Merit System Protection Board 1986 Annual Report

Montgomery County Government
Merit System Protection Board
Rockville, Maryland

April 1987

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1986

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 1986 were:

Fernando Bren - Chairman
(reappointed 1/84)
Richard S. McKernon - Vice Chairman
(reappointed 1/85)
Sandra M. King-Shaw - Associate Member
(reappointed 1/86)

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."

"(d) Personnel Regulations Review. The Merit System Protection Board shall meet and confer with the CAO and employees and their organizations from time to time to review the need to amend these Regulations."

"(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 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 for corrective action necessary."

MAJOR ACTIVITIES DURING 1986

In 1986, the Merit System Protection Board's most time consuming function continued to be its appellate role. The Board received 410 appeals in 1986, which required 26 hearings and 31 worksessions for receipt of evidence and testimony and review of documentation, prior to rendering decisions.

The results of the Employee Attitude Surveys, conducted in late 1985, were transmitted to the County Executive and County Council in March 1986, along with the Board's findings, conclusions and recommendations. The Board met with the County Council to discuss the report, and, subsequent action, if any, is the duty and responsibility of the County Executive and the County Council.

A contract for an audit of the County's Classification and Compensation Plan was awarded to Arthur Young and Co. in May 1986, and the review was completed and final report received by the Board on December 31, 1986. The results of this audit and the Board's recommendations will be forwarded to the County Executive and County Council in early March 1987.

The Board conducted its Annual Public Forum in late May 1986, and received excellent comments and suggestions from County employees. All of these comments were passed on to the responsible administrative officials.

In addition to the foregoing, the Board conducted reviews of one incident of alleged merit system violation, the County's Senior Management Rotational Program and the use of temporary/substitute employees in one Department. The Board also reviewed and submitted comments on the new Personnel Regulations implemented on July 1, 1986 and all new class creations recommended by the Personnel Office.

The major emphasis in 1987, will be on improving communications and relations with Administrative Officials and employee representatives to assure a smooth transition for the new Administration and to the revised personnel function under the new Collective Bargaining Law.

INTERPRETATION OF PERSONNEL REGULATIONS FOR FIRE AND RESCUE SERVICE MERIT SYSTEM EMPLOYEES OF THE INDEPENDENT FIRE AND RESCUE CORPORATIONS OF MONTGOMERY COUNTY

Issued on September 23, 1986

The Merit System Protection Board reviewed the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County, concerning whether temporary employees(i.e.-casual labor) are considered merit system employees and if the Fire Corporations are bound by the Personnel Regulations in actions dealing with such employees. The issue arose as the result of the July 18, 1986 memorandum from the Fire and Rescue Commission setting forth minimum salaries and hiring requirements for temporary employees.

The following Personnel Regulations were considered by the Board:

1. Section 2.1 Applicability which states:
   "These Personnel Regulations apply to all Fire and Rescue Corporation' merit system positions and employees except positions involving contract employment."

2. Section 3.3 Merit System Employee which states:
   "All persons who are employed by a corporation in full-time or part-time Fire and Rescue Services year-round positions who have satisfactorily completed the required probationary period."

3. Section 3.4 Merit System Positions which states:
   "All positions in the Fire and Rescue Services paid in full or in part by tax funds and approved by the Fire and Rescue Commission."

4. Section 3.9 Temporary Employee which states:
   "Incumbent of a temporary position paid by tax funds."

5. Section 3.10 Temporary Position which states:
   "A position required for a specific task...or a position that is used intermittenly on an as needed basis..."

6. Section 5.1 Recruitment and Examination Program which states:
"The Fire and Rescue Commission or its designee shall establish a comprehensive recruiting and examination program for all merit system positions."

7. Section 6.1 Appointment which states:
"An appointment is the assignment of an eligible applicant to a Fire and Rescue Corporations' merit system position by the hiring authority of a corporation."

8. Section 6.2 Types of Appointments which states:
"Appointments may be full-time, part-time, temporary or duplicate."

9. Section 6.4 Probationary Period which states:
"...Temporary employees do not serve a probationary period since such appointment is for a specific task or period."

10. Section 6.5 Merit System Status which states:
"A full-time or part-time employee attains Fire and Rescue Corporation merit system status after satisfactory completion of the required probationary period, and is then entitled to certain rights and benefits as provided for in these regulations."

11. Section 3 Employee Compensation and Awards of the Appendix to the Personnel Regulations which states:
"...(b) General Salary Schedule. Subject to approval of the County Council, the Fire and Rescue Commission shall establish a general salary schedule for all Fire and Rescue Corporations merit system positions.... Whenever deemed necessary for recruitment, administrative or other purposes, the Fire and Rescue Commission shall be responsible for establishing a schedule of hourly rates of pay and any other schedules of pay under the uniform salary plan deemed necessary to fully implement the provisions of these regulations...
(3) All new personnel hired from the eligibility lists must be paid on the first step of the grade..."

It was the interpretation of the Board that temporary employees (i.e. casual labor) are incumbents of merit system positions, but do not attain merit system status, and therefore, are not merit system employees as defined in the Personnel Regulations. However, being incumbents of merit system positions, they are subject to the applicable Personnel Regulations covering such positions.

It was the opinion of the Board that the July 18, 1986 directive was clearly within the authority and responsibility of the Fire and Rescue Commission and was consistent with, and required by, Section 5.1 of the Personnel Regulations and Section 3 (b) of the Appendix to the Personnel Regulations.

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 29.4 Appeal Period of the Personnel 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. In cases involving suspension or dismissal, at least two weeks advance notice of the hearing is required, with thirty days notice required in all other cases. Upon completion of the hearing, the Board prepares and issues a written decision 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 has ten work days to respond. The Board then provides the appellant an additional five workdays to respond to or comment on the County's submission. The case is then placed on the Board's agenda. A copy of all documentation is provided to each Board member and the Board discusses the case at the next work session. 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, it either requests the information in writing or schedules a hearing for the purpose of receiving oral testimony. If the decision is issued based on the written record, it is prepared and released within three weeks of the work session. If a hearing is granted, all parties are provided at least thirty days notice, and a written decision is released within three weeks of completing the hearing.

SUMMARIES OF DECISIONS ON APPEALS

CLASSIFICATION

CASE NO. 86-02

A Health department employee noted an appeal alleging a violation of established procedures in doing a classification study. The classification action was rescinded by the County prior to Board action, rendering the appeal moot.

CASE NO. 86-07

The Traffic Signal Technicians filed an appeal alleging procedural violations in the classification process. The three points raised were:

1. The Classification Review Committee failed to respond in a timely manner.

2. The Personnel Director's letter of January 15, 1986 violated Administrative Procedure 4-2.

3. The combining of maintenance and overhead construction employees in a single class violated the Quantitative Evaluation System.

The parties agreed that established time limits had been violated. The Board believed that the classification of positions had to be based on the level and complexity of duties and responsibilities if the County's system was to have any integrity or validity. To award the appellants a higher grade level solely on this violation would be inconsistent with sound management practices and would only compound the problem, rather than solve it. While delays are intolerable, it was the judgment of the Board that proper corrective action for such violation would be the granting of retroactivity if an upward reclassification was granted, rather than arbitrarily awarding a higher grade level.

The second issue, concerning the Personnel Director's letter of January 15, 1986, was replete with assumptions by the appellants and the Board could find no specific violation of any regulation or procedure. Therefore, it was the judgment of the Board that this charge lacked merit or validity and it was dismissed.

CASE NO. 86-07 Continued

The combination of the two groups of employees into a single occupational class was a matter of judgment. There was a difference of opinion with respect to the complexity of duties assigned and performed. The Board was aware that a Class Specification is not all inclusive and is prepared and used to provide guidance for managers and to assure equity and comparability of pay within the County system. Arguments were made on both sides of this issue and it was debatable and a matter of judgment. When an issue is a matter of judgment, the Board follows the Court guidelines and does not replace management's judgment with its own.

In the final analysis, it was the judgment of the Board that there were no procedural violations that would justify granting the higher grade level requested, and since no change in grade had been approved, the issue of retroactivity was moot.

CASE NO. 86-19

A Police Lieutenant appealed alleging a procedural violation in the Classification study done on his position.

On July 12, 1986, the Chief Administrative Officer modified the classification procedure by eliminating the practice of sending recommendations to the Department Head and affected employee for review and comment. In amending this procedure, the Chief Administrative Officer stated ". . .In place of this practice, classification decisions will be made by the Personnel Director based on the study results; the Department/Agency Head and affected employee will be notified accordingly. . .".

On December 30, 1985, the Personnel Director notified the Director, Department of Police that ". . .From reading (the appellant's) position description, it is evident he has been assigned overall responsibility for the Training Academy. As such, the duties and responsibilities contained in the position description you approved appear to meet those contained in the Police Captain class specification under Police Training Commander."

"However, in my judgment, to affectuate a position reclassification of (the appellant) would have a severe adverse impact on the traditional competitive promotion system within your Department. . .To ensure the present promotional system is followed, I recommend you restructure (the appellant's) duties and responsibilities so that he would report directly to (the) Captain in Personnel. . ."

The Director, Department of Police restructured the Police personnel and training functions, and a Captain was assigned responsibility for the overall direction of those functions. Under this structure, the appellant was a Section Chief, rather than a Division Chief, and subsequent to this change, the Personnel Office found that his position was properly classified.

There was no question that the appellant was worked outside of his class from June 4, 1982 until March 2, 1986 and had performed the duties of a Police Captain. This assignment was a violation of the Chief Administrative Officer's directive on assignment of duties and responsibilities and could not be ignored. Further, the Board found that the classification procedure was violated by the Personnel Office when it failed to follow the directive of the Chief Administrative Officer on the issuance of a decision upon conclusion of a study. Providing the Department of Police with an opportunity to restructure positions to invalidate or nullify the findings of a classification study in favor of an employee was a highly inappropriate action on the part of the Personnel Office. Such activity reflected adversely on the integrity of the classification system and denied an individual fair and equitable treatment, under the law.

Despite these violations, management had created an extremely difficult situation by exercising its prerogative to reassign duties and responsibilities, after the fact. If the Board were to grant the appellant's request to be promoted to the position of Captain, it would result in his demotion back to Lieutenant, because of the restructuring . Therefore, in recognition of management's prerogative and the Board's essential agreement with the competitive promotional process, the Board found it could not grant the appellant's request. However, serious violations of established procedures cannot and will not be ignored. In order to restore a measure of fairness and equity to the Merit System, and to provide the appellant with reasonable redress for the violaitons committed, it was the judgment of the Board that he receive an additional 5% in pay for the period in question. Further, the appellant was to receive priority consideration for promotion to Captain for all present and future vacancies during the lifetime of the present eligible list.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 86-24

A group of employees in the Department of Liquor Control appealed alleging a failure to adhere to established procedures for conducting classification studies. The basic allegation was that the County failed to conduct a proper wage survey.

The Personnel Regulations require consideration of salaries in both the public and private sectors when doing a classification study and that such data be current. The Personnel Office did conduct a specific survey for some Department of Liquor Control classes in August 1985 and utilized data available from sources such as the Local Government Personnel Association, which are updated on a regular basis. Therefore, the evidence showed full compliance with the established procedures, and it was the judgment of the Board that the appeal be dismissed.

CASE NO. 86-27

Two Department of Transportation employees appealed alleging a due process violation in the classification review process.

After careful review of the record and the established procedures for classification studies and appeal, the Board was satisfied that the appellants were given full and appropriate opportunity for input and participation. Accordingly, the Board found no violation of due process and dismissed the appeal.

CASE NO. 86-363

A group of Stock Clerks appealed to the Merit System Protection Board, alleging violation of procedure and due process in the review of their positions.

The record showed that:

1. The appeal procedure for classification issues was set forth in Administrative Procedure 4-2 Position Creation and Classification. The initial A.P. was issued on July 22, 1980 and revised extensively on July 1, 1985

2. The July 1, 1985 revisions - issued on July 12, 1985 - contained a statement that said, ". . .The effective date of the revised Administrative Procedure 4-2 is July 1, 1985 and is applicable to all classification and compensation studies initiated on or after that date. . ."

3. The 19 80A.P. 4-2 section on appeals states as follows:

"12.0 Employee If an employee(s) does not concur with the classification decision, a report will be prepared by the employee(s) or employee's representative stating why they are in disagreement with the classification decision. The report is signed and forwarded directly to the Personnel Director within fifteen (15) County working days from the receipt of the classification decision. Copies of the employee's report must be sent to the immediate supervisor and the Department/Agency Head.

12.1 Supervisor and Department/Agency Head Comments concerning the employee(s) report are forwarded to the Personnel Director within ten (10) County working days from receipt of employee(s) report.

12.2 Personnel Office Submits employee's report, comments, and any additional documentation received from Department personnel to the Classification Review Committee within ten (10) County working days from receipt of employee(s) report.

12.3 Classification Review Committee Conducts whatever review and/or investigation necessary to render a decision, including the use of an outside fact-finder. After reviewing the documentation made available, the Committee will determine if a hearing is required. The Committee will make a written recommendation to the Chief ~~Administra~~tive Officer via the Personnel Director within forty (40) County working days from receipt of employee(s) report.

