MERIT SYSTEM PROTECTION BOARD 1982 ANNUAL REPORT

Montgomery County Government
Merit System Protection Board
Rockville, MD

May 1983

TABLE OF CONTENTS

1982

ANNUAL REPORT OF THE

MONTGOMERY COUNTY

MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

The Merit System Protection 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 1982 were:

Robert R. Fredlund, Chairman (appointed 1980)
Harriet T. Bernstein, Vice Chairman (re-appointed 1981; resigned 10/82)
Richard S. McKernon, Associate Member and later Vice Chairman (appointed 1982)
Fernando Bren, Associate Member (appointed 10/82)

DUTIES AND RESPONSIBILITIES OF THE MERIT SYSTEM PROTECTION BOARD

The duties of the Merit System Protection Board are contained in Article 4, Merit System and Conflicts of Interest, Section 404, Duties of the Merit System Protection Board, of the Charter of Montgomery County, Maryland; Article II, Merit System, Chapter 33, of the Montgomery County Code; and Section 1.2, Audits, Investigations and Inquiries, of the Personnel Regulations for Merit System Employees.

Section 404, Duties of the Merit System Protection Board, states as follows:

"Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns

"the matter to a hearing examiner, any party to the proceeding shall have, as a matter of right, an opportunity to present an oral argument on the record before the Board prior to a final decision. The Board shall establish procedures consistent with law for the conduct of its hearings. The decisions of the Board in such appeals shall not be subject to review except by a court of competent jurisdiction. The Council shall provide by law for the investigation and resolution of formal grievances filed under the merit system and any additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law."

Section 33-7, County Executive and Merit System Protection Board Responsibilities, Article II, Merit System, of the Montgomery County Code, defines the Merit System Protection Board responsibilities as follows:

"(a) Generally. In performing its functions, the Board is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the Board granted herein shall be fully exercised by the Board as needed to rectify personnel actions found to be improper. The Board shall comment on any proposed changes in the merit system law or regulations, at or before public hearing thereon. The Board, subject to the appropriation process, shall be responsible for establishing its staffing requirements necessary to properly implement its duties and to define the duties of such staff."

"(c) Classification Standards. . . . The Board shall conduct or authorize periodic audits of classification assignments made by the Chief Administrative Officer and of the general structure and internal consistency of the classification plan, and submit audit findings and recommendations to the County Executive and County Council."

"(e) Adjudication. The Board shall hear and decide disciplinary appeals or grievances upon the request of a Merit System employee who has been removed, demoted or suspended and in such other cases as required herein.

"(f) Retirement. The Board may from time to time prepare and recommend to the Council modifications to the County's system of retirement pay.

"(g) Personnel Management Oversight. The Board shall review and study the administration of the County classification ~~and~~ retirement plans and other aspects of the Merit System and transmit to the Chief Administrative Officer, County Executive and the County Council its findings and recommendations. The Board shall conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the County Council. All County agencies, departments and offices and County employees and organizations thereof shall cooperate with the Board and have adequate notice and an opportunity to participate in any such review initiated under this Section.

"(h) Publication. Consistent with the requirements of the Freedom of Information Act, confidentiality, and other provisions of law, the Board shall publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

"(i) Public Forum. The Board shall convene at least annually a public forum on personnel management in the County Government to examine the implementation of Charter requirements and the Merit System law."

Section 1.2, Audits, Investigations and Inquiries, of the Personnel Regulations for Merit System Employees, states:

"The Merit Board shall have the responsibility and authority to conduct audits, investigations or inquiries to assure that administration of the merit system is in compliance with the Merit System Law and these regulations . . . The results of each audit, investigation or inquiry shall be transmitted to the County Council, County Executive, and Chief Administrative Officer with appropriate recommendations and/or corrective action necessary."

MAJOR ACTIVITIES OF THE BOARD

In 1982, the Merit System Protection Board's most time-consuming function continued to be its appellate role. One hundred twenty-two appeals were received this year, requiring thirty hearings to receive testimony and evidence, and forty-seven worksessions to review the written record, prior to making and issuing decisions.

The Board completed the investigation into the hiring of a Deputy Director for the Department of Liquor Control, and sent the final report and recommendations to the appropriate authorities in February, 1982. Several other investigations were conducted on specific personnel actions during 1982, and the Board's findings and recommendations were forwarded to the proper County officials in accordance with established procedures.

An audit of the County's recruitment process was conducted in mid-1982, and revealed that, like any system, we do have areas that need improvement, but the present County system appears to be above average when compared to other jurisdictions. The major weaknesses noted were the time required to fill vacancies, and the lack of documentation on job analysis studies.

The Board continued its on-going participation in meetings and public hearings involving proposed amendments to County Personnel Regulations and development of Administrative Procedures; had meetings with the Chief Administrative Officer and others to discuss personnel policies and practices; and conducted its annual public forum to provide County employees an opportunity to comment on persent personnel policies and procedures, needed improvements or changes, and other matters related to personnel management and administration of the Merit System.

CLASSIFICATION REVIEW

Classification activity in 1982 was reduced considerably from prior years for two reasons. First, there were no major reorganizations and/or completion of any major studies of large occupational groups, and, secondly, Section 33-11 (a) (2) of the Merit System Law severely restricted upward reclassification between July 1 and December 31, 1982, since it was a local election year.

The Board did not find any major problems with actions taken during 1982, and continued its practice of communicating its comments and suggestions to the Chief Administrative Officer on individual actions as deemed appropriate and necessary.

A summary of classification activity follows.

	1980	1981	1982
Positions reclassified upward	252	201	61
Average number of grades increased	1.24	2.60	1.82
Positions reclassified downward	11	20	15
Average number of grades decreased	4.55	2.10	2.53
Classes Reallocated Upward	17	23	3
Classes Reallocated Downward	1	1	1
New Classes Created	30	28	10
Classes Abolished	69	54	26

The County had 639 different occupational classes at the end of 1982, which shows a continuing effort to reduce the number of classes being used. The number of classes in use had been 655 at the end of 1981, 681 at the end of 1980, and 720 at the end of 1979. It was noted that many of the classes were single position classes, particularly in the mid-level management areas.

Recognizing that the present 40 grade system requires finite differences in each grade level, and the fact that County law and the Personnel Regulations no longer mandate that number of grades, the Board noted the following:

1. Of the 639 classes, 614 are merit system classes, and 25 are non-merit classes.

2. 98.5% of merit classes are in Grades 1 through 33, with Grades 1 through 4 basically "minimum wage" and seasonal classes.

3. 93.9% of all classes are in Grades 6 through 35 (30 grades).

4. 89.2% of all classes are in Grades 8 through 32 (25 grades).

5. 78.9% of all classes are in Grades 11 through 30 (20 grades).

In light of this information, the Board suggests further consideration be given to reducing both the number of classes, and the number of grades in the County system.

SUMMARY OF CLASSIFICATION ACTIONS

BY DEPARTMENT/OFFICE/AGENCY

January 1, 1982 through December 31, 1982

DEPARTMENT/OFFICE/AGENCY	POSITIONS UPGRADED	POSITIONS DOWNGRADED
Chief Administrative Officer	1	
Commission for Women	3	
Consumer Affairs	1	
County Attorney		1
Facilities and Services	3	
Family Resources	3	
Finance	2	
Fire/Rescue Services		6
Health	13	1
Health Systems Planning		1
Housing and Community Development	5	
Libraries		1
Liquor	1	
Personnel	2	2
Police	7	1
Recreation	13	
State Affairs	1	
Supervisors of Elections	4	1
Transportation	2	1
TOTAL	61	15

CLASSES BY GRADE LEVEL

GRADE	NUMBER OF CLASSES	GRADE	NUMBER OF CLASSES
1	7	21	43
2	2	22	13
3	3	23	25
4	1	24	15
5	5	25	31
6	7	26	19
7	8	27	39
8	14	28	24
9	14	29	15
10	21	30	11 (1 NM)*
11	19	31	16
12	24	32	22 (2 NM)*
13	15	33	5
14	35	34	3 (1 NM)*
15	19	35	7 (3 NM)*
16	32	36	11 (10 NM)*
17	27	37	1
18	37	38	1
19	25	39	7 (7 NM)*
20	15	40	1 (1 NM)*

* NM: non-merit classes

APPEALS AND DECISIONS

The Personnel Regulations provide an opportunity for employees to file appeals with the Merit System Protection Board. Once the notice of appeal has been filed, the employee has ten work days to submit additional information required by Section 23.4, Appeal Period, of the Regulations. After this information is received, the appeal is processed in one of two ways.

First, if the appeal involves a suspension, demotion or dismissal, a hearing is scheduled, as required by Section 404 of the County Charter. In cases involving suspension or dismissal, at least two weeks' advance notice of the hearing is required. Upon completion of the hearing, the Board prepares and issues a written decision, usually within three weeks of the hearing.

The second method for processing appeals requires the development of a written record. Upon receipt of the notice of appeal and supplemental information, the County is notified and allowed ten days to respond, in accordance with Section 23.6, Notification and Submission of Record, of the Regulations. The Board then provides the appellant an additional five work days to respond to or comment on the County's submission. The case is then placed on the Board's agenda, and copies of all documentation are provided to each Board member. The Board then discusses the case at the next worksession, and either renders a decision on the basis of the written record, or grants a hearing. If the decision is issued based on the written record, it is prepared, in writing, and usually released within three weeks of the worksession. If a hearing is granted, all parties are provided at least thirty days' notice, and a written decision is released within approximately three weeks of completion of the hearing.

During 1982, the Board received one hundred twenty-two appeals. In addition, five cases were carried over from 1981, two from 1980, and one from 1979. Case No. 80-60, a dismissal appeal, was subsequently withdrawn by appellant, and Case No. 81-75, an appeal of grievance, was subsequently rendered moot by appellant's retirement. The remaining six cases were completed during 1982, and are included in the following summaries of decisions.

PLEASE NOTE THAT SUMMARIES OF DECISION ISSUED DURING THE FIRST HALF OF 1982 WERE PUBLISHED IN JULY. THOSE SUMMARIES ARE ALSO ATTACHED TO THIS ANNUAL REPORT AS AN APPENDIX.

CLASSIFICATION/COMPENSATION

Case No. 82-47

A group of Health Program Coordinators appealed from the decision of the Chief Administrative Officer regarding retroactivity of their reclassification. Prior to a scheduled hearing, the appellants and County settled the case, and the appeal was withdrawn.

Case No. 82-64

A Stock Clerk appealed a delay of service increment for alleged unsatisfactory work performance.

The record showed that an employee performance plan for appellant's position was prepared and signed by appellant in mid-1981. This plan was used to evaluate appellant's work performance in early 1982.

Documentation in the record reflected that appellant was provided training and assistance for approximately six months. Subsequently, several meetings were held with appellant to discuss work performance, but there is no documentation to show precisely what was discussed or if appellant was told what was expected of him.

Because of a health problem, appellant was not at work for an extended period of time. On his last day, his supervisor completed a work performance evaluation, but did not discuss it with appellant. Approximately one month later, appellant's division chief signed a memorandum to the Director of the department, recommending a three-month delay of service increment due to appellant's alleged unsatisfactory performance. Approximately one month later, the Director of the department sent appellant a letter informing him that he was delaying appellant's service increment for three months due to marginal work performance, and stated that appellant had four months to improve the rating to avoid further action. The Employee Certification form used to implement the delay of increment indicated that the delay was for a period of three months, from February 1 until May 1. This form was signed by the Chief Administrative Officer in early May. Appellant received official notice of the delay the following July.

The Board noted that part of appellant's unsatisfactory work performance involved completion of daily time sheets and maintenance of bi-weekly employee time sheets, leave records and personnel files. After review of the class specification for the position of Stock Clerk II, it was the Board's opinion that these responsibilities are outside the class specification's scope of duties.

The Board noted that no action was taken by the Department until after appellant's increment was due in February; that the final recommendation from the Department Head was not made until almost three months after the increment was due; and that the approval of the Chief Administrative Officer was not made until over three months after the increment was due. Since Section A2.9, Reassignment of Increment Dates, of the Appendix to the Personnel Regulations, does not permit a delay of increment to become effective until approved by the Chief Administrative Officer, the Board found that the effective date of the delay could not have been before the Chief Administrative Officer's approval in May, which, in this case, was completely after the three month period that had been recommended for the delay. Therefore, the Board ruled that the action was not taken in a timely manner.

With respect to due process, the Board was very concerned with the fact that this action was taken without ever discussing the work performance evaluation with appellant, and without providing him an opportunity to respond; that he was not notified of the action until five and one-half months after the proposed effective date; and that the County had failed to inform him of his rights of appeal.

Based on these factors, and irrespective of the evaluation received, it was the unanimous decision of the Merit System Protection Board that the delay of service increment for a period of three months be rescinded, and the Department was directed to process appellant's service increment, effective February, 1982, and to reimburse him all monies due.

Case No. 82-66

A Section Chief appealed from the decision of the Chief Administrative Officer's decision on his grievance concerning promotion to the position of Assistant Division Chief. The record showed that in 1977, the Department Head had reassigned organizational responsibilities of certain positions. In October, 1977, the Director requested the Personnel Office to conduct a classification study and create a new Section Chief class to facilitate the realignment of duties and responsibilities. Approximately one year later, the Personnel Office reported that it had completed the field study and salary surveys, and started to discuss its recommendations with the Department Head.

In December, 1978, the Department Head agreed with the proposed new class specifications, and requested retroactivity be granted to the date of reassignment of duties and responsibilities of the Section Chiefs. In March, 1979, the Personnel Office finalized its recommendations, but, because the new County Executive had terminated the Department Head and had indicated another possible reorganization after appointment

of a new Department Head, no further action was taken.

In the meantime, appellant continued to function outside his authorized class, and received Outstanding Service Increments in November, 1978 and December, 1979, for outstanding leadership and organization of the Section.

On February 5, 1980, the new Department Head submitted his classification priorities to the Personnel Office, which included an Assistant Division Chief and Section Chiefs as the highest priorities since they were part of the Executive reorganization.

In a position description completed and signed by appellant's supervisor in June, 1980, appellant was shown as a Section Chief with a working title of Assistant Division Chief. In July, 1980, the Chief of the Division notified the staff that appellant would be occupying the newly established position of Assistant Division Chief with the six section supervisors continuing to report to him, appellant.

On August 20, 1980, the Personnel Office informed appellant that they had just begun another classification study on the Department, which should be completed by October, 1980, and nothing would be done until that time. In December, 1980, the Chief of the Division of Classification and Compensation in the Personnel Office recommended reclassification of appellant's position to Assistant Division Chief, and recommended consideration of a non-competitive promotion for appellant.

