Merit System Protection Board 1988 Annual Report

Montgomery County Government
Merit System Protection Board
51 Monroe Street, Suite 1707
Rockville, Maryland
279-1693

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1988

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 1988 were:

Sandra M. King-Shaw - Chairwoman
(Reappointed 1/86)
Fernando Bren - Vice Chairman
(Reappointed 1/87)
Paul Corcoran - Associate Member
(Appointed 1/88)

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 1-12, Merit System Protection Board of the Montgomery County Personnel Regulations, 1986.

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 Board and have adequate notice and an opportunity to participate in any such review initiated under this Section."

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

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

Section 1-12, (b) Audits, Investigations and Inquiries, of the Montgomery County Personnel Regulations, 1986 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."

APPEALS PROCESS

The Personnel Regulations provide an opportunity for Merit System employees and applicants to file appeals with the Merit System Protection Board. Once the notice of appeal has been filed, the appellant 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. 88-2

Six Recreation Specialists appealed from the decision of the Personnel Director that their grievance would not be accepted for processing because it involved an issue that was not grievable. The issue raised by the appellants involved an alleged inequitable application of policy concerning promotion to a budget level class. The County insisted the issue involved the classification of positions, which was not a grievable issue.

The issue was clearly the application of the promotional policy and did not involve the grade level or class assignment of the positions. Therefore, it was the judgment of the Board that the issue was grievable. It was the further judgment of the Board that the proper level for filing the grievance was at this level since it was the decision of the Chief Administrative Officer that was being questioned. The Board had consistently held that a grievance should be filed at the level above the one being complained about, and therefore, proceeded to a review and decision on the merits of the appeal, rather than remanding it for further review by the Chief Administrative Officer.

The record showed that:

1. On July 10, 1978, a former Personnel Director issued a policy guideline for budget level classes, which stated:

> ". . .1. Definition of Budget Level Class. The budget level class normally is associated with the full performance/journeyman level positions within an occupational series. The budget level class is the highest level class to which an employee may be promoted on a non-competitive basis. . .
>
> 3. Promotion to a Budget Level Class. The promotion of an employee to the budget level is not automatic nor is it based on proficiency of the incumbent in the lower level class. The budget-level class specification identifies higher level duties and responsibilities and should not be construed as either a guarantee of promotion by the employee or a requirement of the Department/Agency Head to promote an employee to the budget-level class. Management retains the prerogative and responsibility to determine when an employee can perform higher level duties and responsibilities and to assign those higher level duties and responsibilities concurrent with promotion. "

2. On February 17, 1981, a former Personnel Director issued a policy memorandum that stated. ". . .An employee may be promoted within his/her own position when the employee meets the requirements for promotion. . ."

3. On January 31, 1983, the former Director, Department of Recreation issued a memorandum stating: "Please be advised that I am reducing the eighteen month waiting period for Recreation Specialist I (Grade 16) to Recreation Specialist II (Grade 18) to twelve months. Effective immediately, all Recreation Specialist I's who have completed a year of satisfactory service will be promoted to Recreation Specialist II. This change applies to Recreation Specialist I's who are currently on board."

4. On April 29, 1986, the Personnel Director notified the appellants that ". . .the Chief Administrative Officer has determined that your positions should be reclassified from Recreation Outreach Worker II, Grade 14 to Recreation Specialist I, Grade 16. . ." This action was effective May 5, 1986, with retroactive pay to July 14, 1985.

5. The Personnel Office and the Chief Administrative Officer, in various memoranda, decided to treat the appellants' positions differently than other Recreation Specialist I's and adamently denied the request for equal treatment.

6. The class specification for Recreation Specialist I stated that it was "entry level professional recreational work", while the Recreation Specialist II class specification stated that it was "full performance level professional recreational work". The major differences between the two class specifications was one year of experience and direction of some part-time and volunteer workers at the II level.

7. The County's Classification and Compensation Plans Book, issued in August 1987, showed three levels of Recreation Specialist - I, II and Senior, at Grades 16, 18 and 20 respectively. It also showed that the Recreation Specialist II class was the designated budget level class.

