is scheduled to serve his suspension from December 3-5, 2012. Appellant seeks to have this suspension stayed until the completion of his appeal. In support of this request, Appellant notes that if he serves the suspension and is ultimately successful in his appeal, he will have suffered the economic consequences from a suspension for which there was no basis.

Pursuant to Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, and February 8, 2011), Section 35-6(b), the Board is empowered to grant a stay upon such conditions as it may believe proper and just. The Board generally will not grant a stay request absent a showing of irreparable harm, see MSPB Case Nos. 05-07 (2005), 08-12 (2008), 09-10 (2009). Where monetary relief will make an employee whole, no irreparable harm will be found. See In re Frazier, 1 M.S.P.R. 280 (1979) (citing to Sampson v. Murray, 415 U.S. 61 (1974)). The Board has carefully reviewed all of the material submitted by Appellant. The Board is of the opinion that any harm to Appellant by his suspension can adequately be addressed by the Board should Appellant prevail on the merits of his appeal after a hearing on the matter.

## ORDER

Accordingly, the Board denies Appellant's request for a stay.

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<sup>5</sup> In Appellant's Request, he labeled the exhibit as Respondent's Exhibit A. However, Appellant is not a respondent in this matter. Accordingly, the exhibit will henceforth be referred to as Appellant's Exhibit A.

## **CASE NO. 13-07**

### **DECISION ON APPELLANT'S REQUEST FOR AN ORDER OF DEFAULT AGAINST THE COUNTY, REQUEST FOR EXTENDING DEADLINES, RENEWED REQUEST FOR A STAY AND ORDER**

On February 26, 2013, the Montgomery County Merit System Protection Board (MSPB or Board) received a letter from Appellant's counsel, seeking an order of default against the County in this appeal. According to Appellant's counsel, although the Board set a deadline of February 21, 2013 for the County to file its Prehearing Submission in this matter Appellant's counsel had not as of February 26, 2013 received anything from the County. Appellant's counsel also asked that the Board extend the calendar of deadlines in this matter based on the County's inaction, should the Board decide not to sanction the County. Finally, Appellant's counsel requested that the Board reconsider its decision not to issue a stay of Appellant's termination until the Board issues a decision in this matter.<sup>6</sup>

The County responded to Appellant's requests by letter dated February 26, 2013. The County indicated that its counsel had hand-delivered to the Board its Prehearing Submission on February 21, 2013. A date-stamped copy of the filing letter was enclosed, showing that the Board had indeed received the Prehearing Submission filing on February 21, 2013. The County offered to send Appellant's counsel another copy of the Prehearing Submission. The County requested the Board deny Appellant's request for an order of default, request for resetting the calendar of deadlines, and reconsideration of the Board's decision not to grant a stay in this matter.

Having reviewed Appellant's request for an order of default, the Board finds that there is no basis to issue such an order. The County did file its Prehearing Submission with the Board as required by February 21, 2013. The Board's regulations, found at Section 35 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended), require that each party serve the other party with a copy of every paper filed with the Board and indicate that a copy was sent to the other party. MCPR, Section 35-5. The County has indicated that it mailed Appellant's counsel a copy of its Prehearing Submission on February 21, 2013 and has offered to mail another copy if necessary.

With regard to Appellant's request for reconsideration of the Board's decision not to grant a stay in this matter, the Board finds the request is untimely. Pursuant to the Board's regulations, any request for reconsideration of a Board decision on a preliminary matter, such as a stay, must be filed within 5 calendar days from the date of the ruling. MCPR, 2001 (as amended), Section 35-11(a)(5). Thus, Appellant had to file a request for reconsideration on the denial of his stay by December 16, 2012. This Appellant failed to do and therefore, the Board denies Appellant's request for reconsideration based on a lack of timeliness.

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<sup>6</sup> By Decision dated December 11, 2012, the Board denied Appellant's original request for a stay.

**ORDER**

Accordingly, the Board denies Appellant's request for an order of default, his request for an extension of the calendar of deadlines in this matter, and his request for reconsideration of the Board's decision to deny his motion for a stay.