On July 28, 1981, in response to another employee's grievance, the Personnel Director informed the grievant that the position of Assistant Division Chief would be filled competitively. It appears from the record that this was also the response to the Department Head's request for a non-competitive promotion for appellant under Section 16.3, Non-Competitive Promotion, subsection (c), which sets forth certain criteria to be met if a reclassification is outside an incumbent's occupational series.

On July 29, 1981, the Department Head was notified that appellant's position of Section Chief, Grade 26, had been reclassified to Environmental Protection Manager, Grade 27, retroactive to March 30, 1980. That same date, the Department Head was also sent a Classification Action Form showing appellant's position of Environmental Protection Manager, Grade 27, was reclassified to Assistant Division Chief, retroactive to January 6, 1981.

In June, 1982, appellant received a 4% Extraordinary Performance Award because of outstanding work performance at the Assistant Division Chief level.

On October 15, 1982, the Personnel Director responded to an inquiry from the Merit Board which indicated that it was the Personnel Office's opinion that the Assistant Division Chief position was not within the same series as Environmental Protection Manager.

The relief requested by appellant in this case was to either reclassify him pursuant to Section 7.4 of the Personnel Regulations, or to approve a non-competitive promotion pursuant to Section 16.3 (c) of the Personnel Regulations.

The Board's review of the County's Classification and Compensation Plan dated September, 1982, showed the class of Environmental Protection Manager in the Environmental Protection series, while the Chief and Assistant Division Chief were shown in the Inspection series. It was the Board's judgment that the assignment of Chief and Assistant Division Chief to the Inspection series was an error since the incumbents of these two classes supervise all of the classes contained in the Environmental Protection series, and they are in the normal line of promotion for the Environmental Protection series.

It was the unanimous decision of the Merit System Protection Board that the occupational classes of Chief and Assistant Chief of the Division of Construction Codes Enforcement must correctly be considered as part of the Environmental Protection occupational series pursuant to Section 7, Classification, subsection 2, Definitions, (g), Occupational Series, of the Personnel Regulations. Therefore, the issue of a non-competitive promotion was moot since Section 16.3 (c) applies only to reclassification outside an occupational series.

Based on the Department Head's request to promote appellant to the reclassified position, rather than seeking a waiver; appellant's high work performance ratings; and the fact that he had been performing the duties for an extended period and met the minimum qualifications for the class, the Board ruled that appellant met the requirements of Section 7.4, Classification Actions, (b), Reclassification, of the Personnel Regulations, and, as the incumbent of a reclassified position, must be promoted.

The County was directed to promote appellant to the position of Assistant Division Chief, retroactive to the date the position was officially created; and to reimburse him all salary monties due as a result of said promotion; and to reimburse appellant for legal fees incurred.

CLASSIFICATION/COMPENSATION

Case No. 82-75

An Accountant II appealed from the decision of the Chief Administrative Officer denying her request for a non-competitive promotion and directing the Personnel Office to conduct another classification study of her position.

The record showed that in May, 1980, the Personnel Office had been asked to conduct a classification study on appellant's position, and was provided the necessary documentation required by the Personnel Regulations. Approximately five months later, the Personnel Office recommended that appellant's position of Accountant II, Grade 21, be reclassified to the position of Financial Supervisor, Grade 23. Appellant and her supervisor disagreed with the recommendation, and, several months later, after conducting a second examination of the position, the Personnel Office recommended reclassification to Financial Programs Manager, Grade 25. This was subsequently concurred with by appellant's Department, and, approximately six weeks later, the Department was officially notified that appellant's position was reclassified from Accountant II, Grade 21, to Financial Programs Manager, Grade 25.

Appellant's Department Head subsequently requested appellant's non-competitive promotion to the higher level position, in accordance with Section 16.3 of the Personnel Regulations. This request was denied, and, based on the finding of the Personnel Office that the new position was not within the same occupational series, the Department was directed to proceed with competitive filling of the position. An examination was administered, and an eligible list was established. Appellant then requested a stay of appointment pending decision on her request for non-competitive promotion. The Chief Administrative Officer granted the request for stay, and directed the Personnel Office to study the position again to determine the proper classification.

The Board found that, despite the County's disagreement, under the County's Classification Plan, appellant's former position of Accountant II was within the same occupational series as the Financial Programs Manager class. Based on this finding, the fact that appellant met the minimum qualifications for Financial Programs Manager and had received at least a satisfactory work performance rating both before and after the effective date of the reclassification, it was the decision of the Merit Board that she should have been appointed to the higher level position pursuant to Section 7.4 (b) of the Personnel Regulations, and that, as the incumbent of a reclassified position, she was not required to meet the requirements of Section 16.3 for

non-competitive promotion, nor for competitive promotion. Accordingly, the Personnel Office and appellant's Department were directed to take the necessary steps to place appellant in the reclassified position retroactive to the date the position was officially reclassified, and to reimburse her accordingly.

However, since management has the right to conduct a class study at any time, the Board noted that this decision did not modify or negate in any way the County's right to review the position again for determination of proper classification.

Case No's. 82-77 through 82-85; 82-87 through 82-105; 82-107; 82-109 through 82-114; and 82-117

A Firefighter appealed the decision of the Personnel Director (rendered on behalf of the Fire and Rescue Commission) on his grievance concerning compensation for overtime work.

On August 9, 1982, the Personnel Director's office ruled that employees of local fire corporations were eligible to receive compensatory leave or overtime pay on an hour for hour basis for hours worked in excess of the normal work schedule.

On October 4, 1982, the Personnel Director issued a decision on appellant's grievance for retroactivity of payment for overtime hours worked which stated, in part, that " . . . local fire corporation's liability for payment of additional overtime pay or compensatory leave is limited. Corporations are only liable for payment of overtime, consistent with the Personnel Director's ruling earned after the date of that ruling, August 6, 1982, and/or for any incidents of earned overtime for which timely notice (i.e., 20 calendar days from the date the overtime was earned) by eligible employees has been given under the Fire-Rescue Commission Grievance Procedure.".

The record showed that the practice of appellant's fire department, and most of the other fire departments, had been to pay employees overtime (or grant compensatory leave) for work in excess of the normal shift on an hour for hour basis up to a maximum of eight hours per shift. A normal shift was ten hours for daytime, and fourteen hours for nights.

The Fire Board policy had been stated, in 1980, as "Whether employees are being paid for call-back for regular overtime, they cannot receive more than eight hours compensation or time and one-half for a maximum total of twelve hours pay. This applies regardless of the fact that the individual worked the ten-hour day shift or the fourteen-hour night shift. Leave taken is only charged on an eight-hour basis whether it was taken during a day or night shift."

Appellant received eight hours of overtime compensation for each extra shift worked, regardless of whether it was a ten-hour or fourteen-hour shift.

In response to a previous grievance filed by another employee, the Personnel Office had found that " . . . absent language to the contrary under Section 3 (i) the specific language of Section 13.5 requiring payment of overtime on an hour for hour basis must be controlling and serve as the standard for overtime pay and compensatory leave in overtime situations . . .", and ruled that the individual involved was entitled to additional overtime pay based on the actual hours worked instead of the eight hour maximum per shift. When the ruling on that grievance was issued, appellant realized he had not been paid in the manner prescribed, and filed a grievance requesting equitable retroactive payment. Before the fire department had an opportunity to respond to the grievance, however, the Personnel Director issued a decision (dated October 4, 1982) on a similar grievance, and the Fire and Rescue Commission instructed all fire departments that it was to be applied to all outstanding grievances on overtime compensation.

The Board was concerned that the established grievance procedure was not followed, and the individual fire department was not provided an opportunity to respond pursuant to the grievance procedure. However, the Board did not find any adverse impact on appellant resulting from the premature action by the Personnel Director and Fire and Rescue Commission. The Board also questioned why appellant was required to file his grievance with the individual fire department rather than directly with the Personnel Director since a written grievance should be filed with the level responsible for possible corrective action, not at a lower level that is simply forced to pass it on because they lack authority to resolve the issue.

The Board concurred with the Personnel Director that the Personnel Regulations lacked specificity and tended to be ambiguous on the overtime issue. In such a situation, the Board believed fairness and equity required consideration of the administrative construction and implementation of the existing regulations.

While at least two individual fire departments may not have paid employees for overtime work in accordance with instructions received from the Personnel Committee, the Board believed it would be improper and inappropriate to consider their error as a basis for reimbursing other employees. Further, the Board was satisfied that the intent of the administrative construction and implementation of Section 3 (i) of the Appendix was to limit overtime compensation to a maximum of eight hours per shift. A review of the other provisions of the regulations and practices of the fire departments

clearly showed the use of "eight hours" as a base for pay, leave usage, etc., for each shift of ten to fourteen hours, and "sixteen hours" for 24-hour shifts.

It was the Board's judgment that the appeal be dismissed because appellant was paid properly for the overtime worked during the period in question, and the August 9, 1982, decision of the Personnel Office was inconsistent with the intent of the Personnel Regulations adopted by the Fire and Rescue Commission on April 1, 1981, and the administrative construction and application of the prior regulations.

THIS DECISION WAS APPEALED TO COURT.

Case No. 82-106

An Administrative Aide appealed the decision of the Personnel Director (rendered on behalf of the Fire and Rescue Commission) concerning the failure of the Commission to act on the classification study of her position conducted at the request of the County Council for budgetary reasons. The Personnel Director ruled that the previous study had been conducted to determine if the position could be downgraded, and that up-grading had never been an objective of the study. Accordingly, if either appellant or her supervisors believed the position should be reclassified, he instructed them to request a classification review in accordance with Section 7.6 of the Personnel Regulations, and that no action would be taken unless such a request was received.

After review of Section 7.6 of the Personnel Regulations, the Board agreed that the findings of the Personnel Director were correct, and his decision was sustained.

Case No. 82-118

A Bus Operator appealed from the decision of the Chief Administrative Officer on his grievance concerning the County's holiday pay practice as of May 28, 1982.

The first issue, involving the validity of a May 28, 1982, memorandum from the Chief Administrative Officer had been addressed by the Board in the appeal of another employee. The Board had ruled that the memo was not policy, but simply an explanation of how to administer Section A5, Holiday, Annual, Sick and Special Leave, of the Personnel Regulations. Therefore, no further comment was made on this point.

Another issue, that there is no legal requirement for the Chief Administrative Officer to issue an administrative procedure for holiday leave, had also been addressed in a previous appeal, and the Board did not address it further.

The remaining issue to be resolved was the proper method for paying employees who normally work a ten hour day when they are off work as the result of a County holiday. Prior to May 28, 1982, Bus Operators who worked a normal ten-hour day were paid holiday pay for the full ten hours. Subsequent to May 28, 1982, they were paid only eight hours of holiday pay, and the remaining two hours were charged as annual leave, compensatory leave, or leave without pay. The issue specifically related to the two hours being charged to leave rather than holiday pay.

The Board found that Section A5 was developed when the County had a standard eight hour work day for all employees, and the provisions had not been modified or revised to accommodate the longer work days used by the Departments of Police and Transportation since the mid-1970's. In reviewing the present Regulations, the Board noted two specific problems that impacted on this case. First, holiday pay is limited to eight hours for all employees, and, secondly, there is no basis or authority for management to require employees to forfeit leave when off work involuntarily as the result of an official holiday.

Earned leave is a benefit provided to employees for use as they desire, subject to certain approvals of management. Therefore, the Board found it totally inappropriate for management to require employees to forfeit leave or take leave without pay for hours they are unable to work on an official holiday that would normally be a day of work. Based on this, it was the Board's decision that the County should have compensated all full-time employees who normally work four ten-hour days per week in accordance with the following guidelines for all holidays subsequent to May 28, 1982:

1. Eight hours of holiday pay for each official holiday if the employee was not required to work the holiday and it was in addition to the employee's normal forty-hour week.

2. Eight hours of holiday pay plus two hours of administrative leave (or pay) for each official holiday if the employee was not required to work the holiday and it was part of the employee's normal forty-hour week.

3. Eight hours of holiday pay for each official holiday plus overtime pay for all hours worked if the employee was required to work the holiday and it was part of the

employee's normal forty-hour week.

4. Eight hours of holiday pay for each official holiday plus overtime pay for all hours worked plus eight hours compensatory leave or another day off if the holiday was in addition to the employee's normal forty-hour week.

The Board directed that employees' leave accounts be adjusted to reflect proper credit for the holidays involved; that posting of such credits be completed by March 15, 1983; and that any hours credited for this purpose be disallowed as justification to exceed maximum allowable carry-over into the 1984 leave year.

DECISIONS OF THE DISABILITY RETIREMENT HEARING BOARD

Case No. 81-21

A Police Officer appealed from the decision of the Disability Retirement Hearing Board on his application for disability retirement. Final decision was held in abeyance pending the decision of the Court of Special Appeals on the case of Whittaker v. Montgomery County, which was similar to appellant's case.

The record clearly showed that appellant had been injured in the line of duty, and that he had suffered permanent disability as a result of that injury. While it was not totally clear from the record, the Board was satisfied that appellant could not be employed within the Department of Police as a Police Officer, nor in a pos tion of comparable status. Therefore, the only issue was the extent of pension to which appellant was entitled.

In accordance with the Court of Special Appeals' decision in the Whittaker case, the 20% permanent partial disability awarded appellant by the Disability Retirement Hearing Board was rescinded, and appellant was awarded full service-connected disability benefits, and the County was directed to correct his benefits retroactively to the date he initially retired, and to reimburse him accordingly.

Case No. 81-24

A Police Officer appealed from the decision of the Disability Retirement Hearing Board on his application for disability retirement. Final decision was held in abeyance pending the decision of the Court of Special Appeals on the case of Whittaker v. Montgomery County, which was similar to appellant's case.

The record showed that appellant was disabled as a result of a service-connected injury, however, based on correspondence in the record, there was an indication that appellant could have been retained as a Police Officer, which, under law, would preclude his eligibility for disability pension.

Accordingly, the Merit Board remanded the case to the Disability Retirement Hearing Board for determination as to whether or not appellant could be employed as a Police Officer, and instructed that after such determination, the Disability Retirement Hearing Board issue a new decision consistent with the guidelines provided by the Court in the case of Whittaker.

Case No. 81-35

A Police Officer appealed the Merit System Protection Board's prior decision on his case*to the Circuit Court for Montgomery County. The Court remanded the case to the Board to direct the County to take appropriate action to revise appellant's service-connected disability retirement benefits pursuant to Section 33-43 (f) (i) of the Employees' Retirement System of Montgomery County. The payment of the higher amount was to be paid retroactive to the date of retirement.

