

MERIT SYSTEM PROTECTION BOARD 1983 ANNUAL REPORT

Montgomery County Government
Merit System Protection Board
Rockville, MD

February 1984

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1983
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 1983 were:

Fernando Bren, Chairman (appointed 10/82)
Richard S. McKernon, Vice Chairman (appointed 2/82)
Sandra M. King-Shaw, Associate Member (appointed 4/83)

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 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 County 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, whether or not an appeal has been filed, 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

1983 proved to be a busy year for the Merit System Protection Board, with resolution of appeals being the most time-consuming function. The Board received 125 appeals in 1983, which required a total of 50 worksessions and 41 hearings for receiving and reviewing evidence and reaching conclusions. More details on the Board's appellate activities are contained in a later section of this report.

In a continuing effort to maintain communication and to improve cooperation, the Board met with groups of Department Heads on three separate occasions; Executive Office staff on eight occasions; and with the County Council five times. Additionally, the Board held a public forum, open to all interested parties, in June, 1983, and plans to continue more open meetings and meetings with employee representatives, Department Heads, etc. on a regular basis. These meetings have provided the Board and the participants with greater insight into various problems and viewpoints with respect to administration of the merit system.

The Board began two oversight activities during 1983. The first activity involved a review of discontinued service pensions under the Employees' Retirement System of Montgomery County, and the application of appropriate laws related thereto. The final report on this project was broken into two parts, the first submitted to the County Council, County Executive and Chief Administrative Officer in December, 1983. The second undertaking involved an investigation into alleged violations of the merit system, and this activity was still in progress at the end of the year. Upon completion, a final report will be submitted to the appropriate parties.

During 1984, the Board hopes to continue its dialogue with Department Heads and employee groups and other interested parties. The Board also hopes to conduct an employee attitude survey as a means of gaining further insight into the concerns of the County's employees with respect to administration of the merit system. Based on available time, the Board also hopes to embark upon a study of the County's training activities, work performance evaluation program, and the disability retirement system.

CLASSIFICATION ACTIVITY

The number of positions affected by a classification action in 1983 was almost double the number in 1982, but still only about half as many as 1981 and 1980. The County continued to reduce the number of classes being used and the Board endorses and encourages greater use of generic classes rather than one position classes. Use of the Quantitative Evaluation System was broadened this year and appears to be generally accepted and effective.

Number of Classes

The number of approved classes at the end of 1983 was 626, down 13 from 1982. During this year, 13 new classes were created and 26 classes were abolished.

Classes Reallocated

14 classes were reallocated to another grade level this year - 13 went up and 1 went down. Of the 13 classes upgraded, 5 were increased one grade, 7 were raised two grades and one was raised three grades.

Positions Reclassified

122 individual positions were reclassified in 1983, with 115 being upgraded and 7 downgraded. The 115 positions upgraded increased an average 2.1 grades with:

- 21 being increased one grade
- 79 being increased two grades
- 5 being increased three grades
- 5 being increased four grades
- 1 being increased five grades
- 4 being increased six grades

Of the 7 positions downgraded, 2 went down one grade; 2 dropped two grades; 2 dropped six grades and one dropped eight grades for an average of 3.7 grades.

<u>History</u>	1980	1981	1982	<u>1983</u>
Positions Upgraded	252	201	61	115
Average Grade Increase	1.2	2.1	1.8	2.1
Positions Downgraded	11	20	15	7
Average Grade Decrease	4.6	2.1	2.5	3.7
Classes Reallocated				
Up	17	23	3	13
Down	1	1	1	1
New Classes Created	30	28	10	13
Classes Abolished	69	54	26	26
Total Number of Classes	681	655	639	626

INDIVIDUAL POSITION RECLASSIFICATIONS

<u>DEPARTMENT/OFFICE/AGENCY</u>	NUMBER OF POSITIONS RECLASSIFIED	
	UP	DOWN
Animal Control	3	2
Commission for Women	4	-
Consumer Affairs	11	1
Corrections & Rehabilitation	2	-
County Council	1	-
Environmental Protection	9	-
Facilities and Services	1	-
Family Resources	3	-
Finance	2	-
Fire/Rescue	2	-
Health	25	-
Housing/Community Development	1	-
Human Relations	6	-
Information & Volunteer Services	1	-
Landlord/Tenant Affairs	10	-
Libraries	7	1
Liquor Control	2	-
Management & Budget	10	-
Personnel	2	-
Police	2	3
Recreation	2	-
State Affairs	2	-
Transportation	7	-
TOTAL	115	7

INTERPRETATIONS OF PERSONNEL REGULATIONS

During 1983, the Merit System Protection Board received written requests for, and issued, six formal interpretations of the Personnel Regulations, which are reprinted herein, in the following order:

- #1 - Notification of Service Increments and/or Delays.
- #2 - Lateral Transfers between County and Fire Departments.
- #3 - Probationary Periods for promoted employees.
- #4 - Applicability of Prior Regulations.
- #5 - Authority to Employ and Terminate.
- #6 - Jurisdiction on Discrimination Complaints.

INTERPRETATION

of the

Personnel Regulations

For purposes of clarification, the Merit System Protection Board was recently requested to review Section 4, Service Increments; Service Increment Dates of the Appendix to the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County, as amended through September 8, 1982. Our review indicated the following:

1. Section 4 (g) 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 4 with respect to separate procedures or time limits for delays of increments.
2. Section 4 (h) requires reassignment of an increment date if the service increment is delayed, and also requires review by the Personnel Office before it may become effective. The same requirement is also contained in Section 4 (i).
3. Section 4 (k) gives a Corporation 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.

After consideration of the above, it is our interpretation that a Corporation has the right to delay a service increment, but, because of the requirements of Sections 4 (h) and 4 (i), such delay may not become effective until reviewed by the Personnel Office since reassignment of the increment date is required by the delay. Therefore, delays of service increment must be reviewed by the Personnel Office prior to becoming effective.

It is our further interpretation of Section 4 that, in the absence of specific procedures with respect to time limits for delays of service increments, Section 4 (g) 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.

MERIT SYSTEM PROTECTION BOARD

BY 

Richard S. McKernon, Vice Chairman

January 26, 1983

INTERPRETATION

of the Personnel Regulations

As a result of a recent appeal, the Merit System Protection Board has reviewed Section 15.1 (a) of the Personnel Regulations for Montgomery County (approved December 1980), and the same section number of the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County (approved April 1981). The question concerning these provisions is whether or not an individual employee may be laterally transferred from a County department to an independent fire department.

In conducting the review, the Board noted that Section 21-4 (m) of the Montgomery County Code requires that:

"(2)
shall be a comprehensive county
in accordance with subsection (b)(2) of this sec-
tion and will apply to all career personnel employed
by the local corporations and paid with tax funds.
The Chief Administrative Officer shall have the re-
sponsibility to administer and apply these regula-
tions uniformly in a manner consistent with the re-
sponsibilities assigned to the commission elsewhere
under this chapter as a service to the local corpora-
tions. The administration and application of these
regulations shall be consistent with the special
characteristics of the fire, rescue and emergency
medical services."

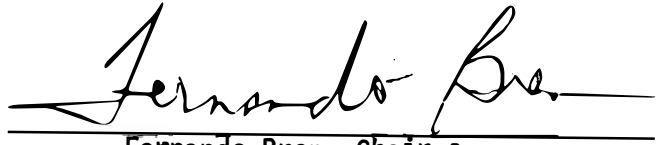
Further, in modifying the County's Personnel Regulations, the Fire and Rescue Commission specifically provided for transfer between corporations or between a corporation and the Department of Fire and Rescue Services (see Section 15.1 (a)). The Board also noted that this lateral movement was included and considered in developing a Career Development Plan for Fire and Rescue Personnel, and that the same class specifications are used by the County and the Fire Departments for fire-related positions.

On September 28, 1981, this Board found that Section 15.1 (a), Transfer of both the County's Personnel Regulations and the Fire and Rescue Personnel Regulations should be interpreted as permitting lateral transfers between individual fire corporations and/or the County's Department of Fire and Rescue Services.

INTERPRETATION - (Section 15.1 (a))

After further study and consideration, it is the interpretation of the Merit System Protection Board that both personnel systems are sufficiently similar to warrant lateral movement from any Montgomery County Department/Office/Agency to an independent Fire Company and vice versa in a manner that does not penalize or reward the person being transferred. Specifically, this means the salary level shall not be changed and accrual rates for leave, in effect at time of transfer, shall be retained subsequent to the transfer.

MERIT SYSTEM PROTECTION BOARD



Fernando Bren, Chairman

March 29, 1983
bse

CC: Fire and Rescue Commission
Montgomery County Fire Board
Robert W. Wilson, Chief Administrative Officer
Paul A. McGuckian, County Attorney
Clinton A. Hilliard, Personnel Director
Independent Fire and Rescue Corporations and their
Employees via department bulletin boards
All County Departments and Employees via department
Bulletin boards

Personnel Regulations

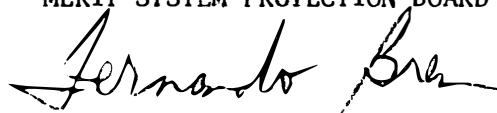
The Merit System Protection Board was recently requested to interpret the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County as they relate to probationary periods. Specifically, the question was:

Does a merit system employee who has successfully completed a probationary period at some time in the past, serve another probationary period in a higher level position upon promotion, and is he/she considered a probationary employee for purposes of retaining the position to which promoted?

After initial appointment to a merit system position, an individual is required to serve a probationary period as part of the examination process. Upon satisfactory completion of that probation, merit system status is attained. Subsequent to that time, retention of any position is based upon work performance and adherence to established rules, regulations, etc.. Failure to perform adequately in a position to which promoted would be grounds for appropriate adverse action, up to and including removal.

In our opinion, if an employee were considered to be in a probationary status after promotion, the right to return to his/her prior position, if unable to successfully complete the assigned tasks, would have to be provided to the employee. Such a right would have a chaotic effect on the promotional process because of possible "bumping" of newly promoted persons who were performing satisfactorily. To minimize the adverse effect on employees, and to assure the effective administration of the merit system, we believe probationary periods are required only at the time of initial appointment to a merit system position.

MERIT SYSTEM PROTECTION BOARD



Fernando Bren, Chairman

August 3, 1983
FB/bsh

INTERPRETATION

of the

Personnel Regulations


The Merit System Protection Board was requested to interpret the Personnel Regulations for Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County, as amended through September 8, 1982, specifically as to the status of Section 28, Interim Regulations and Procedures.

This issue was reviewed extensively as part of an appeal. Testimony during that appeal indicated that Section 28 had been extended to July 1, 1982, and from December, 1982 through July, 1984. There was no indication of any extension from July 1, 1982, to December, 1982, and there was no documentary evidence of extension from August 1, 1981, to December, 1982. Based on this, the Merit System Protection Board ruled that:

"When the Personnel Regulations were implemented on April 1, 1981, Section 28 provided for continuance of all prior regulations until August 1, 1981, 'except to the extent that such regulations are addressed or are in conflict with these regulations'. Lacking any documentation to show an extension from July 1, 1982, to December, 1982, when the Fire and Rescue Commission voted to extend that provision to July, 1984, it is this Board's conclusion that all prior regulations ceased to exist on July 1, 1982, and they would not be applicable in this case."

It was the judgment of the Merit System Protection Board that an extension may not be granted retroactively because the provisions had expired on July 1, 1982. In order to utilize any of the expired provisions, it would be necessary that they be approved and implemented in accordance with established procedures for amending the Personnel Regulations. Therefore, it is the interpretation of the Merit System Protection Board that the provisions of Section 28, Interim Regulations and Procedures, of the Personnel Regulations expired and ceased to exist as of July 1, 1982.

MERIT SYSTEM PROTECTION BOARD


Fernando Bren, Chairman

FB/bsh
September 28, 1983

INTERPRETATION

of the

Personnel Regulations

At the hearing on termination of an employee (Case No. 83-83), the question was raised as to who had authority to remove an employee from County employment. Section 21.5 (b) of the Personnel Regulations states that a Department Head may take such action if delegated the authority by the Chief Administrative Officer. In reviewing relevant law, the Board noted that Section 216, Appointment of Other Employees of the Executive Branch, of the Charter of Montgomery County, Maryland, states:

"All employees of the Executive Branch other than those specifically provided for in this Charter shall be appointed and removed and their salaries shall be fixed under the merit system by the heads of the several departments, offices and agencies of the County."

A review of Article 4, Merit System and Conflicts of Interest, of the Charter revealed that the authority given to Department Heads in Section 216 had not been changed or negated in any manner by the provisions contained therein.

It is the judgment of the Merit System Protection Board that the authority set forth in Section 216 of the Charter of Montgomery County, Maryland takes precedence over the Personnel Regulations for Merit System employees. The authority for appointment and removal of employees was specifically given to Department, Office and Agency Heads by the voters in approving the Charter, and this authority may not be removed by regulations. While the Board recognizes the legitimate role of the Chief Administrative Officer in performing aftermath review and providing systemic guidance to Department Heads in the exercise of their Charter responsibilities, it is this Board's interpretation that a Department, Office or Agency Head has the authority to appoint and remove employees without higher level approval. Therefore, the requirement of Section 21.5 (b) of the Personnel Regulations for formal delegation of authority from the Chief Administrative Officer prior to taking such action is found to be invalid because it violates the provisions of the County Charter.

MERIT SYSTEM PROTECTION BOARD

INTERPRETATION

of the

Personnel Regulations

As the result of several recent grievances involving alleged discrimination, the Merit System Protection Board has been asked to render an interpretation of Section 4.2, Appeals, of the Personnel Regulations, which states:

"If an individual believes that the County has violated the policy with respect to race, color, religion, national origin, sex, marital status, age or handicapping condition, an appeal may be filed with the County's Human Relations Commission in accordance with the procedures established in Chapter 27, Human Relations and Civil Liberties, of the Montgomery County Code, 1972, as amended. Alleged violations involving political affiliation and other non-merit factors, shall be filed with the Merit System Protection Board in accordance with Section (sic) 23 of these regulations."

The question is whether a County employee has the option to file a complaint with the Human Relations Commission or to file a grievance on matters involving race, color, religion, national origin, sex, marital status, age or handicapping condition or if the complaint should go directly to the Human Relations Commission and not be a grievable matter. At the present time, the County has provided procedures for filing complaints through the grievance process or directly with the Human Relations Commission, and, because of the wording of Section 27-21, Procedure for Complaints Against County, of the Montgomery County Code, the Human Relations Commission will not accept a complaint from a County employee if a formal grievance has been filed.

The Merit System Protection Board believes County employees should have the same rights as all other County residents, and are entitled to review of discrimination complaints by persons who are specialists and highly knowledgeable in that area of law. After review of the Human Relations Laws, the Personnel Regulations, and Section 33-9, Equal Employment Opportunity and Affirmative Action, of the Montgomery County Code, and discussions with persons involved in drafting those laws and regulations, it is this Board's judgment that since December 2, 1980, it has been the intent of the County to have all complaints by County employees involving alleged discrimination with respect to race, color, religion, national origin, sex, marital status, age or handicapping condition filed directly with the Human Relations Commission. Therefore,

Interpretation
Section 4.2, Appeals
Page Two (2)

it is the interpretation of the Merit System Protection Board that such complaints filed under Section 4.2 of the Personnel Regulations must be filed directly with the Human Relations Commission. Accordingly, this Board finds that Track 5, Discrimination Grievance, of the County's grievance procedure is null and void, and that, pursuant to Section 33-12 (b), Grievances, of the Montgomery County Code, complaints alleging discrimination with respect to race, color, religion, national origin, sex, marital status, age or handicapping condition are not grievable matters. !!

FB/bsh
November 3, 1983

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, copies of all documentation are provided to each Board member, and the Board discusses the case at the next worksession. If the Board is satisfied that the written record is complete, a decision is made on the basis of the record. If the Board believes additional information or clarification is needed, they either request the information in writing or schedule a hearing for the purpose of receiving oral testimony. 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 1983, the Board received one hundred twenty-five appeals. In addition, one case was carried over from 1982, and one from 1981. Decisions on Case Numbers 99, 117 and 119 were still pending at the time of this report.

SUMMARIES OF DECISIONS
ON APPEALS

COMPENSATION/CLASSIFICATION

Case No. 83-01

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning a six month delay of service increment.

Section 8.5, Appeals from Performance Ratings, of the Personnel Regulations states, "Performance ratings are not appealable to the Merit Board except in cases of failure to follow established procedures". Failing to find any violation of established procedures, it was the unanimous decision of the Merit Board that the issue was not appealable under the Personnel Regulations, and it was dismissed.

Case No. 83-04

A Firefighter noted an appeal with the Merit Board concerning overtime compensation. He had not filed a grievance on the issue, and, therefore, it was the decision of the Board that the appeal be dismissed for failure to file in accordance with established procedures.

Case No. 83-10

A Firefighter/Paramedic appealed from the decision of the Personnel Director, on behalf of the Fire and Rescue Commission, which denied his grievance concerning his movement from County service to the independent fire corporation. The Board noted the September 28, 1981, Interpretation of Section 15.1 (a) of the applicable Personnel Regulations rendered by a prior Board, and believed fairness and equity for all parties required further interpretation. Accordingly, a new broadened interpretation dated March 29, 1983, was issued, and was considered as part of this appeal.

The Personnel Director had found that the action did not constitute a transfer as defined in Section 15.1 (a)

The Board noted that the appellant was allowed to continue participation in benefit programs without any indication of a break in service, and that the Fire Department attempted to process the action as a transfer, and supported the appellant's position in the grievance.

Case No. 83-10 cont.

It was the judgment of this Board that under the particular facts and circumstances of the case, the action grieved resulted in unfair and inequitable treatment of a career service employee, which clearly was not in the best interest of the Fire Department, nor the appellant. The effect of such action was to create a situation where the appellant, as a certified paramedic could not transfer from the Department of Correction and Rehabilitation to a Firefighter/Paramedic position with an independent fire department, while another person, with the exact same qualifications, employed by the County's Department of Fire and Rescue Services could so transfer. The Board could conceive of no rational basis for treating two individuals with the same specialty and qualifications so disparately and concluded that, in this case, such treatment is legally impermissible. It was the unanimous decision of the Merit System Protection Board that the appellant's records be changed to reflect a transfer, that he be reimbursed all salary monies lost, retroactive to date of the action; that his leave accrual rate and balances be adjusted; and that he be reimbursed for reasonable attorney's fees by the Fire and Rescue Commission.

APPEALED TO COURT

Case No. 83-16

A Firefighter appealed from the decision of the Fire and Rescue Commission on his grievance concerning compensation.

On July 1, 1972, the appellant was hired as a Firefighter by an independent fire corporation. On July 1, 1974, that corporation was brought into the County's payroll system. All Firefighters involved, including appellant, received pay adjustments when placed within the County structure, which resulted in pay increases. The appellant was aware of a perceived problem in the County's scale at the time of transfer, but did not file a grievance.

The Board was disturbed by the fact that the appellant did not receive a response to his grievance for over two years after it was filed. The Board found this delay to be inexcusable, and hoped that steps had been taken to eliminate a recurrence. However, despite this fact, the Board could not overlook the timeliness issue. The appellant was aware of the problem at the time it occurred in 1974, but did not avail himself of the appropriate grievance process until over five years later. Therefore, it was the decision of the Merit System Protection Board that the grievance was not filed in a timely manner and the appeal was denied.