12.4 Chief Administrative Officer Reviews recommendation and justification material and renders final decision on position(s) classification within ten (10) County working days from receipt of Committe's report. . .

"The Classification Review Committee will be comprised of four (4) members, three (3) voting members and one (1) member from the County's Personnel Office who will act as a resource person/consultant, but will have no voting power. The voting members will include:

(1) Non-County employee who has experience in position classification, to be appointed by the Personnel Director.

(2) A designee appointed by the Chief Administrative Officer.

(3) A County employee or another person designated by the employee(s) requesting position classification review.

The Committee shall operate under the following procedures:

(1) Notice to the employee(s) when a hearing is to be held by the Classification Review Committee. Such notice shall be provided to the employee(s) at least five (5) work days before the hearing.

(2) If a hearing is held, the employee(s) filing an appeal may make an oral or written presentation to the Committee.

(3) If the Classification Review Committee determines that a hearing is not required, the employee(s) filing the appeal will be notified in writing.

(4) Following conclusion of the hearing or a review of written submission if a hearing is not held, the Committee will submit a written report to the Chief Administrative Officer; the contents shall include, but not be limited to:

Findings of fact
Conclusion(s)
Recommendation(s)
Minority Report if submitted

. Copy of Committee's report shall be sent to the employee(s)

. All Committee reports and recommendations will be retained as a permanent record of the Classification Review Committee actions."

4. The Stock Clerk classification study was started in 1984 and completed on September 4, 1985. The employees received notification of the action on September 26, 1985 and Counsel noted a timely appeal on their behalf on October 17, 1985, and requested a hearing be held.

5. On October 24, 1985, one of the appellants was contacted by the Personnel Office and asked to designate an individual to participate as a member of the Classification Review Committee. The County did not contact or notify appellant's Counsel of this action.

6. The report of the Classification Review Committee to the Chief Administrative Officer was contained in a signed memorandum dated March 7, 1986.

7. On March 17, 1986, appellant's Counsel sent a letter to the Personnel Director, inquiring about the case, as he had not received any correspondence or documentation from the County since he filed the appeal on October 17, 1985.

8. On March 25, 1986, the employee designated member of the Classification Review Committee was sent a memorandum stating, "Attached for your review is a copy of the Majority Report on the Supply Clerk Appeals. Please review and submit your minority report by April 1, 1986. . ."

9. On April 3, 1986, appellant's Counsel wrote to the Chief Administrative Officer concerning alleged procedural deficiencies and asked for a copy of the Majority Report, that had not been made available to him.

10. On April 4, 1986, the Chief Administrative Officer responded stating, that he had not received anything from the Classification Review Committee and had asked the Personnel Office to review the procedures in this case.

11. On April 10, 1986, the Personnel Director wrote to Counsel and indicated that the Classification Review Committee had decided not to hold a hearing at its first meeting; that a copy of all documents given to the Classification Review Committee had been sent to Counsel; that no other correspondence had been sent since the initial contact in October 1985; and that the March 7, 1986 report of the Classification Review Committee was considered a draft and not the final report.

12. On April 18, 1986, the Minority Report was submitted to the Personnel Office.

13. On April 18, 1986, Counsel wrote to the Personnel Director again, indicating that he had never received any documents from the County and continued his objection to the process.

14. On April 29, 1986, the Personnel Director submitted his recommendation to the Chief Administrative Officer and attached the Classification Review Committee report to it. He informed the Chief Administrative Officer that a decision was due by May 13, 1986.

15. On June 12, 1986, the Personnel Director sent a memorandum to each appellant informing them that the Chief Administrative Officer had denied the appeal. There was no evidence of when that decision was made by the Chief Administrative Officer and Counsel was not notified or sent a copy of this memorandum.

The primary issues before the Board were whether time limits were properly adhered to and were the appellants denied basic due process rights.

In accordance with the 1980 policy, the following time limits would have been applicable, based on the filing of the appeal on October 17, 1986:

October 31, 1985	Comments from Department due in Personnel Office within ten working days. All documents submitted to the Classification Review Committee by the Personnel Office within ten working days.
December 31, 1985	Classification Review Committee Report due in Chief Administrative Officer's office within forty working days.
January 15, 1986	Chief Administrative Officer's decision due within ten working days.

Based on uncontradicted evidence of record, none of the deadlines were met.

With respect to due process, the appellants have the right to be represented by legal Counsel and must be given the opportunity to review all documentation considered by the Classification Review Committee and submit rebuttal thereon. Further, when a hearing is not held, the appellants must be notified in writing.

The record showed that the appellants were not properly notified that a hearing would not be held; were not provided with copies of documentation submitted to the Classification Review Committee; were not given an opportunity to make a written submission; and Counsel was not kept informed and was excluded from the process, thereby denying the appellants proper representation.

In light of the record, the Board was totally astounded and amazed by the County's position that the appellant's received adequate opportunity for input and that the appeal procedure was adhered to properly. The opportunity for input prior to the September 4, 1985 classification decision appeared to be reasonable, but once the appeal was noted by Counsel, fairness, reasonableness and compliance with established procedures were totally forgotten and ignored. Every time limit was violated; Counsel was blatantly ignored by the Personnel Office; required notifications were not provided; and the appellants were denied an opportunity for any input or participation in the Classification Review Committee process. The Board found such action to be intolerable, patently unfair and unacceptable.

Accordingly, it was the judgment and decision of the Board that the County violated established procedures and denied the appellants basic due process rights, and the decision of the Chief Administrative Officer was rescinded and the appeal process was voided. The County was directed to begin the appeal process again; to discount and destroy all documents and reports generated by the prior Classification Review Committee; to comply with all procedural requirements, including time limits and acknowledgement and involvement of legal Counsel; and to reimburse Counsel for reasonable attorney's fees.

In addition to the foregoing order, the Board recommended that the Chief Administrative Officer appoint an independent Fact-Finder(s), with the consent and approval of the appellants, to review the case and submit a recommendation directly to the Chief Administrative Officer. It was the Board's judgment that the appearance of fairness would not be attained if the Personnel Office was involved in the appeal process, because of its cavalier attitude and total disregard of Counsel and procedures exhibited in the initial appeal review. While this would deviate from the appellants' rights under the 1980 appeal process, it would be consistent with the 1985 policy. The final decision on process would require the appellants' agreement.

CASE NO. 82-102

The Merit System Protection Board reviewed and considered the arguments and documentation submitted in this case, in accordance with the decision and remand of the Court of Special Appeals of Maryland dated February 26, 1986. The issues to be addressed by the Board were:

1. Does any statute of limitations considerations limit the firefighters entitlement to overtime consideration?

2. How many hours of overtime did the firefighters work without overtime compensation?

   a. Without regard to any limitations considerations, and,

   b. after consideration of limitations, if the Board determined that such consideration was appropriate.

3. Should the overtime compensation found to be due be in the form of cash or compensatory leave, or a combination of the two?

4. Would it be appropriate to include interest on any amount found to be payable to the firefighters?

ISSUE #1 - STATUTE OF LIMITATION CONSIDERATIONS

After review and consideration of cited case law and arguments of the parties and Section 5-101 Courts and Judicial Proceedings Article, Annotated Code of Maryland, it was the judgment of the Board that a three year period of retroactivity from the date the grievance was filed, was both proper and fair.

ISSUE #2 - HOURS OF OVERTIME WORKED WITHOUT COMPENSATION

A review of the departmental time sheets and an unverified audit report submitted by the County revealed an inconsistency in hours worked, and many copies of the time sheets were unreadable. Therefore, the parties were directed to jointly conduct an analysis of the records and certify the following for each appellant:

a. Date overtime worked.

b. Total number of overtime hours worked each date.

c. Method of compensation - i. e., pay or compensatory leave.

1. If pay - number of hours paid and overtime rate.
2. If Compensatory Leave - number of hours credited.

d. Total hours not compensated for each date.

ISSUE #3 - TYPE OF COMPENSATION TO BE PAID

It was the judgment of the Board that the appellants should be reimbursed in the same manner as for other overtime hours worked on the same date.

ISSUE #4 - INTEREST DUE

It was the judgment of the Board that, consistent with State Law, the appellants were entitled to receive interest on cash due from date of the Court decision to date paid, and that the rate should be 10% per annum. Accordingly, the appellants were awarded interest at the rate of 10% per annum from September 24, 1984 (date of the Court of Special Appeals of Maryland decision awarding additional overtime compensation) to the date of payment of the funds due. Interest was not due on Compensatory Leave to be credited as its value had increased consistent with the appellants' salary and the amount creditable had not been adversely affected by time.

APPEALED TO CIRCUIT COURT BY COUNTY AND APPELLANTS

CASE NO. 86-10

A Firefighter appealed a decision concerning holiday pay. The record showed that he had been reimbursed in accordance with the relevant Personnel Regulations and the December 18, 1984 interpretation of the Board on those provisions. Therefore, finding no violation of established procedures, it was the judgment of the Board that the appeal be denied.

CASE NO. 86-32

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning the method of reimbursement for work on a holiday. The issue was whether the appellant should have been paid in cash in lieu of crediting compensatory leave for part of the day in question.

The Personnel Director ruled that the method of payment was at the discretion of the Department. After review of the Personnel Regulations, it was the judgment of the Board that the decision of the Personnel Director was proper and in accordance with established procedures. Accordingly, the appeal was denied.

CASE NO. 86-35 through 86-360, 86-372 through 86-379, 86-385 through 86-388, 86-392 and 86-394

Three hundred and forty Fire Rescue Service employees filed appeals concerning eligibility for overtime under the Fair Labor Standards Act.

The Board noted that the employees had filed a suit in U. S. District Court on the same issue, so decided to hold all appeals in abeyance pending Court action.

CASE NO. 86-389

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning crediting of compensatory leave for attendance at a training class.

Section 13.9 Required Course Attendance of the Personnel Regulations for Fire and Rescue Merit System Employees states: "An employee who is required as a condition of employment to attend certain courses of study...shall be credited with compensatory leave at the rate of one and one-half hours for each hour required in attendance...provided the employee successfully completes the course and does not attend the course during regularly scheduled work hours." The course was required as a condition of continued employment and was successfully completed.

CASE NO 86-389 Continued

The appellant sustained an on-the-job injury in September 1985 and could not work until December 22, 1985. On December 26, 1985 the appellant was cleared to return to light duty, but the Fire Department would not allow him to return and placed him on involuntary sick leave. The appellant was being carried on involuntary sick leave during March 1986, and departmental time sheets for the period of March 2 - March 29, 1986 (signed by the Fire Chief) showed the appellant being charged 8 hours of sick leave daily - Monday through Friday.

The question before the Board was what constitutes "regularly scheduled work hours" when an employee is on approved sick leave. It was the judgment of the Board that the appellant's "regularly scheduled" work days during the period in question were Monday through Friday, as shown on the signed time sheets. Therefore, attendance at the training class on Saturday would be covered by Section 13.9 and the appellant must be reimbursed accordingly. The Fire Department was directed to credit the appellant with 36 hours of compensatory leave for the 24 hours of class time and to revise records consistent with

CASE NO. 86-395

A Health Department employee appealed from the decision of the Chief Administrative Officer on her grievance concerning pay equity at time of promotion. There was no major disagreement with the facts in this case and the only issue to be addressed was the amount of pay adjustment necessary to correct an inequity that occurred in 1981.

After due consideration of the record and arguments submitted, it was the judgment of the Board that the Conclusions: Recommendations contained in the July 17, 1986 report of the Fact-Finder, were consistent with the factual evidence, well thought out, fair and reasonable. Therefore, the Chief Administrative Officer's award of a 10% pay increase retroactive to February 15, 1981, as recommended by the Fact-Finder, was sustained and the appeal was denied.

CASE NO. 86-401 through 405

Five Firefighters appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on their grievances concerning hourly pay rates. It was the judgment of the Board that the September 23, 1986 Grievance Disposition properly responded to the grievances and provided proper relief. Accordingly, the appeals were denied.

DEMOTION

CASE NO. 85-419

An Engineer Technician appealed a demotion for alleged failure to perform duties in a competent or acceptable manner.

In February 1984, the appellant's supervisor met with him to discuss work performance problems. Additional counseling sessions were held in subsequent months, and the appellant received a written reprimand in July 1984 for unsatisfactory work performance. The appellant had also been counseled and informed of work assignments due by July 10, 1984. The assignments were not completed until July 24, 1984 and management deemed the final product incomplete. The appellant was then given another warning about missing deadlines and poor productivity.

In November 1984, the appellant received a "marginal" work performance.

Testimony showed that:

1. Many of the projects were begun under a prior supervisor and the new supervisor directed changes be made based on his professional judgment of how the work should be done.

2. The appellant and the new supervisor did not have a good working relationship and clearly lacked trust and faith in each other's ability.

3. The appellant prepared a plan directly from the concept plan provided by Traffic Engineering and, in his supervisor's judgment, failed to use sound design reasoning.