CASE NO. 88-2 CONTINUED

The County's Merit System Law (Section 33-5(b)) requires all employees be treated fairly in all aspects of personnel administration. The question in this case was whether incumbents in the same class may be treated differently. The County argued that the policy guidelines issued in 1978 and 1981 allowed such treatment. The Board noted that the policy relied on by the County also gave management "the prerogative and responsibility to determine when an employee can perform higher level duties and responsibilities and to assign those higher level duties and responsibilities with promotion". The prior Department Head exercised this prerogative in his memorandum of January 31, 1983 and there was no evidence that that policy was ever rescinded. Further, the general practice within the County was to move individuals up to the authorized budget level class as soon as eligible.

It was the judgment of the Board that the appellants were treated unfairly and inequitably as the result of the improper interpretation and application of established policy guidelines by both the Personnel Office and the Chief Administrative Officer. Therefore, the Board found in favor of the appellants and directed the County to promote them to the full performance level of Recreation Specialist II, Grade 18, retroactive to the beginning of the first pay period following May 5, 1987, and reimburse them for any and all additional salary monies due as the result of this promotion. The County was also directed to reimburse the appellants for reasonable attorney's fees incurred in pursuing this grievance.

CASE NO. 88-14

A group of Planners appealed from the decision of the Personnel Director that they did not have the right to an Administrative Review of the issues raised concerning the Planning Classification Study. The issues raised were:

1. The appropriateness of class titles.

2. The establishment of a lower budget level that limited non-competitive promotions.

3. The clarity of duties between Program Assistant I and Planning Specialist I classes.

4. The inclusion of supervisory responsibilities for the Senior Planning Specialist class.

CASE NO. 88-14 CONTINUED

Section 7-5 Administrative Review of the Personnel Regulations states:

> "Prior to rendering a final classification decision on their position all incumbents and their supervisors must be given an opportunity to provide written comments.
>
> An employee whose position is downgraded or remains unchanged as a result of a reclassification, or a group of employees whose class has been reallocated to a lower grade may file a request for a review with the Personnel Director. . ."

The appellants in this case were assigned to the classes of Planning Manager, Grade 27; Senior Planning Specialist, Grade 25; and Planning Specialist II, Grade 21. None of the appellants was downgraded or otherwise directly affected in an adverse manner by the classification decisions on the Planning Series. Further, the record showed the appellants were provided proper opportunity for input prior to the final decision being issued.

After due consideration, it was the judgment of the Board that the issues raised involved areas of management prerogative and none of the appellants sustained a direct adverse impact as the result of the classification decisions in dispute. Therefore, the Board found the decision of the Personnel Director to be correct and the appellants did not have the right of Administrative Review under these circumstances. Accordingly, the appeal was denied.

CASE NO. 88-56

An employee filed an appeal alleging violation of the procedure for classifying positions.

Under Section 7-6 Appeal of Decision on Classification of the Personnel Regulations, the only issue before the Board was whether established procedures had been violated. Relevant provisions of established procedures were as follows:

1. Personnel Regulations

Section 7-4 Position Classification

> "(a) General. The Chief Administrative Officer must establish written procedures for the review of the classification of a position. An incumbent, or a superior, may request a review of the classification assignment of a particular position."

"(b) Reclassification. The Personnel Director may reclassify a position when a review of the position description or a desk audit indicates a significant change in:

(1) Type of work performed;
(2) Difficulty and complexity of duties;
(3) Level of responsibility; or
(4) Knowledges, skills and abilities required."

Section 7-5 Administrative Review

"Prior to rendering a final classification decision on their position, all incumbents and their supervisors must be given an opportunity to provide written comments.

An employee whose position is downgraded or remains unchanged as a result of a reclassification. . . may file a request for a review with the Personnel Director. The request must be filed within 10 days of receipt of notice of the proposed action. The Personnel Director will arrange within 30 days for a professionally qualified classifier to conduct a fact-finding review. At the conclusion of the review the fact-finder will file a written report of findings and recommendations with the Chief Administrative Officer. The decision of the Chief Administrative Officer is final."