## **SHOW CAUSE ORDERS**

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

For example, the County's grievance process contains a sanction if management fails to meet the time limits therein. Pursuant to Section 34-9(a)(3) of the grievance procedure (as amended February 15, 2005, October 21, 2008, and July 12, 2011), "[i]f the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level." However, Section 34-9(a)(4) provides that "[i]f an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time." Therefore, if the Board receives an appeal of a grievance where there is no CAO decision, in order to determine whether it should assert jurisdiction over the appeal or return it to the employee, the Board usually issues a Show Cause Order to the CAO. The Board will order the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the MSPB should remand the grievance to the CAO for a decision. After receipt of the CAO's response, as well as any opposition filed by the employee, the Board issues a decision.

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

Finally, the Board may issue a Show Cause Order to determine whether it should sanction a party for failing to abide by the Board's appeal procedures or failing to comply with a Board order. Section 35-7 of the Personnel Regulations empowers the Board to dismiss a case as a sanction for a party's failure to comply with a Board rule or order.

No cases involving a Show Cause Order were decided during fiscal year 2013.

# **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.

During fiscal year 2013, the Board issued the following decisions on requests for attorney’s fees.

## **CASE NO. 13-04**

### **DECISION ON ATTORNEY FEE REQUEST**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's request for reimbursement of itemized attorney fees and costs related to the above-referenced case. Appellant has submitted a request for \$17,271 in fees and \$21.00 in costs. See Appellant's Request for Attorney Fees<sup>1</sup> (Appellant's Request) at 2, 3. The County responded (County's Response), objecting to the hours claimed and the costs sought for parking. The County also argued that because the Appellant only partially prevailed, the amount of attorney fees sought by Appellant should be limited to one-third of what was requested, after reducing the number of hours claimed. County's Response at 3. Appellant replied (Appellant's Reply), arguing his fee request was reasonable based on previous Board decisions and arguing that if the Board determines it is appropriate to reduce the amount of attorney fees awarded based on how successful Appellant was, the reduction should only amount to one-third of the total fees requested. Appellant's Reply at 5.

### **POSITIONS OF THE PARTIES**

The County seeks to have the Board disallow 13.4 hours expended by Appellant's counsel on discovery, arguing that the documents provided to Appellant through discovery were available to him through his Union contract and through the County's automated timekeeping system. County's Response at 1. The County also seeks to have the Board disallow 4.7 hours of time expended by Appellant's counsel traveling to and from the hearings<sup>2</sup> in this case, asserting Appellant's counsel was not performing attorney work while driving. County's Response at 2. The County also seeks disallowance of the time spent on Appellant's motion to suspend his suspension pending resolution of his appeal, alleging that Appellant's Union contract and the County's personnel regulations do not provide for suspending Appellant's discipline during the appeal process and noting that the Board denied the motion. County's Response at 2. Finally, the County seeks to have the Board disallow 4.4 hours spent on Appellant's fee petition, arguing that in the past the Board has denied requests for post-decision attorney fees, including time spent preparing an attorney fee request. County's Response at 2-3. The County argues that the Board should deny the \$21.00 in parking fees requested as costs as the County Code and the Board's rules fail to provide for such reimbursement. County's Response at 3. Finally, the County asserts that the Board should reduce Appellant's fees by two-thirds, arguing that Appellant only partially

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<sup>1</sup> In addition to Appellant's Request, Appellant submitted a copy of the Rules and Guidelines for Determining Attorneys' Fees in Certain Cases (hereinafter D. Md. Local Rules) as Exhibit A. The Board notes that the D. Md. Local Rules are available at <http://www.mdd.uscourts.gov/localrules/localrules.html>.

<sup>2</sup> The Board held three days of hearings in this matter: February 21, 2013; March 7, 2013; and March 13, 2013.

prevailed as he ended up with a two-day suspension instead of a three-day suspension. County's Response at 3-4. According to the County, if the Board were to accept all of its arguments with regard to fees, the Board would reimburse Appellant's counsel for 22 hours at the rate of \$190 an hour, for a total of \$4,180. County's Response at 4.