4. The appellant stated that there were errors on plans, as alleged, and that he just didn't have time to correct them.

5. The appellant and his supervisor disagreed as to what was the best way to show certain things on drawings and as to what was essential and necessary.

6. The sediment control plan prepared by the appellant was considered too elaborate, while the appellant contended it was required by established guidelines.

7. Most Engineering Technicians made mistakes and had to do plans over.

CASE NO. 85-419 Continued

The question before the Board was whether the appellant had been demoted properly as the result of work performance.

The case was one of whose judgment takes precedence and was it reasonable and appropriate. The appellant's supervisor was a licensed engineer and was responsible for final design decisions on projects assigned. The design format and style is the prerogative of a supervising engineer, rather than subordinate Engineer Technician. Additionally, licensed engineers corroborated the testimony of the supervisor and agreed with his methods of design. This expert testimony was not refuted by the appellant's witnesses and evidence.

It was the Board's judgment that the appellant had been properly warned, counseled and given ample opportunity to improve. The subsequent finding of inadequate work performance was sufficient and reasonable grounds for taking the demotion action. Accordingly, the demotion was sustained.

CASE NO. 86-25

A Division Chief appealed his demotion. The County had filed a Motion to Dismiss and a Motion for Continuance. The appellant had filed a Motion for a Stay and made a Motion to Dismiss during the hearing.

With respect to the Motions for Dismissal, the County contended that the appeal was untimely filed and that the appellant had voluntarily agreed with the action, while the appellant argued there was coercion in obtaining the agreement and that the action had not been taken in accordance with required procedures for an involuntary demotion. The record showed that:

1. In early 1985, the appellant was employed by the Health Department as a Health Care Services Administrator, Grade 32.

2. There were two memoranda, dated April 19, 1985. One was an unsigned Statement of Charges for possible involuntary demotion and the other was the appellant's agreement to accept a duty reassignment.

3. On June 16, 1985, the appellant was transferred to another facility. The County did not take any other action at that time.

4. On March 6, 1986, the appellant formally rescinded the April 19, 1985 memorandum and requested reassignment back to his prior position.

5. In a memorandum, dated April 4, 1986, the County Health Officer, notified the appellant that he was being transferred and demoted, effective April 13, 1986, in accordance with the April 19, 1985 memorandum.

6. The action, processed in late April 1986, resulted in the appellant being demoted.

7. The appellant's appeal of this action was received by the Merit System Protection Board on April 21, 1986.

Section 20.3 Voluntary Demotion of the Personnel Regulations states in part: "Voluntary demotion may occur with the written consent of an employee. . ." There is no question that the appellant withdrew his consent, which was his right, prior to any formal action by the County. Therefore, the action on April 13, 1986 was not a voluntary demotion under the Personnel Regulations and the requirements for taking an involuntary demotion (Section 20.4 of the Personnel Regulations) had not been met.

In the absence of any formal action, the change in the appellant's work location on June 16, 1985 must be construed as a duty relocation, which was a prerogative of management and not appealable by the appellant. The first, and only appealable/grievable action taken by the County was the April 13, 1986 demotion, which was appealed timely.

After due consideration of the evidence and arguments on the Motions to Dismiss, it was the judgment of the Board that the County's motion was without merit and was denied. The appellant's motion was granted for failure of the County to take the action in accordance with established procedures. The County was directed to:

1. Reinstate the appellant to the position of Health Care Service Administrator, Grade 32, or another position of comparable status.

2. Reimburse the appellant all salary monies due from April 13, 1986 to date of reinstatement.

3. Delete all documentation related to this action from County and Health Department personnel files.

4. Reimburse the appellant for reasonable attorney's fees incurred.

CASE NO. 86-25 Continued

The Motion for Continuance filed by the County and the Motion for a Stay filed by the appellant had been rendered moot by this decision. Therefore, there was no need to address them further.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. #86-390

A Bus Operator appealed his demotion from the position of Transit Operations Supervisor for alleged unwelcomed sexual harassment and the creation of a hostile and intimidating work environment.

The County's policy on sexual harassment stated in part:

> "Montgomery County Government's policy is to maintain a working environment which is free from any form of harassment related to a person's sex. . .This policy prohibits sexual harassment of employees because it . . . interferes with a productive working environment . . ."

In defining sexual harassment, the County policy stated in part:

> ". . .Harassment is prohibited. . .where the conduct interferes with the individual's work performance or creates an intimidating, hostile, or offensive working environment. . ."

The appellant was charged with sexual harassment of two Office Assistants. One of those employees testified that she felt intimidated and harassed by the continual attention of the appellant, after she had informed him that she had no interest in him. The other testified that she never considered his actions as sexual harassment and was not bothered by what he did.

The appellant continued to try to date the one Office Assistant, and to bother her on the job, even after being told not to by her and by at least one other person. The appellant had unwanted physical contact with the Office Assistant on at least one occasion.

The appellant had received counseling on several occasions concerning sexual harassment and had been warned about similar behavior towards a previous Office Assistant.

The Board was presented with the following issues:

1. Should the action have been taken pursuant to Section 26 Demotion or Section 27 Disciplinary Actions of the Personnel Regulations?

2. Did the action meet the progressive requirements of Section 27-1?

3. Was the action justified, based on the totality of the circumstances?

The Board reviewed Sections 26 and 27 of the Personnel Regulations, Montgomery County, Maryland, 1986, and found the two involved separate and distinct actions. Section 26 involved demotion for continued unsatisfactory work performance after counseling, and an opportunity to meet established standards and re-evaluation. Section 27 provided for demotion as the result of a specific action or serious violation of procedures/policy, rather than an ongoing work performance deficiency. Therefore, it was the judgment of the Board that the action should have been, and was, taken under Section 27.

Section 27-1 required disciplinary actions to be progressive in nature and that ". . .The severity of the action should be determined after consideration of the nature and gravity of the offense, its relationship to the employee's work record and other relevant factors." The charges in this case were very serious, particularly since the appellant was in a supervisory position. Given the severity of appellant"s actions, it was the judgment of the Board that the demotion to a non-supervisory position was an appropriate first step in the progressive chain of disciplinary actions, as required by Section 27-1.

After consideration of all of the evidence and testimony, it was the judgment of the Board that the appellant did improperly harass the one Office Assistant and he knew that his continued attempts to date the individual were unwanted and undesired. This behavior clearly created an intimidating, hostile and offensive work environment for the Office Assistant, which constituted a violation of County policy by the appellant. Accordingly, the Board found the charges to be justified and they were sustained, and the appeal was denied.

DISMISSAL

CASE NO 86-06

A Correctional Officer appealed a suspension, pending investigation and subsequent dismissal. The appeal was withdrawn by Counsel for the appellant.

CASE NO. 86-09

An Engineer Technician appealed his dismissal, but withdrew the appeal prior to the scheduled hearing date.

CASE NO. 86-23

A Truck Driver/Warehouse Worker appealed his dismissal for alleged failure to perform duties in a competent or acceptable manner and negligence or carelessness in the performance of duties.

The appellant and his helper were making a delivery in Bethesda and the County truck was parked in a fire lane in a very narrow street. While they were unloading, a fire was reported in a nearby building and emergency equipment responded. It was necessary for a hook and ladder truck to enter the narrow street on which the County truck was parked to reach the scene of the fire.

Upon arrival on the scene, the Fire Officer left the truck and yelled instructions to the helper to move the County truck immediately. The appellant, who was inside the body of the truck unloading cases of beer, testified he never heard the order, which was given at least twice by the Fire Officer. The Fire Chief then arrived, and at the request of the Fire Officer, walked over to the truck and again ordered that it be moved immediately. The appellant stated that he heard that directive, but did not see who gave it, and even though he had heard sirens for about five minutes, did not realize there was a fire truck in the street waiting for him to move. The Fire Chief then went to a Police Officer, who was directing traffic and asked him to get the County truck moved. The Police Officer then walked over to the truck and ordered the appellant to move it immediately. When the appellant did not respond as quickly as the Police Officer believed appropriate, he threatened to move it for the appellant. Subsequent to the time he was ordered to move the truck by the Police Officer, the appellant testified that he off-loaded the last two cases

of beer, fastened the load locks, closed the truck doors, and moved the dolly loaded with ten cases around the truck onto the curb. At that point in time, he moved the truck. The Firefighters and Police Officer indicated a three to five minute delay in moving the truck, while the appellant believed it to be only a matter of "seconds". The helper testified that he told the appellant about the order to move the truck and agreed with him that it only took a few seconds to accomplish.

The basic problem in this case was the movement of the County truck. Testimony indicated that had it been moved quickly nothing would have been said or done about parking in a fire lane, and in fact, a ticket was not issued because every body was too busy to do so once the truck was moved. After due consideration of the testimony and evidence, the Board believed the estimate of three to five minutes to get the truck moved was accurate and constituted an inordinate delay in an emergency situation. Having heard the sirens for some time and having heard the Fire Chief's orders to move the truck, the appellant's failure to act prior to the subsequent order of the Police Officer was, in the Board's judgment, willful neglect and unacceptable performance of duties.

Accordingly, based on the willful misconduct of such a serious nature, and the appellant's prior disciplinary record, it was the judgment of the Board that the dismissal was reasonable and appropriate and it was sustained.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 85-445

A Public Service Worker appealed from the decision of the Personnel Office that his grievance on retroactivity of a classification action was not filed in a timely manner.

The record showed that the appellant was made aware of the classification action in late March 1985 and did not file a grievance until early June 1985. The County Grievance Procedure, at that time, required grievances be filed within ten calendar days of occurrence or knowledge of the incident. Based on the fact that over sixty days expired between knowledge of the action and filing of the grievance, it was the judgment of the Board that the decision of the Personnel Office was correct. Accordingly, the appeal was denied.

CASE NO. 85-449

Seven individuals appealed from the decision of the Personnel Office that their grievance on retroactivity of a classification action was not filed in a timely manner.

The record showed that the appellants were made aware of the classification action in late March 1985 and did not file their grievance until early June 1985. The County Grievance Procedure, at that time, required grievances be filed within ten calendar days of occurrence or knowledge of the incident. Based on the fact that over sixty days expired between knowledge of the action and filing of the grievance, it was the judgment of the Board that the decision of the Personnel Office was correct. Accordingly, the appeal was denied.

CASE NO. 86-05

An Engineer Technician appealed from the decision of the Personnel Office that the issue raised in his grievance was not grievable and that the grievance had not been filed timely.

CASE NO. 86-05 Continued

The appellant contended that higher level duties were assigned to him in late 1983, and stated: "I did this work without complaining since I was sure an Engineer III position was forthcoming and a promotion would justify the work I was performing out of class." In July 1985, an Engineer III position was created and the appellant applied for the vacancy. Another person was selected for the vacancy, and because of office circumstances, the appellant believed it best to retire and to file a grievance for back pay for working out of his class. The grievance was filed on November 14, 1985.

The Board found that the issue of the grievance was back pay for having worked outside of the class, and not a request for reclassification. Therefore, the issue was grievable and the position of the Personnel Office that it was a classification issue covered by another appeal process was incorrect and was reversed.

The issue of timeliness was well-documented and there was no question that the appellant knew in late 1983 that he was working out of his class. County procedure required filing a grievance within ten work days of an action or knowledge thereof. Having had knowledge of the problem in 1983, and not filing a grievance until 1985, was clearly outside the parameters established, and it was the Board's judgment that the decision of the Personnel Office on the timeliness issue be sustained. Accordingly, the appeal was denied.

CASE NO. 86-28

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire/Rescue Commission) on his grievance concerning appointment as a "casual labor" employee. The Personnel Director denied the grievance for lack of timeliness.

The record showed that the appellant had been employed as a "casual labor" by the Fire Department on May 10, 1980 and received an appointment as a full-time Firefighter on February 26, 1984. Procedures required filing of a grievance within twenty days of occurrence of an event or action or knowledge of an alleged violation. Based on the evidence of record, the Board concurred with the Personnel Director's position that the appellant was or should have been aware of the alleged violation in 1984. Therefore, it was the judgment of the Board that the grievance was not filed timely and the decision of the Personnel Director was sustained.

CASE NO 86-33

A Bus Operator appealed a suspension action and the County filed a Motion to Dismiss for the appellant's alleged failure to note a timely appeal. The record showed that the appellant received the Notice of Disciplinary Action on May 21, 1986, and the last paragraph of that notice stated that he had ten work days to file an appeal.

The appellant personally filed his appeal on June 6, 1986, eleven working days after receipt. The appellant did not offer an explanation or reason for being one day late in filing the appeal.

Section 23.4 Appeal Period of the Personnel Regulations states: "An employee shall have ten working days from receipt of a . . .disciplinary action to note an appeal, in writing, with the Board. . . .". Section 23.5 Dismissal of an Appeal of the Personnel Regulations states: "If an appeal is not noted and/or submitted within the specified time limits, the Board may dismiss the appeal. . ."