Case No. 83-24

An Administrative Services Coordinator appealed from the decision of the Chief Administrative Officer on the reclassification of his position. The appeal of reclassification of the appellant's position was filed in June 1982. The final report of the Classification Review Committee was to be submitted to all members of the Committee for review prior to its submission to the Chief Administrative Officer.

Case No. 83-24 continued

The record showed that two members of the Committee had discussed specifics of the case with other County officials on an independent basis. These discussions were not conducted as part of a Committee meeting, nor at the direction of the Committee. Further, the Personnel Office employee assigned to assist the Committee was the same individual who conducted the initial classification study and had made the recommendation being appealed.

The record also showed that the Committee chairperson submitted a report to the Chief Administrative Officer, which indicated a unanimous decision of the Committee, however, the report itself indicated that the decision was not unanimous, and evidence showed that the report had not been reviewed by all of the Committee members, as had been previously agreed. In addition, the findings of fact set forth in the Committee's report were very general in nature, and did not address the specific issues related to the factors considered for classification of the position. The findings of the Committee, as presented in the report, were essentially a summary of the proceedings followed in the case.

The Board found that the Classification Review Committee did not follow its agreed upon procedures for submission of its report; that appellant was not offered an opportunity to submit additional evidence or argument subsequent to noting his appeal; that the individual who recommended the reclassification served as a non-voting member of the Review Committee, and, thereby, was provided an opportunity to orally defend his position; and that the decision appeared to have been affected by ex parte communication.

Accordingly, it was the decision of the Board that the reclassification be rescinded; that the matter be remanded to the Personnel Office for further review in accordance with established procedures; and that appellant be reimbursed reasonable attorney's fees incurred in the matter.

Case No. 83-32

A Firefighter filed an appeal from the decision of the Personnel Director regarding his pay adjustment upon promotion, but the appeal was withdrawn after the parties resolved the issue without action by the Board.

Case No. 83-36/37

Two firefighters appealed from the decision of the Personnel Director (rendered on behalf of the Fire and Rescue Commission) on their grievances concerning eligibility for continued educational salary differentials. The record showed that:

1. From 1972 through 1977, the Fire and Rescue Services Career Personnel were provided an educational salary differential (ESD) for all ranks. The approved plan provided up to a maximum of 10% additional compensation based on education level attained and rank held. For the ranks of Private through Lieutenant, 5% was provided for a Fire Science Certificate, and 10% for an Associate of Arts degree.

2. Both appellants received an Associate of Arts degree, and were granted 10% ESD's prior to 1977.
3. A new plan was implemented on July 1, 1976. The new plan provided for a maximum of 5% additional salary for any rank if a specific educational level was attained. Specifically, an Associate of Arts degree, which made an individual eligible for 10% under the old plan, was required for Lieutenants to receive 5% under the new plan.
4. In approving the new plan, the Fire Board ruled that:
 - a. Employees receiving ESD payments under the old program as of June 30, 1976, would continue to receive the ESD payment that they had been receiving.
 - b. On June 1, 1977, further clarification was provided by the Fire Board when they stated, ". . . ESD would not be removed from any individual, however, as they progress through the career ladder, the ESD would be adjusted to conform to the new schedule. . . ."
 - c. On July 6, 1977, the Fire Board modified the ESD policy at the request of the County's Chief Administrative Officer to read as follows:

"Employees currently receiving an Educational Salary Differential will be allowed to continue any Educational Salary differential currently received in the same percentage amount as it(sic) currently received. . . . Such Educational Salary Differentials are only authorized for educational attainment in excess of any minimum educational requirements approved in the official class specification for a given class."
5. The appellants continued to receive the 10% ESD while employed as Sergeants.

Case No. 83-36/37 cont.

6. On December 5, 1982, both individuals were promoted to Lieutenant, and the ESD payments were reduced from 10% to 5%.
7. A review of employee records revealed that many Fire and Rescue Service employees were still receiving 10% ESD payments. Recent promotion forms show that at least one individual was promoted (in 1982) without a reduction in the 10% ESD payment, but most individuals promoted had adjustments made to their ESD payments.
8. Nine other officers were still receiving 10% ESD payments, but there was no indication as to when they were promoted or how long they have been receiving the payments.

The record supported the Fire and Rescue Commission's position that the policy implemented in 1976 required modification of ESD payments when an individual was promoted. The Board was satisfied that the policy was followed in the vast majority of cases. Therefore, it was the judgment of the Merit System Protection Board that the action of reducing the ESD payments at the time of promotion of the appellants was in accordance with established procedures, and the appeal was denied. The Fire and Rescue Commission was also directed to review all promotional actions since inception of the 1976 policy and to take appropriate steps to assure that all promotions were made in accordance with the policy and to take the corrective actions necessary to achieve equity.

APPEALED TO COURT

Case No. 83-50

An Assistant Fire Chief appealed from the decision of the Personnel Director on behalf of the Fire and Rescue Commission, on his grievance concerning overtime pay during unusual circumstances. The record showed that:

1. In February 1983, the metropolitan area received heavy snow, resulting in the County declaring a snow emergency, and the appellant was directed by his supervisor to remain on duty through the weekend.
2. He worked the entire weekend, and except for additional pay received for the period of general emergency, was denied any further compensation since he was considered to be a senior officer. The Fire and Rescue Commission considered such time as a normal responsibility of a senior officer during such emergency situations, and therefore, found him ineligible for overtime compensation.

3. Section 3 (j), Limitations on Overtime of the Appendix to the Fire and Rescue Service Personnel Regulations states in part:

"...Division Chiefs and other supervisory employees of a level equivalent or higher than a Division Chief shall be eligible to receive overtime pay only to the extent that they are eligible to receive compensatory leave."

4. Section 13.5 (a), Limitations on Crediting of Compensatory Leave for Overtime Work of the Fire and Rescue Service Personnel Regulations, states:

"Division Chiefs and other supervisory employees of a level equivalent or higher than a Division Chief are not usually eligible to be credited with compensatory leave. For purposes of this subparagraph, an employee in the rank of Captain and above or in a pay grade equal to or above the rank of Captain shall be considered as a supervisory employee referred to in this paragraph. However, a Captain engaged in an emergency operation which necessitates work beyond his regular work schedule is eligible to be credited with compensatory leave at the rate of one and one-half hours for each hour of overtime work performed whenever such employee does not receive overtime compensation for such work. For all employees receiving compensatory leave credits, credits of less than one-half hour shall not be counted. The Fire and Rescue Commission shall decide which supervisory employees are considered to be of a level equivalent or higher than a Division Chief. Authorization for crediting of compensatory leave for overtime work shall ordinarily be specifically approved in advance by the corporation and ordinarily it may not be approved on a continuing basis. Only the Fire and Rescue Commission may approve special exceptions to the above requirements."

The Board found that the regulations in effect allowed overtime to be paid to an employee at this level if an exception was granted by the Fire and Rescue Commission. Such a decision, therefore, was discretionary, based on the judgment of the responsible authorities, and the Board may not substitute its judgment for that of the responsible authority. Accordingly, the appeal was denied.

Case No. 83-55

The Fraternal Order of Police appealed the decision of the Chief Administrative Officer on its grievance concerning compensation for Police Officers assigned Canine duty for the period of December 31, 1982 to June 30, 1983. The time after June 30, 1983 was covered by the Collective Bargaining Agreement.

The record showed that prior to 1978, Canine Officers received a 5% pay differential. Effective August 1, 1978, the pay differential was discontinued for persons assigned such duties after that date, and those persons receiving the pay differential prior to that date were allowed to retain it for as long as they remained on Canine duty. The grievants wanted to be reimbursed overtime pay for all off-duty time spent caring for the dog assigned to them. The Board noted that the grievants all volunteered for the Canine duty after the discontinuance of the pay differential in 1978, and all were made aware of the fact that there would be no additional compensation for this duty at the time of acceptance.

It was the judgment of the Board that the care of a canine did not constitute overtime work as defined by the Personnel Regulations. Therefore, the appeal was denied.

APPEALED TO COURT.

Case No. 83-68

A Work Force Leader appealed from the decision of the Chief Administrative Officer on his grievance concerning procedures involving compensation for overtime work that had been issued on March 10, 1983 for only one division of the Department of Transportation.

Section A1.8, Overtime Policy, of the Personnel Regulations gives a Department Head the prerogative of deciding how to compensate employees who work overtime by authorizing either overtime pay or compensatory leave. It also gives the Department Head the authority to establish reasonable guidelines to accomplish this task.

In reviewing the record, the Board noted a lack of consistency in policy and procedures within the Department, as well as within the County Government. In fact, the reasons stated for implementation of reporting procedures for overtime in this case lacked a rational basis, and appeared to be arbitrary in nature. There was no established departmental policy related to this issue, and there was no evidence that the Department Head delegated the establishment of such guidelines to another individual, or that he approved the policy set forth on March 10, 1983 for the Division in question.

Lacking such evidence, it was the judgment of the Board that the March 10, 1983 policy was void and inapplicable, and that the determination of how individuals are to be compensated for overtime work rests with the Department Head unless and until such time as a departmental policy is promulgated.

Case No. 83-68 cont.

The Board further found that the employees involved were compensated (i.e., overtime pay or compensatory leave) for all time worked and, therefore, had not been adversely affected. Therefore, in order to assure the fair and equitable treatment of all employees in the Department of Transportation, the Board urged the department to take appropriate action to establish proper guidelines and procedures as promptly as possible.

Case No. 83-69

An Investigator appealed from the determination concerning classification of his position. In reviewing the record, the Board noted that on May 25, 1983, the Investigator series was reallocated upward two grades, effective May 9, 1982. The County subsequently reclassified all incumbents of the Investigator positions, except for one in the Health Department; three in the Office of Landlord/Tenant Affairs; three in the Human Relations Commission; eight in the Department of Environmental Protection (one of which was the appellant's position); and three in the Department of Animal Control and Humane Treatment. The reason for not reclassifying these positions was employee disagreement with the proposed final action.

The Merit Board understood the County's desire to achieve agreement in classification assignments prior to implementation of a change, however, the classification action of reallocating the Investigator series taken in May 1983, retroactive to May 1982, established higher grade levels for that series and abolished the lower grade levels. Therefore, it became incumbent upon the County to move all incumbents of the Investigator positions to the higher grade levels in accordance with established procedures. Since the appellant had not been treated in a manner consistent with other incumbents of the Investigator positions at the time of reallocation, and had actually been continued in a non-existent class by action of the County, it was the judgment of the Merit System Protection Board that the appellant, and all other Investigators not formally moved to the higher grade levels previously, be treated in a manner consistent with other incumbents. The Board ordered they all be upgraded if all appropriate qualifications were met, retroactively to the original effective date, and that they be paid all monies due.

Case No. 83-71

A Firefighter appealed the decision of the Personnel Director, rendered on behalf of the Fire and Rescue Commission, on his grievance concerning holiday compensation. The Board had previously issued a decision in Case No. 81-79, which involved the same issue, finding in that case that the individual had been reimbursed in accordance with established procedures, and the appeal was denied. The Board at that time pointed out to the Fire and Rescue Commission what it believed to be possible inconsistencies with respect to the Personnel Regulations to be followed in computing compensatory leave for holidays. Subsequent to the 1981 decision, the Personnel Regulations had not been amended. Therefore, since the appellant, in this case, had been compensated in accordance with the guidelines and procedures established by the Fire and Rescue Commission, the decision of the Personnel Director was sustained.

Case No. 83-97

A Planner appealed the decision of the Chief Administrative Officer on her request for additional retroactivity on a reclassification action. The record showed that the Personnel Office received complete documentation necessary to conduct a classification study on June 12, 1981, but did not conduct a desk audit or take any other action on the request until August 26, 1982.

At the time of the desk audit, the Personnel Office requested an updated position description. After review of all documentation, including the new position description, the Personnel Office determined that the position was properly classified, and recommended no further action be taken. On December 1, 1982, the Department Head submitted a detailed memorandum disagreeing with the Personnel Office recommendation, and provided additional information. In February 1983, another memorandum in support of the prior objection offered additional information with respect to a change in duties and responsibilities. Based on the information provided by the Department Head in December and February, the Personnel Office agreed to upgrade the position, effective September 12, 1982.

On February 12, 1980, the Chief Administrative Officer issued a memorandum on effective dates of reclassification actions which stated, in part, ". . . if the classification study is not completed within a six-month period from the date that the Personnel Office receives all the proper documentation from the Department/Agency that is needed to conduct the classification study, and the classification results in a reclassification, the effective date would be six months from the date the Personnel Office received the documentation required to substantiate the classification study request."

A close reading of the February 1980 memorandum revealed two distinct requirements. First, the requirement for submitting proper documentation for justifying the classification study. Second, is the requirement to substantiate upward reclassification of a position. In this specific case, it was clear that the first requirement was met on June 12, 1981. The record further showed that justification or substantiation for the upward reclassification was not received by the Personnel Office until December 1982, and February 1983. It was the Board's judgment that the effective date of the reclassification actually could have been May 1983, six months after appropriate justification was received from the Department Head. Therefore, the appeal was denied.

Case No. 83-113

A Firefighter appealed the decision of the Acting Personnel Director on his grievance concerning holiday pay. On March 3, 1982, the Board rendered a decision on another appeal (Case No. 81-79), which involved the same issue, and, essentially, similar points. That appeal was denied based

Case No. 83-113 cont.

on the Board's judgment that the established procedures had been properly followed. At that time, the Board informed the Fire and Rescue Commission of what they believed were inconsistencies in the approved Personnel Regulations, and the implementation thereof, and suggested changes be considered to assure fairness and equity.

As of the date of the decision in this case, the Personnel Regulations for Fire and Rescue Service Merit System Employees related to holiday pay had not been amended. Therefore, based on the fact that the appellant had been reimbursed in accordance with established procedures, the Board had no alternative but to sustain the decision of the Acting Personnel Director.

Case No. 83-125

Five Police Officers appealed from the decision of the Chief Administrative Officer on their grievance concerning discontinuance of hazardous duty pay.

As the result of a management study, the Department of Police decided to implement a reorganization, effective March 1, 1981, which resulted in a reduction of the authorized positions in the Traffic Enforcement area, and an addition of authorized positions for the Patrol and Special Assignments Teams. This reorganization resulted in a major reduction in the individuals assigned to motorcycle duty, which directly affected the appellants in this case.

The record clearly showed that appellants were fully aware that the five percent pay differential they were receiving while assigned to motorcycle duty was because of the hazardous nature of the duty, and that such pay differential would be discontinued if they were transferred to different duty assignments. Section 15, Transfer, subsection 1, Definition, of the Personnel Regulations states that "Transfer of employees is a prerogative of management . . ." Section 15 sets forth the reasons for such action, and certain requirements that must be met. In fact, Section 15.4 requires that an employee who appeals such action must prove that it was arbitrary and capricious and/or discriminatory. In this specific instance, appellants are arguing that the decision of who would be transferred based on productivity factors was an arbitrary and capricious action. There was never a question that appellants' work performance was anything less than satisfactory, and the Department of Police stated that the decision was a judgment by management officials as to which individuals would be most productive in a given situation.

The Board was satisfied that the actions taken by the Department of Police were reached based on staff available and the needs of the Department after reorganization was implemented. The Board concurred with the Chief Administrative Officer that there was absolutely no justification to allow the hazardous pay differential to be continued once an individual was no longer performing the duty assignment or to provide any other type bonus or

Case No. 83-125 continued

cash incentive as recommended by the Fact Finder. Appellants were fully aware that it was a prerogative of management with respect to their tours of duty as motorcycle officers, and that discontinuance of that duty meant loss of the pay differential. With appellants being aware of this fact at least three years prior to the transfer actions involved in this case, the Board found absolutely no justification or basis for the appeal, and it was denied.

The Board noted that one of the appellants had raised a separate issue with respect to being assigned higher-level duties than normally expected of a person in his occupational class. That issue was a classification matter, and the Board referred appellant to the Personnel Office for proper resolution of that matter.

DELAY OF SERVICE INCREMENT

Case No. 83-38

A Police Officer appealed from a delay of service increment. In reviewing the record, the Board noted that:

1. The appellant's service increment was due on February 27, 1983.
2. The Department of Police evaluated his work performance in early February 1983; his supervisor's comments and recommendations were forwarded to the Director, Department of Police on February 9, 1983, the Director prepared his final recommendations and forwarded it to the Personnel Office for approval on February 11, 1983, the Chief Administrative Officer approved the recommended delay on February 18, 1983, but the appellant did not receive the formal notification from the Personnel Office, until March 1, 1983.
3. On November 30, 1982, the Board issued an interpretation of Section A.2, Service Increments/Service Increment Dates of the Personnel Regulations, which stated in part, ". . .it is required of management to notify an employee of an intended delay of service increment prior to the effective date of the action."

In light of the requirement for notification prior to the effective date and the fact that the appellant was not informed of the action until subsequent to that date, it was the decision of the Board that the action was taken in violation of established procedures and it was overturned.

The Department of Police was directed to rescind the delay of service increment, remove all documents related thereto from the appellant's personnel file and process the service increment in accordance with established procedures.

Case No. 83-39

A Liquor Store Clerk appealed from the six-month delay of his service increment. The record showed that the appellant's increment was due on March 1, 1983.

On November 30, 1982, the Board issued an interpretation of the Personnel Regulations, which stated, "...it is required of management to notify an employee of an intended delay of service increment prior to the effective date of that action."

The Board was satisfied from the record that the Department of Liquor Control followed established procedures and processed the action in a timely manner. However, the final approval of the Personnel Office took over one month and their delay resulted in the appellant not being notified until almost three weeks after the effective date of the action, which violated the November 30, 1982 interpretation. Therefore, despite the fact that the Department of Liquor Control was the one adversely affected, the Board had no alternative but to rescind the delay of service increment for failure to adhere to notification requirements of the Personnel Regulations.

Accordingly, the County was directed to rescind the delay of service increment, grant the increment, and reimburse the appellant for all salary monies due as a result of the action.

Case No. 83-76

A Personnel Specialist appealed from a delay of service increment.

The appellant subsequently withdrew the appeal prior to action by the Board.

Case No. 83-87

A Community Services Aide appealed from a delay of service increment.

Subsequently, the Personnel Office advised the Board that the appellant had decided not to pursue the grievance. Therefore, the Board took no further action.

Case No. 83-95

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning a delay of service increment. With respect to work performance, the record showed that the Police Department had established a rating level for satisfactory performance at 2.5. The appellant received an overall rating of 2.45 on his performance evaluation summary form. On the lower part of the form was the

Case No. 83-95 cont.

statement, "Round scores to one decimal place, e.g. (1.88=1.9, 4.45=5)". Appellant had been counselled on his level of work performance on several occasions prior to the rating, and was aware of what was expected of him. In fact, he essentially agreed his performance may have been somewhat less than that desired or expected. The appellant's supervisors did not believe his work performance was at a satisfactory level on a sustained basis to earn the increment.

The Board found that the appellant's assigned rating of 2.45 should have been rounded to 2.5 in accordance with the instructions on the form, and, by the Department's own written definition, the work performance was satisfactory, and the increment should have been granted. The Board directed that the appellant be granted his service increment retroactive to the date originally due.

Case No. 83-115

A Social Worker appealed from the Delay of Service Increment from November 1, 1983 to November 1, 1984.