Appellant's counsel argues that he has practiced law since 2009 and pursuant to D. Md. Local Rules, \$190 an hour is appropriate for someone of his experience. Appellant's Request at 4 (citing to Exhibit A at 4). Appellant's counsel notes that much of the time spent on this case was the result of the County noticing more than twenty witnesses. Appellant's Request at 3. Appellant's counsel asserts that conducting discovery was a necessary part of defending Appellant and the Board's regulations provide for the right to discovery.

Appellant's Reply at 1.

Appellant's counsel notes that while the County cites to a Board decision issued in 2000 for the proposition that time spent drafting a fee petition is not reimbursable the Board's more recent decisions do permit reimbursement. Appellant's Reply at 3. Appellant's counsel points out that the Board has previously reimbursed counsel for mileage and argues that parking fees and time spent in travel are the same type of costs. Appellant's Reply at 3-4. Finally, Appellant's counsel notes that much of the time spent litigating this case was due to the County putting so many witnesses on the stand and the need to defend against alleged performance-related issues that were ultimately deemed not relevant by the Board after hearing the deciding official's testimony. Appellant's Request at 3; Appellant's Reply at 4. Appellant's counsel argues that reducing the amount of attorney fees by two-thirds makes no sense as the Board only sustained one of the three charges in this matter. Appellant's Reply at 4-5. Rather, according to Appellant's counsel, if the Board decides it is appropriate to reduce fees based on how much success Appellant had, the Board should only reduce the amount by one-third. Appellant's Reply at 5.

### **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).

In the case of Manor Country Club v. Betty Flaa, 387 Md. 297 (2005), the Court of Appeals for Maryland considered an attorney's fee dispute which was governed by the provisions of Montgomery County Code § 27-7(k)(1). The Board notes that the provisions of § 27-7(k)(1) then in effect are identical to § 33-14(c)(9), as set forth supra, which is controlling for the Board. The Court of Appeals in Flaa noted that the factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5<sup>th</sup> Cir. 1974),<sup>3</sup> vacated in part, Blanchard v. Bergeron, 489 U.S. 87 (1989), were "in large part, comparable to the factors of Montgomery County Code § 27-7(k)(1)" for determining an appropriate attorney's fees award."<sup>4</sup> 387 Md. at 313.

In Friolo v. Frankel, 403 Md. 443, 942 A.2d 1242 (2008), the Court of Appeals cited to both Hensley and Flaa for the proposition that the degree of success is a factor to be considered in determining the proper amount of an award of attorney fees. 942 A.2d at 1252. As the County correctly notes, the Board historically has considered the degree of success in making an attorney fee award. County's Response at 3 (citing to MSPB Case No. 05-05). Friolo also indicated that the Court of Appeals generally applied a lodestar type of analysis to calculate a fee award. Monmouth Meadows v. Hamilton, 416 Md. 325, 334-35 (2010).

### **ANALYSIS AND CONCLUSIONS**

In determining a reasonable fee award, the Board follows the guidance of its statute and the guidance of the Court of Appeals, which applies lodestar calculations in assessing a reasonable fee.

#### **The Appropriate Hourly Rate**

Appellant's counsel has requested an hourly rate of \$190, which counsel notes is appropriate for someone with his experience pursuant to the D. Md. Local Rules. Appellant's Request at 4. The County has no objection to this rate. County's Response at 1. In determining what constitutes a customary fee, the Board has previously looked to the D. Md. Local Rules for guidance, as well as considering the nature and complexity of the case.

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<sup>3</sup> Johnson dealt with an award of a reasonable attorney's fee pursuant to section 706(k) of Title VII of the Civil Rights Act of 1964. Johnson set forth twelve factors to be considered in determining the amount of an attorney's fee award. See 488 F.2d at 717-19.

<sup>4</sup> The Maryland Court of Appeals in Flaa noted that the Johnson factors were later adopted by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983). See 387 Md. at 313.