The Board firmly believed in use of discretionary authority in cases where good cause was shown or unforseen circumstances were involved. Failing to find any reasonable explanation or unusual cause for the delay in filing the appeal, it was the judgment of the Board that the Motion For Dismissal should be granted. Accordingly, the appeal was dismissed for failure to file in accordance with Section 23.4 of the Personnel Regulations.

CASE NO 86-364

A Mechanic Leader appealed from the decision of the Personnel Director that his grievance would not be accepted for processing because it concerned a classification issue. The appellant requested compensation for allegedly working out of his class for approximately two years.

The record showed that the appellant's official position was classified as a Mechanic Leader and he had been assigned and performed Mechanic Supervisor duties on a "temporary basis" for the last two years. After due consideration, it was the judgment of the Board that the issue was one of proper compensation, not classification, and therefore, was a grievable issue. Accordingly, the grievance was remanded to the Personnel Office for further processing in accordance with established procedures.

CASE NO. 86-371

A Mechanic Leader appealed from the decision of the Personnel Director that his grievance would not be accepted for processing because it concerned a classification issue. The appellant requested compensation for allegedly working out of his class for approximately fifteen months.

The record showed that the appellant's official position was classified as a Mechanic Leader and that he may have been assigned and performed Mechanic Supervisor duties. It was the judgment of the Board that the issue was one of proper compensation, not classification, and therefore, was a grievable issue. Accordingly, the grievance was remanded to the Personnel Office for further processing in accordance with established procedures.

CASE NO. 86-380

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) that his grievance concerning manning allocations would not be accepted for processing because it was not a grievable matter.

The appellant's grievance alleged inequitable manning levels that resulted in unsafe working conditions. The County's position was that this was a budgetary matter and not grievable. It was the judgment of the Board that under Section 22 Grievances, subsection 22.2 Definition of the Personnel Regulations for Fire and Rescue Service Merit System Employees, manning allocations were a term or condition of employment, especially if it was shown that they could cause unsafe working conditions. The Board was well aware that corrective action may necessitate budgetary actions or reallocation of the work force, but such problems do not negate an employee's right to fair and equitable treatment.

Accordingly, the grievance was remanded to the Personnel Office for acceptance as a grievable matter and processing in accordance with established procedures.

CASE NO. 86-393

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) that his grievance concerning casual labor would not be accepted for processing as it involved an issue that was not grievable. The Board noted that the Personnel Director failed to submit the record as required by Section 23.6 of the Personnel Regulations for Fire and Rescue Service Merit System Employees, and the appellant's submission was unrefuted.

The appellant's grievance alleged violations of several provisions of the Personnel Regulations, which may cause unsafe working conditions. Section 22.2 Definitions states in part "A grievance is a formal written complaint by an employee. . . which expresses the employee's dissatisfaction concerning a term or condition of employment. . .A grievance may be filed if an employee believes he/she has been adversely affected by an alleged:

> (a) Violation, misinterpretation or improper application of established laws, rules, regulations, procedures or policies. . ."

Failing to find any refutation of the appellant's allegations, it was the judgment of the Board that the issue involved a possible term or condition of employment and was grievable under Section 22. Therefore, the grievance was remanded to the Personnel Office for processing as a grievable matter in accordance with established procedures.

It was the further judgment of the Board that the appellant be reimbursed reasonable attorney's fees by the County.

CASE NO. 86-396

A Department of Finance employee appealed from the decision of the Personnel Director on his grievance concerning a Statement of Charges. The Personnel Director had ruled that "a statement of charges is a preliminary action to any discipline, and does not constitute a formal action of record . . .". The record showed that disciplinary action was subsequently taken; that the appellant had grieved said action; and the grievance had been accepted for processing.

It was the judgment of the Board that the issue raised in this case was properly part of the grievance on the disciplinary action, rather than a separate, unrelated issue. Therefore, the decision of the Personnel Director was sustained, and the appeal was denied.

CASE NO. 86-410

An applicant for a promotional opportunity appealed the decision of the Personnel Director that his grievance would not be accepted for processing. The issue involved scoring of an examination.

Section 2.0 Policy of Administrative Procedure 4-4 Grievance/Open Door Review Procedure states: ". . .Employees and their supervisors are to make every effort to resolve differences informally. Provision is made for informal resolution in these procedures and it is expected that employees and supervisors will consider all available alternatives for resolution of problems at this level. . ." The Board noted that the Personnel Office had offered to meet with the appellant in an effort to respond to his questions and resolve the matter but that he had not taken advantage of that offer. Therefore, it was the judgment of the Board that the appellant had not exhausted available administrative remedies, and a grievance may not be filed until that was done. Accordingly, the appeal was denied and the Board suggested he pursue administrative resolution of the problem as provided for in Administrative Procedure 4-4.

MISCELLANEOUS

CASE NO. 86-04

A Fire Corporation employee appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning payment of legal fees.

The appellant was seeking reimbursement of legal fees incurred because of the appeal of a Fire Corporation from the decision of the Board in Case #83-15 - (Law #64822). The Board noted that on November 8, 1984, John J. Mitchell, Judge of the Circuit Court of Montgomery County, Maryland issued a decision on that appeal and specifically ordered, "that appellee's prayer for counsel fees be, and the same hereby is, denied." Therefore, the Court had already ruled on this question, and the Board had no authority or jurisdiction to review the matter further. Accordingly, the appeal was dismissed.

CASE NO 86-34

An employee of the Department of Finance appealed from the decision of the Chief Administrative Officer on his grievance concerning an involuntary transfer. Subsequent to the appeal, the appellant elected to transfer to another Department.

The Board noted that while the issues of timeliness in responding to the grievance, the unspecified length of the temporary transfer period, the lack of meaningful communication and the validity of the reasons for the action were of concern, the appellant's transfer out of the Department of Finance had rendered the appeal moot. The severance of the working relationship between the parties negated the need for further consideration of the charges and such action would serve no useful purpose. Accordingly, the appeal was dismissed without prejudice.

CASE NO 86-370

Seventeen employees in the Department of Liquor Control appealed from the decision of the Chief Administrative Officer on their request for an Open Door Review of the sick leave policy of the department.

CASE NO. 86-370 Continued

Open Door Reviews are covered under Section 6 of the County's Grievance/Open Door Review Procedure (Administrative Procedure 4-4), and the Board noted that decisions of the Chief Administrative Officer, unlike grievances, are final and not appealable to the Merit System Protection Board. After review of the record, it was the judgment of the Board that the issue was correctly processed as an Open Door Review, as it was not grievable. Therefore, the Board found that there was no right of appeal of a decision on a request for an Open Door Review, and the appeal was dismissed for lack of jurisdiction.

CASE NO. 86-399

A Department of Transportation employee appealed from the decision of the Chief Administrative Officer on his grievance concerning the Department of Transportation attendance policy. The appellant did not believe the policy was fair and equitable when compared to how other County employees are treated and did not believe it needed to apply to all employees of the Department of Transportation.

The Board concurred with and supported the report of the Fact-Finder and found the issue to be one of judgment and management prerogative. The Department Head had the authority to establish policy, and as long as that authority was used properly, the Board would not attempt to replace management's judgment with its own. Therefore, it was the judgment of the Board that the appeal be denied.

CASE NO. 86-01

An applicant appealed the "Not Acceptable" medical rating received for the position of Public Service Worker I (PSW 1). The record showed that:

1. Section 5.12 Medical Requirements for Employees/Applicants of the County's Personnel Regulations requires an individual ". . .be of sufficient good health to perform the duties and responsibilities assigned to a position. . ." It further states " . . .Whenever 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 his/her self, or others, the Chief Administrative Officer may declare such applicant ineligible for appointment. . ."

2. The position of PSW I involved "physically taxing unskilled manual labor".

3. The established medical standards (Administrative Procedure 4-13 Section 7.0) allow for rejection for "any condition, disease, illness, injury or abnormality which may reasonably be expected to cause the applicant to be unable, within 12 months following employment, to satisfactorily perform the duties and tasks of the position. . ."

4. The appellant was found to have developmental spondylosis and spondylolisthesis at L5-S1 with slight forward slippage and a leg length discrepancy, related to an automobile accident at age 16.

The position involved in this case required significant heavy manual labor, which would put stress on an individual's back and legs. It was the judgment of the Board that, under such circumstances, the conclusions and recommendations of the Employee Medical Examiner were reasonable and supported by the medical evidence. Therefore, the "Not Acceptable" medical rating was sustained and the appeal was denied.

CASE NO. 86-03

A former Firefighter appealed from the decision of the Fire and Rescue Commission to deny his request for a non-competitive reappointment. The issue before the Board was whether the decision of the Fire and Rescue Commission was arbitrary and capricious or reasonable and proper.

The Fire and Rescue Commission was required to establish an affirmative action plan, and did so. Subsequently, due to a lack of female and minority applicants during an extended period, the Fire and Rescue Commission adjusted the appointment cycle to aid in achieving the established goal. It was the judgment of the Board that the action was reasonable and necessary to assure proper administration of the plan.

Non-competitive reappointments are the prerogative of management, subject to the approval of the Fire and Rescue Commission, which was not forthcoming in this case. The documentation and statistics provided by the parties showed that the Fire Department had recently received permission to reappoint another white male, had utilized the white male category for its last six appointments and had a 6% female/minority ratio to the total entry workforce for the Department. After due consideration of these facts, it was the judgment of the Board that the denial of a non-competitive reappointment was a reasonable and proper action and an appropriate exercise of authority by the Fire and Rescue Commission. Accordingly, the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 86-08

An applicant appealed the "Not Acceptable" medical rating received for the position of Police Officer. The record showed that:

1. The appellant was diagnosed as having glycosuria.

2. Administrative Procedure 4-13 Medical Standards, Section 6.0, E Endocrine and Metabolic Disorders states in part:

"The causes for rejection for appointment shall be:
. (f) Glycosuria, persistent, regardless of cause
"

3. The appellant's personal physician wrote a letter to him stating:

". . .You do not have diabetes mellitus. Most likely you have renal glycosuria. . .Renal glycosuria is defined as the excretion of excessive amounts of glucose in the urine in the presence of normal filterloads of glucose in the blood. This so-called familial renal glysosuria is an isolated defect in renal glucose transport in which all other aspects of sugar metabolism are normal. It is thought to be a benign condition, with an excellent prognosis, does not require any treatment, and is not relevant to physical qualification for a career in the police service. . .renal glycosuria is neither an endocrine nor a metabolic disorder. . ."

4. Another doctor reported his findings as:

". . .has renal glycosuria. This is not a disease. It is a perfectly normal, although unusual finding . . .There is absolutely no medical reason why a patient with renal glycosuria should not be allowed any employment that he is other wise qualified for . . ."

5. Webster's New Collegiate Dictionary contained the following definitions:

Metobolic - relating to, or based on metabolism.

Metabolism - the chemical changes in living cells by which energy is provided for vital processes and activities and new material is assimilated to repair the waste.

After due consideration of the evidence, it was the judgment of the Board that the approved Medical Standard may have been misapplied. The medical reports appeared to show that the condition of renal glycosuria was neither an endocrine or metabolic disorder and, therefore, would not fall under Section 6.0, E (f) of the Medical Standards. Further, the Board could not find a specific reference in the Standards to apply to this condition. Based on this, the Board, directed the County to take the following actions to assure fair treatment and proper evaluation:

CASE NO 86-08 Continued

1. The "Not Acceptable" rating was to be rescinded.

2. The medical records of the appellant, and the County's standards were to be provided to a specialist in the field for evaluation and specific response as to effect on personal health and future work performance as a Police Officer.

3. Upon receipt of this information, a new medical rating was to be assigned, and if "Not Acceptable", documented as to the applicable standard and reasons for the decision.

CASE NO 86-12

Four Police Officers appealed from the decision of the Chief Administrative Officer on their grievance concerning promotions to Sergeant. The major points of disagreement were:

1. The change in selecting from the highest rating category rather than by rank order of scores.

2. The validity of the personnel records reviewed.

3. The lack of guidelines or standards in the final selection process.

The selection of candidates from the highest rating category is the prerogative of an appointing authority, pursuant to Section 6.3 of the Personnel Regulations, and the Board recognized and respected that authority. In this specific case, the Board noted that the final ratings of the applicants were based on the results of a written examination and an assessment center evaluation. Use of an assessment center provides a standard of measuring the applicants' knowledges, skills, abilities and overall fitness for a task under simulated job conditions. With inclusion of this method of evaluation in the scoring process, the appellant's argument that rank order selection more closely met the requirements of the Personnel Regulations for selecting the best qualified person, had validity.

Irrelevant personnel records were retained and reviewed in the selection process, and the Board was satisfied that potential adverse impact had been shown by the appellants.

CASE NO. 86-12 Continued

The use of additional persons in the final selection process was an acceptable practice, provided guidelines or standards are provided to them to assure fairness and consistency of review and selection. There was no evidence of this in this case, which resulted in uncertainty as to how each person decided who to recommend for promotion.

The aforementioned violations and omissions required the Board to take corrective action. After consideration of possible alternatives, and recognizing the rights of individuals who had been promoted without knowledge of violations or any role in the selection process, the Board directed the Department of Police to:

1. Revise the personnel records of three of the appellants to reflect promotion to Sergeant, effective April 7, 1985 and reimburse them all salary monies due as the result of this change.