In complying with the Court's instruction, the Board renewed its prior recommendation that the County put forth a good faith effort to make reasonable accommodation to facilitate appellant's rehabilitation and continued employment.
*Prior decision summarized in 1981 Annual Report

Case No. 81-38

A Firefighter appealed the decision of the Disability Retirement Hearing Board on his application for service-connected disability. The case had previously been reviewed by the Merit Board, but remanded to the Disability Retirement Hearing Board for appointment of a Medical Review Committee in accordance with the retirement law. The Disability Retirement Hearing Board, after reviewing the report of the Medical Review Committee, decided not to change its original decision, and appellant again appealed to the Merit Board. The case was then held in abeyance pending the Court of Special Appeals' decision in the case of Whittaker v. Montgomery County, which raised issues similar to those involved in appellant's case.

The record showed that appellant had suffered a number of service-connected injuries, but had always been cleared for return to duty. However, based on an increase in appellant's use of sick leave, and problems with certain tasks and apparent restricted movements, his Department requested a special physical examination for appellant, as they were concerned about potential further injury to appellant, as well for the safety of others.

The Medical Review Committee had found that appellant was totally and permanently disabled from performing the duties of a firefighter, that he demonstrated a 20-25% permanent impairment of his lower back; that his disability was job-related; and that, although disabled from performing as a firefighter, appellant may have been able to do lighter work. However, the Fire Department and County had reviewed the possibility of alternative placement in the Communications Center,

but this was deemed unsatisfactory due to physical limitations.

After reviewing the entire record and the Court of Special Appeals' findings in the Whittaker case, the Merit Board modified the Disability Retirement Hearing Board's decision to grant appellant full disability benefits, as provided in Section 33-43 of the Employees' Retirement System of Montgomery County.

Case No. 82-42

A Firefighter appealed to the Merit System Protection Board from the decision of the Disability Retirement Hearing Board on his application for disability retirement. The case was held in abeyance pending court resolution of the appeal of Whittaker v. Montgomery County, which raised issues similar to those involved in appellant's case.

The ruling of the Court in the Whittaker case held that if an individual is no longer capable of performing the duties for which he was hired due to service-connected injury or illness, and if that individual cannot be placed within the same department, the individual is entitled to full disability retirement benefits, irrespective of the extent of disability. In reviewing the documentation in appellant's case, the Board noted that the Disability Retirement Hearing Board found that appellant was disabled as a result of a service-connected injury, and awarded him a disability pension of 35% permanent partial disability. There was evidence in the record which indicated that appellant was qualified for, and might be willing to accept a position in the Communications Unit under the Department of Fire and Rescue Services. However, there was no evidence to show that this issue was ever fully addressed or resolved by the Disability Retirement Hearing Board.

Based on the foregoing, the Merit Board remanded the case to the Disability Retirement Hearing Board for determination as to whether or not appellant could be employed as a Firefighter or in another comparable position within the Department of Fire and Rescue Services. After such finding, the Disability Retirement Hearing Board was directed to issue a new decision consistent with the Court's ruling in the Whittaker case.

Case No. 82-65

A Security Officer appealed the decision of the Disability Retirement Hearing Board on his application for disability retirement which found him to be 50% permanently, partially disabled as the

result of a service connected injury. There was insufficient evidence or documentation in the record to reach a final decision as to whether or not appellant could be employed by his Department. Therefore, the case was remanded to the Disability Retirement Hearing Board for further findings with respect to appellant's ability to be employed by the County, and subsequent decision on the application to be consistent with the guidelines provided in the Court decision in the appeal of Charles R. Whittaker v. Montgomery County.

DISMISSALS

Case No. 82-43

A Bus Operator appealed his dismissal for alleged insubordination and failure to take a medical examination or provide medical information. The hearing on the appeal was scheduled, and the parties were advised of their deadlines for submitting pre-hearing statements. Appellant and his employee representative failed to make any pre-hearing submission. At the scheduled hearing, the Board denied Appellant's request to make a late submission, but allowed him to testify on his own behalf.

The Board, on its own initiative, scheduled another session and subpoenaed witnesses to testify. Appellant was urged to obtain legal counsel since the charges against him were serious and his position with the County was at stake. The day before the session, appellant called the Board office to inquire about a continuance, indicating that he had been involved in an accident and was not feeling well. He was told that he would have to appear at the hearing to orally request the Board to continue the hearing.

Appellant failed to appear at the scheduled hearing, but his employee representative was present. The representative indicated that he had just received a telephone call from appellant requesting a continuance to allow him time to obtain legal counsel. He further indicated that there was considerable uncertainty with respect to appellant's retention of counsel, and that, except for that telephone call, he personally had not talked with appellant since the previous hearing, approximately one month before.

Based on the appellant's failure to appear for the scheduled hearing; his failure to supply a legitimate or reasonable explanation for his absence; and his failure, up to that time, to provide a reasonable explanation for not obeying the direct order of his superior which was the basis for the dismissal, the Merit Board dismissed the appeal and sustained the dismissal action.

Case No. 82-51

A Bus Operator appealed his dismissal for alleged failure to perform his duties in a competent or acceptable manner; violation of an established policy or procedure; and knowingly making false statements or reports in the course of employment.

The record showed that during the six months preceeding his dismissal, appellant had an unusually high number of customer complaints filed against him, several of which occurred after he had

been counseled and warned in writing that this was unacceptable. He further had been counseled and warned about attendance and tardiness, and yet was tardy afterwards.

The record also showed that an "incident" had occurred on a particular day while appellant was operating a County vehicle. Another, non-county bus operator claimed that appellant had struck his bus, but did not stop. The other driver followed appellant, stopped him, and explained the situation. Appellant denied striking the other vehicle; gave the other driver a false name; did not contact the Police or Control Center, as required by County policy; and did not obtain any information from the other driver or witnesses. At the conclusion of all testimony, it was still unclear as to whether or not an accident had actually occurred.

Approximately one hour following the "incident", appellant's supervisor met with appellant to talk with him about complaints received against him that morning. At this time, appellant told the supervisor about the incident, and the supervisor directed him to fill out an incident report before going off duty. The supervisor also checked appellant's bus, but found no visible damage to the vehicle. Appellant failed to complete the report form as directed.

The Merit Board believed that, based on the total circumstances surrounding the incident, and appellant's work performance during the period immediately preceeding the incident, the dismissal was reasonable and in accordance with established procedures, and the action was sustained.

Case No. 82-53

A Police Technician appealed the decision of the Chief Administrative Officer on her grievance concerning dismissal from her position. Appellant had been dismissed for, among other things, falsification of documents and failure to perform her duties in a competent and acceptable manner.

The record showed that appellant had been an Office Assistant with the Police Department, assigned to process Employee Certification forms. It was her task to check proposed personnel actions against an authorized list; check for accuracy; attach proper documentation, and forward the package to her supervisor for signature/approval. After approval, appellant would forward the documents to the central Personnel Office for processing. Once processing was completed, two copies of each document were returned to the Department, one for the departmental file and the other for the employee. These forms were generally processed

in large quantities. Appellant was subsequently promoted to the position of Police Technician, and transferred to another Section within the Department.

Approximately one year after appellant's promotion, another Office Assistant in the Department of Police was processing Employee Certification forms for promotion of Police Officers, and discovered that one individual had evidently been promoted prior to being eligible. She could find no documentation to support the prior promotion and pay increase, and, after calling his station and being told that the officer had not previously been promoted, she notified her supervisor of the discrepancy. The matter was then turned over to the Internal Affairs Unit for investigation. The investigation revealed that the departmental files still listed the individual as a Police Officer II, but that the central Personnel Office had an Employee Certification form showing him as a Police Officer III, and that he had been paid at the higher level for a little over one year.

At the hearing before the Board, appellant testified that she had prepared the promotional form as a joke, but did not know how the form had gotten processed because she had put it in her desk drawer and forgotten about it after deciding not to play the joke on the Police Officer.

The Police Officer involved testified that he was aware of the additional pay shortly after the improper promotion, but thought it was his annual service increment. He did not become aware of the improper promotion until a few months later when appellant told him about it. He testified that he asked her to take corrective action, but did not take any action on his own. Appellant testified that she did not know how to correct the matter; knew that people would be upset by the error; and was afraid the error would interfere with her pending promotion. For these reasons, she did not take any corrective action or inform her supervisors of the problem.

It was the opinion of the Board that appellant had attempted to deliberately subvert the promotional system for personal reasons. This opinion was based on the fact that both Employee Certification (promotional and increment) forms appeared to have been prepared on the same typewriter; that appellant admitted to preparing the promotional document; that the salary used on the service increment document would only be known by the individual who prepared the promotional document; that without the promotion, a pre-printed turn around document would have been used to process the service increment; and the total lack of any documents in the Department of Police files, for which appellant was responsible.

The Board ruled that, even if one accepted the idea that the promotional form was prepared as a joke, and that it was processed by

mistake, the failure of appellant to take corrective action once the error was discovered could not be ignored or condoned.

The Board also disagreed with appellant's argument that she had been treated unfairly compared to others in the Department of Police and compared to the Officer involved in this incident. The Board ruled that the other cases cited by appellant were not similar enough to this case to be used as precedent. Further, even though appellant was not given the option of resignation prior to issuance of the dismissal action, as was the Police Officer involved, the Board ruled that there is no provision in the Personnel Regulations to allow management to refuse to accept a resignation, and that, since appellant had not offered a resignation, she could not justify her claim of unfair treatment. Accordingly, the appeal was denied.

Case No. 82-67B

A Bus Operator appealed his dismissal for operating a County vehicle while his Maryland operator's license had been suspended for approximately three weeks.

The record showed that appellant's driving privileges had been suspended by the State of Maryland from January 25 through February 11, 1982, for non-payment of fees when his check for a duplicate license was returned for insufficient funds. The suspension was lifted when he paid the fee and charges on February 11. County payroll records showed that appellant had worked ten days as a bus operator during the period of suspension of his driving privileges.

In response to the charges, appellant indicated that he had been unaware of the suspension. He stated that he had separated from his wife about the time he wrote the check, and that she had depleted the account without telling him. He also indicated that he had moved twice since October, 1981, had notified the Post Office of his address changes, but, since he did not consider either move permanent, he never informed the Motor Vehicle Administration of the change. He stated that while his mother-in-law (with whom he was staying) had signed for a certified letter from the State of Maryland, she had never given it to him. As soon as he found out about the suspension, he notified his supervisor and went to the Motor Vehicle Administration to take care of the problem.

Payroll records reflected that appellant had taken sick leave on the day he allegedly notified his supervisor of the suspension and went to the Motor Vehicle Administration to take care of the problem.

After consideration of the evidence in this case, it was the opinion of the Board that, while appellant had certain responsibilities and obligations with respect to maintaining a valid license, he was

the victim of circumstances not entirely within his control. Based on this, the Board believed that a dismissal action was too severe a penalty. However, the Board also believed that appellant was less than candid with his supervisors, which further complicated the situation. Because appellant had received prior warnings and disciplinary action related to maintaining a valid license, it was the opinion of the Board that disciplinary action of a lesser nature was reasonable and appropriate. Accordingly, the dismissal was rescinded, and a disciplinary action of a lesser nature, as deemed appropriate by the Department, was to be substituted; appellant was reinstated to his position of Bus Operator or a position of comparable status; and was to be reimbursed all salary monies due him subsequent to implementation of the Board's decision.

Appellant had also requested attorney's fees, however, the Board denied the request based on the fact that the charges in the case had been sustained, and only the penalty was modified.

Case No. 82-119

A Public Administration Intern appealed his dismissal, however, the Board dismissed the appeal for appellant's failure to make a pre-hearing submission, as required by established procedures, and for failure to appear for the scheduled hearing.

THIS DECISION WAS APPEALED TO COURT.

Case No. 82-120

A Tree Climber appealed his dismissal for unauthorized absences and chronic or continuous tardiness, and violation of an established policy or procedure. The primary issue before the Board was whether or not appellant was AWOL on three dates in question, and, if so, was dismissal the appropriate action.

With regard to the first date, the record showed that appellant's use of emergency annual leave had not been restricted; that he called within the required time to request leave; and that the Department's procedures did not require submission of documentation until the established guidelines had been exceeded. Further, the testimony of the person responsible for recording attendance was that the absence had been recorded as approved emergency annual leave. Based on all of these facts, it was the Board's judgment that the first absence met the established guidelines for emergency annual leave, and should not have been charged as AWOL.

The documentation and testimony surrounding the two other dates was confusing and misleading. However, the Board was satisfied that appellant had followed the accepted operating procedures with respect to the second absence. The Board ruled that appellant should have been placed on approved annual leave for this date. Testimony and the written record revealed that appellant had called the office within the time required on the third date and spoke with his Assistant Section Chief. Although details of the conversation were unclear, the Board was satisfied that the Assistant Section Chief was fully aware that appellant was not going to be at work within the time limits required, and that his use of emergency annual leave was not restricted at the time. In light of past practices and the testimony, the Board ruled that appellant should have been placed on emergency annual leave for the third date.

The Board found that Section 33-5 (b), Merit System Principles, of the County's Merit System Law states, in subparagraph (5), that " . . . both supervisors and subordinates have an equal responsibility to facilitate work performance correction and improvement . . . ". Further, in the Statement of Purpose of the Personnel Regulations, the merit system principles cited show that the employee has a responsibility to perform well, and to meet required standards, while management had the responsibility to try to correct performance problems through effective counseling, education and training. Section 18, Termination, of the Personnel Regulations, charges management with the responsibility to " . . . inform the employee in writing of the problem, counsel the employee as to what corrective action to take; and allow the employee adequate time to improve or correct performance and/or attendance.". With this type of guidance available, and the supervisor's full knowledge of appellant's work performance capabilities and his personal problems since mid-1981, the Board was concerned about the lack of any meaningful counseling provided after the issuance of a written reprimand in December, 1981. In view of the attendance record of appellant from the last date he was charged with AWOL to the date dismissed, which was after he resolved his personal problems, it was conceivable to the Board that counseling and understanding on the part of appellant's supervisors may have negated the problem earlier and eliminated the need for any disciplinary action. This was particularly disturbing to the Board in light of the testimony that the County did not suffer any loss or damage and only minor disruption of work assignments as a result of appellant's absences. The Board firmly believed that a long term, loyal, hard working employee - which was the portrayal put forth in appellant's case - deserves and should receive continual counseling and guidance in correcting work-related problems.

It was the decision of the Merit System Protection Board that the County had failed to sufficiently prove the validity of the charges for dismissal; had not properly counselled the employee as to the

problem involved; and had not processed a delay of service increment in accordance with established procedures. Therefore, the Department was directed to

1. Rescind the dismissal and remove all documents related thereto from appellant's personnel files.

2. Reinstate appellant to his prior position, retroactive to the effective date of dismissal, and to reimburse him any and all salary monies lost.

3. Rescind the delay of service increment; grant appellant's service increment; and reimburse him all salary monies due as a result of that increment; and to remove all documentation related to the delay from his personnel files.

4. Correct appellant's leave records for the three dates in question to reflect annual leave or emergency annual leave consistent with the Board's findings for each date, and to either reimburse appellant for the three days lost salary and deduct the time from his annual leave balance; or to allow appellant to retain his current annual leave balance.