See MSPB Case No. 11-03; 11-04; 10-19; 07-17; 06-03. Based on these considerations, the Board finds that the rate of \$190 an hour is reasonable.

### **The Hours Reasonably Spent**

The County seeks to deduct from Appellant's fees 13.4 hours spent in discovery and on an unsuccessful Motion in Limine. County's Response at 1. As Appellant correctly notes, the Board's Hearing Procedures provide for the parties to engage in discovery. See MSPB Hearing Procedures at 2. Moreover, while Appellant was unsuccessful on his Motion in Limine to limit various witnesses and exhibits dealing with Appellant's alleged past performance issues, it turned out that based on the hearing testimony of Director Wallenstein that he did not consider Appellant's past work record, these witnesses and exhibits were in fact irrelevant. See Final Decision at 6 n.4. Therefore, the Board concludes that it will not grant the County's request to deduct these hours.

The County also seeks to deduct travel time of 4.7 hours spent by counsel traveling to and from the hearings in this matter, asserting that this would provide counsel with a windfall as he was not performing attorney work while driving. County's Response at 2. The Board notes that the D. Md. Local Rules provide that up to two hours of time (each way and each day) to and from a court appearance may be charged at the lawyer's hourly rate. Appellant's Request, Ex. A at 3. As Appellant only seeks 1.5 or 1.6 hours round-trip for each of the three days of hearing, the Board will not grant the County's request to deduct these hours.

The County further seeks to reduce the overall fees awarded by 2.4 hours spent by counsel on a motion to suspend Appellant's suspension pending the outcome of his appeal. County's Response at 2. The County asserts that neither the Union contract nor the personnel regulations provide for such a suspension and notes the Board did not grant the motion. *Id.* However, contrary to the County's argument, the Board's regulations do provide that an appellant may file a motion for a stay of an action. Montgomery County Personnel Regulations 2001 (as amended), Section 35-6(b). While it is true that the Board did not grant Appellant's motion for a stay, this consideration is more appropriately addressed under the results obtained/degree of success factor discussed *infra*. Therefore, the Board denies the County's request.

The County seeks to have the Board disallow 4.4 hours spent by Appellant's counsel preparing the fee petition. County's Response at 2-3. In support of its position, the County cites to MSPB Case No. 00-13 where the Board refused to grant 4.75 hours spent on a fee petition. *Id.* at 2. As Appellant correctly notes, the Board has changed its position on this matter, allowing reimbursement in its more recent decisions. Appellant's Reply at 3 (citing to MSPB Case Nos. 07-17; 11-03; 11-04). The Board would also note that the D. Md. Local Rules provide for reimbursement for fee petition preparation. See Appellant's Request, Ex. A at 2. Accordingly, the Board denies the County's request.

Therefore, the Board declines to reduce the number of billable hours sought by Appellant's counsel based on any of the above-referenced arguments presented by the

County. However, as discussed infra, a reduction in the number of hours sought is appropriate based on the degree of success obtained by Appellant in this matter.

### **The Degree Of Success Achieved**

As the County correctly notes, under Board precedent where an appellant only partially prevails, as is the case here, the Board only awards a portion of the fee sought. County's Response at 3 (citing to MSPB Case Nos. 00-13; 02-07; 03-05; 05-05). The Board's practice is in accord with Supreme Court and Maryland Court of Appeals precedent. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 436 (1983) (the most critical factor in determining the proper amount of an award of attorney's fees is the degree of success obtained); Friolo v. Frankel, 403 Md. 443, 942 A.2d 1242, 1252 (2008)(citing to Hensley for the proposition that the degree of success is a crucial factoring determining a fee award); Manor Club v. Flaa, 387 Md. 297, 305 (2005) (upholding an award of shifted attorneys' fees where the degree of success in pursuing the claims was a consideration).

The County argues that the Board upheld the most serious portion of Appellant's discipline, finding that on two occasions Appellant negligently performed his duties and placed the safety of others at risk. County's Response at 3. Accordingly, while the Board only upheld one of the three charges against Appellant, because of the seriousness of his conduct, it only reduced Appellant's suspension from three days to two. Id. Therefore, the County reasons that since two-thirds of the penalty assessed against Appellant was sustained by the Board, the Board should only reimburse Appellant for one-third of the reasonable attorney fees incurred. Id. The Board finds there is merit to the County's argument.