2. Administrative Procedure 4-2 Position Creation and Classification

"2.16 Job Evaluation System. A Quantitative Evaluation System (QES) is used for position classification and compensation purposes. All classes and/or positions within the County's merit system shall be classified and allocated to pay grades on the basis of quantifiable job evaluation factors."

"3.0 Policy. The policy of the Montgomery County Government is to classify positions on the basis of assigned duties and responsibilities, minimum qualifications, and knowledge, skills and abilities required to assure equal pay for work of substantially equal value performed under essentially similar conditions. In determining grade level assignments for positions or classes, particular care shall be taken to assure clear and concise distinctions between levels of required knowledges, skills, physical and mental effort, and responsibilities in the work"

"performed. The prevailing salary rates for similar positions in both the public and private sectors shall be considered to assure comparability and competitiveness in the labor market. Each occupational class in the Classification Plan shall be reviewed at least once every five years to insure proper classification and pay grade assignment."

"10.1 Personnel Office. Chief, Division of Classification and Compensation evaluates documentation submitted by Department/Agency Head or employee(s) and provides position classification recommendation for Personnel Director review and decision. Personnel Director determines position's proper classification assignment and notifies requesting Department/Agency Head or employee."

"12.0 Employee(s). If the incumbent of a position does not concur with the Personnel Director's classification decision concerning that employee's position, the employee may appeal the decision for review and consideration by a classification and compensation consultant who is not a County Government employee. . .

A memorandum is prepared by the affected employee or a representative of the employee stating in detail the specific reasons why the employee disagrees with the Personnel Director's decision. The memorandum must be signed by the affected employee and forwarded directly to the Personnel Director within seven (7) County Government working days from the date of employee's receipt of the Personnel Director's classification decision.

A copy of the employee's memorandum is to be provided to the employee's Department/Agency Head and immediate supervisor."

"12.1 Department/Agency Head and Immediate Supervisor. After reviewing employee's memorandum, at their discretion, provide comments concerning the employee's appeal to the Personnel Director, with copy of same to employee."

"12.2 Personnel Office. Submits employee's memorandum, Department/Agency Head and/or immediate supervisor's comments, position classification study report, and supporting documents to the classification/compensation consultant within seven (7) County Government working days from receipt of employee's appeal."

"12.3 Classification/Compensation Consultant. Conducts review to evaluate Personnel Director's classification decision. Consultant provides written report of findings and recommendations to Chief Administrative Officer, via Personnel Director, within twenty-five (25) County Government working days from receipt of documents referenced in Section 12.2 of this Procedure. A copy of consultant's report is provided to employee upon its delivery to the Personnel Director."

"12.4 Chief Administrative Officer. Reviews consultant's report and renders decision on appeal within ten (10) County Government working days from receipt of consultant's report and notifies Personnel Office. Decision of the CAO regarding position classification appeals is final."

"12.5 Personnel Office. Within five (5) County Government working days from receipt of CAO decision, notifies employee in writing of CAO's decision. Prepares and distributes Classification Action Form as appropriate."

The record showed that the Personnel Office did not use Q.E.S. to evaluate the position in question. Further, there was no evidence to show any review of other Executive Management positions to determine the relationship, if any, to the duties and responsibilities assigned to the appellant's position. Additionally, the Fact-Finder did not review or consider examples of the appellant's work product and did not talk to the Division Chief who supervised the appellant. Therefore, it was the judgment of the Board that the classification review was incomplete and the failure to use Q.E.S. constituted a violation of established procedures.

Accordingly, the case was remanded to the Personnel Office for proper completion of the study and for a Q.E.S. review.

The appellant had requested reimbursement for attorney's fees and the expense of an outside consulting firm that conducted an evaluation for him. Under Section 33-14(c)(9) of the Montgomery County Code, the Board had authority to award attorney's fees only. Therefore, the appellant's request for reimbursement of such reasonable attorney's fees was granted and the request for reimbursement of other expenses was denied.

APPEALED TO CIRCUIT COURT BY THE COUNTY.

CASE NO. 88-60

An employee of a Fire Department appealed from the decision of the Chief Administrative Officer on her request for a classification review.