5. Adjust appellant's leave balance and other records that were affected by the improper separation to show continuous employment and proper earnings.

6. Reimburse appellant for reasonable attorney's fees incurred in the case.

MISCELLANEOUS

Case No. 82-52

A Recreation Specialist appealed from the decision of the Personnel Director that the issue he raised - timeliness of a classification study - was not grievable.

The record showed that approximately five years prior to the grievance, appellant's duties and responsibilities had been expanded without a change in position title or classification. Appellant had discussed the matter with his supervisor, including a request for possible reclassification. However, it was not until two years later that the department requested a classification study, and approximately another year and a half before the Personnel Office conducted a desk audit. The County still had not taken any action on the request for reclassification.

The Personnel Director ruled that the timeliness for completing classification studies is not a grievable matter since there were no specific time requirements for such studies. However, on February 12, 1980, the Chief Administrative Officer had issued a memorandum to all department and agency heads concerning effective dates of reclassifications, and indicated therein that, as a general guideline, classification studies would be completed within six months of receipt by the Personnel Office of proper documentation from the Department. Further, Section 7.6, Classification Review, of the County's Personnel Regulations states, in part, that " . . . As a general guideline, individual position classification studies should be completed within six months from date request is received by the Personnel Office in accordance with established procedures or periodic study is initiated".

After review of the grievance procedures, the Board ruled that general guidelines for completion of the study were established by the Chief Administrative Officer and by the Personnel Regulations, and that these guidelines established written policy which affects a condition of employment. Therefore, the issue must be considered grievable under the definition of "grievance" contained in Administrative Procedure 4-4, Track 1, Procedural Violation Grievance. The case was remanded to the Personnel Office for processing in accordance with established procedures.

Further, since the Department had admitted in the record that appellant had been working outside his class specification for an extended period of time, the Board directed that appellant be reimbursed an additional 5% in salary commencing six months after the request for classification study was submitted to the Personnel Office, and continuing until such time as appellant

was relieved of the duties and responsibilities which were outside his class specification, or until formal action was taken on the reclassification request.

Case No. 82-54

A Bus Operator appealed the decision of the Chief Administrative Officer on his grievance alleging that the Department of Transportation's interpretation of Section 5.5, Holiday Leave and Holiday Pay, of the Personnel Regulations discriminated against full-time bus operators whose day off happens to fall on the holiday because such operators are not permitted to request work on such a holiday.

The record showed that the Department permits full and part-time operators to request holiday work if they normally would have been working on the day which happens to fall on a holiday. The Department also permits part-time operators and substitutes to request holiday work if they had not been scheduled to work on the day that happened to fall on a holiday. Except for the full-time drivers whose day off had fallen on a holiday, the selection of all others eligible to request holiday employment is based on seniority, rather than under the former system of permitting any and all operators to request holiday employment on a first-come/first-chosen basis.

The explanation of the Department for refusing to permit full-time operators to request holiday work if their day off happened to fall on a holiday was cost. Those individuals normally scheduled to work receive total compensation of 2-1/2 times their regular rate of pay. Those not normally scheduled to work, if allowed to work, would have to be reimbursed at 3-1/2 times their regular rate of pay.

The Board found that there was no discrimination against full-time operators who may seek to work a holiday when the holiday happens to fall upon their day off because the policy does not mean that full-time operators never have an opportunity to bid on holiday work. Since no statistics were in the record to show how often a regular employee would be ineligible for holiday work, such a restriction against eligibility for such holiday work would have to be considered coincidental, and should not occur with regularity for the individuals concerned.

Priority for holiday work is based on employment seniority, a long-accepted practice in labor relations. Such a system appears to be more equitable than the prior policy which granted holiday work to the first to sign their names on a "sign-up sheet".

MISCELLANEOUS - Case No. 82-54 continued

The County's explanation of not permitting full-time drivers to seek holiday work with the equivalent of 3-1/2 times their regular hourly pay, as required by Section A5.7 of the Personnel Regulations, is not only within management's prerogative, but is an obligation for a government that is not a profit-making endeavor.

The Board ruled that in Section A5.5 of the Personnel Regulations, the clause "as far as practicable" indicates that as many employees as possible should be given the holiday off as long as County services are maintained. It has nothing to do with the manner of deciding which employees should work on holidays, or which should be eligible to apply for holiday work. Therefore, the appeal was denied.

Case No's 82-55 and 82-56

Five employees appealed from letters they received from the Chief Administrative Officer which they believed were disciplinary actions against them. The Board found that the letter did not constitute an official disciplinary action against any of the appellants, and that it was not a part of any personnel records. Finding no adverse action or affect to justify the appeals, they were dismissed.

Case No. 82-57

An individual appealed from the decision of the Chief Administrative Officer on his grievance concerning allegations made against him by other County employees. The Chief Administrative Officer had indicated that he believed the requested relief was inappropriate and suggested that if appellant believed he had suffered personal damage, he should pursue it through private counsel.

The record showed that appellant was the supervisor of all but one of the other individuals involved. The Board ruled that, as such, appellant had the right and responsibility to recommend appropriate disciplinary action if the Personnel Regulations had been violated. The Board believed that the filing of a grievance by a supervisor to achieve disciplinary action against a subordinate was inappropriate and improper.

Since the Chief Administrative Officer, who has final authority and responsibility for disciplinary actions against employees, found no cause to take such action after he had conducted a thorough investigation of the matter, the Board did not believe it would be appropriate to substitute their judgment on the issues, and the appeal was denied.

Case No. 82-58 may be found at the end of "Miscellaneous", page 42.
Case No. 82-59

A Bus Operator appealed the Personnel Director's decision that the issue raised in his grievance was not grievable. A previous grievance by appellant had been resolved when the County agreed to issue an interim administrative procedure prior to the next holiday. The record showed that shortly before the holiday, the County issued a memorandum regarding holiday compensation, but appellant did not believe the memorandum constituted an interim administrative procedure, as required by the disposition of the previous grievance.

The Board found that, under the Personnel Regulations and other County laws, there was no requirement for development of interim administrative procedures, and that, as long as the Personnel Regulations were not violated, there was no basis to require development of such procedures. Accordingly, the decision of the Personnel Director was sustained.

Case No. 82-60

A Bus Operator appealed the decision of the Chief Administrative Officer on his grievance concerning his Department's compliance with previous directives. The appeal was dismissed by the Merit Board due to appellant's failure to provide the information required by Section 23.4, Appeal Period, of the Personnel Regulations.

Case No. 82-61

A Firefighter appealed from the decision of the Personnel Director, rendered on behalf of the Fire and Rescue Commission,, on his grievance concerning temporary certification of firefighters, even though they did not satisfactorily complete a mandatory training class.

The Personnel Director ruled that since appellant was not adversely affected by the situation, it was not a grievable issue. Section 22.2 of the Personnel Regulations for Fire/Rescue personnel requires that an individual be adversely affected by an alleged action in order to file a grievance. Failing to find such evidence, the Board concurred with the Personnel Director, and his decision that the issue was not grievable was sustained.

Case No. 82-62

A Firefighter appealed the decision of the Personnel Director on his grievance concerning denial of an outstanding service increment by the Fire and Rescue Commission.

The record showed that appellant had been awarded an outstanding service increment in February, 1981, and that in January, 1982, his Department recommended another outstanding service increment based on the continued outstanding performance rating received from his supervisors. The Fire and Rescue Commission denied the request as they believed it was inappropriate to grant such awards in consecutive years. This denial was based on their decisions in at least four other cases of similar nature.

The Fire and Rescue Commission also indicated that they were in the process of developing a program for one-time cash awards for extraordinary performance, and that appellant's Department could recommend such an award once the program received final approval. There was no provision for such cash awards at the time of the Department's 1982 recommendation.

Appellant argued that, under the County Code, Fire and Rescue Merit System employees are entitled to the same benefits provided to County Merit System employees.

It was the opinion of the Board that the present Personnel Regulations for Fire and Rescue personnel, while not being identical to the County's Personnel Regulations, provided an award program that must be considered consistent with the County's program, as required by Chapter 21 of the Montgomery County Code. Based on this, and in the absence of a requirement for identical benefits, it was the decision of the Merit Board that the decision of the Fire and Rescue Commission to deny the request for an outstanding performance increment was within its prerogative and jurisdiction under existing law. Accordingly, the appeal was denied.

Case No. 82-63

A Correctional Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning reimbursement for dry cleaning of uniforms during the period of April 5 through July 1, 1982.

MISCELLANEOUS - Case No. 82-63 continued

The record showed that the Department of Corrections and Rehabilitation had previously provided unlimited, free dry cleaning of uniforms for correctional officers. However, in the Fall of 1981, the staff of the Department was notified of possible budgetary problems with respect to dry cleaning of uniforms, and was requested to limit dry cleaning to two uniforms per week.

In March, 1982, the employees were notified that budgeted funds for dry cleaning would be exhausted at the end of the month, and that beginning in April, the service would be terminated until the beginning of the new fiscal year.

The record also showed that in Fiscal Year 1981, the Department expended nearly twice the budgeted amount for dry cleaning. In Fiscal Year, 1982, the Department ceased providing the service when the budgeted funds were expended.

While the Board recognized appellant's concern for discontinuance of the service, they also recognized management's responsibility to operate within the budgetary restrictions and guidelines mandated by the County Council. In this instance, employees of the Department were notified well in advance of a possible budgetary problem, and were given approximately two weeks notice of the actual discontinuance.

Based on the budgetary limitations set by the County Council and the lack of any modification to that budgeted amount, the Board found that the decision of the County to discontinue the dry cleaning service was appropriate, and, in fact, required. Accordingly, the appeal was denied.

Case No. 82-69

A Carpenter appealed an involuntary demotion from the position of Carpenter II to Carpenter I for excessive, repetitious tardiness, and because on at least two occasion, he had allegedly requested co-workers to bring alcoholic beverages onto work sites.

At the beginning of the hearing, appellant moved for dismissal of the case because he believed proper notice had not been provided, as required by Section 20 of the Personnel Regulations. The Board found that the Personnel Regulations provide for an involuntary demotion in two different categories. First, Section 20.4, Involuntary

Demotion, which is related solely to an individual's work performance evaluation, and requires a ten day notice period. Secondly, Section 21, Disciplinary Actions, which also provides for an involuntary demotion based on a specific incident or violation of policy or procedures, and mandates only a five day notice period. The Board ruled that this was a disciplinary action, and that the notification requirements of Section 21.4 (five working days) applied and had been met. Accordingly, the motion to dismiss was denied.

While the County charged appellant with failing to attain a satisfactory level of attendance, they had failed to submit any evidence of formal guidelines or policies on attendance by which a standard could be established, and an individual judged for compliance or non-compliance. However, appellant did not refute being tardy on the dates in question and on other dates as reflected in the attendance record.

The record showed, and appellant admitted, that he had asked two employees to bring beer back for him when they went out for food, but he stated that the first time was a joke, and the second time he was going to meet the individual at his car and have a beer with his lunch. He stated he never intended to have anyone bring beer onto County property for him.

County witnesses testified that neither employee bought the beer for appellant; that many employees had beer with lunch when they went to restaurants; and that the Department did not have a written policy on drinking alcoholic beverages during work hours. They also indicated that appellant was an excellent worker, and they had no problems with his job performance. Witnesses also testified that on at least one occasion, most of the carpentry crew and higher-level supervisors drank beer during a break when completing a large job in the new County complex. This occurred with full knowledge of the supervisor and on County premises, and no one was disciplined or warned as a result.

The Department offered testimony that its biggest concern was the example set by appellant, a supervisor, when he asked subordinates to buy beer for him, and that the unwritten policy was "no drinking on the job". The Department did not have a problem with individuals having a beer with lunch, so long as it was off County property.

The Board believed the charge concerning asking subordinates to bring beer onto a work site to be serious when considered in the context that appellant was a supervisor, and, as such, was expected

to set an example for others. While there were no formal guidelines or policy of "no drinking on the job", and even though there was evidence that the "informal" policy was violated occasionally by a majority of the work crew, including supervisory personnel, the Board believed it essential that a supervisor set the example for subordinates in all areas of work conduct and performance. Whether the requests were made in jest or intended to keep the beer off the work site did not alter the fact that the requests were made. The Board ruled that this action was totally inappropriate for a supervisor, and, based on appellant's prior attendance problems, a demotion to a non-supervisory position was considered to be reasonable and appropriate. Accordingly, the appeal was denied.

Case No. 82-70

A Bus Operator appealed from the decision of the Chief Administrative Officer on his grievance concerning the Department of Transportation's discontinuance of the Run Switch Policy. The grievance was based on alleged violation of established procedures and alleged discrimination.

The Chief Administrative Officer had found that the Run Switch Policy had not been adhered to in all cases, and directed the Department to rescind, revise or re-establish the policy within thirty days. Because of operational problems in the Department, it was determined that elimination of the policy was the best alternative. Appellant alleged that the policy was discontinued for discriminatory reasons, but there was no evidence to support the allegation.

The Board believed the County had acknowledged the problems involved, and the Department had taken corrective action, as directed by the Chief Administrative Officer. Since the development and implementation of administrative policies such as a Run Switch Policy is a prerogative of management, the Board did not substitute its judgement for that of the operating officials to reinstate a policy that had been deemed ineffective and inefficient. Accordingly, the appeal was denied.

Case No. 82-73

A Bus Operator appealed from the decision of the Personnel Director that a memorandum from the Chief Administrative Officer on holiday compensation was not a matter to be handled in the grievance process.

MISCELLANEOUS - Case No. 82-73 continued

The record showed that in resolution of a prior grievance filed by appellant, the County had agreed to issue an interim administrative procedure regarding holiday compensation, and to do so before the next holiday. Rather than issuing an interim administrative procedure, the County issued a memorandum the last normal working day before the next holiday.

The Board ruled that the memorandum in question in and of itself did not constitute a policy, but provided clarification of the requirements of Section A5, Holiday, Annual, Sick and Special Leave, of the Appendix to the Personnel Regulations. The County's actual policy and procedures to be followed are contained in Section A5.1 through A5.9 of that Appendix. Since there is no requirement in the Merit System Law or Personnel Regulations for the Chief Administrative Officer to develop administrative procedures or interim administrative procedures on this matter, and in the absence of any indication that the Personnel Regulations had not been adhered to, it was the decision of the Board that the grievance filed was inappropriate for processing since appellant had not been adversely affected. Accordingly, the decision of the Personnel Director was sustained.

Case No. 82-74

A Firefighter who had been on extended leave without pay appealed from the decision of the Fire and Rescue Commission which denied his request to be reinstated to the eligible list for entry-level Firefighters. He specifically wanted to be reinstated to an active Firefighter position without being required to pass a physical agility test.