Appellant's counsel argues that if the Board determines to reduce the fee amount to be paid based on the degree of success achieved in this appeal, it should reduce the fee by only one-third as Appellant successfully defended against two of the three charges brought against him. Appellant's Reply at 4. The Board is not persuaded by this argument as the Board did emphasize the seriousness of Appellant's negligence by only reducing the penalty by one day.

Appellant's counsel also argues that to reduce the fees to one-third of the amount claimed makes no sense as Appellant was forced to defend against many irrelevant allegations. Appellant's Reply at 4. As Appellant points out, the Board noted in its Final Decision that the County spent a great deal of time during the three-day hearing putting on testimony about Appellant's past performance issues, which were ultimately deemed irrelevant. Id. According to Appellant's counsel, the County should not be allowed to litigate to the hilt and then complain about how much time Appellant spent in his defense. Id. The Board finds there is merit to this argument as the County did not prevail in its argument that Appellant had had other performance issues related to his failure to satisfactorily perform his duties, which should be considered in assessing the reasonableness of the discipline imposed.

Having considered both the County's and Appellant's arguments with regard to the degree of success, the Board is of the opinion that a reduction of the amount of hours billed by one-half is appropriate in this matter. See, e.g., MSPB Case No. 05-05.

### **Reimbursable Costs**

Appellant's counsel seeks reimbursement for \$21.00 in parking fees incurred. Appellant's Request at 3. Appellant argues that the parking fees are similar to mileage fees that the Board has previously found reimbursable. Id. at 4. The County argues that neither the County Code nor the MSPB's regulations provide for parking reimbursement. County's Response at 3.

The Board notes that the D. Md. Local Rules call for the reimbursement of mileage incurred but do not address reimbursement for parking fees. See Appellant's Request, Ex. A at 4. Accordingly, the Board denies Appellant's request for reimbursement of parking fees.

### **ORDER**

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

1. The County shall reimburse Appellant for one-half of the attorney fees sought in this matter – i.e., \$8635.50; and
2. Appellant's request for costs of \$21.00 to compensate for parking fees is denied.

## **CASE NO. 13-07**

### **DECISION ON ATTORNEY FEE REQUEST**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's request for reimbursement of itemized attorney fees and costs related to the above-referenced case. Appellant has submitted a request for \$31,675 in fees and \$682.42 in costs. See Appellant's Request for Attorney Fees,<sup>5</sup> Statement at 3. The County responded (County's Response), objecting to the hourly rate sought by Appellant's counsel as well as the number of hours claimed, arguing that the hours should be reduced by half based on the degree of success obtained in this case. County's Response at 2. Appellant's counsel filed a reply (Appellant's Reply) along with a copy of the Retainer

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<sup>5</sup> Appellant's Request for Attorney Fees consists of a cover letter, a Statement for Professional Services rendered (Statement), and a copy of the Laffey Matrix, which according to Appellant's counsel would justify him charging an hourly rate of \$505. Appellant's Request for Attorney's Fees, Statement at 3.

Agreement he had with Appellant. In Appellant's Reply, he argued that the County's Response was late and should be stricken. Appellant's Reply at 1. Appellant's counsel also claimed that Appellant was entirely successful in his appeal to the Board so no reduction in fees is warranted. Id. at 2-3.

### **POSITIONS OF THE PARTIES**

The County objects to Appellant's counsel hourly rate of \$350. County's Response at 1. The County notes that the Board has repeatedly rejected the application of the Laffey Matrix to attorney fee cases before it.<sup>6</sup> Id. The County notes that the highest rate awarded by the Board to an experienced employment law attorney with a strong reputation in the community was \$300. Id. (citing to MSPB Case No. 07-17). The County argues that because Appellant's counsel failed to provide more detail about his background and experience in handling personnel-related matters \$190 is a reasonable rate for Appellant's counsel. County's Response at 1.