A question as to right of appeal was raised in this case, based on the fact that the issue revolved around a work performance evaluation, and involved a State/County employee who had filed a similar grievance with the State of Maryland. The Board noted that:

1. Section 8.5, Appeals from Performance Ratings of the County's Personnel Regulations, prohibits appeal of a rating, "except in cases of failure to follow established procedures".
2. Section A2.12, Notification of Service Increment Delay of the Appendix to the County's Personnel Regulations gives an employee the right to appeal such action to the Merit System Protection Board.
3. Section 5, Grievances and Appeals of the Memorandum of Agreement Concerning the Operation of a Personnel System for State/County Positions in the Montgomery County Department of Social Services, signed by the State of Maryland and Montgomery County, states in part:

" . . .Grievances and appeal on any issue relating to the County salary supplement only shall be heard by County authorities and processed in accordance with County procedures."

Case No. 83-115 cont.

4. The rating involved is for the County salary supplement, which covers a different time period than the State increment evaluation period.

The Board was satisfied that the jurisdiction in this case rested with the County, that the appeal was filed timely, and was filed with the proper authority in accordance with established procedures. Accordingly, the Board deliberated on the case and rendered the following decision.

The review of the employee's work performance is the responsibility of management. The Board's review was made to determine if proper procedures were followed and if the decision of management was reasonable and appropriate, or discriminatory, arbitrary and capricious, as alleged. The Board did not attempt to replace the supervisor's judgment with respect to actual work performance on-the-job.

A review of the work performance rating showed that the appellant's work quantity and quality were acceptable, and her capability was unquestioned. The unsatisfactory areas involved work attitude and work habits, with the greater emphasis on the attitude problem.

The appellant had been placed under the supervision of a new supervisor in September 1982, and noted her objection immediately, based on a previous problem she had had with a supervisor of similar work background, and the fact that she had not been contacted, or given any input into the change. In November 1982, at the beginning of the rating period in question, the appellant was on record as stating that she was not going to be able to work with the new supervisor. There was a difference in management style and philosophy, between the prior supervisor and the new supervisor. The new supervisor required stricter adherence to standard work schedules, improvement in the timely submission of reports, set-up regular meetings to review and discuss workload and performance and required improvement in the accuracy of reporting statistics and case file data.

The department documented problems with tardiness, use of leave and accuracy of reports. While the Board recognized the appellant's desire for greater flexibility in her work schedule, management clearly had the prerogative and responsibility to determine work schedules best suited to meet the needs of clients, employees and the County. The Board did not find any evidence to show that the one-half hour change in the work schedule, or the requirement for stricter adherence to that schedule created any undue hardship for the appellant, or was unreasonable. Further, there was no disagreement on the accuracy issue.

Case No. 83-115 cont.

On the work attitude issue, the supervisor met with the appellant regularly to discuss policy and procedures, and to keep her informed as to changes and improvements needed in areas of work performance. While the supervisor was attempting to use these meetings as a management oversight vehicle, and a means of counseling the appellant to help her adjust to his style and work requirements, the appellant interpreted them as interference and harassment, and reacted by being less than cooperative, and attempted to challenge his authority with respect to policy and procedure changes.

It was the judgment of the Board, that the Management decision to delay the County service increment, was entirely within their prerogative and judgment, and was reasonable based on the evidence of record. There was no indication that it was an arbitrary or capricious decision.

DISMISSALS

Case No. 81-34

A Warehouse Worker/Truck Driver Helper appealed his dismissal for insubordination, destruction of County property, and fighting on the job.

The Board found that the testimony did not support the charge of destruction of property, rather that a can or two may have been dented. Additionally, while a case of beer may have been dropped, testimony refuted the allegation that it was kicked and spread over the entire aisle. Appellant did initially refuse to obey a supervisor's order to pick-up the beer cans, but did eventually comply. The testimony convinced the Board that the supervisor's conduct exacerbated the situation and ultimately resulted in the physical encounter. The testimony of other witnesses and the police report contradicted the supervisor's testimony, and the Board was convinced that he did strike appellant with a stick, which instigated the fight. Because of the mitigating circumstance, the Board believed it to be improper and contrary to good management practices to hold appellant solely responsible for the incident, and to absolve the other party of all responsibility.

The investigation by management at the time of the incident failed to properly document or report all the essential facts and made a reasonable interpretation and evaluation at a later time extremely difficult, if not impossible. The burden of proof rested with the County, and a lack of written documentation to support testimony, weakened by the lengthy lapse between the original incident and the present time, led the Board to the conclusion that the charges were insufficiently supported to justify a dismissal action.

After due consideration of all the evidence and testimony, it was the judgment of the Board that the dismissal action be rescinded; appellant be reinstated to a position of comparable status within the County; that appellant be suspended without pay for a period of thirty calendar days for failure to obey his supervisor's orders and for fighting on the job; and that he be reimbursed all salary monies lost as the result of the dismissal action except for the period of suspension.

Case No. 83-03

A Correctional Specialist appealed his dismissal for failure to perform in an acceptable manner. After review of the written documentation and consideration of the testimony, the Board found that appellant had received "met requirements" ratings for ten of thirteen months preceeding his dismissal; "met requirements to marginal"

Case No. 83-03 cont.

ratings in two of the remaining three months; and "marginal" in the other month. The "marginal" rating was in December 1981, and was followed by eight months of "met requirements", with the "met requirements to marginal" ratings being assigned at about the time the decision to dismiss had been made. The written ratings were not contradicted by the testimony of the supervisors.

It was the Board's further finding that management had a responsibility under the County's Merit System and work performance evaluation guidelines to give an employee written notice of specific deficiencies in work performance; to provide a written work plan or schedule for improvement; and to give the employee appropriate supervision and assistance needed to accomplish the task. The Board did not find sufficient evidence to show that this responsibility was met, and appellant was never provided a work improvement plan detailing the specific steps needed to achieve a satisfactory level of performance.

It was the decision of the Board that the dismissal action be rescinded; appellant be reinstated to his prior position or a position of comparable status within the County Government retroactive to the date of dismissal; appellant be reimbursed all salary monies lost; and that he be reimbursed for reasonable attorney's fees.

Case No. 83-5 & 6

Two Warehouse Workers/Truck Drivers appealed their dismissals for allegedly engaging in an argument with a private citizen while making a delivery and physically hitting the individual on or about the face.

The appellants were making a delivery and the truck had to be double parked for unloading, blocking one vacant parking space. An individual drove up and wanted to park in the vacant space. During the oral exchange, the individual used vulgar and provocative language towards the appellants. Both employees approached the car, and, believing the individual was reaching into the back seat to get something to attack them, they struck him while he was still seated in the car. The man then proceeded to leave and the employees returned to the warehouse.

The Merit System Protection Board does not and cannot condone any employee striking another person while on duty, and an employee who reacts in a violent manner must realize that a disciplinary action will be the ultimate result of such behavior.

However, it was the Board's judgment that the gross and provocative behavior of the private citizen involved created circumstances which clearly mitigated the seriousness of the employees' reaction - rendering dismissal as too severe a disciplinary action. Yet, the gravity of the employees' reaction, made it imperative to impose a stern and rigorous penalty. Therefore, the Department of Liquor Control was directed to

Case No. 83-5 & 6 cont.

rescind the dismissal action and to prepare and process appropriate documents for suspension without pay for a period of seventy-five (75) calendar days.

The appellants' request to be reimbursed for reasonable attorney's fees was denied, except for one hour of time related to the County's request for reconsideration of the decision.

Case No. 83-41

A Liquor Store Clerk appealed his dismissal for allegedly selling alcoholic beverages to a minor, after being disciplined for a similar infraction previously.

In reviewing the record, the Board noted two problems. First, both the Statement of Charges and the Notice of Disciplinary Action were erroneous with respect to the date of incident and the item allegedly sold. Secondly, the decision to suspend an individual for 40 hours for a first offense and dismiss immediately for a second offense in a situation absent malice, personal gain, or health or safety risk to the County and without consideration of the persons work record, etc. was, in the Board's judgment, inconsistent with the requirement for progressive disciplinary action, as contained in Section 21.1, Policy of the Personnel Regulations.

The Board recognized the serious nature of the situation, and believed appropriate disciplinary action in cases of this nature, should be more severe than a written reprimand initially, and recommended the following guidelines, which are consistent with the type of action taken against private employees in similar circumstances:

- 1st offense - 1 workday suspension
- 2nd offense - 5 workdays suspension
- 3rd offense - 20 workdays suspension
- 4th offense - dismissal

Based on the fact that the appellant had already served a five-day suspension for a first offense of this nature, it was the decision of the Merit System Protection Board that fair and equitable treatment required the rescission of the dismissal action and removal of related documentation from the appellant's personnel file, suspension of the appellant for one-day without pay, which would make total disciplinary action received for the two incidents consistent with the guidelines, after consideration of his otherwise satisfactory work performance record, and reinstatement to the payroll with full reimbursement of all salary monies lost, except for the one-day suspension without pay.

case No. 83-54

A Bus Operator appealed his dismissal for alleged "unauthorized absence or chronic tardiness"

The record showed that the appellant began employment with Montgomery County on March 17, 1980. Two months later, he was orally warned about his attendance and the problem was noted on his career status evaluation on August 12, 1980. In December 1980, he was counselled on his leave usage and his annual evaluation in March 1981 indicated a problem still existed.

During calendar year 1982, the appellant was late getting to work on 27 occasions, was absent without leave for 4 hours on one occasion, was absent on undocumented sick leave on three dates (no pay), used approved emergency annual leave on 11 dates, and used approved sick leave on 18 different days.

The appellant was late for work on January 8 and 27; March 23 and April 8, 1983. Also, on February 12, 1983, he failed to call in or report for work, as scheduled.

It was the judgment of the Board that the appellant's attendance record was clearly unsatisfactory, that he had been counselled sufficiently as to corrective action required, and that the prior disciplinary actions were progressive in nature and should have served as warning of imminent separation upon failure to improve. The fact that he continued to be tardy and miss work after being notified of possible dismissal, was indicative of a poor prognosis for ever attaining a satisfactory level and was additional cause for such an action. Accordingly, the dismissal was affirmed and the appeal was denied.

Case No. 83-59

A Bus Operator appealed her dismissal for allegedly driving a County bus during a period of time when her driving privileges had been suspended by the State of Maryland and after her license had expired without proper renewal.

The appellant was made aware that she was to notify her supervisor immediately of any action that affected her driving privileges.

In 1981, she received two speeding tickets while off duty, did not notify her supervisors of either ticket, and did not pay either fine by the date due.

Case No. 83-59 cont.

In April 1982, the State of Maryland Motor Vehicle Administration notified her that her driving privileges were being suspended for failure to pay the fines and to return her driver's license to them. The appellant's driver's license expired on January 23, 1983 because she did not pay the fee to have it renewed.

In March 1983, while reviewing the appellant's work performance for the preceding twelve months, appellant's supervisor obtained a copy of the Motor Vehicle Administration's record and discovered that she had been driving on a suspended/expired license for approximately ten months.

The appellant testified that she knew she had to have a valid 'Class C' license to operate a County bus, knew she was supposed to report the State's action to her supervisor, and knew she would be disciplined for failure to report it, but expected a suspension, not a dismissal. The appellant had experienced prior progressive disciplinary action related to tardiness, up to and including suspension.

It was the judgment of the Board that the appellant consciously violated State Law and County policy and procedures and had received prior warnings and disciplinary actions, which should have served as an indication of the serious potential for such actions. The dismissal was found to be reasonable and in accordance with established procedures. Accordingly, it was sustained.

Case No. 83-66

A Forklift Operator appealed his dismissal for insubordination by refusing to obey his supervisor, for violation of the departmental policy relating to consumption of alcoholic beverages and misappropriation of County property.

Testimony revealed that the appellant was employed in the warehouse of the Department of Liquor Control, and that a supervisor in the warehouse saw appellant drinking from a bottle of liqueur, and, when confronted, appellant hid the bottle and ran. He refused to stop even though ordered to do so on several occasions. Subsequent search of the immediate area where the incident occurred resulted in finding an almost empty bottle of liqueur. A check of the storage area found one bottle of that brand missing from a case.

Once in the office, appellant was ordered to go upstairs to the Director's Office and wait there. He refused to do so on several occasions, one of which was witnessed by another supervisor.

The appellant did not refute the fact that he failed to stop when told to do so, and refused to go to the Director's Office when told to do so. Appellant admitted to having had a problem with alcohol over the past years; the County was aware of it; and efforts had been made to assist him in overcoming the problem.

Case No. 83-66 continued

The department had established guidelines prior to this incident stating that consumption of alcoholic beverages on the job and/or insubordination were considered serious infractions, and could result in immediate dismissal.

It was the judgment of the Board that the County had submitted sufficient evidence and testimony to support the charges against appellant, and that the charges were serious enough to warrant dismissal. Accordingly, the action was sustained.

Case No. 83-70

A Bus Operator appealed his dismissal for driving on a suspended license, driving on an expired license, failure to report the suspension or expiration, and denying any knowledge about the suspension.

After review of the documentation and consideration of the oral testimony, the Board concluded that appellant was fully aware of the licensure requirements of the County and the established procedures for reporting citations, suspensions, etc. to supervisors. Further, as a professional driver, appellant had the responsibility to maintain a valid operator's license as required by his employer. Appellant's Maryland Class C license was suspended from June until February, 1983, and expired in February 1983, and was not renewed until one week after expiration. Despite these circumstances, appellant continued to drive a County bus during this period of time, in violation of established procedures.

Appellant testified that his mailing address had not changed, and, lacking any evidence or indication that there was any problem in receiving mail, the Board found it extremely difficult to accept his statements that he was totally unaware of any of the problems prior to being confronted by his supervisors in late February, 1983. The record showed that both the Maryland and District of Columbia Motor Vehicle Administrations had sent him various notices, as did the District Court of Maryland, all related to failure to pay fines and suspensions of driving privileges.

The Board was satisfied that the County had met its burden of proof that appellant knowingly and consciously violated County procedures by operating a Ride-On bus while his license was suspended and expired, and failed to keep his supervisors properly informed as required. Accordingly, the dismissal was sustained.

Case No. 83-72

A Bus Operator appealed his dismissal for driving a County Ride-On bus while under the influence of alcohol.

Two Ride-On passengers called to complain about alleged poor driving by an operator. Supervisors immediately relieved the appellant of driving duties, and transported him to the Silver Spring Police Station for a breathalyzer test. Two tests were administered by a County Police Officer, which showed a blood alcohol content of .10%. Maryland State law states that a reading of .08% or greater shall be prima facie evidence of driving while under the influence of alcohol, and it is unlawful to operate any motor vehicle while in such a condition.

The unrefuted evidence in this case showed that the appellant was under the influence of alcohol, as defined by State law, during the time he operated a County vehicle. This action not only violated State law, but endangered the safety of passengers on the appellant's bus and/or persons in the vicinity of where he operated the bus. It was the judgment of the Board that the seriousness of the violation and possible consequences fully justified the action, and the dismissal was sustained.

Case No. 83-114

An individual appealed his dismissal, but withdrew the appeal prior to any action by the Board.

Case No. 83-116

An individual appealed his dismissal, but withdrew the appeal prior to any action by the Board.

GRIEVABILITY/TIMELINESS

Case No. 83-09

A Transit Supervisor appealed from the Personnel Director's decision on three grievances that the issues raised were "not grievable". The Board noted that one grievance had been resolved through discussion with management. Appellant had also agreed to re-file another of the grievances under the appropriate grievance track. The third grievance had to do with the employee/supervisor ratio, which the Personnel Director indicated was not grievable because staffing needs are subject to management determination within budgetary limitations.

This grievance did not allege any difference in the supervisory responsibility between appellant and other similarly classified employees, but was expressing the belief that additional supervisory employees were needed. The Board concurred with the Personnel Director that determination of the number of employees in any category is the prerogative and responsibility of management, and, unless a discrepancy can be shown between similarly classified employees, such issue is not grievable. Accordingly, the decision of the Personnel Director was sustained.

Case No. 83-13

A Division Chief appealed from the decision of the Personnel Director that an appeal from an oral admonishment was not a grievable matter. The record showed that the appellant had received a statement of charges and met with management on two occasions to discuss them. Subsequently, a decision was made not to take a formal disciplinary action, and the appellant was advised that he could consider the discussion to be an oral admonishment. In accordance with the Personnel Regulations, there was no written record made on this action.

Therefore, the Board found insufficient justification for the appeal. Further, appellant requested that the oral admonishment be rescinded, which was not possible since there was no formal documentation of such action. Based on this, it was the decision of the Board that the appeal be denied.

Case No. 83-14

A Police Officer appealed from the decision of the Personnel Director that his grievance concerning compensation for duties performed was not filed in a timely manner, as required by Administrative Procedure 4-4, Grievance Procedures.

Case No. 83-14 cont.

The evidence of record showed that the grievance was not filed until approximately three weeks after the issuance of a decision on another employee's grievance on a similar issue, and approximately two months after conclusion of the alleged improper assignment of duties. While the Board understood appellant's concern and frustration with respect to the situation, the prescribed time limits for filing a grievance were not adhered to. Accordingly, the Board ruled that the "not timely" ruling of the Personnel Director be sustained.

Case No. 83-17

A Police Lieutenant appealed from the decision of the Personnel Director who denied his grievance concerning qualifications for participation in the promotional examination for the rank of Captain in the Police Department because it was not filed in a timely manner. The record showed that:

1. On October 4, 1982, Personnel Bulletin 271, titled Police Promotional Examination for the Rank of Captain was issued, and contained minimum qualifications for participation in the examination, with a deadline for submitting applications as November 15, 1982.
2. The appellant submitted his application to compete in the examination process on November 10, 1982.
3. On November 16, 1982, the appellant filed a grievance concerning the minimum qualifications for participation in the process.
4. On November 29, 1983, the appellant was notified by the Police Department that he did not meet the qualifications for participation in the process.
5. On January 3, 1983, the Personnel Director ruled that the grievance had not been filed in a timely manner, because the "filing should have been predicated on receipt of the Personnel Bulletin or upon the determination of the Police Department that the application would not be accepted."

The Board ruled that since the appellant did not receive formal notification of ineligibility until November 29, 1982 (thirteen days after he noted the grievance), the grievance was filed timely, and the Personnel Office was directed to continue processing the grievance in accordance with established procedures.

Case No. 83-21

An Administrative Aide appealed from the decision of the Personnel Director that a grievance of being placed on leave without pay was not filed timely. The Board noted that there was no evidence that the appellant had been given formal notice of being placed on leave without pay or advised of any appeal rights.

It was the opinion of the Board that placing an individual on involuntary leave without pay requires formal notification as to effective date, etc. Further, since such action is a loss in pay, it must be construed as an adverse action, and, therefore, appeal rights must be provided. In the absence of any evidence to show that the appellant was formally notified or that she had been provided with appeal rights, it was the decision of the Board that the grievance must be considered timely, and processed in accordance with established procedures.

Case No. 83-25

A Police Officer appealed from the decision of the Personnel Director that his grievance concerning the minimum qualifications for promotion to the class of Master Police Officer I was not filed in a timely manner. The Board noted that the announcement for promotional examination for Master Police Officer I was issued on October 1, 1982, with subsequent modifications being issued on October 11, 1982; the deadline for submission of applications to the examination was November 15, 1982, and the appellant submitted his grievance on December 13, 1982, and it was denied by the Personnel Director since it was not filed within the ten days required by Administrative Procedure 4-4, Grievance Procedure.

It was the judgment of the Board that if the appellant disagreed with the qualifications as announced in October 1982, a grievance should have been filed within ten days of the deadline for receipt of applications, which would have been November 26, 1982. Therefore, since he did not file a grievance until December 13, the Board found that it was not filed timely, and the decision of the Personnel Director was sustained.