Under Section 7-6 Appeal of Decision on Classification of the Personnel Regulations, the only issue before the Board was whether established procedures had been violated. Relevant provisions of established procedures were as follows:

1. Personnel Regulations

Section 7-4 Position Classification

"(a) General. The Chief Administrative Officer must establish written procedures for the review of the classification of a position. An incumbent, or a superior, may request a review of the classification assignment of a particular position."

"(b) Reclassification. The Personnel Director may reclassify a position when a review of the position description or a desk audit indicates a significant change in:

(1) Type of work performed;
(2) Difficulty and complexity of duties;
(3) Level of responsibility; or
(4) Knowledges, skills and abilities required."

Section 7-5 Administrative Review

"Prior to rendering a final classification decision on their position, all incumbents and their supervisors must be given an opportunity to provide written comments.

An employee whose position is downgraded or remains unchanged as a result of a reclassification. . . may file a request for a review with the Personnel Director. The request must be filed within 10 days of receipt of notice of the proposed action. The Personnel Director will arrange within 30 days for a professionally qualified classifier to conduct a fact-finding review. At the conclusion of the review the fact-finder will file a written report of findings and recommendations with the Chief Administrative Officer. The decision of the Chief Administrative Officer is final."

2. Administrative Procedure 4-2 Position Creation and Classification.

" 2.16 Job Evaluation System. A Quantitative Evaluation System (QES) is used for position classification and compensation purposes. All classes and/or positions within the County's merit system shall be classified and allocated to pay grades on the basis of quantifiable job evaluation factors."

"3.0 Policy. The policy of the Montgomery County Government is to classify positions on the basis of assigned duties and responsibilities, minimum qualifications, and knowledge, skills and abilities required to assure equal pay for work of substantially equal value performed under essentially similar conditions. In determining grade level assignments for positions or classes, particular care shall be taken to assure clear and concise distinctions between levels of required knowledges, skills, physical and mental effort, and responsibilities in the work performed. The prevailing salary rates for similar positions in both the public and private sectors shall be considered to assure comparability and competitiveness in the labor market. Each occupational class in the Classification Plan shall be reviewed at least once every five years to insure proper classification and pay grade assignment."

"10.1 Personnel Office. Chief, Division of Classification and Compensation evaluates documentation submitted by Department/Agency Head or employee(s) and provides position classification recommendation for Personnel Director review and decision. Personnel Director determines position's proper classification assignment and notifies requesting Department/Agency Head or employee."

"12.0 Employee(s). If the incumbent of a position does not concur with the Personnel Director's classification decision concerning that employee's position, the employee may appeal the decision for review and consideration by a classification and compensation consultant who is not a County Government employee. . ."

"A memorandum is prepared by the affected employee or a representative of the employee stating in detail the specific reasons why the employee disagrees with the Personnel Director's decision. The memorandum must be signed by the affected employee and forwarded directly to the Personnel Director within seven (7) County Government working days from the date of employee's receipt of the Personnel Director's classification decision.

A copy of the employee's memorandum is to be provided to the employee's Department/Agency Head and immediate supervisor."

"12.1 Department/Agency Head and Immediate Supervisor. After reviewing employee's memorandum, at their discretion, provide comments concerning the employee's appeal to the Personnel Director, with copy of same to employee."

"12.2 Personnel Office. Submits employee's memorandum, Department/Agency Head and/or immediate supervisor's comments, position classification study report, and supporting documents to the classification/compensation consultant within seven (7) County Government working days from receipt of employee's appeal."

"12.3 Classification/Compensation Consultant. Conducts review to evaluate Personnel Director's classification decision. Consultant provides written report of findings and recommendations to Chief Administrative Officer, via Personnel Director, within twenty-five (25) County Government working days from receipt of documents referenced in Section 12.2 of this Procedure. A copy of consultant's report is provided to employee upon its delivery to the Personnel Director."

"12.4 Chief Administrative Officer. Reviews consultant's report and renders decision on appeal within ten (10) County Government working days from receipt of consultant's report and notifies Personnel Office. Decision of the CAO regarding position classification appeals is final."