In addition, the County asserts that the Board should reduce Appellant's fees by one-half, based on the degree of success in this case. County's Response at 2. According to the County, it tried to settle this case with Appellant's union prior to the litigation and Appellant refused to accept the settlement. Id. The County asserts that the Board found the settlement terms to be appropriate in this case. Id.

Appellant's counsel argues that he has practiced law since 1980 and based on the Laffey Matrix he should receive \$505 an hour. Appellant's counsel notes that his actual hourly rate for this case was \$350 and that is what he is seeking. Appellant's Request for Attorney Fees, Statement at 3. In Appellant's Reply, Appellant's counsel notes that his \$350 rate is consistent with the District Court of Maryland's Rules and Guidelines for Determining Attorneys' Fees in Certain Cases (hereinafter D. Md. Local Rules). Appellant's Reply at 3.

In Appellant's Reply, Appellant's counsel asserts that the County's Response was untimely and should be stricken as the County did not provide an adequate reason for failing to file in a timely fashion. Appellant's Reply at 1.<sup>7</sup>

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<sup>6</sup> The Laffey rate of \$505 cited by Appellant's counsel is based on the Matrix of hourly rates for attorneys of varying experience levels prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. See MSPB Case No. 07-17. Specifically, the Matrix is based on the hourly rates for attorneys allowed by the Federal District Court of the District of Columbia in Laffey v. Northwest Airlines, 572 F. Supp. 354 (D.D.C. 1983), aff'd in part, rev'd in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985). The Matrix's rates for subsequent years are determined by adding the cost of living for the Washington, D.C. area to the applicable rate for the prior year. See MSPB Case No. 07-17.

<sup>7</sup> With regard to this issue, the Board notes that the Associate County Attorney of the County Attorney's Office emailed the Board, with a copy to Appellant's counsel, indicating that the attorney who handled this case at hearing was on maternity leave and the office's

## 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).

In the case of Manor Country Club v. Betty Flaa, 387 Md. 297 (2005), the Court of Appeals for Maryland considered an attorney’s fee dispute which was governed by the provisions of Montgomery County Code § 27-7(k)(1). The Board notes that the provisions of § 27-7(k)(1) then in effect are identical to § 33-14(c)(9), as set forth supra, which is controlling for the Board. The Court of Appeals in Flaa noted that the factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5<sup>th</sup> Cir. 1974),<sup>8</sup> vacated in part, Blanchard v. Bergeron, 489 U.S. 87 (1989), were “in large part, comparable to the factors of Montgomery County Code § 27-7(k)(1)” for determining an appropriate attorney’s fees award.”<sup>9</sup> 387 Md. at 313.

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administrative staff failed to properly handle her mail in her absence. Email to the Board’s Executive Director, dated 06/11/13. Based on this information, the Board accepts the County’s submission. In addition, the Board accepts Appellant’s Reply, even though it did not grant Appellant the right to file a reply to the County’s Response.

<sup>8</sup> Johnson dealt with an award of a reasonable attorney’s fee pursuant to section 706(k) of Title VII of the Civil Rights Act of 1964. Johnson set forth twelve factors to be considered in determining the amount of an attorney’s fee award. See 488 F.2d at 717-19.

<sup>9</sup> The Maryland Court of Appeals in Flaa noted that the Johnson factors were later adopted by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983). See 387 Md. at 313.

In Friolo v. Frankel, 403 Md. 443, 942 A.2d 1242 (2008), the Court of Appeals cited to both Hensley and Flaa for the proposition that the degree of success is a factor to be considered in determining the proper amount of an award of attorney fees. 942 A.2d at 1252. As the County correctly notes, the Board historically has considered the degree of success in making an attorney fee award. County's Response at 2 (citing to MSPB Case No. 05-05). Friolo also indicated that the Court of Appeals applied a lodestar type of analysis to calculate a fee award. Monmouth Meadows v. Hamilton, 416 Md. 325, 334-35 (2010).