The Commission contended that appellant had not followed proper procedures in noting the appeal, and that he should have filed through the grievance process. However, it was the Board's opinion that to require an employee to file a grievance through the chain of command when the decision under appeal was rendered by the body at the top of that chain served no useful purpose. The usual process followed in filing complaints is to go to the level above the one where the decision being appealed was made. It was the decision of the Board that the appeal was properly filed.

The record showed that appellant had been employed by a Fire Department, but was placed on leave without pay in 1979 because of injuries sustained while in a volunteer status, and that he had

waived reinstatement rights to his prior position. Subsequently, the Fire and Rescue Commission was established by law, and new procedures for employment of entry-level Firefighters were developed and approved. These procedures are contained in Administrative Procedure 7-1, which was issued by the Commission. That procedure also indicates that the physical agility test is not administered until after an individual has been placed on the eligible list and selected for further processing by one of the fire corporations.

Based on the fact that new procedures had been implemented, it was the opinion of the Board that the previous requirements for reinstatement for Firefighters may not be considered precedent-setting, and that individuals who are placed on leave without pay and waive their rights to their positions, for any reason, are always subject to the regulations in effect at the time of the application for re-employment, not the regulations in effect at the time they went on leave without pay.

Based on the information in the record, it was the unanimous decision of the Merit System Protection Board that appellant's name be placed on the eligible list for entry-level Firefighter positions, and that he be eligible for selection by a corporation for further processing prior to placement in the pre-selected applicant group. However, prior to being included in the pre-selected applicant group, appellant had to pass the return to work agility test and physical examination, and the Fire and Rescue Commission was directed to take the steps necessary to implement the Board's decision.

Case No. 82-86

A Section Chief appealed the Personnel Director's decision that eligibility for an Extraordinary Performance Award was not grievable.

The record showed that appellant had been told by his supervisor that he was being recommended for an Extraordinary Performance Award, and that the recommendation was at the Department Head level. However, the Department Head had never approved the recommendation for further processing. Several months later, appellant filed a grievance, claiming entitlement to an Extraordinary Performance Award since the Department Head had not informed him that he would not recommend the award.

The County's procedures for cash awards or outstanding service increments give management the responsibility and authority for recommending and approving such actions. An employee does not automatically

have an entitlement to such an award until such time as it is approved by the Department Head, and the procedures do not contain any time limitations for obtaining such approval. Since the granting of an Extraordinary Performance Award is discretionary with management, it was the decision of the Board that the ruling of the Personnel Director that the issue was not grievable was correct, and it was sustained.

Case No. 82-108

A Firefighter appealed from the decision of the Personnel Director (rendered on behalf of the Fire and Rescue Commission) on his grievance concerning a written reprimand.

The record showed that appellant and two other firefighters were notified that their certificates for completion of the hazardous materials course were being revoked for alleged falsification of attendance records. The other two employees involved were given temporary certification, with the provision that they re-take the course, making them eligible to participate in the next Sergeant's examination. Appellant was denied the temporary certification and the right to participate in the Sergeant's examination.

Appellant received a statement of charges from his Department which stated that he engaged in conduct unbecoming an employee of the Department by falsifying his attendance at a scheduled class. Approximately one month later, appellant received a written reprimand from his Department for engaging in conduct unbecoming an employee of the Department by his actions involving the falsifying of attendance records for a scheduled class.

The various investigations conducted indicated that appellant was involved in signing the names of two other individuals for attendance records at a class, even though the others were not in attendance. However, the investigations failed to show that appellant had falsified his attendance at the scheduled classes, as originally charged. The Personnel Director reviewed the case on behalf of the Fire and Rescue Commission, and concluded that the statement of charges issued by the Department was not specific and did not provide sufficient details regarding the incident for which appellant was charged. The Personnel Director also noted that the Department had acknowledged a mistake in the wording of the charges for the written reprimand, but, despite these errors, the Personnel Director directed that the written reprimand be modified to reflect the charges as originally stated in the statement of charges.

Based on the defective notice and lack of any evidence to show that appellant had falsified his attendance at the classes in question, it was the decision of the Merit Board that the written reprimand be

rescinded and all documentation pertaining thereto be removed from appellant's personnel file. Further, the Board directed the Fire Department reimburse appellant for reasonable attorney's fees incurred.

Case No. 82-116

A Transit Operations Supervisor appealed from the decision of the Chief Administrative Officer on his grievance requesting that he be re-credited annual and sick leave used during the period of investigation of a grievance which had been filed against him by another employee. The record showed that the Department Head's response to the other employee's grievance was due by the close of business on May 21, and that May 21 was appellant's last day of work prior to going on vacation. Under Track V of the County's grievance procedure, the Personnel Office Review (Step II) is not to begin until the grievant submits a written request for such action. However, on the afternoon of May 21, the Personnel Office had a telephone conversation with the grievant, and, based on oral communication, proceeded to schedule a Personnel Director Review by calling the parties involved. This was appellant's first knowledge that a grievance alleging discrimination had been filed against him.

Appellant was not required to cancel his vacation or change any plans as a result of this review, and took his vacation as originally approved and scheduled. The grievance charging appellant with discrimination was subsequently ruled to be without foundation, and no action was taken against appellant.

On September 29, appellant's grievance was handled by a fact finder who reported that, even though the Personnel Office had not complied with established procedures in handling the grievance filed against appellant, there was no basis for granting the relief requested - re-crediting leave due to unnecessary anguish which interfered with his vacation.

It was the Board's judgment that the recommendations of the fact finder and the decision of the Chief Administrative Officer were reasonable and based on evidence of record, and there was no evidence in the record to support appellant's claim for emotional anguish interfering with his vacation. Accordingly, the appeal was denied.

Case No. 82-58

A Bus Operator appealed from the decision of the Personnel Director that the issue of preventability of an accident is not grievable.

The Board found that the Department of Transportation's accident review procedures did not provide for appeal of determinations regarding preventability of accidents, and the Personnel Director's decision that the issue was not grievable was sustained. However, the Board noted that any disciplinary action resulting from a preventable accident would be grievable.

RECRUITMENT/PROMOTION

Case No. 80-67

An Assistant Liquor Store Manager appealed the decision of the Chief Administrative Officer on his grievance which raised four major issues: 1) Discrimination because of political affiliation; 2) Bias because of activity in the field of public housing; 3) Harassment because of filing a grievance; and 4) Discrimination because of age.

The record showed that appellant had recommended creation of a Program Assistant I position for the Department of Liquor Control. When his recommendation was implemented and the position was advertised, appellant applied, was interviewed, but was not selected for the vacancy. The Chief Administrative Officer denied his appeal.

On the first allegation, the record showed that the individual appointed to the position of Program Assistant I had previously worked for the Montgomery County Delegation in Annapolis. However, there was absolutely no evidence or indication of any political favoritism or influence in the selection process. The individual selected met the established qualifications for the job, and the position was of a generic class, which, in the Board's opinion, negated appellant's allegation that it was created and tailored to fit one specific person. Further, there was no showing of a political relationship between the individual's selection and subsequent delegation to assist the County in Annapolis, which would support the charge of political favoritism or discrimination. Based on the total lack of evidence, this charge was dismissed.

On the second allegation, bias because of activity in the field of public housing, the record showed that appellant had worked for the County on housing issues from 1967 until 1969 when he resigned. He returned to County employment in 1973 as a Liquor Store Clerk, and, in 1978, was promoted to Liquor Store Clerk II. Since 1973, appellant had applied for fifty-four positions, but was successful only in the promotion to Liquor Store Clerk II, until the Fall of 1982 when he was promoted to Assistant Liquor Store Manager.

The work record of appellant revealed that he was considered an outstanding employee, and received several special awards while employed with the County in the late 1960's in the housing field. In fact, the Director of the Department of Community Development who appellant alleged kept him from re-employment was the same individual appellant praised in a 1976 letter to the County Personnel Board on a similar matter, and that person left County employment prior to 1976. With respect to the other persons alleged to be involved, they were available at the hearing on this appeal (under subpoena), but

appellant elected not to call them to testify. While the Board agreed that it appeared to be unusual for an individual to be unsuccessful in obtaining employment after so many attempts, they also noted that eight of the fifty-four vacancies for which he applied were not filled for various reasons, and approximately twenty were not in the field of housing or related activities. Further, the Board realized and considered the impact and requirements of affirmative action and the labor market in the housing field during the period in question, which made the market unusually competitive. Because of all these factors, and the lack of supporting documentation or evidence, the Board concluded that the allegation was without foundation, and it was dismissed.

On the third allegation, the record showed that the Director of the Department of Liquor Control had issued an order concerning a petty cash incident, but that the order was rescinded once an explanation was provided by appellant. There was no indication of continued problems or other incidents of management activity to constitute undue harassment as alleged by appellant. Therefore, this charge was dismissed.

On the fourth issue, appellant alleged discrimination because of age. However, the record was devoid of any evidence to support the allegation. The individual selected for the Program Assistant position was over forty years of age, and, in the Board's opinion, appellant's belief that the age of the County's recruiters and most applicants was under thirty-five years did not consitute a valid argument in the case. Lacking sufficient basis or justification for the charge, it was dismissed.

While the Board could understand appellant's frustration and concern in his efforts to improve his employment status, they were equally concerned that he may have been disappointed by the outcome of the competitive selection process. An individual who suggests creation of a new position and does most of the work to prepare for it might expect to have an advantage in the selection process. After review of all the facts in this case, however, the Board was of the opinion that this specific instance was a good example of how the merit system should work - selection of the person considered to be the best qualified without favoritism and/or discrimination. Despite appearances and the allegations set forth, there was no evidence of any improper procedures or violations of the Personnel Regulations. Accordingly, the decision of the Chief Administrative Officer was sustained, and the appeal was denied.

Case No. 82-67A

A Police Technician appealed the decision of the Chief Administrative Officer on her grievance concerning promotion from Office Assistant

to Police Technician without the normal 5% salary increase.

The County's position was that since appellant had previously been employed as a Police Technician, had been voluntarily demoted without a loss in salary, and then competitively returned to her prior occupational class, she was not entitled to receive the normal 5% increment given individuals when promoted. The County insisted that such action would give appellant an opportunity to manipulate the system, and would create inequities in the County's pay structure.

Appellant argued that the County's stated policy with respect to promotions, as articulated in memoranda dated June 16 and July 13, 1978, requires an employee be given a minimum five percent increase in salary. Appellant further argued that since there was no question that the action was a promotion as defined in the Personnel Regulations, that the promotional increase should be granted since Section 20.3, Voluntary Demotion, of the Personnel Regulations specifically states that such an action "shall not be detrimental to an employee's work record and shall not adversely affect the employee's opportunity for future promotion."

The Board noted that Section 33-17 (h), Salary of a Promoted Employee, of the Personnel Regulations in effect in 1978 provided for a minimum increase of 5% for promotion. However, this provision was not included in the current Personnel Regulations which were approved on December 2, 1980, and there was no current requirement in the law for such increases.

After consideration of the arguments put forth by the parties, the Merit System Protection Board ruled that appellant had been treated fairly, and was not adversely affected by the County's denial of the promotional increase. The fact that she was returned to her prior position was clear evidence that the voluntary demotion did not adversely affect her promotional potential, as mandated by Section 20.3 of the Personnel Regulations. Further, in the absence of any requirement in present law or Regulations for mandatory salary increases for promotion, the Board failed to find sufficient justification to award the increase. The Board concurred with the County's argument that a 5% increase upon return to the prior position would create salary inequities, and have an adverse impact on the morale of other employees. Therefore, the decision of the Chief Administrative Officer was sustained.

THIS DECISION WAS APPEALED TO COURT.

Case No. 82-68

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning the extension of the eligibility list for the position of Police Lieutenant.

The record showed that at the time of the examination in 1980, it was indicated that the eligible list would be valid for a period of approximately two years, but was initially certified for a period of only one year, then subsequently extended by the Chief Administrative Officer for the second year, to expire in March, 1982.

In August, 1981, the Department of Police began preparations for administration of an examination for promotion to the position of Lieutenant. The Personnel Office conducted a job analysis study during October and November, 1981 as the first step in preparing the examination. The Personnel Office indicated that preparation of the examination should take no more than two or three months after the job analysis was completed, however, by September, 1982, the examination had not been administered.

The Department of Police requested permission to develop and administer the examination in the interest of completing the timely examination process before June, 1982, when vacancies for the position were expected. This approval was not granted.

In March, 1982, the Department of Police requested that the eligible list for Lieutenant be extended for six months to permit filling of the vacancies prior to July 1, 1982. The Department expected three vacancies, and there were three individuals remaining on the list. The Chief Administrative Officer approved the extension for a period of six months.

While the Board believed that the County was remiss in not constructing and administering an examination in a timely manner, it ruled that such failure did not negate the right of the Chief Administrative Officer to extend an eligible list, nor did it indicate that the individuals on the list were not qualified for promotion. Based on the fact that the individuals on the eligible list had been placed there after competitive examination in 1980, and the fact that the Chief Administrative Officer had extended the list in accordance with his authority under Section 5.10, Eligible Lists, of the Personnel Regulations, the Board found no basis to overturn the extension of the list or subsequent promotions, and the appeal was denied.

Case No. 82-71

A Firefighter appealed from the decision of the Personnel Director, rendered on behalf of the Fire and Rescue Commission, on his grievance concerning a promotional examination question. The record showed that prior to administering the multiple choice examination, all candidates

were instructed to select "the best answer" for each question.

In the question under discussion, all four answers supplied constituted "correct answers", but one was more specifically related to the situation outlined in the question. Therefore, the Board believed it was incumbent upon all individuals taking the examination to carefully analyze the questions and select the best answers from the list provided, which may, to a certain degree, all be correct answers. This required an awareness of and the ability to think-through subtle differences between correct answers, to select the one "best answer", as well as paying close attention to specific instructions for taking the examination. Accordingly, the Board denied the appeal.

Case No. 82-72

A Firefighter appealed from the decision of the Personnel Director regarding the promotional examination for the position of Sergeant. The record showed that appellant was scheduled to take the promotional examination for the rank of Sergeant at 8:00 a.m.. He did not arrive at the examination site until after 8:00 a.m., and was denied admittance by the individual in charge. Appellant's subsequent appeal to the Fire and Rescue Commission was denied, and he was not allowed to take the examination.

Several weeks later, another individual was approximately fifteen minutes late in reporting for an examination for the rank of Captain, and was denied admittance by the individual in charge. However, this individual also appealed to the Fire and Rescue Commission, and was allowed to take the examination later that same day.

There was no written policy of record on the issue in question, but the County contended that the practice for many years had been to deny admittance to late-comers. This statement was not refuted by any evidence submitted. Further, the Personnel Director indicated that had the second individual passed the examination for the rank of Captain, his name would not have been certified to the eligible list since his treatment had differed from that accorded appellant and would not have been in keeping with established procedures.