"12.5 Personnel Office. Within five (5) County Government working days from receipt of CAO decision, notifies employee in writing of CAO's decision. Prepares and distributes Classification Action Form as appropriate."

The record showed that:

1. The appellant was employed as an Officer Services Manager, Grade 13, by the Fire Department.

2. The Fire Department requested a classification review of the position in 1983 and again in 1985.

3. After review by two different Personnel Specialists and the Chief, Division of Classification and Compensation, on May 16, 1988, the appellant was notified that her position was found to be properly classified. The appellant and the Fire Department were given until June 2 to submit a response if they disagreed.

4. A response was submitted on May 27, 1988. After review, the Chief, Division of Classification and Compensation affirmed his earlier decision.

5. This decision was affirmed by the Personnel Director on July 19, 1988.

6. The appellant filed a request for an administrative review on August 12, 1988.

7. On September 9, 1988, Counsel for the appellant requested a copy of the County's QES report on this position.

8. The County informed Counsel that a QES study had not been done as QES was only used to evaluate classes, not individual positions.

9. The appellant and the Fire Department had an opportunity for input during the administrative review process.

10. On October 26, 1988, the consultant hired for the administrative review, submitted his report to the Chief Administrative Officer and recommended no change in classification assignment.

11. On November 14, 1988, Counsel for the appellant submitted a position paper to the Chief Administrative Officer.

CASE NO. 88-60 CONTINUED

12. On November 19, 1988, the Chief Administrative Officer approved the recommendation of the consultant and the Personnel Office, which was to deny upgrading.

13. On November 29, 1988, the Personnel Office notified the appellant of this decision.

Section 7-3(e) of the Personnel Regulations required the Chief Administrative Officer establish a quantitative job evaluation system for the County, which had been done. Under Section 2-16 of Administrative Procedure 4-2, the Chief Administrative Officer had set up the requirement that, ". . .all classes and/or positions. . ." must be classified on the basis of quantitative job evaluation factors. The practice of the Personnel Office was to use Q.E.S. only on class studies and not on individual positions.

It was the judgment of this Board that the failure to evaluate the position by using Q.E.S. constituted a violation of Section 2-16 of Administrative Procedure 4-2. Accordingly, the appellant's appeal had merit. The case was remanded to the Personnel Office for proper evaluation and action, as required by the established procedures. The appellant was also awarded reimbursement for reasonable attorney's fees incurred.

CASE NO. 88-61

A Fire Lieutenant appealed from the decision of the Personnel Office that his grievance concerning the classification of his position would not be accepted for processing, as it was not a grievable matter. The record showed that:

1. Appellant filed a grievance on November 14, 1988, alleging violations of Section 7-4(c) of the Personnel Regulations and the class specification; questioning the testing requirement for promotion; and alleging false promises.

2. Appellant was assigned to the rank of Fire Lieutenant when employed by the private corporation, and given a temporary promotion to the rank of Fire Captain when he elected to become a County employee on January 15, 1988.

3. When the County took over the paid Fire Services in January 1988, it was decided to create additional overage positions and grant temporary promotions, pending completion of a competitive promotional process.

4. The County had a long established practice of utilizing competitive promotions for all vacancies in the uniform public safety classes.

5. Section 33-12(b) of the Montgomery County Code does not permit use of the grievance procedure on issues involving classification allocations.

6. Under Administrative Procedures established by the County, an individual may file a request for a classification review in June or December, if dissatisfied with the results of that study, an employee may request an administrative review, pursuant to Section 7.5 of the Personnel Regulations.

After due consideration and discussion, it was the judgment of the Board that classification allocation was the issue in this case. Therefore, pursuant to Section 33-12(b) of the Montgomery County Code, it was not a grievable issue. Accordingly, the decision of the Personnel Office was affirmed and the appeal was denied.

COMPENSATION

CASE NO. 88-3

Three employees in the Department of Finance appealed from the decision of the Chief Administrative Officer on their grievance concerning alleged pay inequities.