2. Promote the fourth appellant to the next available position of Sergeant with an effective date retroactive to April 7, 1985 and reimburse him all salary monies due as the result of this action.

3. Reimburse the appellants for reasonable attorney's fees incurred.

4. Remove all outdated and improper documents from the appellants' personnel files.

5. Reimburse the appellants an additional sum of 6% per annum on all salary monies due, if not paid in full by May 23, 1986.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 86-14

An applicant appealed a "Not Acceptable" medical rating received for the position of Police Officer Candidate.

Prior to action by the Board, the rating was changed to "Acceptable" rendering the appeal moot.

CASE NO 86-18

A Firefighter appealed from the decision of the Personnel Director on his grievance concerning promotions from the 1982 eligible list after the 1984 list had been certified, promotion from a lower rating category and the administration of the 1986 promotional examinations.

The continued use of the 1982 eligible list occurred as the result of Merit System Protection Board decisions in 1983, which were not implemented immediately because of Court appeals by the Fire Corporations involved. Upon loss of the lengthy appeal process, the Fire Corporations were required to implement the decisions to correct prior failure to promote timely and properly. Therefore, use of the 1982 list was appropriate.

Specific procedures have been established for selection of individuals for promotion, and promotion of a person in a lower rating category is permitted when justified by the Fire Corporation and approved by the Fire and Rescue Commission. There was no requirement that individuals being by-passed be given an opportunity to argue against such action and the Board found no evidence of any violation.

The 1986 examination process established by the Fire and Rescue Commission, in the Board's judgment, complied with the requirements of Section 16.2 of the Personnel Regulations, and there was insufficient evidence or justification to stay administration of the examination.

The Board recognized the appellant's concern that the length of eligibility of the 1984 list had been shortened because of the initial delay in certifying the original 1984 eligible lists. Further, certification of the new eligible lists will not be completed until approximately ninety days after administration of the written examination, while the 1984 lists were scheduled to expire on the date of the written examination. The extended period of time without an eligible list could adversely affect the delivery of critical services and the public safety as vacant supervisory positions could not be filled. It was the judgment of the Board that to protect County residents and to be fair to employees and the Fire Corporations, the 1984 eligible lists and all subsequent eligible lists should remain in effect until new lists are certified.

Accordingly, the County and the Fire and Rescue Commission were directed to extend and use the 1984 Fire and Rescue Service eligible lists until the 1986 lists are certified for use.

CASE NO. 86-20

A Community Health Nurse appealed from the decision of the Personnel Director on a grievance concerning proper grade level and position at the time of appointment.

The appellant accepted the Community Health Nurse I position in good faith, believing that she would be upgraded retroactively because of prior experience and education. The statements she relied upon were not made by the appointing authority and the persons making them lacked proper authority to do so. Under the Personnel Regulations, the appointing authority has discretionary privileges in making within-grade or budget level appointments and did not choose to do so in this case. Therefore, it was the judgment of the Board that the denial of retroactivity was permitted and was discretionary

Finding no violation of the Personnel Regulations or evidence that the appointing authority's judgment was arbitrary or capricious, it was the decision of the Board that the appeal be denied.

CASE NO. 86-31

An applicant appealed from the decision of the Fire and Rescue Commission to deny the request of a Fire Department to appoint him to a vacant firefighter position. The denial was based on the Fire and Rescue Commission's decision to adjust the affirmative action rotation cycle for appointments.

The Fire and Rescue Commission had established an affirmative action plan for appointments, as required by the Personnel Regulations. However, the applicant pool did not contain any females or minorities from September 27, 1983 to March 1, 1985 and all appointments during that time were white males. In an effort to improve the level of female/minority employees, the Fire and Rescue Commission adjusted the hiring cycle to require a greater number of female/minority hires until the voluntary goal was achieved.

It was the judgment of the Board that the action was reasonable and necessary to assure proper administration of the plan and was an appropriate exercise of authority by the Fire and Rescue Commission. Accordingly, the appeal was denied.

CASE NO. 86-365

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning the proper eligible list to be used in filling a Sergeant vacancy in the Department of Fire and Rescue Services. The primary issue to be resolved was whether the Department of Fire and Rescue Services should have used the 1982 or 1984 eligible list to fill a Sergeant's vacancy created by a lateral transfer.

This case related to, and was affected by the decisions on prior Board cases #83-15, #84-17, #85-459 and the Board's January 15, 1986 opinion on filling a Fire Department vacancy. The record showed that:

1. The Sergeant vacancy in the Department of Fire and Rescue Services was caused by the:

    a. Promotion of a Sergeant from the Chevy Chase Fire Department to the position of Lieutenant at the Glen Echo Fire Department.

    b. Lateral transfer of a Sergeant from Glen Echo to Chevy Chase.

    b. Lateral transfer of a Sergeant from the Department of Fire and Rescue Services to Glen Echo.

2. The Lieutenant vacancy at Glen Echo had occurred on November 30, 1982, but was not allowed to be filled pending Court appeals on Case #83-15.

3. On January 15, 1986, this Board ruled that the Glen Echo Lieutenant vacancy should be filled from the 1982 eligible list, consistent with the directives in Case #83-15.

4. In Case #85-459, the Board ruled that the Department of Fire and Rescue Services was covered by the decision in Case #84-17.

5. The Personnel Office denied a grievance on January 22, 1986, stating that Glen Echo was correct in using the 1982 eligible list to fill the Lieutenant vacancy.

CASE NO. 86-365 Continued

The County argued that the Department of Fire and Rescue Services Sergeant vacancy was not covered by the decision in Case #84-17 and the Board's January 15, 1986 opinion, as it was not specifically mentioned. Based on the County's participation and actions in this long drawn out process, the Board found such an argument to be without merit and indefensible. On the one hand, the County said the 1982 eligible list was correct for filling the Lieutenant vacancy at Glen Echo, consistent with the decision in Case #84-17, but then went on to deny the applicability of the "trickle down" effect, which is part of the decision in Case #84-17. This position is totally inconsistent with the facts and applicable decisions and law. The Sergeant vacancy in the Department of Fire and Rescue Services was clearly caused by the promotion of another individual to Lieutenant at Glen Echo and the subsequent lateral transfers. Therefore, it was the decision of this Board that the vacancy in question was a "trickle down" vacancy and should have been filled from the 1982 eligible list. The County was directed to take the necessary corrective actions in accordance and compliance with this decision and prior orders and decisions.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 86-391

An applicant appealed from the "Not Acceptable" medical rating received for the position of firefighter. The record showed that:

1. On October 25, 1985, the appellant sustained a hyperflexing injury to her left knee.

2. On November 8, 1985 she underwent a diagnostic arthroscopy, which revealed no meniscal or cruciate ligament tear. Substantial chondromalacia of the lateral facet of the patella was found and arthroscopic shaving was performed to correct the problem.

3. The County obtained limited information from her private physician, but there was no indication of any current information, or attempt to obtain current data from the specialist that treated the injury.

4. On July 18, 1986, The Employee Medical Examiner, recommended a "Not Acceptable" medical rating because of "Chondromalacia, manifested by verified history of joint effusion".

5. On August 15, 1986, the treating physician reported that: "...I do not see any bony pathology...Based on our present examination and today's finding as well as the Cybex testing that was done, patient has full range of motion, has not (sic) instability and has good strength in the left knee which was injured back in 1985 and I see no objection for her to participate in any sport or activity with no restriction.."

6. Section 2-2 Medical Requirements for Fire Department Candidates of the NFPA 1001 Firefighter Professional Qualifications (the approved medical standards used in this case) subsection 2-2.6.3(k) states that cause for rejection shall be "Chondromalacia, manifested by verified history of joint effusion, interference with function, or residuals from surgery".

After reviewing the medical standard and the medical evidence of record, it was the judgment of the Board that appellant did not have a history of joint effusion, nor was there any indication of interference with function or residuals from surgery. Appellant sustained one injury to her left knee, that was treated and had apparently healed normally, leaving her capable of unrestricted activity. In the Board's judgment, one injury did not constitute a history and such a finding could not be supported or sustained. Accordingly, the "Not Acceptable" medical rating assigned, because of this injury and chondromalacia, was overturned and the appellant was to be assigned an "Acceptable" medical rating. The County was directed to modify the records consistent with this decision and to continue processing the appellant for employment in accordance with established procedures.

CASE NO. 86-398

An applicant appealed from the "Not Acceptable" medical rating received for the position of firefighter. The record showed that:

1. On the Report of Medical History, completed by the appellant, the only past injury or surgery shown was a 1984 gunshot wound.

2. An x-ray, taken on August 13, 1986, revealed narrowing of the L4-5 disc space, and the appellant was sent to an orthopedist for a special evaluation. On August 27, 1986 the orthopedist reported that the appellant had stated that he had back surgery in Puerto Rico at about age 10, but did not know why and was unable to obtain any records concerning that surgery. The orthopedist indicated that the surgery may have been a laminectomy.

3. On September 8, 1986, another doctor submitted a report stating that he had performed surgery on the appellant on July 19, 1977, for a herniated disc. The doctor also stated that the appellant had injured his neck in an auto accident in December 1981.

4. Medical evidence indicated the appellant was in good health and had no restrictions on activities.

5. The appellant had been an active volunteer with the Bethesda-Chevy Chase Rescue Squad since 1978.

6. The appellant had also been an active volunteer with the Cabin John Volunteer Fire Department since December 1984 and was employed by it as a "casual labor" employee from December 1984 until March 1986.

7. The Independent Fire Departments did not require volunteers to meet the same medical standards as paid firefighters. Since August 1986, the Fire and Rescue Commission has required new "casual labor" employees to meet the same medical standards as paid firefighters.

8. The County Fire Services use the NFPA 1001 Medical Standards for Professional Firefighters for all paid firefighter positions. This is a nationally recognized and accepted medical standard for fire service positions.

9. Section 2-2.15.1 Spine and Sacroiliac Joints of NFPA 1001 states:

> "The causes for rejection for appointment shall be: ...(g) Ruptured nucleus pulposus (herniation of intervertebral disk) or history of operation for this condition..."

CASE NO. 86-398 Continued

The appellant had been functioning as a Firefighter/Paramedic since 1978 and the doctors indicate that he had made a remarkable recovery and had no job restrictions at this time. However, during the medical processing, it was discovered that he had undergone a laminectomy for a herniated disc, which was a disqualifying condition under the County's medical standards (NFPA 1001). Unlike certain other conditions, the standards do not provide for individual evaluations or exceptions when a history of surgery for this condition is present. Therefore, it was the judgment of the Board that the appellant did not meet the established medical standards and the "Not Acceptable" rating was sustained.

CASE NO. 86-408

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning periodic medical examinations. The issues concerned the assignment of authority, the validity of the procedures/policies, and fairness of the decision.

The Board found the argument related to which department the Employee Medical Section was assigned to, to be non-convincing. It was the County's Employee Medical Section and it had been properly assigned the responsibility to conduct all medical examinations. The Board further found the procedures and policies to be fair and reasonable and consistent with, and established pursuant to, the requirements of the Personnel Regulations.

The appellant did not want to submit to a periodic medical examination by the Employee Medical Examiner, and had requested, and been denied the opportunity to have an examination by a physician of his choosing. It had been allowed years before, but the practice had been discontinued several years ago and consistently enforced since then.

The Board believed an employer - in this case the County - had the right to establish medical standards and to require and administer examinations necessary to assure compliance and capability for continued employment. Therefore, it was the judgment of the Board that the reasons set forth by the Chief Administrative Officer in his decision of October 21, 1986, were correct, reasonable and fair. Accordingly, that decision was affirmed and the appeal was denied.

CASE NO. 86-22

Two Firefighters appealed the decision of the Personnel Director on their grievances concerning the purchase of additional retirement credit. The two issues raised were whether the matter was grievable and whether the appellant's had been treated unfairly.

The grievances concerned the alleged unfair application of certain provisions of the Personnel Regulations and the Retirement Law. Under Section 22.2 of the Personnel Regulations, ". . .improper, inequitable, or unfair application of . . .employee benefits. . ." is a grievable issue. Therefore, the Board found the issue was grievable.

The County had responded on the merits of the appeal and denied it after finding full compliance with the law. A review of the applicable provisions did not reveal any violations, and in fact, showed that proper compliance had occurred. Further, there was no provision in the Retirement Law for the purchase of the type of service requested. Finding no violations, and lacking provision for such a purchase, it was the judgment of the Board that the Personnel Director's decision was correct, and it was sustained.

CASE NO. 86-29

An employee appealed from the decision of the Chief Administrative Officer on her grievance concerning the denial of a request for a Discontinued Service Pension. The major disagreement was whether her prior position of Assistant Division Chief had been abolished or reclassified.