Based on the evidence of record, the Board found that treatment of appellant in this case was consistent with established past practices, and that both individuals had been treated similarly by the individuals responsible for administering the examinations. Irrespective of subsequent events with respect to the second individual, it was the opinion of the Board that those events had no impact on appellant and did not affect his rights. Accordingly, the appeal was denied.

SUSPENSIONS

Case No. 82-76

A Firefighter appealed a suspension, but failed to appear for the scheduled hearing. The Merit Board dismissed the appeal.

Case No. 82-115

A Bus Operator appealed his suspension pending investigation and/or trial, but the Department rescinded the suspension prior to the hearing, rendering the appeal moot.

INTERPRETATIONS OF THE PERSONNEL REGULATIONS

Pursuant to Section 1.4, Interpretation, of the Personnel Regulations, the Merit System Protection Board issued the following interpretations regarding:

Reduction in Force
Service Increments
Compensatory Leave.

As mentioned in Section 1.4, Board interpretations are final, subject only to review by a court of competent jurisdiction. None of the above interpretations were appealed to court.

REDUCTION IN FORCE

The Board was requested to interpret Section 19, Reduction in Force, and Administrative Procedure 4-19, Reduction in Force, particularly as they relate to seniority. The primary question raised was whether or not employment in a State/County position should be counted as County service in calculation of seniority.

The County has two distinct types of positions dealing with services provided in conjunction with the State of Maryland. First, there are "State positions", which are totally responsible to and funded by the State of Maryland. Second, there are "State/County positions", which are classified in both systems, with incumbents receiving salary monies from both jurisdictions and eligible for benefits in both jurisdictions.

Section 3.18, Seniority, of Administrative Procedure 4-19, states, in part, that " . . . all paid service in a full or part-time position as defined in Section 3.6 and 3.8 of the Personnel Regulations" shall be included when calculating seniority. Section 3.6, Full-time Position, of the Personnel Regulations states:

> "A position that requires employment for forty regularly scheduled hours per week on a continuing year-round or school year basis including:
>
> "(a) A position created for a special term, project or program, or which is funded in whole or in part by Revenue Bonds (C.I.P.) or Federal, State or private funds or organizations.
>
> "(b) A State of Maryland merit system position which is also classified under the County's merit system."

Based on the foreging, it was the interpretation of the Merit System Protection Board that, in determining seniority for purposes of reduction in force, full-time employment in a State/County position must be considered as County service, but that service in a State position may not be considered in calculation of seniority.

SERVICE INCREMENTS

The Board was requested, for purposes of clarification, to review Section A2, Service Increment/Service Increment Dates, of the Personnel Regulations. The Board's review indicated the following:

1. Section A2.7 sets forth procedures for recommending service increments, and requires that it be done, in writing, " . . . at least fifteen days before the recommended effective date". There is nothing in Section A2 with respect to separate procedures or time limits for delays of increments.

2. Section A2.8 requires reassignment of an increment date if the service increment is delayed, and also mandates that such reassignment requires the Chief Administrative Officer's approval before it may become effective. The same requirement is also contained in Section A2.9.

3. Section A2.11 gives the Department Head authority to approve a service increment delay, but also requires that reasons for such action be submitted in writing. The Regulations do not state to whom such justification must be submitted.

It was the Board's interpretation that a Department Head has the right to delay a service increment, but, because of the requirements of Sections A2.8 and A2.9, such delay may not become effective until approved by the Chief Administrative Officer since reassignment of the increment date is required by the delay. Therefore, delays of service increments must be approved by the Chief Administrative Officer.

Further, in the absence of specific procedures with respect to time limits for delays of service increments, Section A2.7 should be applied to both the granting of service increments and delays of service increments. Based on this, it is required of management to notify an employee of an intended delay of service increment prior to the effective date of that action.

COMPENSATORY LEAVE

The Merit Board was requested to Interpret Section 13.5, Compensatory Leave, subsection (c), Limitations on Accrual of Compensatory Leave, specifically, as to the meaning of "ten work days" contained therein.

Section 13.5 (c), Limitations on Accrual of Compensatory Leave, states:

> "Not more than ten days of compensatory leave may be carried over from one leave year to the next. Unused compensatory leave in excess of this amount will automatically be credited to sick leave. Upon specific approval of the Chief Administrative Officer, an employee may be permitted to retain a compensatory leave balance in excess of ten (10) days at the end of a leave year whenever it is shown that the employee was unable to reduce the compensatory leave balance to ten (10) days because of emergency or special work load considerations. Such carry-over of excess compensatory leave must be reduced by not later than December 31 of the succeeding leave year."

In considering the matter, the Board reviewed all of Section 13.5, and found subsections (d), Disposition of Compensatory Leave at Separation, and (g), Use of Compensatory Leave for Purchase of Retirement Service Credits under the Provisions of the Employees' Retirement System of Montgomery County and the Montgomer Count Police Relief and Retirement Fund Law, instructive. Further, the Board was aware of t e fact that the generally accepted work week is five eight-hour days, which has caused some difficulty for management in applying the Regulations in a fair and equitable manner when dealing with other work schedules such as four ten-hour days, etc.. However, it is quite clear from Section A6.2, Work Day and Work Week, of the Personnel Regulations, that the normal work week for full-time employees is forty hours.

Based on the forty hour normal work week, and the limitations contained in subsections (d) and (g) of Section 13.5--eighty hours, which equates to two work weeks--it was the interpretation of the Board that "ten work days" as contained in Section 13.5 (c) of the Personnel Regulations means eighty hours of compensatory leave. Any other interpretation would result in discriminatory treatment by allowing one group of employees to retain 25% more compensatory leave, even though other groups work the same number of hours per year, i.e. 2080.

GENERAL COMMENTS

While the Board's appellate duties continue to consume a large portion of time, the Board plans, during 1983, to expand its personnel management oversight role through use of its audit and inquiry functions, and increased used of the public forum and dialogues with management officials and representatives of employee organizations. Through these media, the Board hopes to ascertain the best measure of where we are, and what changes are needed to improve personnel management in Montgomery County.

In addition to this, the Board will continue to strive to improve communication among all groups in a cooperative spirit to stimulate a meaningful exchange of ideas and thoughts, and, accordingly, facilitate the effective management of our human resources in an efficient and compassionate manner.

SUMMARIES OF APPEALS
BEFORE THE
MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD

July, 1982

In an effort to provide employees and management a better understanding of the appeal process, and County personnel policies in general, summaries of the Merit System Protection Board's decisions on appeals are published at least once a year. It should be noted that, while complete records on appeals are confidential, copies of the Board's final decisions are public records, as they are included in minutes of Board meetings.

From November 25, 1981, through June 30, 1982, fifty-seven appeals were filed with the Merit System Protection Board. Cases filed after mid-November were assigned 1982 case numbers since decisions on those cases could not reasonably be expected before the close of the calendar year. In addition, four cases were outstanding from previous years--Case No. 79-78 (dismissal); Case No. 80-60 (dismissal); Case No. 80-67 (recruitment); and Case No. 81-75 (disability retirement). Also, Case No. 81-05, an appeal from the decision of the Fire and Rescue Commission regarding a special duty assignment, was remanded by the Circuit Court for Montgomery County

to the Merit Board, with instructions that the Board remand the case to the Fire Department.

Since the beginning of 1982, forty-eight appeals have been resolved, including Case No. 79-78. Summaries of those appeals follow.

MERIT SYSTEM PROTECTION BOARD

Ro ert R. Fredlund, Chairman

Harriet T. Bernstein,
Vice Chairman

Richard S. McKernon,
Associate Member

COMPENSATION

Case No. 82-01

A Transit Operations Supervisor appealed from the decision of his Department Head to deny a recommendation for an Extraordinary Performance Award. The denial was sustained by the Chief Administrative Officer after the employee filed a grievance.

The individual had received an "outstanding" performance evaluation, and his supervisor had recommended an Extraordinary Performance Award. The recommendation was denied by the Division Chief and Department Head for reasons that were not necessarily job-related.

In reviewing the case, the Merit Board noted that authority and responsibility for granting Extraordinary Performance Awards rest with the Department Head, subject to approval by the Chief Administrative Officer. There were no established standards or criteria for the awards, and the factors considered in this particular case were of questionable nature. However, the Board found that an employee does not have a right to an Extraordinary Performance Award, and that such award may not be granted unless approved by the Department Head and Chief Administrative Officer. In light of these requirements, the Board determined that it could not substitute its judgment for that of management, and the appeal was denied.

Case No. 82-18

A Deputy Sheriff appealed from the decision of the Chief Administrative Officer which denied his request for an increase in clothing allowance and for laundry and dry cleaning privileges for deputy sheriffs because there were differences in benefits provided police detectives and deputy sheriffs. Appellant believed the benefits should be equal because the jobs were similar.

The Board ruled that there was never a requirement that parity be maintained between different occupational classes, and that the level of duties and responsibilities assigned police detectives and deputy sheriffs were not similar enough to justify equity in classification and/or other areas of compensation. The Board also noted that the request was a budgetary matter, which could only be granted after consideration and approval of the County Council. Therefore, the appeal was denied.

COMPENSATION

Case No. 82-40

An Administrative Aide appealed from the delay of her service increment which resulted from a performance rating. The record showed that appellant's service increment had initially been delayed because of unsatisfactory work performance. Approximately six months later, appellant's performance was again evaluated. While her work performance had improved, she was rated as "marginal". In the opinion of her supervisor, her work performance was still not sufficient to justify granting of a service increment.

The record showed that there was some disagreement as to the actual extent of deficiencies in appellant's work performance, but there were problems in four of the eight areas evaluated. It was also clear from the record that appellant had been experiencing physical and personal problems. Management had taken these facts and planned medical treatment into consideration, and expressed a willingness to continue working with appellant to help her attain a satisfactory work performance.

The Board ruled that the determination of whether or not an employee has performed at a satisfactory level rests with the employee's supervisor, and that, based on the record in this case, there was insufficient justification for modifying or overturning the judgment of appellant's supervisor. Therefore, the appeal was denied.

Case No. 82-44 and 82-46

A Bus Operator appealed from the decision of the Chief Administrative Officer on a class action grievance concerning the holiday compensation policy, which is set forth in Section A.5, Holiday, Annual, Sick and Special Leave, of the Addendum to the Personnel Regulations. There was no indication or evidence that this policy had not been followed. Rather, the question in the case involved the validity of guidelines for holiday compensation which had been developed with the assistance of the Personnel Office and issued by the Department of Transportation in 1981.

The Fact Finder assigned during the grievance process found that the authority for issuing guidelines had not been delegated by the Chief Administrative Officer, and recommended that the 1981 guidelines be rescinded. The Chief Administrative Officer subsequently rescinded those guidelines, and directed return to the previous policy until an Interim Administrative Procedure could be developed and implemented. While no Interim Administrative Procedure had been

Case No. 82-44 and 46 - continued -

established at the time the Board's decision in this case was issued, the Board found that such failure did not affect the validity of Section A.5 of the Personnel Regulations, which continued as the mandatory policy until changed through the appropriate process.

Based on the fact that the Chief Administrative Officer had rescinded the guidelines which had been issued improperly, and in the absence of any evidence that the Personnel Regulations had been violated or that employees had not been paid in accordance with Section A.5, the appeal was denied.

DECISIONS OF THE DISABILITY RETIREMENT HEARING BOARD

Case No. 82-24

A Warehouse Worker/Truck Driver Helper appealed from the decision of the Disability Retirement Hearing Board on an administrative application for his disability retirement, raising two issues: first, that alternative placement was available in his case, and second, that the 25% permanent, partial disability rating was incorrect. He also requested that the question of alternative placement be addressed as soon as possible, but that, if necessary, the percentage rating be held in abeyance pending decision of the Maryland Court of Special Appeals in the case of Whitaker vs. Montgomery County, Md., which could have a direct impact on appellant's case.

The Merit Board scheduled a hearing on the issue of alternative placement. The record showed that appellant was capable of performing limited duties; was willing to perform limited duties in any available position in the County government, irrespective of department; and that he made an effort to remain in regular contact with the Personnel Office in hopes of obtaining other employment. The record also showed that the actions of the County consisted of talking with appellant and telling him that if he was interested in any job announcement, to let them know and they would see what they could do. The County did not conduct a skills inventory; did not provide aptitude testing; did not suggest or provide training for purposes of vocational rehabilitation; did not provide adequate counseling; did not offer or make any effort to obtain a waiver of minimum qualifications for any position; did not make any effort to restructure any position within the County government; and did not make any attempt to provide reasonable accommodation within any available position.

The County presented testimony concerning its efforts to provide reasonable accommodations for employment of the handicapped to bring them into the work force, however, the Board was of the opinion that there had been insufficient effort on the part of the County to provide similar treatment for individuals who are injured in the line of duty to retain them in County service.

Section 5.12, Medical Requirements of Employees/Applicants, of the Personnel Regulations states, in part:

> ". . . Whenever an employee/applicant is found to have a defect or condition that would impair satisfactory performance of duties . . . the Chief Administrative Officer may remove that individual from the position and temporarily place him/her on limited duty or transfer to a position where the individual may be productively

Case No. 82-24 - continued -

> "employed, or take another personnel action deemed appropriate and reasonable. Prior to making a decision or taking an action based on the medical findings, the Chief Administrative Officer shall determine if the problem is correctable and whether or not 'reasonable accommodation' could be made in accordance with the County's policy of employment of the handicapped and/or disabled."

Based on the foregoing, the Board believed that the record was incomplete, and unanimously remanded the case to the Chief Administrative Officer for determination as to whether or not the problem was correctable, and whether or not reasonable accommodation could be made prior to proceeding with an administrative disability retirement. In reaching those conclusions, the Board ruled that the County would have the burden of conducting a skills inventory; administering an aptitude test; and documenting specific efforts made toward training for rehabilitation purposes, waiver of minimum qualifications and/or restructuring a position for purposes of re-employing appellant.

-THE COUNTY APPEALED THIS DECISION TO COURT.

DISMISSAL

Case No. 79-78 (resolved 4/82)

A Warehouse Worker/Truck Driver Helper appealed his dismissal. During the hearing of the case, the County agreed to rescind the charges, rendering the appeal moot.
-APPELLANT APPEALED THIS MATTER TO COURT.

Case No. 82-21

A Bus Operator appealed his dismissal for operating a county vehicle while his driving privileges were suspended, and failing to disclose to the Department of Transportation the fact that his driving privileges were suspended.

The record showed that during a routine review of appellant's driving record, it was discovered that the State of Maryland had suspended appellant's driving privileges for a period of approximately eight months. Appellant denied any knowledge of the suspension. The record further showed that appellant had been suspended for a similar offense in 1979.