Case No. 83-46

A Police Officer appealed from the decision of the Personnel Director that his grievance concerning transfer from Motorcycle duty was not filed in a timely manner. The record showed that the appellant had been transferred from Motorcycle duty on March 1, 1981. He did not file a grievance at that time, but did enter into a lawsuit in Circuit Court with other officers, which addressed the transfer issue. On May 6, 1982, the Court of Special Appeals issued its decision and the appellant's attorney received a copy of that decision on May 7, 1982. The appellant filed his grievance on January 24, 1983.

Case No. 83-46 cont.

The Board failed to find any reasonable explanation or justification for the eight month lapse between receipt of the Court order and the actual filing of the grievance. While it may have been an oversight, the Board had no alternative but to conclude that the grievance was not filed in a timely manner. Accordingly, the decision of the Personnel Director was sustained.

Case No. 83-47

A Community Development Coordinator appealed from the decision of the Personnel Director on a grievance concerning alleged failure of the County to adhere to time limits established in the County's grievance Administrative Procedure. The record showed that:

1. The appellant filed a grievance with the Personnel Director's Office on March 17, 1983.
2. Administrative Procedure 4-4, Grievance Procedure, Track I, Step III requires the Personnel Director or designee to meet with the grievant within seven work days of receipt of the grievance.
3. On March 18, 1983, the appellant was notified that a meeting with the Personnel Director would not be scheduled until the department head returned from leave on April 4, 1983.
4. On March 21, 1983, the appellant filed a second grievance with the Personnel Director asking that the first grievance be moved to Step IV of the process since the County had allegedly failed to comply with Step III.
5. The Personnel Director ruled that the appellant had not been adversely affected by the delay, so the second grievance (involving time limits) was considered not a grievable issue.

Case No. 83-47 cont.

6. Section 9.9, Time Limits of Administrative Procedure 4-4 states:

"In the event a grievance is not answered within established time limits, the employee may appeal to the next higher step within the time frame normally provided for such an appeal. The time limits specified in this procedure may be extended by written mutual agreement of the parties or by the Personnel Director or designee for compelling reasons, e.g., workload requirements."

The purpose of a grievance process is to address misunderstandings or disagreements between employees and management. In this situation, the employee believed the procedures required mutual agreement for extension of a time limit. Because of this misunderstanding, or disagreement with the intent of the procedures, the Board found the issue was grievable and should have been accepted by the Personnel Director.

Section 4.9 of Administrative Procedure 4-4 gives the Personnel Director the authority to extend time limits for any reason if deemed compelling enough - without the consent of the grievant. Based on this rather broad, unrestricted authority and the fact that the department head was unavailable within the time limit established in Track I, and was a key individual on this case, it was the Board's judgment that the decision to delay the meeting was reasonable and appropriate. Therefore, the March 21, 1983 request to advance to Step IV should have been denied on the merits of the situation, rather than denied as a grievable issue. Based on this conclusion, no corrective action was ordered.

Case No. 83-64

A Health Department employee appealed the ruling that his grievance had not been filed in a timely manner. The Personnel Office subsequently reversed its decision, and accepted the grievance for processing, rendering the appeal moot.

Case No. 83-79

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning participation in the Master Police Officer I promotional examination process.

Case No. 83-79 cont.

The Board noted that the appellant's application was denied for the same reason as other individual's applications, and that he had failed to note a grievance in a timely manner, as did the other affected individuals. Based on that failure, the Board found no basis for the allegations of preferential treatment or denial of due process, and the decision of the Chief Administrative Officer was sustained.

Case No. 83-80

A Bus Operator appealed from the Personnel Director's decision that a grievance would not be accepted for processing because it was not filed timely and that the issue of work performance rating was not grievable.

The County's grievance procedure requires an individual to file a grievance within ten days from the date of occurrence or knowledge of the matter being grieved. The first issue raised concerned denial of leave on October 15, 1982; an accident on December 7, 1982, which later resulted in a written reprimand; and a March 8, 1983 warning for route diversion. These issues were not grieved within the prescribed time, but were made a part of the grievance filed on July 1, 1983, after receiving an annual work performance rating.

Section 8.5, Appeals from Performance Ratings, of the Personnel Regulations, permits appeals of performance ratings only in cases where the County has failed to follow established procedures. There was no indication of such failure in this case. Accordingly, the Personnel Director's rulings were sustained.

Case No. 83-98

A Police Officer appealed from the decision of the Acting Personnel Director that his grievance concerning the Master Police Officer I examination process was not filed in a timely manner, as required by Administrative Procedure 4-4. The record showed that:

1. The examination in question was given March 13, 1983.
2. On April 1, 1983, the appellant noted an appeal on two questions in the examination, as provided for in the announced examination procedure.
3. On August 10, 1983, the appellant received his examination score and was aware that his appeal with respect to the two questions had been denied. All Police Officers were informed at that time, that any disagreement with the examination scores had to be noted with the department by August 19, 1983.

Case No. 83-98 cont.

4. On August 22, 1983, the Department of Police announced the names of those individuals who would be participating in the remainder of the examination process and the appellant discovered that he had missed the cut-off.
5. The appellant noted this grievance on the same two questions, on August 30, 1983.

The appellant's failure to file a notice of disagreement with the department within the time period allowed and the delay in filing his grievance until August 30, 1983, twenty days after the incident occurred resulted in his failure to meet the time requirements, as set forth in the established grievance procedures. Accordingly, it was the judgment of the Board that the appellant did not file the grievance in a timely manner.

Case No. 83-101

A Police Officer appealed from the decision of the Acting Personnel Director that a grievance concerning the Master Police Officer I examination process had not been filed in a timely manner, as required by Administrative Procedure 4-4. The record showed that:

1. On January 15, 1983, the appellant filed a grievance concerning being denied the opportunity to participate in the Master Police Officer I examination process.
2. On or about March 10, 1983, he was informed that he would be allowed to participate in the examination process scheduled for March 13, 1983 and March 20, 1983, but the result of his examination would be held pending resolution of the grievance.
3. On May 9, 1983, the appellant received a favorable response on the grievance and was granted the same consideration as all other applicants for promotion.
4. In early August 1983, the test results were released. The appellant noted a grievance on August 10, 1983, concerning inadequate time to prepare for the test, which was given in March 1983.

Case No. 83-101 cont.

The issue to be resolved was when did the incident occur and when was the appellant aware of the problem that he was attempting to grieve. It was the judgment of the Board that the appellant should have been aware of the alleged inadequate study time upon completion of the examination process in March 1983. The Board concurred with the Acting Personnel Director that filing the grievance related to the study time after finding out final ranking, did not meet the time requirements of the established grievance process, and the appeal was denied.

Case No. 83-110

A Program Assistant appealed from the decision of the Acting Personnel Director that his grievance had not been filed timely. The Board noted that in January 1982, the appellant has been formally notified that his position was being abolished, and he would be laid-off on June 30, 1982. The same date, the appellant's supervisor sent a memorandum to the Personnel Director informing him of the situation; provided the Personnel Director the appellant's application for a similar position in another office, and requested the appellant receive priority consideration for the vacancy.

The appellant was subsequently notified that he would not be placed in the position, even though in the "outstanding" category. He questioned the Personnel Office on his right to the vacancy, but never formally filed a grievance or pursued the issue until this grievance was noted.

On July 5, 1983, Bill 47-82 related to the RIF process was introduced by the County Council. The appellant met with the Chief of Employment in July 1983 to discuss the bill and his rights under the RIF process then in effect as it related to the prior vacancy. On August 31, 1983, the appellant notified his supervisor that he planned to file a grievance. Appellant met with a representative of the Employee Relations Office on September 8, 1983 to discuss the issue and procedures, and filed his grievance on September 22, 1983. Administrative Procedure 4-4, Grievance Procedure, requires the filing of grievances within ten days from the date of occurrence or knowledge of same. Because one section states ten calendar days, and another ten work days, the Board considered it in the light most favorable to the employee, and considered the time requirement to be ten work days.

The appeal was not filed until September 22, 1983, which was fifteen work days after the date the appellant definitely knew of the incident. Accordingly, it was the judgment of the Board that the grievance was not filed timely, and the decision of the Acting Personnel Director was sustained.

Case No. 83-112

A Bus Operator appealed the "not timely" ruling of the Personnel Director on filing of a grievance.

Prior to any action by the Board, the Personnel Director reversed his earlier decision, and the grievance was accepted for processing.

A supervisor appealed from the decision of the Acting Personnel Director that his grievance concerning the rescission of the evaluation of an employee under his supervision, involved an issue that was not grievable. The record showed that the appellant assumed supervisory responsibility for the employee in question, in October 1982; developed a daily schedule for the employee to follow; and continued to monitor his work performance and to counsel him.

The performance evaluation in question, was completed and signed by the supervisor on March 7, 1983, but was not given to the employee until June 10, 1983. Subsequent to this "marginal" rating, the supervisor recommended the employee be required to forfeit 30 hours of compensatory leave for disciplinary purposes.

On August, 1983, the employee filed a grievance with the Department Head alleging he had been discriminated against by the supervisor in the evaluation process. The Departmental review (in October 1983) did not find any basis for the discrimination charge, did not find any problems with the supervision of other employees, and validated the concerns about sick leave usage. However, the Departmental review indicated "cultural differences" may have affected the employee/supervisor relationship, as well as the employee's desire for greater independence and less supervision. The Department also was concerned that the rating was based on a five-month period only, which may have been too short a time for a fair evaluation.

The Department Head subsequently nullified the evaluation, and had it removed from the files, denied the recommended action, and directed a new performance plan be prepared for the coming 12 month period.

The Board further noted that Administrative Procedure 4-4, Grievance Procedure, requires that grievances alleging discrimination be filed within ten calendar days from the date of the occurrence or knowledge of such occurrence, through the immediate supervisor to the Department Head. This Administrative Procedure further requires the Department Head to respond to the grievance, in writing, within five work days.

The primary purposes, or uses, of work performance evaluations in the County have been to determine eligibility for an annual service increment and to improve employee awareness of weaknesses and strengths, to raise the overall level of effectiveness in the job. Section A2.11, Delayed Service Increment, gives a Department Head the authority to take such action if an employee's work attitude or performance has been sub-standard. A delay of service increment is the action usually taken when an employee fails to attain a satisfactory level of performance.

A disciplinary action, such as the forfeiture of compensatory leave, recommended in this case, is usually taken as the result of a specific infraction or violation of law, regulations, etc., although the Personnel Regulations do not forbid such action based on a less than satisfactory work performance evaluation.

Case No. 83-121 cont.

After due consideration of the evidence in this case, the Board was concerned about several factors:

1. The unexplained delay in notifying the employee of the evaluation results and the apparent addendum to that evaluation based on incidents that occurred after the period for which the employee had supposedly been evaluated.
2. The acceptance of a grievance from an employee when it was clearly not filed timely.
3. The failure of the Department to review and respond to the grievance it had accepted, within the time permitted, and lack of written documentation to support or verify what did occur.
4. The statement by the Acting Personnel Director that evaluations are not a term or condition of a supervisor's employment, when they are specific, assigned duties and responsibilities for such employees.

It was the opinion of the Board that this appeal resulted from misinterpretations and misunderstandings by all parties, caused by a breakdown in communications with a serious lack of explanation for conclusions and decisions reached. The Board ruled that:

1. It is definitely the duty and responsibility of first line supervisors to conduct work performance evaluations of subordinates and to notify the affected employee(s) of the results in a timely manner.
2. The acceptance of the grievance charging the supervisor with discrimination and subsequent actions related thereto was in violation of established procedures.
3. The recommendation for forfeiture of accumulated leave for unsatisfactory work performance, while permitted by the Personnel Regulations was not appropriate action as it does nothing to encourage change or improvement.
4. The final authority for taking a personnel action was vested in the Department Head, after due consideration of the facts and circumstances involved. That final decision was a matter of judgment, and while it

Case No. 83-121 cont.

impacted on a subordinate supervisor and/or be contrary to what the supervisor believes is correct, since it involves judgment and management prerogative, that decision is not grievable by the supervisor unless it is a specific action against that person.

Accordingly, the Board found the decision of the Department Head was not grievable, as it did not result in any action being taken against the supervisor, and the decision of the Acting Personnel Director was sustained.

Case No. 83-122

A Police Technician appealed from the Personnel Director's decision that her grievance concerning utilization of sworn police officers in the Emergency Operations Center was not grievable.

The Board noted that under Section 15.1 of the Personnel Regulations, transfer of employees is a prerogative of management, with specific examples of reasons for transfer being contained in Section 15.2. The sworn officers were usually on limited duty because of on the job injuries. The Board also noted that Section 12.2 of the Personnel Regulations requires such employees to accept other duty assignments or forfeit their eligibility for any disability leave.

Therefore, in view of the fact that such assignment is a management prerogative, and appellant was not adversely affected, it was the decision of the Board that the issue was not grievable, and the ruling of the Personnel Director was sustained.

MISCELLANEOUS

Case No. 83-22

A Police Technician appealed from the decision of the Chief Administrative Officer on grievances concerning alleged retaliation and harassment and shift transfer.

In addressing the issue of alleged harassment and retaliation, the Board believed it was essential to define those terms prior to reaching any conclusions. Webster's Dictionary states that "harass" means "to annoy persistently", while "retaliate" means to "repay, in kind, get revenge". The Board agreed with those definitions, but added that before finding a person guilty of such action, the Board would have to find that the action was premeditated and deliberate, and in response to a proper and appropriate action by the individual affected.

The Board did not find sufficient evidence to support the appellant's allegation that her supervisors harassed her and retaliated against her because of her activities as PTA President. The Board's evaluation of the situation, from the record and contact with the participants, was that, because of their respective positions and personalities, an adversarial relationship developed between appellant and her superiors, rather than one of cooperation and mutual problem-solving. This resulted in a breakdown in meaningful oral communications, and led to a "paper war", which subsequently found both sides provoking each other and over-reacting in areas of disagreement. This activity reduced the ability of the parties to objectively review and/or discuss problems and to reach mutually satisfactory, workable solutions.

In the Board's judgment, the behavior of all parties had been less than desirable, or expected, and needed in an effective work environment, but the behavior could not be construed to be harassment or retaliation. Therefore, finding no basis for the allegations set forth by the appellant, the appeal was denied.

Case No. 83-26

A Firefighter appealed from the decision of the Personnel Director, rendered on behalf of the Fire and Rescue Commission, on his grievance concerning an amendment to the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County. The Board noted that the appeal did not involve a violation, misinterpretation or

Case No. 83-26 continued

improper application of an established law, but rather, a disagreement with the content of the law. This Board has no authority to rule on the validity of an amendment such as the one in question. Ruling on an issue such as that would have to be made by a court of competent jurisdiction. Accordingly, the appeal was denied.

Case No. 83-28

A Police Technician appealed a decision on a grievance, but later withdrew it prior to Board action.

Case No. 83-51

A Bus Operator appealed from the decision on his grievance concerning granting of general emergency leave for February 11 and 12, 1983. The record showed that, as the result of a major snow storm, the Chief Administrative Officer declared a general emergency from 12 noon to 5 p.m. on February 11, 1983, and, subsequently, extended the period to 12 midnight. Based on service needs and anticipated driving conditions, management made the decision on February 11 to try to operate the Silver Spring Ride-On on Saturday, February 12, 1983, but on a limited, Sunday schedule, and to keep the Gaithersburg Unit closed.

Late Saturday morning, management decided to close the Silver Spring Ride-On Operation as well at 1 p.m. that date because of the severe conditions.

Gaithersburg employees were paid administrative leave for the entire Saturday shift if normally scheduled to work, while the Silver Spring employees were paid administrative leave for all normally scheduled hours after 1 p.m. that date.

Section 13.2, Administrative Leave, of the Personnel Regulations gives the Chief Administrative Officer the prerogative of granting such leave in cases of general or public emergency, and the County has had a formal written policy on how such leave is paid since January 4, 1980. There was no indication that this policy was violated.

The issue in this case was the length of time approved for general emergency by the Chief Administrative Officer. While employees may not agree with management's decision in such matters, it is a question of judgment. Since the authority for determining such periods (general emergency) rests with the Chief Administrative Officer, and

Case No. 83-51 continued

there was no evidence of violation or misapplication of any procedure or policy, it was the decision of the Board that the disposition of the Chief Administrative Officer be sustained.

Case No. 83-52

A Bus Operator appealed from the decision of the Chief Administrative Officer on his grievance concerning a preventable accident, and the accident review process used by the Department of Transportation. Based on the evidence of record, there was no question that a preventable accident had occurred, that the disciplinary action taken was in accordance with established policy and procedure, and the Board had previously ruled such procedure and policy was in accordance with Board directives in other cases. Finding no basis for the appeal, the decision of the Chief Administrative Officer was sustained.

Case No. 83-67

Two Employment Specialists appealed from a decision to abolish their positions because of a reduction in force. The Board noted that one appellant was terminated as the result of a reduction in force on April 30, 1982. On April 28, 1982, she entered into an agreement with the County to resolve another matter, and as part of that agreement, waived any and all appeal rights with respect to a subsequent reduction in force. The other appellant was notified of a pending reduction in force on November 29, 1982, with an effective date of January 28, 1983. She accepted a transfer and voluntary demotion from her position of Employment Specialist III, Grade 19, to the position of Public Administration Intern, Grade 16, effective February 13, 1983, and was not removed from the County payroll.

Section 19, Reduction in Force, subsection 19.5, Appeals, of the Personnel Regulations, states "Except for those employees as defined in Sections 3.6 (a) and 3.8 (a) of these regulations, a merit system employee who is demoted or terminated due to reduction in force, may appeal in accordance with Section 22 of these Regulations." Section 22 of the Regulations contains the County's grievance procedure.

Both individuals were employed in grant-funded positions, as defined in Section 3.6 (a) of the Personnel Regulations. Therefore, it was the unanimous decision of the Board that neither individual had appeal rights related to reduction in force, and the appeals were dismissed for lack of jurisdiction.

Case No. 83-75

A Police Technician appealed from the decision of the Personnel Director that her grievance concerning an incident with her supervisor was inappropriate for review under the County's Grievance Procedure. That decision was based on the belief that the filing of a Citizen's Complaint under the Law Enforcement Officers' Bill of Rights precluded any further review or action under the County's Grievance Procedure.

The Board noted that part of the relief requested was disciplinary action against a sworn police officer if the charges were sustained. Since the basic allegations involved possible misconduct on the part of a sworn police officer, it was the judgment of the Board that the Law Enforcement Officers' Bill of Rights superceded the County's Personnel Regulations. Section 735 (b) of Article 27 specifically states: "the provisions of this subtitle shall supercede any state, county or municipal law, ordinance or regulation that conflicts with the provisions of this subtitle, and any local legislation shall be preempted by the subject and material of this subtitle."

Appellant had filed a Citizen's Complaint under the Law Enforcement Officers' Bill of Rights, and the charges were investigated in accordance with established procedures. Therefore, it was the decision of the Merit System Protection Board that the matter had been closed, and there was no further right of grievance or appeal under the County system.

Case No. 83-78

An Administrative Aide appealed from the decision of the Chief Administrative Officer on a grievance concerning being placed on involuntary leave without pay, and, pursuant to the Board's discretionary authority in Section 23.2, Right of Appeal and Hearing, of the Personnel Regulations, the decision in the case was based on the extensive written documentation of record.