## **ANALYSIS AND CONCLUSIONS**

In determining a reasonable fee award, the Board follows the guidance of its statute and the guidance of the Court of Appeals, which applies lodestar calculations in assessing a reasonable fee.

### **The Appropriate Hourly Rate**

As the County correctly notes, it is well established that the Board has repeatedly rejected, with the Circuit Court's approval,<sup>10</sup> the use of the Laffey Matrix for determining an appropriate hourly rate. County's Response at 1 (citing to inter alia MSPB Case No. 07-17 (2008)). Rather, the Board looks to the D. Md. Local Rules<sup>11</sup> for guidance, as well as considering the nature and complexity of the case. See MSPB Case No. 11-03 (2011); 11-04(2011); 10-19 (2010); 07-17; 06-03 (2010). Based on these considerations, the Board finds that the rate of \$350 an hour is reasonable given Appellant's counsel's thirty-three years of experience,<sup>12</sup> as well as his demonstrated skill and efficiency in his litigation at the hearing in this matter.

### **The Amount Of Hours Billed**

One of the factors the Board must consider in awarding attorney fees is the time and labor required – i.e., the number of hours reasonably expended. Montgomery County Code § 33-14(c)(9)(a). This is impossible to determine based on Appellant's counsel's submission. Many of the time entries are too vague for the Board to be able to determine whether the time was reasonably spent, or even if it was spent on the disciplinary matter before the Board as opposed to Appellant's driving while under the influence case. For example, Appellant's counsel list 9.6 hours expended on calls to and from his client and an unnamed witness (or witnesses) but does not provide any further information so as to permit the Board to

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<sup>10</sup> See also Friolo v. Frankel, 373 Md. 501, 819 A.2d 354, 371 (2003) (noting the Maryland Court of Appeals has not endorsed any matrix adopted by the U.S. Attorney in the District of Columbia).

<sup>11</sup> The Board notes that the D. Md. Local Rules, Appendix B are available at <http://www.mdd.uscourts.gov/localrules/localrules.html>.

<sup>12</sup> In accordance with the D. Md. Local Rules, the range of rates for an attorney with fifteen or more years experience is \$275-\$400. See D. Md. Local Rules, Appendix B at 124. Thus, Appellant's counsel's rate of \$350 falls within this range.

determine whether this expense was necessary.<sup>13</sup> While the Board certainly understands that calls with one's client are necessary, the number of calls to and from the client appear excessive based on the Board's experience. As the entries with regard to calls to witnesses do not indicate who the particular witness called was; the Board cannot determine whether the call to the witness was actually necessary. Likewise, Appellant's counsel claims 4.1 hours<sup>14</sup> for meetings with his client and a witness but provides no indication of what the meetings were about.

The Board would also note that other time entries appear excessive. Appellant's counsel claims 12.0 hours for work on the Prehearing Submission.<sup>15</sup> Appellant's counsel claims 4.0 hours for preparation for the Prehearing Conference – a Conference which is not adversarial in nature and is only for the purpose of reviewing the various exhibits and witnesses to determine if they are relevant and setting a date for the hearing. Appellant's counsel claims 1.8 hours for his appearance at the Prehearing Conference, which the Board notes only lasted a short period of time. Appellant's counsel also claims 27.5 hours to prepare for trial. The Board notes that 4.8 hours were expended on trial preparation even before the Prehearing Conference was held (see Entries for 02/13/13 and 03/01/13).

Based on the above analysis, the Board concludes that a significant cut in the amount of hours claimed is warranted based on the vagueness of Appellant's counsel's entries and the excessiveness of certain hours claimed. Accordingly, the Board has determined to reduce the total amount of hours claimed by one-third – i.e., from 90.5 to 60.3 hours.