The issue before the Board was whether the appointment of another individual at the mid-point of the pay scale for a Public Administration Intern, Grade 16 position, resulted in an unfair pay inequity for the appellants. The record showed that:

1. The Public Administration Intern Class was established as an entry level training class and listed as "beginning-level professional work". The pay range for the class in May 1987 was $20,295 to $30,688 per annum, with a mid-point of $25,492.

2. The employee in question was appointed, effective May 4, 1987, as a Public Administration Intern in the Purchasing Office at an annual salary of $25,492.

3. The appellants all began work in the Purchasing Office as Public Aministration Interns in 1984 or 1985; were subsequently promoted to Buyer I and Buyer II positions as the result of their work performance; and were performing duties equal to or more difficult than the individual in question. On May 4, 1987, their salaries in the Buyer positions ranged from $21,116 to $22,615.

4. On July 18, 1980, the Chief Administrative Officer issued a memorandum establishing the policy and required procedure for Within-Grade Appointments. This procedure required written justification from the Department Head, which was to include:

> ". . .1. Qualifications of the individual recommended for the within-grade appointment as compared to the minimum qualifications.
>
> 2. A statement concerning the number of qualified applicants and availability in the labor market, including the county work force, as determined by recruitment efforts. If the Eligible List includes candidates who do not require a within-grade appointment, reason should be stated why one of those individuals is not being appointed.
>
> 3. The applicant's salary requirement."

"4. A statement as to whether or not the recommended salary for the new employee is in excess of salaries being paid on-board employees in identical, or higher level, positions in the department. If the recommended salary is in excess of that being paid the employees referenced, specific documentation must be supplied concerning the new employee's qualifications, and assignment; including a statement as to the availability of current employees who can qualify to handle that assignment.

5. Any pertinent information, not referenced above, which provides additional support for the within-grade recommendation.

6. A statement regarding availability of salary monies. . ."

5. On March 29, 1984, the Chief Administrative Officer delegated the authority to approve Within-Grade Appointments, up to the mid-point, to the Personnel Director, subject to the July 18, 1980 policy.

6. On October 15, 1986, the Personnel Director further delegated authority for such approval to the Chief, Division of Employment.

7. On November 20, 1986, the Chief, Division of Employment issued a Memorandum to All Department and Agency Heads, setting forth new procedures, which eliminated the written justification for Within-Grade Appointments.

8. On April 8, 1987, the Department of Finance recommended the appointment of the individual in question at the mid-point ($25,492), "because of her prior 6 years' purchasing experience and salary history." The recommendation did not contain any other information or explanation of these two factors.

9. The eligible list for Public Admin. Intern contained approximately 200 names at time of this appointment.

10. Section 1-4(b) Delegation of Authority of the Personnel Regulations states:

"The Chief Administrative Officer may designate a representative to implement any or all of the provisions of the merit system law or the personnel regulations. The Chief Administrative Officer should make a delegation of authority in writing. The delegation of authority may be withdrawn by the Chief Administrative Officer at any time."

11. Section 9-15 Salary on Appointment and Reappointment of the Personnel Regulations states:

> "The base salary of a newly appointed or reappointed employee is to be fixed within the applicable grade by the appointing authority subject to procedures established by the Chief Administrative Officer."

12. Section 11-2 Special Within-Grade Advancement of the Personnel Regulations states:

> "In special or emergency situations a merit system employee . . . may also be advanced . . . to resolve a pay inequity."

After due consideration, it was the judgment of the Board that the management action in this case definitely created a pay inequity and that the action was taken in violation of established procedures. The appellants had all been hired and brought into the system as Public Administration Interns, and even though performing higher level duties in positions of equal or higher grade level at the time of the appointment in May 1987, were then being paid $3,000-$4,000 less than the new person. The Board did not question the qualifications of the new appointee, but believed if she was so eminently qualified, management's decision to appoint her as a Public Administration Intern, instead of a Buyer II, was a disservice to merit system principles and practices. The appointment as a Public Administration Intern was further proof to the Board that on-the-job training was deemed more important than prior experience, which only compounded the extent of the pay inequity. The Board found the appellants were not treated fairly with respect to equal pay for work of equal value and should have received an increase to at least the level of the new appointee.