Appellant had been undergoing treatment for a serious illness, and was having personal problems involving mental and physical abuse at home. She was paid for the period of August 2, 1982 to September 21, 1982, and it was charged to her accrued sick and annual leave. She voluntarily resigned from County service to accept employment with the United States Government. The Chief Administrative Officer overturned the leave without pay action, and appellant was reimbursed full salary for all unpaid time up to the date of resignation from County service.

Case No. 83-78 continued

Appellant had made numerous demands concerning recrediting of leave, lost savings, reinstatement, transfer, etc.. However, it was the judgment of the Merit System Protection Board that the decision of the Chief Administrative Officer on the grievance was a fair and reasonable resolution, and further remedy was neither justified nor appropriate. Accordingly, the appeal was denied.

Case No. 83-83

A Bus Operator appealed his termination. In January, 1983, appellant signed up for two weeks vacation in June, 1983, and his name was placed on the vacation book, which, testimony revealed, was assurance that the leave would be granted upon proper request being submitted, provided his leave accrual was sufficient to cover the time off. Testimony revealed that, despite the written policy for requesting and approving vacation time three to four weeks in advance, management did not make the final decision until the Thursday preceding the week requested. The leave was denied because appellant did not have sufficient leave to cover the time requested. Appellant requested he be placed in a leave without pay status for the week, and reiterated the need for the time off. His supervisor told him that such request would have to be made in writing to a higher level as it could not be approved by the supervisor.

Lacking sufficient time to submit a written request, appellant took the time off, believing the matter would be straightened out when he returned. Appellant returned to work the following week, and proceeded to work his regular schedule for several hours until relieved and told to report to the office, where he was informed orally that his services had been terminated for failure to report to work the preceding week.

The Board noted that the word "abandon" means "to give up with the intent of never again claiming a right or interest in". The facts of this case clearly showed that appellant never intended to abandon his job, and management was cognizant that his action was one of leave without pay rather than abandonment. In the Board's judgment, both parties erred. Appellant was unclear as to his accrued leave balances, and had been told his leave could not be approved. Prior to leaving, he had the responsibility to clarify

Case No. 83-83 continued

the situation to eliminate confusion and misunderstanding rather than hope to straighten it out when he got back. The Department had the responsibility to consider all the facts, to evaluate them rationally, and then take appropriate action. The decision to terminate was made before talking to appellant to learn the reason for his absence.

Section 18.1 of the Personnel Regulations defines "termination" as " . . . a non-disciplinary act by management to conclude an employee's service with the County . . .". Based on the evidence of record, there was no doubt that this action was intended to be a removal for cause, i.e., poor attendance, and that termination was selected as the most expedient method of action.

The Merit Board found the action to be totally inappropriate as a termination within the meaning and intent of the Personnel Regulations, and directed the termination be rescinded; appellant be reinstated as a Bus Operator; reimbursed for all lost wages less any earnings from a job obtained in the intervening period pending adjudication; and reimbursed reasonable attorney's fees.

Case 83-105

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

In reviewing this grievance, the Board noted that Section 23 (a), Work Schedules, of the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County states, "The work schedules for all employees shall be determined by the corporation." Further, Section 15.1, Definitions, (b), Duty Assignment, states, "A duty assignment is the movement of an employee from one position or task assignment to another position of the same grade and step level within a corporation." Section 15.4 states, "There are no appeals of transfers and duty assignments."

A review of the documentatin indicated that appellant's duty assignment was determined based on the staffing requirements of the Fire Department, and he submitted insufficient evidence to support his allegation that the action was discriminatory. The Department explained, to the Board's satisfaction, the movement of other Firefighters which were required to meet staffing needs.

Case No. 83-105 continued

It was the judgment of the Merit System Protection Board that the assignment of personnel is the prerogative of management, and that management's judgment in this instance was reasonable and implemented in accordance with established procedures. Accordingly, the appeal was denied.

Case No. 83-106

An appeal was filed but subsequently withdrawn without action by the Board.

Case No. 83-107

An Office Assistant appealed a 5% within-grade reduction for 90 days. The record showed that appellant's supervisor had given her a list of written assignments and work responsibilities, which contained specific goals, guidelines and instructions necessary to complete the tasks satisfactorily. She was also told that periodic review of workload and performance would be made. Appellant received two previous warnings concerning number of errors in her work, and had also received a written reprimand for failure to respond to specific requests from her supervisor for information, mistakes on reports and documents, and problems with the files. An extensive number of arithmetic errors were found in the July report prepared by appellant, as well as other incorrect data and other problems. These errors were all documented in the record, and appellant admitted responsibility for errors in three sections of the report.

Based on the evidence of record, the Board found that the number of errors made and other work-related problems, justified management's action, and the appeal was denied.

Case No. 83-120

A Bus Operator appealed from a within-grade reduction for thirty days for alleged tardiness. The record showed that appellant had received an oral admonishment on March 26, 1982, because of an attendance problem. On September 14, 1982, he received a written reprimand for a continued problem with timely attendance. From January 31, 1983, through July 7, 1983, appellant was tardy on six occasions. On November 17, 1983, he was notified that his salary was going to be reduced within-grade (ten percent) for thirty days because of the continuing attendance problem.

Case No. 83-120 continued

The Merit Board concurred with the Director of the Department that, although appellant may be performing satisfactorily when at work, and may be working extra hours frequently, that did not justify or excuse reporting to work late on other occasions. The nature of the Ride-On operation requires timely attendance and prompt adherence to work schedules by all employees in order to assure adequate delivery of services to the citizens of Montgomery County. Based on the documented record of tardiness, it was the judgment of the Board that the disciplinary action taken because of appellant's failure to report to work in a timely manner was reasonable and fair. Accordingly, the appeal was denied.

Case No. 83-123

An appeal was filed but subsequently withdrawn prior to action by the Board.

PERFORMANCE EVALUATIONS

Case No. 83-12

A Division Chief appealed from the decision of the Personnel Director that a grievance concerning performance evaluation had not been filed in a timely manner. The Board noted that:

1. The performance evaluation received for the period in question was "met requirements";
2. Appellant received the rating on October 14, 1982, and was notified on November 1, 1982, that certain amendments would be made, as requested by him;
3. The grievance was filed on November 18, 1982;
4. Administrative Procedure 4-4, Grievance Procedure, requires a written grievance be filed within ten calendar days from date of occurrence or knowledge of same;
5. Section 22, Grievance, subsection 2, Definition, of the Personnel Regulations gives the employee the right to file a grievance if adversely affected by a management action;
6. Section 8.5, Appeals from Performance Ratings, of the Personnel Regulations states, "Performance ratings are not appealable to the Merit Board, except in cases of failure to follow established procedures."

The Board found no evidence to show that the procedure for conducting a performance evaluation had been violated, or that appellant had been adversely affected by the rating received. In the absence of either of these, there was no basis or justification for a grievance, and, therefore, the issue of timeliness was not appealable.

Case No. 83-49

A Police Officer appealed from the Personnel Director's decision on his grievance concerning a work performance rating. Section 8.5, Appeals from Performance Ratings, of the Personnel Regulations, states, "Performance ratings are not appealable to the Merit Board, except in cases of failure to follow established procedures." A review of the written record did not indicate any violation or alleged violation of established procedure. Therefore, it was the decision of the Board that there was no basis for the appeal, and it was dismissed.

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Director's decision that the issue was not grievable was sustained.

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noted that Section 8.5.4.1 of the Performance

have any further information, please contact the FBI at (202) 452-4000.

The County requested reconsideration of the decision, as it

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RECRUITMENT AND PROMOTION

Case No. 83-02

A Police Lieutenant appealed from the decision of the Chief Administrative Officer on his grievance concerning promotion to the rank of Captain, Department of Police.

The basic issue to be resolved was whether appellant had been arbitrarily passed over or improperly considered for promotion to the rank of Captain. The action that precipitated this grievance was the promotion of another individual who was in the same rating category on the eligible list, but had a lower numerical score than appellant. Appellant believed that he was aggrieved by this action because all prior promotions in the Department of Police, except in instances where unusual circumstances were involved, were made strictly on the basis of numerical scores.

The Board noted that under Section 16, Promotion, subsection 2, Policy, "Promotions shall be made on a competitive basis. . .after an evaluation of each individual's qualifications as defined in Section 5.6 of these Regulations. . ." Section 5, Application and Examination Procedures, subsection 6, Examinations, sets forth the requirements for administering promotional examinations and neither party alleged that the examination process was not conducted in accordance with established procedures.

Under Section 6, Appointments and Probationary Period subsection 6.3, Selection Procedures, the appointing authority is given the freedom to, ". . .choose any individual from the highest rating category based on that person's overall rating, character, knowledge, skill, ability and physical fitness for the job as well as possible future advancement. . ." It was this provision of the Personnel Regulations that was alleged to have been violated.

The appointing authority was aware that three individuals remaining in the "Well-Qualified" category were eligible for promotion to the rank of Captain. The appointing authority discussed the eligible applicants with several of his subordinates and made a decision to appoint an individual whose numerical score was slightly lower than appellant's.

Case No. 83-02 continued

It was the decision of the Board that despite past practices, the appointing authority had the right (under Section 6.3) to select any of the three individuals remaining in the "Well-Qualified" category based on personal judgment of that individual's qualifications. Since the decision of the appointing authority was a judgmental matter and not one of process, the Board found no basis or justification for the appeal and it was dismissed.

APPEALED TO COURT, BUT SUBSEQUENTLY WITHDRAWN.

Case No. 83-07

An Applicant appealed the selection decision for the position of Social Worker Assistant I, Department of Family Resources.

The issue was resolved, prior to any action taken by the Board.

Case No. 83-15

A Fire Captain appealed from the decision of the Personnel Director on behalf of the Fire and Rescue Commission on a grievance concerning the promotional process utilized for the position of Fire Chief.

After the development of an extensive written record and many hours of testimony, the Board addressed nine separate points in reaching the final decision. Each of the questions discussed are summarized herein.

QUESTION 1. What authority does the Merit System Protection Board have to rule on an action by an independent Fire and Rescue Corporation?

Based on the present law, the Board determined that it had jurisdiction over the matter, and had the responsibility and authority to decide the appeal, "in any manner deemed necessary, appropriate and in the best interest of the County Fire and Rescue Services" (Section 23.18 of the Fire and Rescue Services Personnel Regulations)

QUESTION 2. Is the position involved in this appeal a merit system position?

Based on the laws and regulations in effect, all parties agreed that the Fire Chief position was a merit system position.

Case No. 83-15 continued

QUESTION 3. Is the Fire Chief position, as well as other "Senior Officers" in the Fire Services, exempt from certain merit system requirements for recruitment and promotion based on prior Personnel Regulations?

Section 5.1 of the April, 1981 Personnel Regulations required the Fire and Rescue Commission or designee to establish a comprehensive recruiting and examination program for all merit system positions.

When the Personnel Regulations were implemented on April 1, 1981, Section 28 provided for continuance of all prior regulations until August 1, 1981. Lacking documentation to show an extension from July 1, 1982, to December, 1982, when the Fire and Rescue Commission voted to extend that provision to July, 1984, it was the Board's conclusion that all prior regulations ceased to exist on July 1, 1982. It was the Board's ruling that the prior provision concerning "Senior Officers" was null and void, and the position of Fire Chief, as well as all other Senior Officers, is subject to all merit system rules and regulations.

QUESTION 4. Was the position being filled a Fire Chief, Grade 28; Assistant Fire Chief, Grade 28, or some other level?

Under present laws and regulations, the Fire and Rescue Commission has the responsibility to maintain a classification and compensation plan similar to the County, and to "classify positions on the basis of assigned duties and responsibilities and minimum qualifications required to assure equal pay for work of substantially equal value performed under essentially similar conditions". Grade level assignments are to be based on clear and concise distinctions between levels of responsibilities and duties, and each class is to be assigned to a grade level.

The Board found the class of Fire Chief had not been assigned a pay grade, as required. Rather, each corporation had been allowed to set its own pay scale for the Fire Chief position. This practice resulted in Fire Chiefs being assigned to Grade 28 or 32. The Assistant Fire Chief class was also assigned to Grade 28. The Board found the dual assignment of the classes of Assistant Fire Chief and Fire Chief to the same pay grade violated the requirement for clear and concise distinctions between levels of responsibilities and duties, and that separate, distinct classes and grade levels are required to bring the classification structure into compliance with the laws and regulations.

Case No. 83-15 continued

The Board ruled that until the Fire and Rescue Commission took the necessary steps to determine proper classes based on level of assigned duties and responsibilities; assigned each class to the proper pay grade in accordance with the requirements of the Personnel Regulations; and took the necessary personnel actions to bring all Corporation positions into compliance with the approved classification and compensation plan, it was not possible to say or determine what level the position should be.

QUESTION 5. Did the Fire and Rescue Commission properly delegate the responsibility for establishing a comprehensive recruiting and examination program to the individual independent corporations?

Because of the special needs of each Corporation, the Fire and Rescue Commission had informally allowed each Corporation to prepare and administer its own recruitment, examination and selection process for the position of Fire Chief. Formal written guidelines were not provided to the Corporations, and this authority was never delegated in writing or by formal action of the Fire and Rescue Commission.

Lacking a formal written delegation of authority, it was the Board's judgment that responsibility for this task remained solely with the Fire and Rescue Commission.

QUESTION 6. Was a comprehensive recruitment and examination program for all merit system positions established by the Fire and Rescue Commission?

An extensive written program had been developed and utilized for all classes from entry level Firefighter to the Assistant Fire Chief. The program consisted of a series of examinations, including physical and medical; written test of knowledge; oral interviews; and, for the higher-level positions, assessment center exercises. Eligible lists had been established for promotion to each class, and remained in effect until exhausted or until new examinations were administered, approximately every two years.

The Fire Chief class was excluded from this program, and the Fire and Rescue Commission had never taken steps to develop a formal program for this class. It was the Board's judgment that such a program, as required by the Personnel Regulations had not been properly established and that there was no uniform selection process for the class of Fire Chief.

Case No. 83-15 continued

QUESTION 7. Was the oral examination administered to the final group of applicants a reasonable and appropriate method of measuring the qualifications, fitness and ability of the competitors, and was it properly and accurately evaluated?

The first part of this question called for a subjective conclusion based on the perceived needs of the person or group involved. As the Board was not part of that process, they were not in a position to substitute their judgment for that of the Fire Department. The record reflected that the Fire Department made a substantial good faith effort to do what was right by complying with all of the directives and suggestions of the Fire and Rescue Commission and the County Personnel Office.

With respect to evaluation of the competitors, there was no evidence, record or testimony to clarify or support any of the ratings assigned. No guidelines or procedures for rating of the questions were announced prior to the examination, as required by Section 5.9 of the Personnel Regulations, and there were no established standards to be used for comparing the responses of the applicants, to determine appropriate scores or ratings of each. There was an indication that the interview board considered one applicant's work performance in an "acting" capacity as highly favorable to him, which, gave him a competitive advantage, in violation of Section 16.4 of the Personnel Regulations.

While there was insufficient documentation to unequivocally conclude that the examination process was inappropriate or evaluated improperly, the Board found the process to be highly questionable because of the lack of proper documentation and the failure to adhere to the announcement requirements of the Personnel Regulations.

QUESTION 8. Was the eligible list properly established and was the selection made in accordance with established procedures?

The basic purpose of conducting examinations and establishing an eligible list for merit system promotions, is to provide an unbiased independent evaluation of applicants' knowledges, skills and abilities to ensure obtaining the best-qualified person. Once ratings are assigned and the eligible list is certified, the selecting official is to be provided with the list, and is free to choose anyone from the highest rating category. Selection from a lower rating category requires written justification and approval of the Fire and Rescue Commission.

Case No. 83-15 continued

In this case, the Interview Board conducted the entire examination process; rated the applicants, and determined the make-up of the eligible list; and recommended appointment of a person from a lower rating category. Several committee members then participated (as members of the Board of Directors) in the voting for selection of the Fire Chief.

Formal selection was made by the Fire Department on November 23, even though information to establish the eligible list was not provided to the Fire and Rescue Commission until November 29 (by phone), and the actual eligible list was not certified until November 30.

The eligible list was certified by the Fire and Rescue Commission and the County Personnel Office without receipt or review of any documentation to verify the validity of the ratings assigned, and after both were aware that a selection had already been made.

The documented dates of action by the parties and the involvement of the Interview Board in the total process lead the Board to the conclusion that the eligible list was not established in accordance with the requirements of the Personnel Regulations, and the selection was made prior to the certification of the eligible list, all in violation of Section 6.3 of the Personnel Regulations.

QUESTION 9. Was the promotion consistent with merit system principles and practices?

Progression or promotion to the next higher level of responsibility in an organization that utilizes merit system positions is normally preceded by a period of demonstrated satisfactory performance at the next lower level position in the chain of command, or similar experience in another organization. A review of Fire Service class specifications showed that a period of satisfactory employment with the Montgomery County Fire Services in the next lower level is required for promotion to all higher-level classes, except for the position of Fire Chief. The Fire Chief class specification had not been changed since 1971. All other Fire Service class specifications were revised and updated at the time of implementation of the Career Development Plan, approximately five years ago.

The person selected for promotion had served as a Fire Lieutenant for ten years, and was on the eligible list for promotion to Fire Captain at the time of recruitment for a Fire Chief. Appellant was on the eligible list for promotion to Assistant Fire Chief. Neither individual had any experience as an Assistant Fire Chief, and both received "Well-Qualified" ratings for the Fire Chief position. While there was no question of either person's ability in performing satisfactorily in the merit position of Fire Chief, the Board believed it showed that promotion of either to the position of Fire Chief over persons with both higher ratings and experience at the higher-level would be inconsistent with the basic premise of a merit system.

Case No. 83-15 continued

It was the Board's considered judgment that the promotion of a Lieutenant over an Assistant Fire Chief and two Fire Captains, all of whom were in the "Outstanding" category on the eligible list, was inconsistent with merit system principles and practices.

After consideration of all factors and conclusions, the Board directed that:

1. The promotion be rescinded, but that the Lieutenant be allowed to retain all monies received while serving in that position.
2. The Lieutenant was to be reinstated to his former position with the Fire Department without loss of status or benefits and this action should not adversely affect or hinder his eligibility for promotion to Fire Captain.
3. The eligible list for Fire Chief be abolished, and all persons listed thereon be notified, as required by the Personnel Regulations.
4. Prior to recruitment for a Fire Chief for any corporation, the Fire and Rescue Commission had to bring the class specification and pay grade assignment for the class of Fire Chief into compliance with the requirements of the Personnel Regulations.
5. The Fire and Rescue Commission take the necessary steps to assure that future recruitment efforts for Fire Chief meet the requirements of law and regulations, as presently written, or as subsequently amended.
6. The Fire and Rescue Commission, as agent of the County, reimburse both appellants and the Fire Department for reasonable legal fees incurred in adjudication of this matter, since the parties acted in good faith and/or on the advice and direction of the Fire and Rescue Commission.

APPEALED TO COURT.

Case No. 83-18

An applicant for the position of Firefighter appealed the "not acceptable" rating received. Prior to action by the Board, the County Employee Medical Examiner changed the rating to "acceptable", resolving the appeal.