The Board found that appellant had, in fact, operated a county vehicle during a time his driving privileges had been suspended, in violation of departmental policy, the motor vehicle laws of the State of Maryland, and the Personnel Regulations. Because appellant had previously been disciplined for a similar violation, the dismissal action was sustained.

Case No. 82-30

A Bus Operator appealed his dismissal for abuse of sick leave and knowingly making false statements or reports in the course of his employment. These charges were based on appellant's submission of allegedly forged medical certification for absences from employment on two consecutive days.

In the Board's opinion, there were five questions that needed to be addressed:

1. Who had the authority to dismiss an employee, and was the action in this case taken in accordance with established procedures?

2. What constitutes a proper charging document?

3. Did the employee in this case abuse his sick leave?

DISMISSAL

Case No. 82-30 - continued -

4. Did the employee knowingly file a false report for his absences on the dates in question?

5. Even if found guilty, was the penalty of dismissal the proper action under the County's Personnel Regulations?

On the first question, the parties pointed out two delegations of authority. First, an October 21, 1981, delegation by the Chief Administrative Officer which gave the Personnel Director authority and responsibility for dismissals, and secondly, a delegation dated January 19, 1982, which had the Chief Administrative Officer retaining that authority. The dismissal in question had been approved by the Personnel Director on January 22, 1982, and, it was apparent from the record that proper notice to rescind the October 21 delegation had not been given until after January 25, 1982, so the County contended that the Personnel Director still had the authority to approve the action. Appellant argued that the change in authority must be considered as January 19, 1982, the date of the memorandum, and, since the Chief Administrative Officer never approved the action, it must be rescinded for failure to follow proper procedures.

Based on the record, it was the Board's opinion that the Personnel Director still had the authority to approve the dismissal on January 22, 1982, and that the action was taken in accordance with the October 21, 1981, guidelines.

The second issue involved the charging document, which was alleged to be vague, thereby denying appellant adequate due process since it hindered rebuttal. The County had not developed a standard charging document, as required by Section 21.4 of the Personnel Regulations, but, rather, had provided management with an outline-type form letter to be used for assurance of consistency. In this instance, the Department Head chose to use, by reference, a supervisor's memorandum outlining the facts and problem as the charging document. While this memorandum did not clearly state the charges in an outline form with specific facts, etc., appellant testified that he was well-aware of the problem and the facts presented, and knew to what he had to respond when provided that opportunity. There was no showing by counsel that due process was denied or adversely affected by this procedure. Therefore, even though the County did not have a standard charging document, the Board found such failure did not adversely affect appellant's right to an extent that would require nullification of the action.

The question of abuse of sick leave concerned the matter of whether or not an employee can be charged with abuse of leave that requires management approval before being reimbursed for the time.

Case No. 82-30 - continued -

The Departmental guidelines for use of undocumented sick leave were never exceeded by appellant, and the time off for sick leave purposes had been approved by management. Yet, a special medical examination failed to reveal any specific reason for the large number of absences. Management, while apparently not necessarily believing all documentation previously presented, did not challenge it or disapprove use of sick leave, which were two options open to them that probably should have been used. Despite that, the Board found the use of sick leave in this specific instance to be highly questionable, and believed the charge of abuse of sick leave must be sustained, particularly since appellant failed to refute the County's evidence that the documentation submitted had been falsified or that he, in fact, had, or needed, immediate treatment for the alleged problem.

With respect to the charge of knowingly filing a false report, the County had shown that the doctor's certificate was false, and that it was submitted by appellant. Appellant did not show, or did not attempt to prove, who filled out the doctor's form and how he got it. Further, he testified he had not received or paid a bill for the office visit, nor did he indicate that any x-rays or tests had been taken by the doctor, even though the condition for which he was seeking treatment was considered serious. The only conclusion the Board could reach, based on the evidence of record and consideration of the testimony, was that appellant did file the report/medical certificate with full knowledge that it was not correct and that the signature was invalid.

The last issue involved severity of the penalty. Appellant argued that Section 21.1 of the Personnel Regulations requires actions be progressive in severity, and the most recent action against appellant prior to this dismissal action was a written reprimand. Appellant suggested the more appropriate action would be a reduction in pay or suspension. The County argued that severity must be determined based on the nature of the incident and prior work history, as well as other relevant factors. In this instance, falsification of a doctor's note was considered to be a very serious offense. Appellant's prior work record was replete with warnings, other actions, and promises for improvement, however, there was little evidence that appellant had tried to meet the requirements set forth by the County, and had walked a "fine line" for some time. Based on the total work record of appellant, and the nature of the charges in this case, the Board was of the opinion that the County was fully justified in taking the dismissal action, and that, with all of the warnings provided, the action must be considered progressive in nature.

Based on the record and findings, the Board sustained the dismissal.
-APPELLANT APPEALED THIS DECISION TO COURT.

DISMISSAL

Case No. 82-35

An Employment Specialist appealed her dismissal. The hearing was started, but carried over to a second date. Prior to conclusion of the hearing, the parties settled the case without action by the Board.

DECISIONS OF THE FIRE AND RESCUE COMMISSION

Case No. 82-22

An individual appealed from the decision of the Fire and Rescue Commission, but did not provide the Merit Board the information required by Section 23.4, Appeal Period, of the Personnel Regulations. The appeal was dismissed, with prejudice, for failure to file in accordance with established procedures.

Case No. 82-26 (Educational Salary Differential)

A Firefighter appealed the decision on his grievance which denied his request for an additional Educational Salary Differential (ESD) for an Associates of Arts degree. The record showed that appellant was hired by a fire department in 1974. At that time, the Fire Board's policy provided for a 5% ESD for a Fire Science Certificate, and an additional 5% for an Associate of Arts degree. In 1977, the Fire Board, at the direction of the County Council, adopted a new ESD program which included certain limitations on granting of the ESD's, and eliminated any extra percentage for an Associate of Arts degree. Appellant obtained his Fire Science Certificate in May, 1979, and his Associate of Arts degree in August, 1981. He received his ESD for the Fire Science Certificate.

The Board found that the policy was changed in accordance with established procedures, and that the Fire Board did, in fact, have authority to make such changes. Further, since participation in the ESD program is completely voluntary on the part of an employee, an individual does not have a vested or property right to the benefits of the program unless and until the individual meets all requirements of the program. It was the ruling of the Board that appellant did not meet all requirements of the program until May, 1979, and, therefore, was not entitled to any additional compensation for the Associate of Arts degree, and the appeal was denied.

MISCELLANEOUS

Case No. 82-02 (Written Reprimand)

An Equipment Operator appealed a written reprimand for allegedly sleeping on the job. The evidence of record showed that the individual had been observed sitting in his truck, but that the individuals who observed him were not close enough to determine whether or not he was asleep or awake. They assumed he was asleep and reported him to their supervisors, who subsequently gave the individual a written reprimand for the incident. Since neither of the witnesses could state with any certainty that appellant was asleep at the time of the incident, the Merit Board ruled that the written reprimand was unjustified, and directed it be rescinded, and all documentation related to the incident be removed from his personnel file.

Case No. 82-03 (Uniforms)

A Police Officer appealed from the decision of the Chief Administrative Officer which denied his grievance requesting that additional uniform shirts be issued because of laundry problems.

The record showed that the County provided each Police Officer eight summer shirts and eight winter shirts. Shirts are laundered free by the County, with pick-up on Wednesdays and Fridays, and deliveries on Monday and Wednesday of the following week. Because of varying work schedules, an individual may not have a sufficient number of clean shirts to provide one for each day of duty. However, the officers are allowed to wash shirts themselves, if desired, or to wear a winter shirt in summer or summer shirt in winter. The County also indicated that it was studying the possibility of switching to a year-round uniform and providing each officer with ten shirts.

It was the unanimous decision of the Merit Board that the number of shirts provided along with the laundry services, was a convenience for the Police Officers, and provided a reasonable and appropriate level of service to those individuals. Accordingly, the appeal was denied.

Case No's. 82-04; 06; 07; 08; 12; 13; 14; 15; 16; and 17 (Work Schedule)

Ten Police Officers appealed from the decision of the Chief Administrative Officer which denied their grievances concerning two consecutive days off. The Chief Administrative Officer's denial was based on the facts presented by another Police Officer in a

Case No's. 82-04, etc. - continued -

separate but similar grievance, and appellants in these cases were not provided an opportunity to present any evidence or arguments on their positions on the issue.

It was the opinion of the Board that the County had arbitrarily combined the grievances without notifying appellants or obtaining their concurrence. Therefore, all of the cases were remanded to the Chief Amministrative Officer for appointment of a special investigator to receive and review evidence, and consider arguments presented by all appellants, and complete processing of the grievances in accordance with established procedures.

Case No. 82-20 (Tuition Assistance)

Two Police Officers appealed from the decision of the Chief Administrative Officer which denied their request for tuition assistance under the Police Professional Advancement Program (PPAP). The record showed that appellants applied for PPAP benefits, and were subsequently advised of funding and policy changes in the program, which stated that individuals receiving other governmental educational benefits for a given course of study were not eligible to receive duplicate County benefits. Appellants' applications for tuition assistance were denied because they would be receiving Veterans' Administration benefits, but the letter of denial indicated that if VA funds were not provided, PPAP funds would be made available.

The Board ruled that, in this case, appellants had a choice of one of two benefits, and, because they chose VA benefits, the Chief Administrative Officer's decision to deny PPAP benefits was proper and in accordance with established procedures, and the appeal was denied.

- APPELLANTS APPEALED THIS DECISION TO COURT.

Case No. 82-25 (Purchase of Retirement Credit)

A Firefighter appealed from the decision of the Personnel Director (rendered on behalf of the Fire and Rescue Commission in accordance with its grievance procedure) which denied his request to purchase retirement credit for prior military service under Section 33-41 of the Employees' Retirement System of Montgomery County. The record showed that appellant was receiving retirement benefits for the military service in question from another retirement system, and that appellant did not have a vested right to benefits in 1978, when certain changes were made in the retirement law. The Board ruled that, pursuant to Section 33-41 (a) of the

Case No. 82-25 continued -

Employees' Retirement System of Montgomery County, appellant was ineligible to purchase the credit, and the appeal was denied.

Case No. 82-27 (Duty Assignment)

An Environmental Protection Inspector appealed the decision of the Personnel Director on his grievance concerning assigned duties and responsibilities. Appellant claimed he was not qualified for new duties assigned because they adversely affected his health and well-being, and, therefore, the County was wrong to require his performance of the new duties.

Appellant had been assigned to the license section of his unit, but, because of reductions in force in the unit and distribution of workload, appellant was advised that he would be required to perform routine field duties, which were a part of the normal job to which he was assigned. Appellant requested a transfer from his unit, but no other vacancies in his classification were available. His superiors informed him that he would either have to perform the duties, find another job within the County government, resign or retire.

The Board reviewed the class specification for appellant's position, and ruled that he was qualified for the job. It was the opinion of the Board that the problem in this case was appellant's lack of interest in and distaste for the field phase, which is officially a part of the class specification. The Board believed that the County had been making an effort to accommodate appellant by limiting his assigned duties as long as possible. However, the County has the right to require employees to perform the duties and responsibilities contained in the assigned class specification. The Board ruled that the County had acted reasonably in this case by outlining appellant's alternatives, and that he would have to make the choice most satisfactory to him. The appeal was denied.

Case No. 82-28 (Radio Communication System)

A Deputy Sheriff appealed the decision of the Chief Administrative Officer which denied his request for additional equipment and changes in the radio communication system in the Sheriff's Office. The County stated that the equipment being used was in good condition; the system was reliable, and met the needs of the Department; that a comprehensive study of the equipment and system had recently been completed, but recommendations had not yet been received; and that the Sheriff's Office had submitted a budget request which included additional funding to up-date the radio system.

MISCELLANEOUS

Case No. 82-28 - continued -

The Board found that management had considered all factors, including employee safety and costs, and concluded that the situation was acceptable and met the needs of all parties, and that since appellant had not presented any evidence to the contrary, the appeal must be denied.

Case No. 82-29 (Purchase of Retirement Credits)

A Division Chief appealed the decision of the Chief Administrative Officer on his request to purchase retirement credit based on salary and other data as of 1974 (when he initially requested information on the purchase of service), rather than current data. The record showed that appellant had applied to purchase the credit three times. The first application was cancelled by the Personnel Office after appellant had failed to respond to letters requesting additional information, and the second was not filed in accordance with the law in effect at the time. The third application was processed in accordance with the most recent retirement law, which requires that the purchase be based on current salary information. The Board found that the Chief Administrative Officer was correct in denying the request to purchase credit based on the 1974 data, and the appeal was denied.

Case No. 82-32 (Transfer)

An individual appealed his Department Head's decision to transfer him. The Board noted that Section 15.4, Appeal of Transfer, of the Personnel Regulations requires that appeals of this nature be filed in accordance with Section 22, Grievances, of the Personnel Regulations. It was the decision of the Board that the appeal could not be accepted, and the employee was advised to file a grievance with the appropriate authorities, in accordance with established procedures.

Case No. 82-33 (GED Classes)

A Bus Operator appealed from the decision of the Chief Administrative Officer which denied his request to attend GED classes during working hours. The basic issues to be decided by the Board were whether or not the denial was a discriminatory practice in violation of Section 4, Equal Employment Opportunity, of the Personnel Regulations, and whether or not the class specification for another position should be amended to include an equivalency statement for education and experience.

Case No. 82-33 - continued -

Based on the record, the Board found that the Chief Administrative Officer's denial was reasonable and responsible, particularly after consideration of present practices, costs and availability of classes, and all other factors. While the Board recognized the fact that appellant desired to obtain his diploma for promotional purposes, they also recognized that the diploma was not required for his present position. It was the opinion of the Board that appellant had been treated fairly and in a manner consistent with practices followed in similar cases. Therefore, the appeal with regard to attending classes during working hours was denied.

The Board noted that responsibility for amending class specifications rests with the Chief Administrative Officer, who, in this case, had indicated that the matter was outside the scope of the actual grievance. The Board ruled that since the issue had not been raised by appellant in his grievance, but, rather, by the Fact Finder in the case, the matter was not appealable, particularly since it is a classification matter.

Case No. 82-34 (Uniform Cleaning)

A Bus Operator appealed from the decision of the Chief Administrative Officer which denied his grievance concerning discontinuance of uniform cleaning privileges. The record showed that the Department of Transportation had provided cleaning privileges for Bus Operators' shirts, slacks, jackets, liners and collars, but that in the Spring of 1981, the County Council directed the Department to evaluate the service and consider its deletion as a cost-saving measure. As a result, the Department proceeded to purchase "wash and wear" slacks and shirts, anticipating discontinuance of the service. In the Fall of 1981, the Department notified operating personnel that because of continuing problems, service for slacks and shirts would be discontinued, but continued for jackets, liners and collars. Appellant's major argument was that discontinuance of the service was an unfair burden and disparate treatment of County employees since cleaning services are provided other County employees, and that management should resolve the problems rather than discontinue the service.