The record showed that the duties and responsibilities assigned to the two positions of Assistant Chief, had undergone an evolution of change in the last four to five years as the result of reorganization within the Department as well as a change in management philosophy in the Office of Management and Budget. The assignment of duties and responsibilities and the organizational structure of a Department are the prerogative of the Department Head, subject to the parameters of the Merit System. In cases involving judgment, the Board may not substitute its judgment for that of management, except when it is shown that it was arbitrary and capricious. The Board found insufficient evidence to show the reallocation of duties and responsibilities was an arbitrary and capricious act by management.

CASE NO. 86-29 Continued

Section 33-45(d) Discontinued Service Pension of the Employees' Retirement System for Montgomery County states that "Any member whose position has been abolished or employment has been terminated by an administrative action may elect a discontinued service pension. . ." The record supported the County's position that the position was reclassified and downgraded two grades as the result of the changes in the organizational structure. Even though the position was downgraded, the appellant was informed that there would be no reduction in salary for a period of two years. The appellant elected to seek retirement, rather than to continue employment in the lower grade.

While the Board understood the frustration with, and concern for the way changes had been made or allowed to occur, the actions were taken in accordance with established procedures and as the result of management prerogatives.

It was the judgment of the Board that the position was reclassified downward, and therefore, the appellant did not qualify for a discontinued service pension. Accordingly, the appeal was denied.

CASE NO. 86-30

An HVAC Mechanic appealed from the decision of the Disability Retirement Hearing Board on the administrative request for a service connected disability retirement. The Disability Retirement Hearing Board awarded a 30% permanent partial service connected disability retirement and the appellant was seeking a full disability retirement.

In the case of Whittaker vs Montgomery County, the Courts held that in cases of service connected disability, the responsibility for alternative placement rested with the County, and, in the absence of such placement, the County must provide full disability benefits. The Disability Retirement Hearing Board found that there was no other position available and that the County had possibly failed to provide adequate training for a sedentary, or alternative, position.

CASE NO 86-30 Continued

Based on this, the award of a partial disability retirement was totally inconsistent with case law. Therefore, it was the judgment of the Merit System Protection Board that the award of a partial disability retirement for the appellant be modified to provide full disability benefits under Section 33-43(f)(1) of the Employees' Retirement System for Montgomery County instead of Section 33-43(f)(2). The County was directed to:

1. Revise the appellant's retirement to reflect full disability benefits.

2. Reimburse him for additional benefits due from date of retirement, as a result of this change.

3. Reimburse the appellant's Counsel for reasonable attorney's fees.

4. Provide the appellant with assistance in rehabilitation and training needed to be re-employed, and to make every effort to reinstate him to County employment within six months.

CASE NO. 86-366

A Health Room Technician appealed from the decision of the Disability Retirement Hearing Board on her application for a service connected disability retirement. The Disability Retirement Hearing Board found that she was not disabled from continuing in her present position and denied the application.

The primary medical problem was the appellant's inability to fully use the right thumb, with minor problems related to her right knee and ankle. Medical documentation indicated no long term residual problems with the right knee or ankle and minimal long term problems with the right thumb if treatment/surgery was successful. While the appellant's supervisor may have indicated a problem with continued employment, there was nothing in the record that would preclude reasonable accommodation and/or transfer to facilitate continued employment.

While the Board recognized the appellant's concern for being unable to perform at 100% of her prior capabilities, it was the Board's judgment that the medical requirements for a service connected disability retirement had not been met. Accordingly, the decision of the Disability Retirement Hearing Board was sustained and the appeal was denied.

CASE NO 86-382

A Department of Environmental Protection employee appealed from the decision of the Chief Administrative Officer on his grievance concerning purchase of retirement credit for a period of military service. The question to be resolved was whether the appellant had been treated differently than another employee, and if so, was that treatment improper.

On July 1, 1978 the County Council recognized a flaw in the notification process for purchase of retirement credits for various types of service and amended Section 33-41 Credited Service of the Employees Retirement System of Montgomery County to correct the problem. The change required the Chief Administrative Officer to take steps to notify all employees completing five years of service after that date of their right to purchase retirement service credits. At that same time, the County Council amended the law to allow current employees, with five or more years of service, to purchase service credits, if applied for by September 1, 1978. These changes were publicized through normal channels, but there was a question as to whether the appellant received any of the publicity documents, as he lived in Baltimore and was working in a remote facility. The appellant completed five years of County service in June 1977, while the other employee involved completed five years of County service in August 1981. As the result of the County's failure to notify the other employee in 1981, he was allowed to buy the service, when requested, at a later date.

The Chief Administrative Officer denied the grievance (even though the Fact Finder recommended the appellant be allowed to buy the service) based on the fact that there was no requirement that he be personally notified at the time of his fifth anniversary, as was the case with the other employee. A review of the law supported this position as there was no legal requirement for notification prior to July 1. 1978.

After due consideration, it was the judgment of the Board that the decision of the Chief Administrative Officer must be sustained. The Board could find no legal basis to overturn the decision and could not ignore the fact that an employee has an obligation to obtain current information on pay, benefits, policies and procedures, particularly when one does not live in the area and is assigned to an outlying unit. As in legal matters, an ignorance of the law was not a valid excuse or defense. Therefore, it was the decision of the Board that the appeal be denied.

CASE NO. 86-383

A Parking Enforcement Officer appealed from the decision of the Disability Retirement Hearing Board on his application for a service connected disability retirement. The Disability Retirement Hearing Board concluded that the appellant was disabled, but that the disability was not as the result of service connected injuries, and awarded him a non-service connected disability retirement.

The medical opinions in this case were evenly divided, with three doctors saying the appellant was capable of performing Parking Enforcement Officer duties, while three others said he could not and that his disability seemed to be work aggravated. All of the doctors agreed that the appellant was employable, although some limited it to desk-type/light duty positions.

After a review of the retirement law, and the evidence, it was the judgment of the Board that the appellant did not meet the requirements for the non-service connected disability retirement awarded, as Section 33-43(b)(5) does not limit such employment to the County Government, as done in Section 33-43(c)(3). Therefore, payment of benefits under Section 33-43(e) were inappropriate, and must be discontinued immediately.

As a result of the preceding, the issue now before the Board was whether the appellant had a service connected disability. The perplexing problem in this case was that the appellant, while suffering from recurring back pains, had not been involved in an accident or sustained a specific injury directly related to his employment with the County that could be identified as the cause of the problem. There was evidence that the "rough riding" nature of the heavy equipment he operated may have contributed to the on going problem. The Board was very concerned, and disturbed, by the fact that the County failed to act on recommendations in 1982 that the appellant be provided with vocational rehabilitation and not be allowed to ever return to his job as a heavy equipment operator. Despite this knowledge, the appellant was returned to full duty as an Equipment Operator on at least two occasions after that time. It was also recommended that he be provided with physical therapy, but there was no indication that this was ever done. The Board also noted that the twisting and turning required as a Parking Enforcement Officer may have exacerbated his back problem.

CASE NO 86-383 Continued

After careful consideration and thought, it was the judgment of the Board that the appellant was unable to be employed as a Parking Enforcement Officer; that the back problem was aggravated by his employment; that the County had failed to provide any rehabilitative therapy necessary to make him employable; and the County did not have a position for him. Therefore, it was the decision of the Board that the appellant was eligible for, and was to be granted a temporary service connected disability retirement for a period of one year, consistent with the provisions of Section 33-43(a) and (f)(1) of the Employees' Retirement System of Montgomery County. During this one year period, the County was directed to provide him with assistance in obtaining treatment/therapy necessary to make him employable and to make a concerted effort to return him to a County position as a productive employee. The case was to be reviewed at the end of that time as provided for in Section 33-43(d).

CASE NO. 86-384

A Mechanic appealed from the decision of the Disability Retirement Hearing Board on his application for a service connected disability retirement.

The Disability Retirement Hearing Board issued its decision on July 7, 1986 and listed six facts in support of its decision. It was the Board's judgment that none of the cited facts supported the decision rendered and the Disability Retirement Hearing Board did not provide any rationale or justification for the decision. Further, there was no indication that prior on-the-job injuries in 1981, 1982 and 1983, an off-the-job auto accident in 1983 or the appellant's medical condition after a stroke in 1985 were evaluated and considered in this case. Therefore, it was the judgment of the Board that the record was not fully and properly developed and evaluated by the Disability Retirement Hearing Board. Accordingly, the July 7, 1986 decision was vacated and the case was remanded to the Disability Retirement Hearing Board for further review and action consistent with this decision.

CASE NO. 86-384 Continued

The Board also noted that the July 7, 1986 decision was invalid as it was not permitted by law. Section 33-43(b) Non-Service Connected Disability Retirement of the Employees' Retirement System of Montgomery County requires an individual to have ten years of credited service before being eligible for such retirement and he must be unable to be productively employed in any other position for which qualified. The appellant was only with the County for four years and medical records indicated possible employment in other positions. Therefore, the appellant was not eligible for the award granted, and if benefits had been paid, the County was to be responsible for reimbursing the Retirement Fund for the total amount disbursed improperly.

The County was directed to take the actions necessary to assure compliance with the decision and the retirement law.

CASE NO. 86-397

A Police Officer appealed from the decision of the Disability Retirement Hearing Board on his application for a service connected disability retirement. The Disability Retirement Hearing Board concluded that he was disabled, but that the disability was not as the result of service connected injuries, and awarded him a non-service connected disability retirement.

In August 1984 appellant experienced chest pains while on duty; requested to be relieved of duty and placed on sick leave; was subsequently admitted to the Washington Hospital Center and underwent cardiac catheterization and coronary angiography to open the affected artery.

The Workmen's Compensation Commission of the State of Maryland ruled that the appellant's heart problem was a compensible injury.

On June 4, 1986 the Employee Medical Examiner, reported the Medical Review Committee conclusions as:

> "...1. The appellant should not be subjected to police-related emotional stresses and should, therefore, be considered as permanently disabled from performing the duties of a police officer.

2. This disability is not service connected. However, the job-related stress is a contributory factor in this patient's medical disability though it is not the sole factor.

3. The appellant may perform sedentary type duty."

The Department of Police did not have a permanent light duty position available to allow continued employment.

The issue before the Board was whether appellant's disability was service connected or non-service connected, as defined in Section 33-43 Disability Retirement of the Employees Retirement System of Montgomery County, Md..

In reviewing the law, the Board noted that an individual must be "unable to productively perform the duties of another available position for which qualified" in order to be eligible for a non-service connected disability retirement. Section 33-43 (b) does not restrict such employment to the same department or even within the County government, as does Section 33-43 (c). With this in mind, the Board noted that the medical evidence of record showed that the majority of doctors agreed that the appellant could be employed, but not in a high stress type position. Therefore, it was the judgment of the Board that the granting of a non-service connected disability retirement was in violation of Section 33-43 (b).

The remaining issue then was whether the disability met the requirements of Section 33-43 (c). There was no question that the requirements of Section 33-43 (c) (2) and (3) had been met, leaving only 33-43 (c) (1) as the unresolved question. Section 33-43 (c) (1) allows an individual to retire on a service connected disability if "the member is totally incapacitated for duty or partially and permanently incapacitated for duty as the natural and proximate result of an accident occuring, or an occupational disease incurred or condition aggravated while in actual performance of duty...". The Board found that several factors were involved in the medical condition that led to the heart condition and that that condition prevented the appellant from being employed as a police officer. The majority of the doctors again agreed that stress of the job was a contributing cause, but not the sole cause of the problem. Based on this evidence, it was the judgment of the Board that the appellant's condition was aggravated while in the actual performance of duty, and he was eligible to receive a service connected disability retirement.

CASE NO. 86-397 Continued

Accordingly, the Board directed the County to:

1. Rescind the improperly granted non-service connected disability retirement.

2. Retire the appellant on a service connected disability retirement, effective the date of the initial award, with benefits to be calculated under Section 33-43 (f) (1).

3. Reimburse the appellant the difference in benefits due as the result of the forgoing change.

4. Reimburse the appellant for reasonable attorney fees incurred.

CASE NO. 86-409

A Bus Operator appealed from the decision of the Disability Retirement Hearing Board on his application for a service connected disability retirement. The Disability Retirement Hearing Board concluded that the appellant was not disabled as the result of a service connected injury or illness and denied his request.

After review of the record in this case, the Merit System Protection Board was very perplexed and disturbed by the interminable amount of time taken to process the application for disability retirement and the apparent haphazard, lackadaisical handling of this case. It was quite evident that the Board's decision and remand of October 29, 1985 (Case No. 85-468) was not complied with properly or in a timely manner. Further, the Disability Retirement Hearing Board offered no explanation or justification for its conclusions and decision. Normally, because of such failure by the County, the Board would remand the case for further action, and provision of the information requested. However, given past history in this case, and the extenuating circumstances concerning the appellant's mental health, the Board found it to be in the best interest of all parties to retain jurisdiction and to issue a decision on the available facts to bring this case to a final conclusion.