Case No. 83-29

A Police Officer appealed from the Police Department's failure to comply with or implement the decision of the Chief Administrative Officer on his grievance concerning the promotional process for the rank of Master Police Officer II. The Board noted that the grievance was filed on August 5, 1981. The Chief Administrative Officer's decision on the grievance was issued on December 11, 1981, in which he directed that the Police Department develop the duties and responsibilities for the MPO II class specification, and a schedule for implementation of the promotional process. The class specification for MPO II was approved and established in June, 1979, but the occupational class had never been used. Section 7.4, Classification Actions, (e) Class Abolishments, of the Personnel Regulations states, in part, "... a class shall automatically be abolished if not utilized during a consecutive two year period".

In light of Section 7.4 (e) of the Personnel Regulations, the Board found that the occupational class of MPO II was automatically abolished in June, 1981, two years after it was created, since it was not utilized during that period. Therefore, the grievance filed in August, 1981, after the actual abolishment of the class, was not valid and should not have been accepted for processing. The Board dismissed the appeal for lack of validity and justification.

Case No. 83-30

A Police Lieutenant appealed from the decision of the Chief Administrative Officer on his grievance concerning the promotional process for the position of Police Captain.

The question at issue was whether the deadline for qualifying to participate in the promotional process was reasonable and fair. The Special Investigator recommended that since a deadline subsequent to completion of the examination process had been established for the position of Master Police Officer, a similar deadline for other police positions should also be established. The Board concurred with that recommendation, particularly since the class specification for Police Captain requires two years' experience, and appellant met that requirement prior to the date of the examination.

It was the decision of the Board that the appellant was eligible to participate in the process for the rank of Police Captain.

APPEALED TO COURT.

Case No. 83-31

A Police Sergeant appealed the examination process for the position of Police Lieutenant.

The primary issue to be decided was whether the County's establishment of a cut-off date for eligibility to participate in the promotional process was fair and reasonable.

The class specification for the position of Police Lieutenant requires that an individual have two years sworn experience in the rank of Sergeant prior to promotion to the position of Lieutenant. The class specification does not set forth a requirement that such experience is necessary to participate in the examination process. In this case, the cut-off date for eligibility to participate in the examination process was established as August 31, 1982, but the examination process was not completed until March 1983. Appellant met the experience requirement on November 9, 1982.

The Board noted that the eligibility date for participation in the examination process for the position of Master Police Officer I was set for sometime after administration of the examination itself, and that the special investigator, in this case, recommended that the later date be applied to all promotional processes for police officer positions to assure fairness and equity to all officers.

It was the judgment of the Board that the appellant should have been permitted to participate in the examination process.

Based on the fact that the examination process had been completed without appellant's participation, the Board found it necessary to invalidate the promotional process for the position of Police Lieutenant, and directed the Department of Police and the Personnel Office to:

1. Rescind the eligible list for the position of Police Lieutenant.
2. Invalidate all test results based on the prior examination; and
3. Proceed immediately with a new examination process.

APPEALED TO COURT. BOARD'S DECISION OVERTURNED.

Case No's. 83-42 and 83-43

Two applicants appealed from the decisions of the Fire and Rescue Commission to terminate further consideration of their applications for employment. The records showed that appellants' names had been placed on the eligible list for the position of Firefighter in 1981, but that neither was selected for appointment.

Case No's. 83-42 and 83-43 continued

In November, 1982, appellants were notified that the eligible list for the position of Firefighter would expire on January 24, 1983, and that they would have to submit new applications and compete again if still interested in the position.

Appellants had received scores of 41 correct answers out of 46 questions, and 44 correct answers out of 50 questions, respectively. The score required to qualify for the eligible list had been set at 40.

The test was revised in 1982, and appellants each received a score of 43 correct answers out of 50 questions, but the score for a qualified rating had been raised to 44. The record showed that 306 individuals took the 1982 test; 230 (75%) achieved scores of 44 or higher, and were certified to the eligible list for further processing. Appellants were not certified to the eligible list because of their scores of 43, one point below the established cut-off point.

The Board did not find any evidence of violation of the Personnel Regulations, or indication that the examination was not job-related, or that it resulted in discriminatory treatment. Finding no valid reason to overturn the action in these cases, the appeal was denied.

Case No's. 83-56 and 83-57

The Fraternal Order of Police appealed the promotional process utilized for the class of Master Police Officer I. The issues addressed were:

1. Is the minimum educational requirement for MPO I valid or is it discriminatory and arbitrary because of an alleged lack of job-relevance?
2. Should a waiver be granted to allow substitution of all police experience for all required minimum education for MPO I as was allowed for the 1981 Sergeant's examination?

Case No's. 83-56 and 83-57 continued

3. In creating two groups for promotion, Type I and Type II, were some persons improperly excluded from competition for Type II vacancies and/or was a non-competitive promotional process created in violation of the Personnel Regulations?

The Board concluded that the establishment of educational requirements for positions must take into consideration several factors, which may vary from one occupational class to another. First, it is necessary to determine if a certain level of technical knowledge is required prior to employment if one is to be successful in the job, or if such knowledge may be acquired on the job after employment. Secondly, if it may be acquired on the job, then a certain level of education attainment may be indicative of a person's ability to learn, and could provide a broad base of knowledge upon which to build after employment. Finally, it is also possible that certain supervisory or management type courses may be required for promotion to administrative and supervisory positions. Based on the average educational level of the citizens of Montgomery County (over fourteen years), the Board found the requirement for twenty college-level courses (the equivalent of an Associate of Arts degree) for a Master Police Officer I to be a reasonable and valid requirement, particularly since this has been the minimum educational requirement for Police Officer Candidates since June 1979. The Board further found no reason to require a direct-job relationship between the courses and the MPO I position, as the main purpose for the requirement is to assure an intellectual equality between the officers and the citizens to minimize communication and inter-personal relationship problems. The MPO I is not a supervisory or management level position, and technical knowledge required may be obtained on the job. Accordingly, it was the Board's decision that the educational requirement for MPO I was reasonable and valid.

Substitution of education for experience or experience for education requirements has been permitted for many years in Montgomery County, subject to management discretion on a position by position basis. The class specification for MPO I contains the equivalency provision. In this instance, the County decided to allow for substitution of experience for a maximum of 80% of the educational requirement, instead of the full amount as had been done previously. While such a decision may give the appearance of discriminatory treatment towards individuals without college-level courses, the record clearly showed the County started up-grading its educational requirements for Police Officers in 1979, and made the fact known to all employees. Even though full substitution

Case No's. 83-56 and 83-57 continued

was allowed as recently as 1981, a period of approximately four years from date of setting the requirement to date of actual implementation, provided a reasonable time to acquire twelve credit hours of college-level courses. Therefore, it was the Board's judgment that the establishment of limited substitution of experience for the educational requirement was reasonable and within the prerogative of management.

The issue involving separating MPO I positions into two types - Type I and Type II was not relevant to the examination process or the establishment of eligible lists. Whether certain individuals will be placed in specific vacancies could not be known until the selection process begins, and the Personnel Regulations provide certain requirements to be met and followed in that area. Based on the fact that the classification study had not been completed and no specific action had been taken or announced in this area, the Board found no basis or justification for ruling on this question at this time.

Case No. 83-58

A Police Sergeant appealed from the decision of the Chief Administrative Officer on his grievance concerning the promotional process for the rank of Lieutenant.

The Board had recently invalidated that promotional process as the result of another appeal, and directed the County to proceed with a new examination. Based on that action, the relief sought by this appellant had already been approved. Accordingly, no further action was taken by the Board.

Case No. 83-82

A Transit Controller appealed the promotional process utilized for the position of Transit Operations Supervisor I because of alleged unfair composition of qualifying examination; unfair, discriminatory administration of that examination; unfair, improper evaluation of examinations; and unfair, discriminatory selection of applicants.

Appellant had questioned the validity of the written examination based on his belief that it did not relate well to the duties and responsibilities assigned to the positions, and that it did not properly measure all of the skills and knowledges required. He further believed that the persons who composed the examination lacked sufficient direct knowledge of the position to permit them to compose valid, job-related questions. The Board recognized that any written test

Case No. 83-82 continued

involves some subjectivity with respect to the type and number of questions to ask, which will measure certain skills, knowledges and/or abilities judged necessary for the attainment of a satisfactory level of performance. It may not be practical, nor necessarily desirable, to attempt to measure every knowledge, skill and ability needed, as some are readily learned on the job, and, as in this case, some are already apparent based on the demonstrated work performance at the Transit Controller level. It may also be necessary in some cases to base questions on a simulated set of facts and circumstances, as a means of testing one's ability to follow instructions and to interpret data. It was not an absolute requirement, as appellant suggested, that every question be directly and specifically related to exactly how it may be done on the job at a precise time and place. Situations and guidelines change with time, and all applicants would not necessarily be exposed to the same precise events. A thorough review of the questions revealed that all were related to some phase of the assigned duties and responsibilities of the position in question.

The persons who composed the examination were fully knowledgeable, and were aware of the work performance requirements of the position. While appellant alleged certain acts of omission in constructing the examination, and alleged flaws in the job analysis study, these allegations were not supported by evidence, nor was it shown or proven that such acts or flaws adversely affected the appellant or any other applicant in any manner. Therefore, it was the Board's judgment that the written examination was prepared in accordance with established procedures, and was a fair and reasonable measurement tool.

The examination was administered to all applicants at the same time, with all being given the same instructions, data, and unlimited time to complete. The appellant did not submit any evidence to show that any specific act in the process had an adverse impact on him, or any other applicant, or that it affected his ability to answer the questions, or lowered the final results in any manner. The record showed that the administrative process provided an avenue of appeal that resulted in a positive benefit to appellant's score. The Board concluded that the administration of the examination was clearly proper and did not result in any adverse impact on the appellant and/or other applicants.

There was no indication that the grading was unfair and/or improper, as alleged. The record showed that subsequent to the favorable resolution of the item appeals, all examinations were graded on the same set of acceptable answers and in the same manner. An answer key, developed prior to giving the examination, was used, and there is absolutely no evidence to show any adverse impact or discrimination towards the appellant, as alleged.

involved was subjectivity with respect to the type and number of questions asked, which will always occur in all knowledge analysis and/or judgment necessary for the attainment of a certain factory level of performance. It may not be possible to measure exactly knowledge, skill and ability involved in attaining the maximum factory knowledge, skill and ability needed, as some are really learned on the job and not in this case, some are already present based on the knowledge and past performance of the former factory level. It may also be necessary in some cases to lose something as a controlled set of tools and equipment, as a means of testing one's ability to follow instructions and to interpret data. It may not be possible, as suggested, to suggest that every question be directly and specifically related to exactly how to perform on the job as a question time and place. Efficiency and quality change with time, and all questions could not necessarily be applied to the same person or group. A thorough review of the above shows several that all were related to some form of the training and responsibilities of the position in general, but not in

estimated procedure, and was a fair and reasonably accurate judgment that the written examination was prepared in accordance with any standard in any manner. Therefore, it was the Director's opinion that such use of films adversely affected the applicant in these affidavits was not supported by evidence, and was in violation of the regulations, and affected films in the same manner as stated. While applicant offered certain rules of evidence in connection with the examination, and offered films in the same manner as stated, but none of the work requirements of the regulations, the Director who composed the examination was fully qualified.

The Board concluded that the administration of the investigation was soundly handled and did not result in any adverse impact on the applicant and other applicants.

There was no indication that the meeting was intended to be a discussion of the proposed legislation. The meeting was held in a room at the hotel and was attended by a number of people, including the President of the United States, the Vice President, and the Speaker of the House of Representatives. The meeting was held in a room at the hotel and was attended by a number of people, including the President of the United States, the Vice President, and the Speaker of the House of Representatives.

Case No. 83-82 continued

A review of the record showed three distinct steps in the qualifying process. First, the applications were reviewed to determine if the minimum qualification requirements had been met. At this point, only thirteen of the applicants were found qualified to participate in the written examination phase of the process. Secondly, the written examination results were used to rank the remaining applicants based on their performance in a controlled situation to assure uniformity and fairness in judging one's ability, skill and knowledge. Finally, the applicants in the highest rating category were interviewed, and selection for promotions were made. Section 6.3, Selection Procedures, of the Personnel Regulations was explicitly followed in this case, and the appellant failed to show any violation of established procedures in the final selection process.

It was the judgment of the Board that the appellant failed to bear the burden of proof on all of the allegations, and the appeal was denied.

Case No. 33-84

An applicant appealed from the decision to remove his name from the eligible list for the position of Correctional Officer, and denial of his request to grant veteran's credit retroactive to November, 1982. The record showed that:

1. Appellant was certified to the eligible list for Correctional Specialist II (Pre-Release) on February 24, 1983, and was in the highest rating category on that list.
2. On September 8, 1983, the appellant was offered an appointment as a Correctional Officer Candidate, subject to completion of appropriate background investigation.
3. Based on certain information contained in the background investigation report relating to truthfulness and honesty, appellant was considered ineligible for appointment to a Correctional Officer or Correctional Specialist position.
4. Appellant had completed a questionnaire as part of the County's employment process, and also underwent an oral board examination. Information concerning the use of drugs and prior

Case No. 83-84 continued

employment provided on the questionnaire and to the oral board was "modified" or changed during the interview with the investigator.

The appellant admitted the information relating to the use of drugs as provided on the questionnaire and to the oral board was incorrect. Further, information provided about prior employment was also incorrect. Based on these two specific instances of providing false or misleading information, it was the judgment of the Board that the decision to disqualify the appellant from further consideration for a public safety position was reasonable and appropriate. Therefore, the appeal was denied.

The issue relating to "veteran's credit" was rendered moot by the appellant's disqualification.

Case No. 83-86

An applicant appealed from the rating received for the position of Legislative and Budget and Economic Analyst II in the Office of the County Council, questioning the announcement procedure, the qualifications of applicants and the possible bias of the application process. The Board noted that:

1. A job analysis was conducted prior to the announcement of the vacancy to determine knowledge and skills required for the position.
2. The position was advertised in the County's Employment Opportunities Bulletin as well as the newspaper.
3. The announcement contained detailed information with respect to the use of a supplemental application that would be required and rated to determine the relative capabilities of the applicants.
4. The questions contained in the supplemental application were job-related.
5. Supplemental applications were reviewed and evaluated by two subject matter experts. The subject matter experts evaluated the supplemental applications to determine the level

Case No. 83-86 continued

of each individual's knowledge of the principles of good budget and economic analysis, experience in the use of the principles and practices of budgeting in economic analysis, analytical skills/problem solving and the effectiveness of written communication.

6. The maximum possible score on the supplemental application was 40, the highest score attained by any applicant was 33, and the lowest was 13. Appellant received a score of 22 on the supplemental application.
7. Individuals with scores of 28 and above were certified and placed on the eligible list as "well-qualified", while those with scores of 19 to 27 were placed on the eligible list as "qualified".
8. The individual appointed was from the "well-qualified" list.

Finding no evidence to show that the procedure was incorrect, or that the rating was improper, it was the judgment of the Board that the vacancy was filled in accordance with established procedures.

Case No. 83-94

A Fire Captain appealed the promotional process used for filling an Assistant Fire Chief position. The Board noted that:

1. The Fire and Rescue Commission had established a formal procedure for filling all vacancies in the career fire service from Firefighter through Assistant Fire Chief. This procedure requires announcing the vacancy on the Fire and Rescue Commission's Vacancy List, and following other procedures approved by the Commission.
2. The position in question was that of Assistant Fire Chief, Grade 28.
3. The position was advertised on the Fire Department's own letterhead. There was no evidence that the vacancy was advertised on the Fire and Rescue Commission's Vacancy List.

Case No. 83-94 continued

4. A certified eligible list for the position of Assistant Fire Chief, Grade 28 was established in 1982 following a comprehensive promotional examination process, and was still in effect.
5. The appellant was on the approved eligible list for promotion to the position of Assistant Fire Chief.
6. The Fire and Rescue Commission had notified the fire department that it was in violation of the Personnel Regulations with respect to the steps taken to fill its Assistant Fire Chief position.

Based on the documentation in the record, there was no doubt that the position in question was that of an Assistant Fire Chief, and that the Fire and Rescue Commission required such positions be filled from an already established eligible list. It was the judgment of the Board that the Fire Department had failed to comply with established procedures in their efforts to fill the Assistant Fire Chief position, and they were directed to advertise the vacant Assistant Fire Chief position, and to recruit for same in accordance with established procedures set forth by the Fire and Rescue Commission.

Case No. 83-100

A Correctional Officer filed a grievance, contending the County had discriminated against him because of his race in a promotional process.

The Board noted that Section 4.1, Policy, of the Personnel Regulations, prohibits discrimination in " . . . all personnel practices related to the . . . promotion . . . and general treatment of employees . . .". Further, Section 4.2, Appeals, states " . . . If an individual believes that the County has violated the policy with respect to race . . . an appeal may be filed with the County Human Relations Commission . . .". Based on this, the appeal was forwarded to the Human Relations Commission for appropriate action.

Case No. 83-102

An applicant appealed from the "not acceptable" medical rating received for the position of Correctional Officer. The record showed that the applicant had:

1. Some calcification in the soft tissue of the left elbow, slight medial joint line narrowing of the right knee, and Schmorl's nodes throughout the lumbar area with some

Case No. 83-102 continued

anterior lipping in the region of L-4, -5, and narrowing of the disc space at L-5, S-1.

2. The County's Medical Standards for the position of Correctional Officer require rejection of an applicant if the problem is "symptomatic or is likely to interfere with performance of duty or is likely to require assignment limitations."

It was the judgment of the Board that the medical rating of "not acceptable" had been sufficiently and properly documented by the County. The Board recognized that each problem, in and of itself, may not justify disqualification, but the sum total of the problems certainly justified the action taken. Accordingly, the medical rating was sustained.

Case No. 83-103

An applicant appealed from his rejection for employment based on an allegation of discrimination. The appeal was forwarded to the Human Relations Commission for processing in accordance with Section 4.2, Appeals, of the Personnel Regulations.

Case No. 83-104

An applicant appealed from the "not acceptable" medical rating received for the position of Firefighter. The record showed that:

1. As an applicant for the position of Firefighter, the appellant was required to undergo the normal pre-employment medical examination, which included X-rays of his spine. Because of the X-ray findings, he was sent to an orthopaedic surgeon for further evaluation, who later reported, ". . .these indicate that he has spondylolysis. . . the presence of spondylolysis would disqualify him for regular employment as a firefighter. . ."
2. The appellant was examined by another orthopaedic surgeon, who reported that, ". . .This patient by history has never had any symptoms referable to his back and as I interpret. . 1001-32(H), the mere presence of spondylol would not necessarily disqualify him from occupation as a firefighter . . .I do not find contraindication to his employment as a firefighter."

Case No. 83-104 continued

3. On October 4, 1983, the Employee Medical Examiner, notified the Fire and Rescue Commission that he was reaffirming his "not acceptable" rating.
4. Section 5.12, Medical Requirements for Employees/Applicants of the Personnel Regulations for Fire and Rescue Service Merit System Employees states, "Each individual must be of sufficient good health to perform the duties and responsibilities assigned to a position . . . the Fire and Rescue Commission shall establish a system of medical examinations and standards for employees/applicants. . . When-ever an employee/applicant is found to have a defect or condition that would impair satisfactory performance of duties, or may jeopardize the health or safety of himself/herself, or others, the Fire and Rescue Commission or designee may declare such applicant ineligible for appointment. . ."
5. Section Q.1, Spine and Sacroiliac Joints of the Medical Standards approved by the Fire and Rescue Commission lists causes for rejection as:
 - " . . . (h) Spondylolisthesis that is symptomatic or likely to interfere with performance of duty or is likely to require assignment limitations."
 - "(i) Spondylosis as evidenced by X-ray findings would require evaluation by orthopaedic surgeon to determine whether this condition is likely to interfere with performance of duty or is likely to require assignment limitations. . ."