After review of the record, the Board found that most of the problems were either caused or raised by the individuals using the service, and that this, coupled with the cost impact, was sufficient reason for the discontinuance of service. Since it was within management's prerogative to provide or discontinue the service, the appeal was denied.

MISCELLANEOUS

Case No. 82-39 (Subject Unknown)

An individual appealed from the decision of the Chief Administrative Officer on his grievance, but did not provide the Board the information required by Section 23.4, Appeal Period, of the Personnel Regulations within the time provided. Accordingly, the appeal was dismissed, with prejudice, for failure to file in accordance with the Personnel Regulations.

Case No. 82-41 (Work Schedules)

Police Technicians appealed from the decision of the Chief Administrative Officer on their grievance concerning implementation of a new deployment plan--a four month rotational system--in lieu of the weekly plan that had been in effect. The four month plan had been replaced with another new plan, which provided for a volunteer midnight shift, and assignment to the remaining two day shifts based essentially on employee requests. Opportunity to change from one day shift to another was provided every four to six weeks. Most of the initial issues were resolved with this change, and were not addressed by the Board.

The only issues to be addressed by the Merit Board were whether or not the newest plan had been developed and implemented in accordance with established procedures; was there a provision for employee input; and was there sufficient advance notice of a schedule change?

The record indicated that the four month rotational plan was developed with minimal input from employees. The Board ruled that, while it may be desirable and good management practice to provide employees an opportunity to comment on proposed changes, such as these, there is no requirement to do so. It was noted, however, that the newest plan resulted from suggestions from employees and experience gained from other plans. The Board recognized that management is responsible for determining staffing needs, and has the authority to assign employees in what management believes to be the most effective and efficient manner to meet those needs, and that, in the final analysis, development of a staffing plan is a prerogative of management.

Under the newest deployment plan, shift changes may occur every four to six weeks. Approximately two to three weeks prior to the effective date of any changes, employees are advised that, if desired, they may request transfer to another shift. Once transfer requests are received and the schedules are prepared, employees are given at least five days' notice of the changes. It

Case No. 82-47 - continued -

was clear from the record that employees were dissatisfied with that notice.

The Board found that, while five days' notice of actual change seems short, it is tempered by the two to three weeks' notice of possible change that is given, albeit indirectly, when employees are afforded the opportunity to request a transfer. In this case, the Board believed two to three weeks' indirect and five days' direct notice to be a reasonable time for individuals to make contingency plans if required by a shift change.

Based on all of the facts and findings, the Board ruled that management has the right and responsibility to determine staffing needs, to make duty assignments accordingly, and that the plan in this case was developed in accordance with established procedures and requirements. With respect to the amount of notice of changes, it was the Board's opinion that the combined period of approximately three weeks was reasonable and provided employees adequate opportunity to make adjustments as required, and, therefore, the appeal was denied.

Case No. 82-48 (Grievability of Issue--Special Awards)

An Administrative Aide appealed the ruling of the Personnel Director that her grievance concerning an Outstanding Service Increment was not a grievable matter. The record showed that appellant had grieved the fact that there had been inconsistent application of the standards for granting such awards.

Administrative Procedure 4-4, Track 1, defines "grievance" as a "dispute concerning the interpretation, application or alleged violation of the County's Personnel Regulations, Administrative Procedures, or any other written policy affecting conditions of employment for which there does not exist a more appropriate appeal procedure". Based on this definition, which is contained in the grievance procedure, and the fact that procedures and standards for awards are contained in Section A.3 of the Addendum to the Personnel Regulations, it was the opinion of the Board that the issue raised by appellant was, in fact, grievable, particularly since grievances on similar matters had previously been accepted by the Personnel Office and processed as valid.

Accordingly, the Personnel Office was directed to process the grievance in accordance with established procedures.

MISCELLANEOUS

Case No. 82-50 (Enforcement of Directives)

A Bus Operator appealed from the decision of the Chief Administrative Officer which denied his requests for relief and disciplinary action against a non-merit employee because previous directives of the Chief Administrative Officer and orders of the Merit System Protection Board had not been followed. The Board found that it did not have authority for corrective action or to take disciplinary action against a non-merit employee, but advised appellant that it would take steps necessary to enforce its previous decision.

RECRUITMENT AND PROMOTION

Case No. 82-05

An applicant for the position of Correctional Officer Candidate appealed from his "not acceptable" rating received as a result of his failure to meet established medical standards. Upon medical examination, appellant was found to have minor problems with his lumbar spine, and the doctors noted degenerative changes occurring in the lumbar spine. Section Q1, Spine and Sacroiliac Joints, of the County's medical standards provided for disqualification of an applicant with problems of this nature. Since the problem noted was considered degenerative, it was the unanimous decision of the Board that the "not acceptable" rating was appropriate, and it was, therefore, sustained.

Case No. 82-11

An applicant for the position of Accounting Assistant appealed the decision of the Chief Administrative Officer which denied her request that the examination for the position be invalidated because it contained inappropriate questions. Upon review of the written record, the Board believed it necessary to take oral testimony, and the case was scheduled for hearing. However, prior to the hearing, the parties reached an agreement to dismiss the appeal, and no further action was taken by the Board.

Case No. 82-19

An Office Assistant appealed from the decision of the Chief Administrative Officer which denied her request for a temporary promotion. The record showed that appellant had been performing the duties and responsibilities of the higher-level position for an extended period of time, while the Department and Personnel Office were working toward filling the vacancy.

The Board noted that Section 16.4, Temporary Promotion, of the Personnel Regulations, allows an employee to be temporarily promoted on a non-competitive basis only if recommended by the Department Head and approved by the Chief Administrative Officer. Since the Department Head in this case had not recommended the temporary promotion, the Board ruled that such an action was a prerogative of management, and the appeal was denied.

However, the Board also ruled in this case that because appellant had performed duties and responsibilities outside her occupational class for an extended period of time, she was entitled to additional compensation. While the Board recognized management's responsibility

Case No. 82-19 - continued -

to get all work completed, it is still necessary to limit an individual's work outside the assigned class specification to a reasonable period of time. The Board believed that a reasonable period of time for filling a clerical position to be six weeks, and that appellant's assignment of the higher-level duties and responsibilities for six weeks would have been reasonable and acceptable. The Department was directed to reimburse appellant an additional 5% regular earnings from six weeks after the time she was assigned the work outside her class specification until she was either granted a temporary promotion, a competitive promotion, or relieved of the duties and responsibilities of the higher-level position.

Case No. 82-23

A Police Officer appealed the decision of the Chief Administrative Officer which denied his request that a promotional examination be invalidated because it contained inappropriate questions and administration of the examination deviated from standard instructions published prior to the examination.

After review of the entire record, the Board ruled that appellant failed to document his allegation that the test contained questionable material, and did not show that any of the questions were invalid or inappropriate. Further, while the administration of the examination at one site may not have been in strict compliance with the standard instructions provided, there was no evidence to show any adverse impact, impropriety, or that all individuals did not have equal opportunity in taking the examination. Therefore, the appeal was denied.

Case No. 82-36

An employee appealed the "Qualified" rating assigned by the Personnel Office as the result of his application for promotion to a supervisory position.

The vacancy had been announced intra-office only; the advertisement was very general in nature, and based on minimum requirements contained in the class specification. There was no evidence of a job analysis being done to determine the knowledge, skill and ability required for the position, and the announcement did not reflect subsequent special requirements used to evaluate the applicants. Applicants were rated by Personnel Office staff solely on the information contained on applications, without verification of any data and without formal guidelines for rating, as required by Section 5.9, Rating of

Case No. 82-36 - continued -

Examinations and Eligible Lists, of the Personnel Regulations.

It was the decision of the Board that the Personnel Office had sufficient information to determine if applicants met the minimum requirements, but lacked technical expertise and properly documented experience data needed to actually assign final ratings and certify an eligible list. The Board sustained the process up to determining if applicants met the minimum qualifications, but rescinded all final ratings and certification of the eligible list. The Personnel Office was directed to establish formal procedures for evaluating applicants, then evaluate all applicants properly, and establish a new eligible list, in accordance with the requirements of the Personnel Regulations.

Case No. 82-38

An individual appealed from the decision of the Chief Administrative Officer on his grievance concerning disqualification from further consideration for two vacancies. The record showed that from 1977 through 1981, appellant had submitted a number of applications for various positions within the County government. In reviewing the applications, the Personnel Office had found discrepancies in statements contained in the applications, and was unable to verify certain information on experience necessary for the two positions in question. Appellant could not provide any documentation to verify alleged experience, so the Personnel Office disqualified appellant from further consideration for the two positions.

It was the opinion of the Board that, when requested by the Personnel Office, it is the responsibility of an applicant to document the experience and education reflected on an application. In this particular case, appellant was unable to do so. The Board ruled that the decision of the Personnel Office to disqualify appellant was appropriate and in accordance with established procedures. Accordingly, the appeal was denied.

Case No. 82-45

An applicant for the position of Police Officer Candidate appealed a "not qualified" rating based on medical requirements for the position.

Case No. 82-45 - continued -

The record showed that appellant had been given a medical examination on January 29, and on April 13 was notified by the County's Employee Medical Examiner that he was found "not qualified" because he failed to demonstrate normal color vision. Appellant had consulted private physicians and was fitted with contact lenses to correct the defect in his vision, and submitted documentation from his physicians concerning the use of lenses which indicated that the vision test administered by the County during appellant's physical examination was considered obsolete.

The record further showed that the County's Committee for Reasonable Accommodation Review had questioned the standards for color vision and the practice of denying new employees the right to use contact lenses while incumbents were allowed to wear them. These questions were raised after this applicant filed his appeal. The County then requested an extension of the time allowed for responding to the appeal, and the time was extended to the date requested. However, the County failed to respond, and appellant requested the Board decide the case on the basis of the uncontroverted evidence.

The Board found that Section 5.12, Medical Requirements for Employees/Applicants, of the Personnel Regulations states that the Chief Administrative Officer may declare an applicant ineligible for appointment based on a medical report prepared by the Employee Medical Examiner, and further requires the Chief Administrative Officer to determine if the problem is correctable and whether or not reasonable accommodation can be made.

Based on the evidence submitted by appellant, and on the absence of findings required by Section 5.12 before the Chief Administrative Officer may disqualify an applicant on the basis of medical examinations, the Board directed the County to continue processing appellant in accordance with established procedures for the position of Police Officer Candidate.

SUSPENSION

Case No. 82-09

A Warehouse Worker/Truck Driver appealed his ten-day suspension without pay for allegedly drinking on the job, abuse of overtime, and allowing his truck to sit idle and unattended on each of two dates. The record showed that management was made aware of circumstances the day after the alleged first occurrence, but failed to notify and counsel the individual about the problem. Instead, management arranged to secretly observe the individual in a similar circumstance the following week, at which time he was observed parking the truck after completing the delivery, and entering the establishment, leaving the truck unattended. Since this occurred after the employee's normal work day, he was on overtime at the time of the incident, and the individual admitted to having a beer on the last occasion.

After due consideration of the evidence, the Merit Board found no formal or written guidelines with respect to leaving a vehicle unattended, and, therefore, found no violation as alleged in the charges. For this reason, the charge of leaving the truck unattended was dismissed.

With respect to the abuse of overtime charge, the Board found that there was no clear-cut policy on the issue, and that the employee's overtime for the dates in question had been approved by his supervisors subsequent to the charges being issued, and that he had been paid for the time. Since the supervisors approved the overtime, the Board ruled that the employee could not be charged with abuse of overtime, and that charge was also dismissed.

On the final issue of drinking on the job, the Board ruled that because the individual had not been charged with this offense in the statement of charges he received with respect to the first incident, that portion of the charge be dismissed. However, appellant admitted that he drank a beer on the second date in question, and Board ruled that since he was on overtime, he was on the job. Since the Board cannot and does not condone the drinking of alcoholic beverages by <u>any</u> employee while on duty, it ruled that appellant was subject to disciplinary action for this violation.

In considering the individual's work record and the total facts of the case, the Board found the ten-day suspension for a first infraction to be excessive. Since they did not believe that a written reprimand would have sufficient impact to achieve corrective action, the Board directed the suspension be reduced to five days, and that the employee be reimbursed for the five days regular earnings lost as a result of the initial action.

SUSPENSION

Case No. 82-10

A Warehouse Worker/Truck Driver Helper appealed his five-day suspension without pay for alleged abuse of overtime and drinking on the job on each of two dates. This was a companion to Case No. 82-09, Suspension, and based on the same set of facts.

Again, because the overtime in this case had been approved by the supervisors subsequent to the charges being issued, and the fact that the employee had been paid for the time, the Board ruled that this portion of the charges must be dismissed.

Appellant in this case also admitted to drinking a beer on each of the two dates in question, and the Board ruled that since the employee was on duty, disciplinary action was necessary and appropriate. However, based on the individual's work record and the total facts of the case, the suspension was reduced from five to two days, and the Department was directed to reimburse appellant the three days regular earnings lost as a result of the initial action.

Case No. 82-31

A Bus Operator appealed a suspension, but, prior to action by the Board, the Department rescinded the action.

Case No. 82-37

A Bus Operator was suspended from her position. During the hearing of the case, the County withdrew the charges, and the appeal was settled.

Following the settlement, appellant's attorney requested the Board order reimbursement of attorney's fees. It was the majority opinion of the Board that because the charges had been withdrawn, the appeal must be considered as having been "warranted", as required by Section 33-14 (c) (9) of the County's Merit System Law, which permits the Board to award attorney's fees. Accordingly, the County was directed to reimburse the attorney a specified amount.

Case No. 82-49

A Public Service Worker was suspended without pay for two weeks for insubordination and threatening his supervisor if the

Case No. 82-49 - continued -

supervisor reported his actions. The record showed that, on the day in question, appellant and several others on his crew were scheduled for annual leave in the afternoon. At approximately 10:30 that morning, appellant had a minor disagreement with co-workers, and requested the supervisor take him back to the depot immediately so he could discuss the problem with the District Supervisor. The supervisor talked with him about the problem, and then instructed him to return to work so they could finish the job before everyone left for the day. The supervisor also told appellant that if he did not return to work, he would have to write up a report. Appellant refused, cursed and threatened the supervisor. At lunch time, the crew returned to the depot, and appellant left for the day without further incident, except that at approximately 3:00 p.m., he called the supervisor to apologize.

Appellant had previously been warned about fighting on the job, and had been put on notice that further incidents could result in disciplinary action. There was no evidence that appellant had been treated differently from other employees as he had alleged. Based on these facts, the suspension was sustained, and the appeal denied.