### **The Degree Of Success Achieved**

Appellant argues that he should be able to recoup all of his attorney fees as his appeal was entirely successful. Appellant's Reply at 2. This is simply not the case. Appellant asserted in his closing argument that the penalty that should be assessed against him based on the loss of his Commercial Driver's License (CDL) was to be reinstated to his Mechanic Technician II position on day shift (with a brief accommodation to remove the driving component of his position), with a 5-10% reduction in pay for one month or until he regained his CDL endorsement (within a period of six months). Appellant's Closing Argument at 7. This, the Board refused to do. Rather, the Board ordered Appellant demoted to a Supply Technician III, with the caveat that if Appellant regained his CDL within six months he

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<sup>13</sup> Compare Entry for 01/15/13 (call to client) with Entry for 02/22/13 (call to client re: document review). Statement at 3. While the 02/22/13 entry still is a bit vague, at least it provides the Board with what the subject matter of the call to the client was about.

<sup>14</sup> Like the total number of hours cited above for calls, the total number of hours cited for meetings does not include those entries where appellant's counsel identified the purpose of the meeting (e.g., Entry for 02/13/13 – meeting with client (preparation for trial)).

<sup>15</sup> See Entries for 03/04/13 – 1.0 (compile documents (Appellant's submission)); 03/05/13 – 2.0 (compile documents; two calls to client and meeting with client re: Appellant's submission); 03/12/13 – 3.0 (Prepare Appellant's pretrial submission); 03/13/13 – 3.0 hours (Revisions to Appellant's pretrial submission); 03/14/13 – 2.5 hours (Revisions to Appellant's pretrial submission). Appellant's Request for Attorney Fees, Statement at 2.



would be reinstated to a Mechanic Technician I position. Final Decision at 14. Thus, it is clear that Appellant did not completely prevail in his appeal.

As the County correctly notes, under Board precedent where an appellant only partially prevails, as is the case here, the Board only awards a portion of the fee sought. County's Response at 2 (citing to MSPB Case Nos. 00-13; 02-07; 03-05; 05-05). The Board's practice is in accord with Supreme Court and Maryland Court of Appeals precedent. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 436 (1983) (the most critical factor in determining the proper amount of an award of attorney's fees is the degree of success obtained); Friolo v. Frankel, 403 Md. 443, 942 A.2d 1242, 1252 (2008)(citing to Hensley for the proposition that the degree of success is a crucial factoring determining a fee award); Manor Club v. Flaa, 387 Md. 297, 305 (2005) (upholding an award of shifted attorneys' fees where the degree of success in pursuing the claims was a consideration).

The County argues that the Board should reduce the total amount of hours by fifty percent based on the fact that the County attempted repeatedly to settle this matter but the Appellant refused to accept the settlement. County's Response at 2. The County notes that the Board found the terms of the settlement to be appropriate and reasonable. Id.

The County is correct that the Board found that the settlement rejected by Appellant was, in fact, the appropriate remedy in this case. See Final Decision at 13. The only additional relief ordered by the Board was priority consideration. Id. Appellant having gained little more through this litigation than what was offered to him by the County; the Board is of the opinion that a reduction of the total amount of hours billed by one-third is appropriate in this matter. See, e.g., MSPB Case No. 05-05. Therefore, Appellant's counsel shall be compensated for a total of 30.2 hours at the rate of \$350 an hour.

### **Reimbursable Costs**

Appellant's counsel seeks reimbursement for \$682.42 in costs. Appellant's Request for Attorney Fees, Statement at 3. The County has not opposed these costs. Having reviewed the various costs listed, the Board finds they are reasonable and orders the County to reimburse counsel for them.

### **ORDER**

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

1. The County shall reimburse Appellant's counsel for 30.2 hours at the rate of \$350 and hour – i.e., \$10,570; and
2. Appellant's counsel's request for costs of \$682.42 is granted. Thus, a total of \$11,252.42 in fees and costs is awarded.

# **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, October 21, 2008, and July 12, 2011) provides that the Office of Human Resources Director shall 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 FY12, the Board reviewed and, where appropriate, provided comments on the following new class creations:

- 1) Emergency Management Specialist I;
- 2) Emergency Management Specialist II;
- 3) Gilchrist Center Office Assistant;
- 4) Procurement Specialist III;
- 5) Procurement Specialist IV; and
- 6) Resident Supervisor III