A review of the appropriate medical standards and the medical documentation of record clearly showed that Section Q.1 (h) is not applicable because there have been no symptoms reported. Subsection Q.1 (i) of the standards requires an evaluation by an orthopaedic surgeon to determine whether the condition is likely to interfere with the performance of duties or requires assignment limitations. In this specific case, the County never made such a determination. The record reflected that the Doctor's opinions were based solely on the presence of spondylosis, which is an indication that a person may have a problem at a future date. There was no evidence that there was any present problem or that the condition would interfere with the performance of assigned duties or would require assignment limitations.

Case No. 83-104 continued

Absent such valid findings by the County's Medical Examiner and in light of the orthopaedic surgeon's findings that there would be no problems in the appellant's employment as a Firefighter, it was the judgment of the Board that the "not acceptable" medical rating was arbitrary and not based on findings of fact. The Fire and Rescue Commission was directed to rescind the "not acceptable" medical rating, and to continue processing the appellant in accordance with established procedures for placement on the pre-select list. Additionally, the Fire and Rescue Commission was directed to reimburse the appellant in the amount of \$100 to cover the cost of obtaining additional medical information.

Case No. 83-108

An applicant appealed from the "not acceptable" medical rating received for the position of Police Officer Candidate. The record showed that the applicant's own physician stated that there was a respiratory history beginning at age 15, with chronic allergic rhinitis and asthma with mild air flow limitation.

The Board recognized that the physician did not believe the chronic allergic rhinitis or asthma would interfere with the appellant's ability to perform the duties of a Police Officer. However, the approved Medical Standards for that position are very specific and did not provide the Board, or the examining physician, with leeway in interpretation with respect to this type of problem. Based on the specific requirements of Sections K.3 (b) and R.2 (a) of the Medical Standards and the Doctor's confirmation of a respiratory history, it was the judgment of the Board that the appellant did not meet the stated Medical Standards for a Police Officer Candidate. Accordingly, the medical rating of "not acceptable" was affirmed.

Case No. 83-109

An applicant appealed from the "not acceptable" medical rating received for the position of Correctional Officer with the Montgomery County Department of Corrections and Rehabilitation. The record showed that appellant had a history of two blackouts, had been having right frontal headaches, had febrile convulsions as an infant, and had had chicken pox, requiring hospitalization and a spinal tap. A sister also had a history of convulsions.

Section 6.0-N.4, Paroxysmal Convulsive Disorders, of the County's medical standards approved in January, 1979, stated: "The causes for rejection shall be: Disturbances of consciousness, all forms of psychomotor, focal petit mal, or grand mal epilepsy or history thereof except for seizures associated with toxic states or fever during childhood up to the age of 12."

Case No. 83-109 continued

The County's medical standards were very specific with respect to the problem identified as being disqualifying. Therefore, it was the judgment of the Board that appellant did not meet the established medical standards for a Correctional Officer, and the medical rating of "not acceptable" was affirmed.

Case No. 83-118

A Liquor Store Assistant Manager appealed from the decision of the Personnel Office to rescind her promotion. The written record showed that:

1. On September 7, 1983, the Personnel Office certified the eligible list for Liquor Store Assistant Manager. This list contained fifteen names, and appellant was tied for tenth place on the list. The Personnel Office had not established ranges for rating categories; and, since the scores were all relatively close, all were considered to be in the highest rating category.
2. The Department Head subsequently selected appellant for promotion to one of several vacant Liquor Store Assistant Manager positions, and she was promoted effective September 25, 1983. The Employment Certification Form implementing the action was approved by the Personnel Office, and contained the statement that appellant was in the highest rating category of the eligible list.
3. On November 10, 1983, the Personnel Office notified appellant that the proper procedures for selection had not been followed when she was promoted because of a misinterpretation of that procedure, and her promotion was to be invalidated.
4. The promotional opportunity announcement issued by the Personnel Office for this vacancy stated that " . . . The Eligible List will be constructed based on a rank ordering of final scores. For each vacancy which occurs, the Department will be provided with the names of the top five (5) numerically ranked candidates on the Eligible List. This procedure will be followed for each subsequent vacancy, so that the Department will have the option of selecting from the highest-ranking group of five (5) eligible candidates each time a vacancy is filled. . . ."

Case No. 83-118 continued

5. Section 5.10, Eligible Lists, of the Personnel Regulations states, in part: ". . . the Personnel Office shall certify the names of all individuals found qualified for the vacancy for placement on the eligible list. The names of qualified applicants shall be placed on the eligible list and grouped in a manner which will accurately reflect the individual relative standings. . ."
6. Section 6.3, Selection Procedures, of the Personnel Regulations states: "When a position is to be filled, the appointing authority shall be provided an eligible list that has been certified by the Personnel Office. Subject to Affirmative Action objectives, the appointing authority shall be free to choose any individual from the highest rating category based on that person's overall rating, character, knowledge, skill, ability and physical fitness for the job as well as possible future advancement. . . ."
7. On October 28, 1983, the Merit System Protection Board had issued an interpretation of the Personnel Regulations related to both the appointment and removal of merit system employees. The Board found that, under Section 216, Appointment of Other Employees of the Executive Branch, of the Montgomery County Charter, the Department Head has sole authority, without higher level approval, to appoint and remove merit system employees under his/her supervision.

It was the judgment of the Board that the selection of appellant for promotion to the position of Liquor Store Assistant Manager by the Department Head was entirely proper and in full compliance with Section 6.3 of the Personnel Regulations and Affirmative Action guidelines for the Department. It was the Board's further judgment that the "rule of five" imposed by the Personnel Office was arbitrary, without foundation or justification, and improperly interfered with the right and authority of the Department Head in making a selection, particularly when said selection was based on Affirmative Action needs.

Accordingly, the invalidation action by the Personnel Office was overturned, and the promotion of appellant was reaffirmed. Appellant was also awarded reasonable attorney's fees.

RETIREMENT

Case No. 82-24

A Warehouse Worker/Truck Driver Helper appealed the Disability Retirement Hearing Board's decision on his application for disability retirement. The Hearing Board decided that since appellant was 25% permanently, partially disabled, according to the medical evidence, he was entitled to 25% service-connected disability retirement.

The Board noted that on August 3, 1982, the Court of Special Appeals of Maryland, in the case of Whittaker v. Montgomery County, Maryland, sustained a lower court decision that an employee who is incapacitated for full duty as a result of a service-connected injury or illness, is entitled to a full disability pension if the County is unable to utilize that employee in another capacity.

Based on the County's failure to find alternative placement, it was the decision of the Merit Board that the award of 25% of final earnings was incorrect. Accordingly, the award of 25% was increased to a full disability retirement, with benefits payable pursuant to Section 33-45 (f) (1) of the Employees' Retirement System of Montgomery County (60% of final earnings) retroactive to the date of disability retirement. The County was also directed to correct appellant's records to reflect the change, and to reimburse him all monies due plus interest at the rate of ten percent per annum.

The Board also directed the County to re-evaluate appellant's physical status annually, pursuant to Section 33-43 (d) of the Employees' Retirement System of Montgomery County, and to actively continue to seek alternative placement for him, and urged the County to make a serious effort to restructure a job, if necessary, to allow appellant's re-employment, as it believed reasonable accommodation to be in the best interests of the County as well as appellant.

The County was further directed to reimburse appellant for his attorney's fees incurred as a result of the appeal.

Case No. 83-34

A Firefighter appealed the decision of the Disability Retirement Hearing Board which denied his request that his disability award be increased from 25% to at least 40% because of a change in his physical condition since retirement in 1975. In its decision, the Disability Board found what it believed to be sufficient justification for increasing the percentage of disability from 25% to 30%, and denied the request for attorney's fees, as they did not have specific authority in law to grant such fees.

Case No. 83-34 continued

The issue before the Board was the percentage of total bodily disability of appellant as the result of the injuries to his knees. The general consensus appeared to be that appellant had lost 50% use of his right knee, and 20% of his left knee. The findings on whole body disability ranged from 25% to 40%, with no general agreement on any one figure.

After consideration of the medical reports, the nature of the injuries, the poor prognosis, and recognizing the severe impact on one's ability to function with such injuries, it was the judgment of the Board that appellant's argument for a rating of 35% permanent partial disability was reasonable. Therefore, the award was increased from 30% to 35% permanent partial disability. The effective date of the increase was set at January 1, 1981.

Case No. 83-45

A retired Assistant Chief appealed from the Chief Administrative Officer's denial of his request for an administrative retirement. The case was remanded from the Circuit Court for further hearing.

The Board found that as a result of a management study in 1975, several changes were proposed to improve the warehouse operation in which the appellant had been employed. One of the changes involved replacement of the Chief because of alleged management shortcomings, while another was to create a second Assistant Chief position.

Appellant was told that the Chief was going to be retired, the vacancy filled by outside recruitment, and that he could apply, but that he would not be considered for the Chief's position.

On April 19, 1976, appellant discovered the Director's Administrative Assistant knew everything that had happened, and decided he could no longer be effective, and that he was unable to continue working for the Director, and would not train or work under a new Chief under the circumstances.

Appellant prepared a memorandum requesting an administrative retirement, effective June 1, 1976, and gave it to the Director. The Director denied the request for an administrative retirement, and would not forward it to the Chief Administrative Officer.

At a staff meeting, the Director announced that appellant was retiring even though he had not discussed the date or the announcement with appellant prior to making it public.

Case No. 83-45 continued

The request for an administrative retirement was subsequently reviewed by the Chief Administrative Officer, who denied it because appellant had not been adversely affected and was not the subject of any management action. The Chief Administrative Officer also informed appellant he had every right to apply for the promotion and would be considered.

Appellant proceeded to retire on an early retirement. He testified that he never tried to rescind the early retirement, never told anybody he would reconsider, never applied for the Chief's position, and never changed his mind about retiring because of what he believed was an intolerable working situation.

The Board found that the behavior and actions of the Department Head during this episode were totally inexcusable and deplorable; the working environment created by this situation was less than satisfactory for all concerned, but was not necessarily beyond a point that it could not have been corrected. The Board believed appellant was a very conscientious and sensitive individual who was "crushed" by management's actions, and, because of his deep convictions for fairness and honesty, may have been intimidated from aggressively fighting the actions taken.

However, an employee was eligible for retirement under Section 33-38 (h) of the Employees' Retirement System of Montgomery County, only if such action was approved by the County Executive or Chief Administrative Officer. Lacking such approval, the Board ruled this section was not applicable.

Under Section 33-45 (c), an employee had the right to elect a discontinued service pension if he or she should " . . . vacate the position by reason of its abolishment or should the member's employment, tenure or status be terminated by administrative action or adversely affected by an act . . ." of County officials. While the working conditions may have deteriorated and become unbearable, no personnel action had been taken or contemplated at any time that would have resulted in an adverse impact on appellant's employment, tenure or status. Appellant was being retained as an Assistant Chief, and there was never any question as to his ability to perform assigned duties and responsibilities.

While it was regrettable that the County lost appellant's services because of trying circumstances, it was the Board's judgment that his actions, and not those of the County, were the direct cause for his retirement. It was clear that he could have taken steps to continue County employment with no loss in tenure or status. Therefore, the Board, by 2 - 1 vote, found appellant ineligible for a discontinued service pension under Section 33-45 (c).

In a dissenting opinion, the third member of the Board voted that it was difficult to conceive of a situation in which an employee's

Case No. 83-45 continued

status or employment would be more adversely affected than in the one presented in this case. The effect of all of this was understandably devastating, and to say that appellant's status or employment was not adversely affected within the meaning of Section 33-45 (c) of the Retirement Law is to close one's eyes to the facts of the case, and to ignore the well-established legal principle that retirement laws should be liberally construed in favor of those the Legislature seeks to reward for long years of valuable service.

APPEALED TO COURT.

Case No. 83-74

A Police Officer appealed from the decision of the Disability Retirement Hearing Board which denied his request for a service-connected disability retirement. The Hearing Board made a specific finding that there was insufficient justification to grant a service-connected disability retirement. While the issue of what caused the disability had been addressed as far as being service-connected was concerned, there was no determination as to whether or not appellant was, in fact, disabled from his employment as a Police Officer, and, if so, what the extent of disability was. If the individual were disabled, the Hearing Board had the authority to grant a non-service connected disability if the requirements of the law were met.

Lacking specific findings on these two points, the case was remanded to the Disability Retirement Hearing Board for further review and issuance of further findings with respect to the extent of disability, if any.

Case No. 83-96

An Administrative Aide appealed from the decision of the Personnel Office on her request to purchase prior service credits under the Employees' Retirement System of Montgomery County.

The record showed that in 1978, appellant had submitted a written request to purchase prior service credits for service with the State of Maryland. While there were informal contacts and telephone conversations during the intervening period, the Personnel Office did not respond, or take any formal action on the request until March, 1982.

Case No. 83-96 continued

In June, 1982, the Personnel Office notified appellant of the cost of said purchase. When she questioned the amount, the Personnel Office informed her that the calculation was based on her salary as of April 1, 1982, and not November 6, 1978 as she believed it should be.

The Personnel Office contended that Section 33-41 (a) and (l) when considered together, mandate five years of County service before an employee is eligible to purchase any prior service credits.

Appellant contended that Section 33-41 (l) does not mandate such time limit, and that legislative history supports the right to purchase such service credits at any time after employment and membership in the retirement system.

In reviewing Section 33-41, the Board found that each subsection addressed a specific type of credited service or procedure for such purchases. Where a specific type of credited service is involved, the subsection usually contained requirements for eligibility and cost determination. The Board also noted the differences specified in the various subsections, and concluded there was no consistent pattern set forth or intended as each was treated in an independent manner. In fact, consideration of several other factors, in the Board's opinion, showed the County position as being in error. In those subsections where a time limit has not been set for eligibility to purchase service credits [subsection (d), (k) and (l)], the purchase is based on the full actuarial cost, without any contribution by the County. Therefore, irrespective of when the purchase is made, the employee must bear the full cost. Secondly, subsection (j) prohibits use of any credited service for qualifying for any retirement or vesting benefits until the member has had five years of membership. If one were to accept the County's position, then one would have to question why the legislators retained this provision since it would be meaningless and unnecessary. It was apparent to the Board that the legislators intended for each subsection to retain certain independent status and safeguards regarding cost and use were included to prohibit abuse.

Pursuant to the Board's authority in Section 33-56, Interpretations, it was the Board's interpretation that Section 33-41 (a) does not set a five year service requirement for purchase of prior service credits in the succeeding subsections, and that the specific requirements, if any, as set forth in each subsection was controlling.

In this instant case, the Board found that appellant was eligible to purchase prior service credits under Section 33-41 (l);

Case No- 83-96 continued

that there are no specific service or membership requirements to be met under this section; that she submitted a valid request on November 6, 1978; that she had absolutely no control over the delay in processing by the Personnel Office, and that the use of the April 1, 1982 salary in determining the cost resulted from an incorrect and arbitrary interpretation of the retirement law. Accordingly, the decision of the Chief Administrative Officer was overturned, and the County was directed to recalculate the purchase cost on appellant's salary as of November 6, 1978, and to afford her a reasonable opportunity to make such purchase in accordance with established procedures.

SUSPENSIONS

Case No. 83-08

A Police Technician appealed a suspension without pay for three days for allegedly using offensive, profane and unacceptable language to another employee.

Appellant had requested a meeting with her supervisor to discuss a problem, and was told he had several scheduled appointments and she would be called as soon as he was able to see her. Appellant later discovered that the supervisor had left for the day, and would not be available to meet with her. She was very upset that she had not been able to meet with him, and went to the office to talk to the Sergeant about the problem. While there, appellant used profanity in a remark when responding to another female employee. She was immediately relieved of duty, and placed on administrative leave for the remainder of the day.

After review of the incident, the supervisor recommended dismissal of appellant, but the action was reduced to a suspension by the Director of the Department of Police.

Testimony revealed that this incident occurred in a private office with several employees present; that the language used was typical of conversation in the Emergency Operations Center on a regular basis; that other employees, including the supervisors, had used the same language in front of the same employee, but had not directed it to or at her; that no one in the Emergency Operations Center had ever been disciplined for use of such language unless it involved a telephone call, and there was no adverse effect on the morale of the workforce because of the use of this language.

It was the judgment of the Merit Board that the County had failed to show that appellant had violated any regulation, rule or policy, or that the language used was inappropriate for the work setting. While certain persons may have found the language offensive, the general acceptance and tolerance exhibited by management over an extended period negated the selective enforcement, as was done in this case. It was the decision of the Board that the suspension action was unfounded, unreasonable, and improper, and the Department was directed to rescind the suspension, remove all related documents from the personnel file, and reimburse appellant for all salary monies lost as a result of the suspension.

Case No. 83-11

A Division Chief appealed a five-day suspension without pay, but, prior to action by the Board, the Department withdrew the charges and reimbursed appellant for lost salary and removed documentation from his personnel file. Accordingly, the appeal was rendered moot.

Case No. 83-19

A Liquor Store Clerk appealed a suspension for allegedly making an improper sale in violation of the Departmental rules and regulations and State law.

Upon completion of presentation of the County's evidence, appellant moved that the disciplinary action be rescinded because the County failed to present any witnesses or evidence to show that an improper sale had been made, as alleged. After review of the documents formally in the record and the testimony presented by the County's single witness, it was the finding of the Board that the County had failed to present any first-hand testimony to show that an improper act had occurred, or to present any documents directly in support of the charges. It was noted that the County's witness had received information from other individuals, did not know precisely what had allegedly been sold improperly, and had not been present in the store at the time of the alleged sale. In the absence of any direct testimony or specific evidence to support the allegations, the Board granted appellant's motion to dismiss the charges, and the Department was directed to rescind the suspension, remove all documentation related thereto from appellant's personnel file, and to reimburse appellant all salary monies lost as a result of the suspension.

Case No. 83-20

A Bus Operator appealed a suspension. At the hearing on the appeal, the Board reviewed documentation supplied by both parties, and found that when notified of the disciplinary action, appellant had been given the option of appealing directly to the Merit System Protection Board or through the grievance process. Appellant filed letters of appeal with the Department of Transportation a few days after notification, and, approximately one month later, noted an appeal with the Board because he had not received a response to his grievance. The Department then informed him that the grievance would not be responded to while the appeal before the Board was pending, and a substantive finding on the merits of the grievance had never been made.

It was the Board's ruling that the appeal be remanded to the Personnel Office and Department of Transportation for consideration and action on the grievance in accordance with established procedures.

Case No. 83-23

A Firefighter appealed a suspension. At the hearing, the Board received and heard arguments from the parties on three motions:

1. Appellant's Motion to Strike a Pre-Hearing Submission of the Fire and Rescue Commission
2. Appellant's Motion to Rescind the suspension
3. The County's Motion to Continue the Hearing to a later date.

Appellant argued that the Fire and Rescue Commission had no legal standing in a disciplinary case between an employee and a Fire Corporation, and that since the Fire Department had not complied with established procedures in making a pre-hearing submission, the suspension should be rescinded. The County requested a continuance to allow the Fire Department to comply with established procedures.

The Board noted that the Fire Department had received formal notification of the hearing, had been provided a copy of the hearing procedures and the deadline for submission of certain information, and had been aware that failure to follow proper procedures could result in forfeiture of all rights.