Medical records showed that the appellant started to have medical problems in 1978 and the County was notified that he should not continue functioning as a Bus Operator. After sustaining an on-the-job injury, this same recommendation was made in 1979, and concurred in by the County's Employee Medical Examiner. However, the County was unable to find alternative placement and returned the appellant to the Bus Operator position in 1981. In April 1984, the appellant suffered a serious injury to his left hand, which was job related; had not been allowed to work as a Bus Operator since that time; and the County had not been successful in finding alternative placement for him. As the result of the 1984 injury, the appellant underwent hand surgery in June 1984, which also included some corrective surgery on one finger, related to a birth defect. His personal physicians confirmed a significant loss of grip strength in the left hand, which effectively prohibited him from operating a bus safely.

Contrary to the Board's 1985 order, the County did not believe it necessary to have the appellant re-examined by orthopaedic surgeons, and the only new medical evidence offered was from his personal physicians. One confirmed her finding of a job related disability and indicated that significant mental stress, aggravated by the long delays in this case, had resulted in total disability. The other confirmed the presence of mental stress related to the delays and recommended speedy resolution to minimize its impact.

After consideration of all of these facts and Section 33-43(c) of the Retirement Law, it was the judgment of the Board that the appellant was disabled from performing the duties of a Bus Operator, and that said disability was caused by aggravation of his condition while in the actual performance of his Bus Operator duties. Therefore, he met the requirements for a service connected disability retirement, and the Board overruled the decision of the Disability Retirement Hearing Board and ordered the County to:

1. Grant the appellant a service connected disability retirement, pursuant to Section 33-43(c) of the Employees' Retirement System for Montgomey County.

2. Make the effective date of the retirement the date he exhausted accrued sick leave, pursuant to Section 33-43(a).

3. Calculate retirement benefits, pursuant to Section 33-43(f)(1).

4. Reimburse the appellant for reasonable attorney's fees incurred in pursuing this appeal.

SUSPENSION

CASE NO. 86-06

A Correctional Officer appealed his suspension, but withdrew the appeal prior to any action by the Board.

CASE NO. 86-13

A Bus Operator appealed his suspension without pay for one day for alleged failure to follow instructions for proper operation of equipment, improper parking, leaving bus unattended with the engine running, failure to secure vehicle and equipment when parking or at layovers, violation of radio procedure, failure to follow prescribed route or schedule and knowingly making false statements or reports in the course of employment. The evidence and testimony showed that:

1. On September 4, the appellant was operating a bus that was overheating and the controller instructed him on how to try to cool the engine, and to continue on while they tried to find a replacement bus. The appellant decided to shut the bus down and did not leave on his scheduled route, thereby causing a run to be missed.

2. On September 9, the appellant left his bus parked with the back door open and the engine running, while he went to relieve himself and to get a cup of coffee. This stop was made in the middle of a scheduled run, causing him to be late. The appellant did not follow established radio procedures for leaving a vehicle unattended and did not secure the bus properly as required.

3. On September 10, the appellant was observed arriving five minutes early on a run, yet was late leaving as scheduled, causing him to be eight minutes late at the first check point.

4. On September 10, the appellant was scheduled to run a route but failed to pass a controller who was watching for him. In checking on the radio, it was learned that the appellant was at the end of his run, resulting in the conclusion that he went off route in violation of established procedures.

CASE NO. 86-13 Continued

5. On September 27, the appellant was scheduled to complete a run, park his bus and take a meal break. The appellant took the bus off route and drove to a restaurant to pick-up food, was observed by a controller and directed to return to the proper location.

As an experienced Bus Operator, the appellant was well aware of established operating procedures. However, based on his testimony, it was the judgment of the Board that he believed he had final authority in when and how to operate the bus and that he questioned the judgment of his supervisors. For whatever reason, the appellant appeared to be determined to do things his way.

Bus Operators provide a service to the public, are expected and required to adhere to schedules and must comply with the established operating procedures. The appellant clearly violated established procedures in each situation cited, with the September 9 violations being the most serious. As the result of these violations, disciplinary action was warranted, and due to the number and severity of the violations, a one day suspension was a reasonable action. Accordingly, the appeal was denied.

CASE NO. 86-21

A Bus Operator appealed a suspension, but withdrew the appeal prior to the scheduled hearing date.

CASE NO. 86-26

A Transit Controller appealed a suspension without pay for 80 hours for alleged sexual harassment.

The incident occurred when a male controller told a female controller that the seat of her slacks was dirty. The female stated she would brush it off herself and attempted to do so. The appellant, who was standing nearby, used his hand and brushed the seat of her slacks twice. The female was upset by his action, orally let him know that she was upset and the parties considered the matter settled. The incident occurred in the controller's office and testimony indicated that while others may have heard the oral exchange, nobody else observed the incident.

Management subsequently heard about the incident, called the parties in and requested a written report from the female controller. She informed them that she considered the matter closed and refused to file a written report, even though threatened with disciplinary action if she failed to do so. The County alleged at least two prior incidents of sexual harassment by appellant, but neither of the females involved filed a complaint with the supervisors and neither was called to testify.

The County's policy on sexual harassment states that: "...Sexual harassment interjects into the work environment conduct unrelated to job performance."

"The conduct prohibited may be verbal, visual, or physical in nature. It includes sexual advances, requests for sexual favors, or granting or witholding benefits (e.g., pay, promotion, time off) in response to sexual conduct. More subtle forms of harsssment, such as displaying sexually suggestive posters, cartoons, caricatures, and telling jokes of a sexual nature are included."

"Harassment is prohibited where submission to the unwelcome conduct is implicitly a term of an individual's employment, where submission is the basis for an employment decision, or where the conduct interferes with the individual's work performance or creates an intimidating, hostile, or offensive working environment. All such conduct is to be avoided. Conduct appearing to be welcome or tolerated in the eyes of one employee may offend another and may at some later date form the basis for a discrimination charge..."

After reviewing the testimony and documentation, it was quite clear that appellant had been charged with sexual harassment in violation of the County's policy. While the facts of the case were not in dispute, the intent and/or the impact of his action were.

The parties involved in the incident were peers and, at that time, were working in what they described as a "friendly" atmosphere. The County had been concerned about possible charges of sexual harassment because of the "friendly" physical contacts in the workplace and had taken steps to discourage and minimize physical contact between employees. This disciplinary action was taken in an effort to protect a female employee from what management believed was improper sexual harassment, even though the female did not consider it such and did not want to pursue the matter any further.

CASE NO. 86-26 continued

Sexual harassment is a very serious charge and the burden of proof rested with the County. It was the judgement of the Board that the County had not met its burden in this case. The action of the appellant may have been inappropriate and offensive to the female, but it clearly did not constitute sexual harassment as defined and described in the County's policy. There was no evidence to show that it was a term of employment, a basis for an employment decision, interfered with the individual's work performance or created an intimidating, hostile, or offensive working environment.

Accordingly, it was the decision of the Merit System Protection Board that the action was unsupported by the evidence and could not be allowed to stand. Therefore, the County was directed to:

1. Rescind the 80 hour suspension and remove all documentation related thereto from all personnel files.

2. Reimburse appellant for the 80 hours of lost pay due to the suspension.

3. Reimburse appellant for reasonable attorney fees incurred.

CASE NO. 86-369

A Code Enforcement Officer appealed a suspension without pay for five days for alleged failure to accept an assignment during regular duty hours and failure to obey lawful directions given by a supervisor.

On the day in question, the appellant was assigned to work from 8:00 A.M. to 4:30 P.M. At approximately 4:15 P.M. a humane complaint was called into the office. The appellant was contacted by radio at approximately 4:20 P.M. and was asked to respond to the call, which was in Germantown. The appellant indicated she was due to go off duty in ten minutes; was then in the Bethesda area responding to a call; preferred not being given the assignment so late in the day; and needed supervisory approval for overtime before she could accept the call.

The dispatcher contacted the supervisor by phone, received approval for the overtime and subsequently relayed that information to the appellant. Testimony and evidence did not show if the appellant received this information during radio contact at 4:30 P.M. when she left her vehicle to handle a call, or at 4:38 P.M. when she completed the call and officially went off-duty.

CASE NO. 86-369 continued

The appellant did not accept the assignment during the 4:38 P.M. radio contact because she was then off-duty and believed it should have been given to the officer "on-call" after 4:30 P.M. Shortly after arriving at her home, the appellant received a call from her supervisor, who directed her to respond to the call and reiterated the approval for overtime. The appellant declined to accept the overtime assignment.

The call was assigned to another officer, and, after several telephone conversations, it was determined that the case was not an emergency and a response was not necessary until regular duty hours the next day. The supervisor testified that the appellant could have responded by calling the complainant or by going to the site and that she usually tried to accomodate employees if they had a personal conflict that made overtime a problem. The supervisor was unaware of a conflict in this case. The appellant stated that she believed she was required to go "on site" when ordered to respond to the humane complaint.

After consideration of the testimony and review of the evidence, it was the judgment of the Board that the charges had been sustained. The appellant did not accept the assignment and she failed to obey the directive of her supervisor, which, in the Boards' judgment, was a reasonable request at the time in question. The subsequent determination that the complaint was not of an emergency nature did not negate the fact that the appellant refused to obey a reasonable order of a supervisor in the usual course of employment. The incident had started prior to the end of the appellant's shift and the fact that the normal shift had ended did not negate her responsibility in this case. Accordingly, the Board sustained the suspension action and the appeal was denied.

CASE NO. 86-400

A Firefighter appealed his suspension without pay for one-day for alleged insubordination by violating a direct order of a superior.

The appellant was transferred from one station to another, and immediately upon being notified of the transfer, filed a request for annual leave for all work days during the coming 30 day period. The request was denied by the Fire Department. The appellant then requested all Fridays and Mondays off during that same 30 day period. This request was also denied.

On the day in question, the appellant approached the Lieutenant and requested four hours leave for that afternoon. The Lieutenant denied the request and informed the appellant he would reconsider only if a qualified standby was available. At approximately 4:30 p. m. , an emergency call came in and two pieces of equipment were to respond. The appellant was the driver assigned to the one vehicle. The Lieutenant was on the first vehicle that left the station, while the appellant was waiting for the air pressure to build up so he could move his vehicle. At this point a volunteer ran up and asked if he could drive the vehicle. The appellant asked him if he would agree to be a standby for him, and when he agreed, appellant asked the Technician riding with him if he could then go on leave. The Technician said okay, the switch was made and appellant signed himself out and left the station. He was scheduled to be off-duty at 5 p.m., and testified the reason he wanted to leave was to beat the traffic. The Lieutenant was never formally informed of the change by the Technician and did not approve use of the annual leave.

The issues before the Board were:

1. Can a leave restriction be lawfully imposed?

2. Did the appellant knowingly and willfully disobey an order of his superior?

Section 9.7 Scheduling of Use of Annual Leave of the Personnel Regulations states in part "Accrued annual leave may be used, if approved by an employee's supervisor. . ." The Fire Department had established procedures for approval of use of annual leave to assure adequate manning levels. It was the judgment of the Board that management had, and needs, certain latitude and prerogative in approving leave and that decisions related thereto may not be arbitrary or capricious. The Board realized that work load or manning may require certain restrictions on leave usage, and in specific circumstances, it may be necessary to limit use of leave for an individual employee. However, it must be understood that use of leave may not be denied or restricted in the case of a justifiable emergency.

In this specific case, the appellant had been transferred in an effort to improve work performance. In order to assure quick and proper adaptation to the new work site,schedule and supervisors, it was decided to limit the appellant's use of annual leave for 30 days. The Board found that the stated reasons for the action in this case, were not unreasonable and there was no evidence that the appellant was adversely affected

or needed leave for a justifiable emergency. Therefore, the Board found the 30 day restriction was a proper and lawful action by the supervisor, given that allowances were subsequently made for justifiable emergencies.

After reviewing the extensive documentation and observing the demeanor and hearing the oral testimony of the witnesses, it was the judgment of the Board that the appellant was fully knowledgeable of the leave restrictions imposed; that he attempted to manipulate and use his supervisors, one against the other; and he did not have proper approval for use of annual leave on the day in question. While the appellant insisted his immediate supervisor was the Technician on his truck at the time of the incident, the Board disagreed. The appellant's supervisor at that time was the Lieutenant on the first truck to leave the station in response to an emergency, and the fact that he exited the station seconds ahead of the appellant's vehicle did not shift responsibility for approval of leave to the Technician. The appellant's action of leaving the vehicle in the middle of an emergency response without approval of the Lieutenant and placing himself on annual leave was, in the Board's judgment, a willful violation of the Captain's order, and therefore, an insubordinate act subject to disciplinary action.

In consideration of the appellant's work record, the Board found the one-day suspension was appropriate disciplinary action. Accordingly, the suspension was sustained and the appeal was denied.

CASE NO. 86-406

An Office Supervisor appealed a one-day suspension for alleged improper conduct. During the preliminary phase of the hearing, Counsel for the appellant moved the charges be dismissed and his client be reimbursed all lost wages and attorney's fees because the County allegedly failed to take the action promptly, as required by Section 21.1 Policy of the Personnel Regulations.

The specific incident that was the basis for the suspension action occurred on February 19, 1986 and a comprehensive, complete investigative report was prepared by the supervisor on February 25, 1986, with recommendations for immediate corrective action. Based on the fact that the incident resulted from a lengthy period of friction between the individuals involved, the Department delayed action to allow time for a further independent review of the underlying cause. The Board, while recognizing the good intentions of management and supportive of its desire to alleviate and correct a long-standing problem, agreed with the appellant's Counsel that the incident of February 19, 1986 and the long-standing feud were separate issues and should have been addressed independently. In looking at the underlying cause, management lost sight of the need for immediate action on a potentially volatile situation in the work place, which was fully known and stated in the February 25, 1986 report.

In consideration of due process requirements, and after applying the test of common sense and logic to the facts in the case, it was the judgment of the Board that the action was not taken promptly, as required by Section 21.1. The Department was in a position of being able to prepare and issue a Statement of Charges upon receipt of the February 25, 1986 report, and should have done so within ten to fourteen days after receipt thereof. It was the Board's judgment that failure to take any action until more than sixty days after the incident denied the appellant, and the County, prompt resolution of the matter. Accordingly, the motion to dismiss was granted and the County was directed to:

1. Rescind the suspension action and remove all documentation related therto from the appellant's personnel files.

2. Reimburse the appellant for all lost wages incurred as the result of the suspension.

3. Reimburse the appellant for reasonable attorney's fees incurred.

CASE NO. 85-399

This case, involving a Liquor Store Clerk, was remanded to the Merit System Protection Board, by the Circuit Court, for review and consideration of the evidence and testimony on the issue of "whether or not the purchaser of the wine appeared to the appellant to be under the age of twenty-five, requiring identification".

The County submitted two photographs of the individual who purchased the wine, which were taken at the Police Station immediately preceding the purchase. The Police Officer involved testified as to the appearance of the young woman and the lighting and store surroundings at the time of the purchase. The appellant testified that she believed the young woman was the same age as she (28 at that time), and therefore, did not seek identification. It was also noted that the County did not provide any training or guidance for employees in determining the age of customers.

After careful study of the photographs, it was the judgment of the Board that there was no clear and convincing evidence of the youthfulness of the purchaser, which would show that the appellant was guilty of knowingly and willfully violating the policy through the use of poor judgment. The Board could find no objective reason to believe or conclude that the young woman appeared to be under age 25, as contended by the County. Accordingly, the decision of May 22, 1985 was affirmed, and the appellant was to be reimbursed all monies due, plus interest at the rate of 7.5% per annum from May 22, 1985 to date payment was made, provided payment was made by Friday, January 16, 1987. If payment was made after January 16, 1987, interest, starting that date, was to be at the rate of 10% per annum, until date payment was made.

CASE NO. 86-11

A Firefighter appealed from the decision of the Personnel Director on his grievance concerning a Within-Grade Reduction. The appellant was disciplined for tardiness and there was no disagreement as to the facts on that matter. The issues raised concerned the procedures followed and the validity of the departmental policy on attendance.

CASE NO. 86-11 Continued

The appellant contended that adequate due process had not been given because a hearing was never granted during processing of the grievance and copies of certain policies were not provided. The record showed that the appellant was given an opportunity to respond to the charges in writing; met with the Fire Chief to discuss the charges; submitted written argument at all levels of the grievance process; and received a copy of all policies and procedures and responded thereon during the Board's review process. A review of the various procedures did not reveal any requirement for a hearing on matters of this nature. Therefore, it was the judgment of the Board that the appellant received appropriate due process and the procedures were properly followed.

The appellant alleged that the departmental policy to utilize a twenty-four month period, rather than a twelve month period, for use in determining severity of the action was in violation of Section 23 of the Personnel Regulations.

Section 23(a) Work Schedules of the Personnel Regulations stated in part, ". . .An employee who fails to report for duty at the time prescribed or who is late four times within any twelve month period shall be subject to disciplinary action . . ." In the Board's judgment, this provision established a minimum standard and mandated an action be taken after four instances within twelve months, but it did not preclude or discourage a department from taking action prior to four incidents of tardiness. In this case, the department had an established policy, the appellant was aware of the policy, disciplinary actions were progressive in nature, and established procedures were followed. Accordingly, the Board found the policy was valid, the action taken was reasonable and appropriate, and proper procedures were followed. Therefore, the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 86-15,16 & 17

Three Department of Liquor Control employees appealed from their Within-Grade Reductions for allegedly drinking alcoholic beverages on the job and making false statements related thereto.

After careful review of the documentation submitted by the County, the Board found the charges to be based on supposition, assumption and innuendo. The appellants were simply observed standing together near where empty beer cans were found. No one saw them drinking, no evidence or witnesses were produced to show drinking occurred on any other date, factual data in

CASE NO. 86-15,16 & 17 Continued

documents was inconsistent, and there was no evidence of making false statements. Absent such evidence, it was the judgment of the Board that the charges be overturned. The Department of Liquor Control was directed to:

1. Rescind the Within-Grade Reductions taken against the appellants.

2. Reimburse the appellants all salary monies lost as the result of these actions.

3. Remove all documentation related to these actions from all County personnel files.

4. Reimburse the appellants for reasonable attorney's fees incurred in appealing these actions.

CASE NO. 86-361

A Fire Lieutenant appealed from a 10% Within-Grade Reduction imposed by a Fire Department for alleged:

1. Violation of direct orders and refusing to recognize legitimate and lawful authority, which disrupted the orderly work environment and created an unreasonable health and safety risk to citizens and firefighters under his command.

2. Knowingly and willfully failing to prepare his crew to enter a burning building.

3. Refusal to obey fire ground orders of Senior officers.

4. Failure to obey removal from duty.

5. Unauthorized use of fire department apparatus.

6. Negligence or carelessness in the performance of duties by refusing to enter the burning building.

The written record showed that:

1. The appellant was the Training Officer for the Fire Department and had taken care of all preliminary preparations for the house burning.

2. The Fire Chief and Deputy Fire Chief took complete charge of the training session and left the appellant at the Station, to be called later.

3. The appellant was subsequently called and instructed to bring all remaining participants to the burn site. Upon arrival, they were instructed to wait away from the house until the ongoing burn was completed.

4. The Fire Chief subsequently asked the appellant if he would take a specific firefighter into the house for a drill. He said he did not want to. The Fire Chief then ordered him to prepare his crew for the burn drill, which was done. When later ordered to take the crew into the house, the appellant refused, was relieved of duty, and taken back to the Station.

5. The appellant indicated he was very upset at being excluded from his normal training leadership role and believed the methods being used were unsafe. As a result of these factors, he decided not to participate in the drill, but did not tell anybody of his decision or inform them of his concerns for safety. He simply refused to enter the burning house and said he would explain later.

6. After return to the Station, the appellant continued working and responded to an emergency call later that afternoon.

The Fire and Rescue Service is a para-military type organization that relies heavily on discipline and obeying orders in times of emergencies. With this in mind, and after reviewing the charges and evidence, it was the judgment of the Board that:

1. The appellant did fail to obey the orders of his superiors at the burn site, with respect to taking the crew into the house. However, there was no evidence to show that this created an unreasonable health and safety risk to citizens and other firefighters. Therefore, the charge of a health or safety risk could not be sustained.

2. The appellant prepared his crew for the burn, but refused to lead them into the fire. Therefore, the charge that he knowingly and willfully failed to perpare his crew to enter the house could not be sustained.

3. The appellant, upon failure to obey orders, was relieved of duty and returned to the Station. There is reasonable doubt as to the specific nature of the order and whether the appellant understood the intent of that order. Based on this, his continuance on duty and responding to an emergency call could not be construed as further failure to obey orders.

4. The charge that he used fire department apparatus without authorization was totally unsupported as there was nothing in the record related to such an action.

5. While the appellant refused to follow instructions, this Board does not believe such action constituted "negligence or carelessness in the performance of duties as charged."

This was undoubtedly an unfortunate incident that could, and should have been avoided by all parties. It was quite clear that communications were terse and too limited under the circumstances and that personalities and egos affected the interaction of the parties. This was very unfortunate, as officers at all levels must, and are expected to, set the example for subordinates, particularly in very stressful situations. Despite the fact that both parties contributed to the problem, the appellant did refuse to obey a lawful order of a Senior Officer on the fire ground, and by so doing, was subject to approriate disciplinary action.

The determination of appropriate disciplinary action is a judgment call by management, within the limitations of the Personnel Regulations. The fact that the appellant is a line officer added weight to the severity of the punishment, and it was the judgment of the Board that a 10% Within-Grade Reduction for a period of one year was not unreasonable or arbitrary. Accordingly, the action was sutained and the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 86-362

A Fire Lieutenant appealed from the decision to reduce his salary 10% for a period of sixty work days for alleged failure to obey lawful directives of his supervisors and failure to perform his duties in a competent and acceptable manner.

CASE NO. 86-362 Continued

The record showed that the appellant was given both oral and written directions, guidance and counseling on numerous occasions. Subsequent to this, the appellant clearly did not submit his position description timely, as directed; did not pursue the uniform order timely, as directed; and did not comply with instructions related to day to day operation of the Department.

An officer or supervisor has the duty and responsibility to comply with directives of superior officers and must set an example for subordinates. Based on the record, the Board found that the appellant failed to meet that responsibility in an acceptable manner; the action was taken in accordance with established procedures; the appellant received adequate and proper due process; and the disciplinary action taken was reasonable and justified. Accordingly, it was the decision of the Board that the action be affirmed and the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 86-367 and 368

Two employees of the Department of Liquor Control appealed from a 5% Within-Grade Reduction for 20 work days for both appellants and a Delay of Service Increment for one.

The issue before the Board was the interpretation of the facts and the propriety of the action taken thereon. There was no question that the case was based largely on circumstantial evidence and that the Fact-Finder and Chief Administrative Officer reached entirely opposite conclusions, after evaluation of that evidence. After due deliberation, it was the judgment of the majority of the Board that a reasoning person could have reached the same conclusion as the Chief Administrative Officer, and therefore, there was insufficient basis or justification to overturn said decision. Accordingly, the decision was sustained and the appeals of Within-Grade Reduction were denied.

A service increment is earned through satisfactory work performance, and the appellant's increment was delayed for two months pending resolution of the December 17 and 18 incidents, as they impacted on his overall work performance rating for the period of evaluation. Based on the sustaining of the Within-Grade Reduction, it was the judgment of the Board that the Delay of Service Increment was a proper action, and by majority vote it was sustained.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 86-407

A Firefighter appealed a 5% Within-Grade Reduction for six months. The issues were whether the action was taken in a timely manner, was an employee required to deliver correspondence to his superiors, and was the action progressive in nature. The record showed that:

1. On May 31, 1986, the appellant suffered a severe headache, was subsequently off duty for an extended period, and received ongoing treatment.

2. On June 13, 1986, he was released for duty on Saturday, June 21, 1986.

3. On June 23, 1986, the appellant reported to the County's Employee Medical Section for a return to duty examination. He was given a release form stating he was able to return to light duty status. The bottom of the form clearly stated, "Note: PLEASE RETURN THIS FORM TO YOUR SUPERVISOR". The appellant stated that he never bothered to read the form and forgot about it.

4. In subsequent weeks, the appellant continued to report to his supervisor that he was unable to return to work even though the supervisor indicated there was plenty of light duty work available. After further questioning, on July 18, 1986, the appellant gave the June 23, 1986 release form to his supervisor.

5. On August 13, 1986, the supervisors presented the information on this situation to the Board of Directors, at its monthly meeting. The Board of Directors requested further investigation and information and directed it be available at its next meeting, on September 10, 1986.

6. After the Board of Directors reviewed the information on September 10, a Statement of Charges was prepared and given to the appellant on September 16. The appellant submitted a written response on September 19 and the Board of Directors held a hearing, which he attended and participated in, on September 24, 1986.

7. Subsequently, the Board of Director decided to reduce the appellant's salary 5% for a period of six months and directed the necessary paper work be completed. After completion and signature by all necessary parties, the Notice of Disciplinary action was given to him on October 22, 1986.

8. Section 21 Disciplinary Actions, subsection 21.2 Policy of the Personnel Regulations for Fire and Rescue Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County, Maryland states:

> "Policy. A disciplinary action against an employee shall be initiated promptly when it is evident that such action is necessary to maintain an orderly and productive work environment. Except in cases of theft or serious violations of policy or procedure that creates a health or safety risk, disciplinary actions must be progressive in severity. The severity of the action shall be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employees work record and other relevant factors."

9. The appellant continued to perform light duty type tasks related to his private painting business during the entire period of absence from duty.

After due consideration, it was the judgment of the Board that:

1. There was no reasonable or legitimate excuse for not reading the form in question.

2. The absence of a written policy did not negate an employee's responsibility to keep his superiors advised of his status, and the request to have the employee deliver the release form was reasonable and proper.

3. The time taken to determine if disciplinary action would be taken was not unduly long, under the circumstances, and assured proper review and adequate due process.

4. Considering the appellant's length of service and experience with the process, his action was of such severity that a Within-Grade Reduction was an appropriate first-step in the progressive chain of disciplinary actions.

Accordingly, the appeal was denied.