After due consideration of all the arguments and facts of the case, it was the unanimous decision of the Board that there was no statutory authority which permitted the Fire and Rescue Commission's representation of the the charging Fire Department, and that the County Attorney was precluded by the Charter of Montgomery County, Maryland from representing a private corporation. Therefore, the Board granted the Motion to Strike the Pre-Hearing Submission of the Fire and Rescue Commission; denied the Motion to Continue the Hearing to a later date since the charging party had received proper notification, and had failed to comply with established procedures; and granted the Motion to Rescind Appellant's Suspension.

The Board directed that appellant be reinstated to his position and reimbursed all normal salary monies lost as the result of this suspension; that the documentation related to the suspension be expunged from appellant's personnel records; and that he be reimbursed reasonable attorney's fees.

Case No. 83-27

A Unit Supervisor appealed a suspension, but withdrew the appeal prior to the hearing date.

Case No. 83-33

An Equipment Operator appealed a suspension without pay pending investigation of charges. The appellant was returned to duty and the case was settled prior to the hearing date. Accordingly, no action was required of the Board.

Case No. 83-35

A Firefighter appealed a suspension without pay for three days. The appellant, who was off-duty at the time of the incident, was seated in the kitchen of the fire station with an open can of beer. The duty officer saw him, and told him to rid of the beer. He proceeded to put the can in his pocket, but the duty officer told him that was not satisfactory. Appellant then drank the beer, crumpled the can and put it in his pocket. The duty officer then told him to leave the building and left to take care of some business. When the duty officer returned, appellant was still seated at the table.

The record showed that the Fire Department has "House Rules", which stated, in part " . . . 10. There will be no alcoholic beverages on fire department property. . . ." and appellant was aware of the policy and practices related to drinking beer in the fire house prior to the date of the incident.

Testimony showed that drinking of alcoholic beverages on the rear parking lot by off-duty employees was done frequently with the full knowledge and approval of management. It was indicated that beer may have been taken into the fire house when not authorized, but it was common knowledge that such action was inappropriate, and, in fact, prohibited.

At least one other person had been caught by a supervisor with beer in the fire house, had left immediately when told to do so, and was not disciplined for the infraction.

As the charges clearly indicate, the primary issue was one of insubordination. Even though off-duty, appellant was still a member of the Fire Department, and subject to reasonable directives from the duty officer. His behavior of deliberately drinking the beer in front of the duty officer after being told to get rid of it, and his failure to leave immediately when told to do so were both direct acts of insubordination. It was the judgment of the Board that the three-day suspension for insubordination was reasonable, and it was sustained.

Case No. 83-40

A Liquor Store Clerk appealed a suspension for allegedly selling alcoholic beverages to a minor.

Prior to the hearing, the County reduced the suspension from five days to one day, in accordance with guidelines provided by the Merit Board in Case No. 83-41 involving similar circumstances, and reimbursed appellant for the four days lost earnings. Therefore, the case was closed and the Board took no further action.

Case No. 83-44

A Section Chief appealed his suspension without pay for three days for alleged failure to obey lawful directions given by a supervisor, failure to perform in a competent or acceptable manner, violation of established policy or procedure, and knowingly making false statements or reports in the course of employment.

In reviewing the record, the Board noted that the County's class specification for appellant's job showed that he was responsible for " . . . planning, directing and coordinating the activities of a large number and variety of employees . . . through Unit Supervisors . . ." In February, 1982, he was told by his superior that he was not to have any direct involvement with lower-level employees without the full knowledge and involvement of their immediate supervisors.

Several incidents occurred wherein the employees contacted appellant directly in an effort to resolve problems, and he was able to do so. Testimony indicated that employees often had difficulty arranging meetings with the Unit Supervisors, and that the Unit Supervisors often by-passed appellant in communications, and, in fact, were encouraged to do so by the Division Chief. The Division Chief also met with Section supervisors and lower-level employees without the knowledge of appellant. Communications among individuals involved in this case were almost always in writing because of the lack of trust between the managers and supervisors.

The Board found that, in light of appellant's position and the responsibilities assigned thereto, an order to avoid contact with lower-level employees was inappropriate and incomprehensible if he was expected to perform the duties for which he was being paid. In the incidents cited, the employees initiated the contact, and, in the Board's judgment, appellant responded and took action that was clearly within his authority and responsibility.

Case No. 83-44 continued

The burden of proof rested with the County, and the Board did not find sufficient evidence to support the charges. The allegations concerning false statements and disclosure of confidential information were based solely on circumstantial evidence and inferences that were not reasonable.

The by-passing of individuals in the chain of command, the lack of trust and respect for one another, and the general conduct of all parties involved clearly created an unproductive and unsatisfactory work environment that cannot and should not be tolerated or allowed to continue. However, lacking evidence to support the charges that the problem was the fault of one person--appellant--the Board found the action taken to be inappropriate and unfounded, and the Department was directed to rescind the suspension, remove all documents related thereto from the personnel file, and to reimburse appellant for the three days' salary lost as the result of the suspension.

Case No. 83-48

A Liquor Store Manager appealed his suspension without pay for ten days. Appellant had been suspended for being absent without official leave; for failure to obtain authorization for leave in accordance with established procedures; for making false statements when questioned about a check cashing problem; and for cashing a check in excess of the amount of a purchase, in violation of established procedures.

Appellant testified that he did give management false information concerning the check he cashed, and the money was for personal use, not to pay for a purchase at the store. The Department has an established policy which permits accepting personal checks for the exact amount of a purchase only.

A new Director of the Retail Stores Division had been appointed in September, 1982 and had informed the store managers of policy changes in a meeting in November, 1982. One of the points discussed at that meeting was the need to have annual leave approved by proper authorities before going on leave.

Appellant called the main office to inform his supervisors of his need for emergency annual leave for personal reasons. Neither superior was available to approve the request, so he left a message with the secretary, and proceeded to take the time off. His superiors were unable to contact him at home until several days later to discuss the situation with him, and he had made no effort in the interim to contact them about his absence.

Case No. 83-48 continued

It was the judgment of the Board that the severity of the penalty was reasonable and consistent with the severity and impact of the violations committed, and the ten day suspension was sustained.

Case No. 83-53

A Bus Operator appealed a one-day suspension for being involved in three preventable accidents within a twelve month period. Appellant argued that the rules were changed in the middle of the year, and he was denied adequate due process by not being able to appeal the ruling of preventability on the third accident, as he had been allowed to do on the first two, and that the year should be for a specified period of time (i.e., calendar year), rather than on open-ended twelve month period. Appellant also questioned the lack of a Bus Operator on the accident review committee for his accident in October, 1982.

While the procedure was changed in mid-year, there was no evidence that appellant was adversely affected by the change. In all three accidents, appellant had been given the opportunity to appear before the decision-making body to orally present his position. Based on this, the Board did not find any denial of due process rights to the appellant.

The Board found that the period of time to be used for determining extent or type of disciplinary actions, based on the number of preventable accidents, is a prerogative of management as long as it is fair and applied equitably. A twelve month period was considered to be reasonable when evaluating the number of preventable accidents, and there was no indication that the policy had been administered in an unfair manner.

The composition of a review committee is also a prerogative of management, as long as the individuals are capable and qualified to perform the task. Evidence showed that the committee was comprised of two individuals with Bus Operator or Bus Supervisory/Management experience, and one individual was from the Office of Risk Management, which is responsible for safety-related activities. It was the Board's judgment that the review committee was clearly qualified for the task, and rendered a decision consistent with the facts.

Based on the foregoing findings and conclusions, it was the decision of the Merit System Protection Board that the one-day suspension was proper and in accordance with established procedures, and the appeal was denied.

Case No's. 83-61 and 83-62

A Fork Lift Operator and an Assistant Warehouse Leader appealed their five-day suspensions. Upon completion of the presentation of the County's case at the hearing, appellants made a motion to dismiss the charges because of the County's failure to give proper notice of the action.

The formal notice was given to appellants on a Tuesday, with an effective date being three working days later, the next Monday. Section 21.4, Notification, of the Personnel Regulations, states, in part:

"In cases of . . . suspension . . ., an employee shall receive written notice of such disciplinary action at least five working days prior to the effective date, except in cases of theft of County property or serious violations of policy or procedure that creates a health or safety risk. . ."

The County argued that appellants were not harmed in pursuit of their appeal rights by the late notification, however, appellants argued that if employees must always meet established deadlines or forfeit appeal rights, then management must be held to the same standards of timeliness. The Board's reading of Section 21.4 was that " . . . at least five working days . . ." (emphasis added) advance notice of a disciplinary action is required, and the use of the word "shall" in the regulations sets that time as an absolute minimum. Therefore, based on the lateness of the notice, it was the decision of the Merit System Protection Board that the motion to dismiss be approved, and the charges against each appellant were dismissed with prejudice. The County was directed to reimburse appellants and to purge their personnel files of the records on the suspension.

APPEALED TO COURT, BUT SUBSEQUENTLY WITHDRAWN BY THE COUNTY.

Case No. 83-63

An Equipment Operator appealed his suspension without pay for one day. Appellant had been injured on the job, and was restricted to light duty assignments only at the time of the incident. Testimony revealed that daily work assignments varied, based on available work because of appellant's restrictions. There was evidence in the record which questioned appellant's ability to perform any duties at the time of this incident. It was also noted that these factors,

Case No. 83-63 continued

along with differences in personalities and management style contributed to a general misunderstanding on the part of both parties, which resulted in very poor communication on the day in question, as neither party involved properly understood what the other's intentions were. There was no evidence in the record of any prior problems or disciplinary actions with respect to appellant's work performance or behavior.

The Board recognized the responsibilities of the parties involved, and appellant did have an obligation and responsibility to clarify the situation with his supervisor, as he was uncertain as to what was occurring. Therefore, it was the judgment of the Board that, as the result of the requirement for progressive disciplinary action of the Personnel Regulations, the suspension action was too severe, and the Department was directed to rescind the suspension and remove all documents related thereto from the personnel file; to reimburse appellant for all wages lost as the result of the suspension; and to prepare a written reprimand for appellant's failure to clarify his work status prior to leaving the work site on the day in question. The written reprimand was to become a part of appellant's personnel file.

Case No. 83-65

A Bus Operator appealed a one-day suspension, but the County rescinded the suspension without action by the Board.

Case No. 83-77

A Bus Operator appealed a one-day suspension for tardiness and insubordination. The record showed that appellant had previously been disciplined for tardiness, including oral admonishments and a written reprimand, but his attendance record and behavior showed no improvement. Further, on one occasion, appellant reported for work late, but then left the Operations Center, refusing to work, even though directed to do so by his supervisor.

In an organization such as Ride-On, that provides services to the public on the basis of a regular, published schedule, it is essential that employees be on time when reporting to work to assure proper delivery of those services. Appellant knew what his work schedule was; had received counseling and warnings about tardiness on several occasions; and had been disciplined previously for the same problem. Based on the continued record of tardiness, and the absence of any real effort on appellant's part to take corrective action to improve the situation, it was the judgment of the Merit

Case No. 83-77 continued

Board that the one-day suspension was fully justified, and, in fact, very reasonable, in light of the attendance problems and insubordination. Therefore, the suspension was sustained, and the appeal was denied.

Case Nos. 83-88, 89, 90 and 91

Four Fire Department employees appealed their suspensions without pay.

In May, 1983, appellants went to a public area to participate in an approved physical fitness activity.

In accordance with established procedures, the employees proceeded to the area in assigned emergency vehicles, and were expected and required to maintain radio contact and to respond to calls as directed. Four emergency vehicles were at the activity site, and the appellants were assigned as officers in charge for each vehicle. Each vehicle was assigned and was carrying a portable radio to be used when away from the vehicle in order to maintain continuous radio contact. The four appellants were cognizant of their responsibilities, were familiar with established procedures, and did have the portable radios in their possession on the day in question. During the physical activity, one of the portable radios was turned off to save the batteries. Two of the vehicles were required to respond to calls, and, upon return, their portable radios were left in the vehicles. The remaining portable radio was at the scene of the activity, but had inadvertently been knocked over, face down, or it had fallen, and no one realized it had happened.

The Emergency Operations Center tried to contact three of the vehicles to ascertain their location, but none of the persons participating in the physical activity heard the radio call. Subsequent to sounding of the Station siren, contact was made, and the vehicles responded, as directed.

The parties to this case all understood and articulated the need and importance of maintaining radio contact at all times while on duty in order to assure proper delivery of services to the citizens of the County. There was no doubt in the Board's mind that this incident resulted from an accidental tipping-over of the radio, and there was no deliberate intent to break radio contact by any of the parties involved. However, the testimony and evidence showed that the four units failed to maintain proper radio contact at the time, and that failure to do so constituted a serious violation of established practice and procedure. The Board considered the appellants' arguments that:

Case Nos. 83-88 through 91 continued

1. The responsibility for maintaining radio contact rests with every employee, and, therefore, other participants could also be held to be culpable.
2. Based on the chain of command policy, only the senior officer at the activity should be held responsible, rather than the senior person on each vehicle.
3. The penalties were not progressive in nature, particularly when one considers appellants' work histories.
4. Other employees involved in prior incidents involving serious violations of procedures were not disciplined as harshly.

The Board found the decision regarding whom to discipline, and the severity of the disciplinary action was the prerogative of the department head. While others may have been involved, and had a responsibility to maintain radio contact, the appellants were the parties who were directly responsible for the portable radios and for maintaining radio contact. Therefore, the Board believed the decision to discipline only those in charge was reasonable. Recognizing the importance of constant radio contact, this Board concurred that the violation by appellants was of a serious nature and could have created a health or safety risk, thereby negating the need for progressive disciplinary action.

The Board was cognizant of the excellent work record of all appellants and the absence of any prior disciplinary actions against them. Yet, the evidence in the case was substantial and did show that appellants did fail to maintain radio contact in violation of the Departmental procedures. Accordingly, the suspensions were sustained.

Case No. 83-92

A Bus Operator appealed a suspension, but the action was rescinded by the Department without action by the Board.

Case No. 83-93

An Inspector appealed his suspension. Prior to the hearing date, the County filed a Motion to Dismiss for appellant's failure to file his appeal in accordance with established procedures, citing the fact that appellant had not provided the information required by Section 23.4, Appeal Period, of the Personnel Regulations, even though specifically requested to do so by letter from the office of the Board.

Based on the fact that appellant had not filed in accordance with established procedures; had not contacted the Board's office after noting his appeal; had not provided the Board a new address, even though he had apparently relocated; and had had his telephone disconnected, making contact improbable, if not impossible, the Board granted the Motion to Dismiss the appeal, and the hearing was cancelled.

Case No. 83-124

A Firefighter appealed a suspension without pay for a two-week period for alleged theft of Fire Department property.

Counsel for appellant moved the action be rescinded for alleged failure of the department to provide specific charges prior to date of the action, and failure to take the action in accordance with established procedures.

The evidence of record clearly supported appellant's argument that proper procedures were not followed by the Fire Department. Specifically, it was noted that the decision to suspend appellant was made prior to his being charged with any violation and without providing him an opportunity to be heard or to defend himself, as required by Section 21.5 (b) of the Personnel Regulations. The statement of charges did not meet the criteria established by the Fire and Rescue Commission in Section 3.0 of Administrative Procedure 7-4. The response to the statement of charges filed by appellant had not been reviewed and considered by the Fire Department prior to the determination of appropriate disciplinary action, as required by Section 5.2 of Administrative Procedure 7-4. The Notice of Disciplinary Action did not contain the effective date of the action, as required by Section 21.4 of the Personnel Regulations. The action was not approved by the Fire and Rescue Commission prior to implementation, as required by Section 21.3 (d) of the Personnel Regulations for a suspension of more than five days.

The Board found that it was incumbent upon management to be knowledgeable of, and to adhere to, the established procedures for

Case No. 83-124 continued

taking disciplinary actions to assure employees the necessary due process rights afforded under the law and regulations. In this instance, management not only erred in almost every step of the process, but they pre-judged the case and failed to provide the appellant an opportunity to defend himself, thereby denying him due process....

Accordingly, the Merit Board granted the Motion to Rescind the Action, and directed the Fire Department to reinstate appellant effective immediately; reimburse him all salary monies lost as a result of the suspension; and to remove all documentation related to the suspension from appellant's file.

WRITTEN REPRIMAND

Case No. 83-73

A Bus Operator appealed from the decision of the Chief Administrative Officer on his grievance concerning a written reprimand.

Appellant had been involved in a physical altercation with another employee, which he was partly responsible for instigating as he could have easily avoided the situation. Based on appellant's involvement in the altercation, it was the Board's judgment that the written reprimand was fully justified, and the appeal was denied.

Case No. 83-81

A Community Development Coordinator appealed from the Chief Administrative Officer's decision on a grievance concerning a written reprimand.

Appellant pointed out several incidences of deviation from the normal process in the resolution of his grievance. The Board clearly recognized the importance of adherence to established procedures, and found that the mistakes cited did occur during the processing of the grievance. However, the Board did not find any evidence that appellant was adversely affected or that presentation of his case was prejudiced in any way by these oversights or omissions. Therefore, appellant's request that the action be rescinded because of procedural violations was denied.

Appellant objected to inclusion of the Personnel Office review in the material presented to and considered by the Chief Administrative Officer. The Board believes the Chief Administrative Officer, along with any good manager, has the duty and responsibility to base decisions on all available information and reports. While the Factfinder may not have reviewed some of the documentation, the fact that it had been included in the lower level review made it a proper part of the case record for consideration by the Chief Administrative Officer. It was the judgment of the Board that the use of the Personnel Office review material in reaching a final conclusion was a totally appropriate action by the Chief Administrative Officer.

The extensive documentation on the issue of performance showed that 1) the incident involved extended over a period in excess of 2-1/2 years, and several levels of management could be faulted for failing to take proper action to resolve the problem. Disciplinary

Case No. 83-81 continued

action was proposed against several of the individuals involved; 2) written guidelines and procedures in contract administration and resolving disputes involved therein were not available to appellant and/or the other parties involved; 3) appellant was responsible for the overall administration of the program, failed to respond to the problem in a timely manner, failed to adequately supervise subordinates with respect to resolution of the problem, and failed to take the necessary steps to assure proper documentation of all activities involved; 4) because of the lack of written procedures and guidelines, it was difficult to determine precisely who had the authority to resolve the problem, or who was responsible for the problem initially.

It was the Board's judgment that appellant did not take the necessary steps to assure proper performance by subordinates, and did not respond to the problem within a reasonable period of time. Because of these shortcomings, it was the decision of the Board that the written reprimand be sustained.

Case No. 83-85

A Personnel Specialist appealed from the decision of the Chief Administrative Officer on his grievance concerning a written reprimand and within-grade reduction in pay. The Board noted that a prior written reprimand and a subsequent reprimand and thirty day reduction in pay were issued because appellant had difficulty in applying the provisions of law to factual situations; his error ratio in performing calculations was too high; and many of his errors resulted from carelessness and inattention to detail.

The Board concurred with the fact finder that appellant's supervisors had failed to provide adequate instruction on the intricacy of the law, which would have made it possible for him to apply it in the manner desired. While appellant had successfully contended that he was not trained properly in the intricate details of the law, the type of computations he was expected to perform in determining benefits involved simple mathematical calculations. In light of the numerous errors made by appellant, and the fact that many of them were due to lack of attention to detail and carelessness, it was the judgment of the Board that the disciplinary actions were appropriate, and were taken in accordance with established procedures.