With respect to the procedure used in approving the appointment, Section 1-4(b) of the Personnel Regulations provided for delegation of authority by the Chief Administrative Officer only. Further, Section 9-15 required appointments to be made subject to procedures established by the Chief Administrative Officer. The Chief Administrative Officer delegated authority to approve Within-Grade Appointments to the Personnel Director, subject to the 1980 policy memorandum. The subsequent delegation of authority by the Personnel Director went beyond the provisions of Section 1-4(b) and the modification of the procedure by the Chief, Division of Employment, violated the provisions of Section 9-15. It was the judgment of the Board that these violations brought the validity of the appointment into serious question and further compounded the pay equity issue.

CASE NO. 88-3 CONTINUED

As the result of these findings, the Board found the appellants were the victims of unequal treatment with respect to pay and directed the County to:

1. Increase the appellants base salaries to $25,492 per annum, retroactive to May 4, 1987.

2. Modify all subsequent personnel actions in accordance with this change and reimburse the appellants all additional monies due as the result of the salary change.

3. Reimburse the appellants for reasonable attorney fees incurred in pursuing the grievance.

The higher salaries ordered were to remain in effect, unless and until such time as management took the necessary steps to correct the appointment in question and reduced the incumbent's pay accordingly. All corrective action ordered was to be accomplished within 45 days from the date of the decision.

Subsequently it was learned that management failed to comply with the Board's order in a timely manner. Further, the Board considered the excuse offered as less than satisfactory when one considered the responsibility of management for doing its job in a proper and timely manner. Therefore, it was the judgment of the Board that the delay in implementation of the order had cost the appellants lost investment income, which they should not be denied, regardless of the length of time involved. Accordingly, the County was directed to reimburse the appellants an additional 10% interest per annum on all monies due, from the date of the decision to the date the money was actually received by the appellants.

CASE NO. 88-15

Two Firefighters appealed from the decision of the Personnel Director on their grievance concerning compensation for the successful completion of an EMT-P training class.

The record showed that:

1. The EMT-P class in question commenced on January 25, 1987 and was completed on July 14, 1987. The class consisted of 90 hours of class work and 50 hours of practical work. This course was not required to maintain employment.

2. On January 15, 1987, one appellant sent a memorandum to his Fire Chief, noting that EMT-P students were not compensated for attending the class and recommending the Fire Department take action to provide compensation. On February 22, 1987, the recommendation was formally rejected by the Fire Department.

3. Eleven individuals, from seven Fire Departments and the Department of Fire Rescue Services, attended the class in question. Only one person, employed by the Rockville Volunteer Fire Department, was compensated for attendance at the class.

4. Section 13.9 Required Course Attendance of the 1981 Personnel Regulations for the Fire Services required employees be compensated for attending courses "required as a condition of employment".

5. The Fire and Rescue Commission did not establish a policy on this issue until October 8, 1987. Therefore, that policy was not applicable in this case.

6. The Personnel Director relied on A.P. 4-6 Employee Development to show consistency of treatment. However, A.P. 4-6 applied only to County employees, not firefighters with the Independent Corporations, and it also was not applicable to this case.

7. On March 17, 1988, the Personnel Director denied the grievance, stating that the Fire Departments "were in compliance with the policy of the Fire and Rescue Commission and the Fire and Rescue Personnel Regulations".

Based on a review of the record and the applicable laws and regulations, it was the judgment of the Board that Section 13.9 of the Personnel Regulations for the Fire Services was the only relevant regulation. Therefore, the decision of the Personnel Director was incorrect when it stated the action of the Fire Department was consistent with the Fire and Rescue Commission policy that was not established until October 1987. Despite this error, it was the Board's conclusion that the action of the Fire Department was technically correct and the appellants are not entitled to any further compensation for attending the EMT-P course. This conclusion was based on the fact that Section 13.9 limited reimbursement to courses required as a condition of employment and the EMT-P class was not required to maintain employment. The Fire Departments were private corporations and the fact that one elected to pay its employees

did not obligate another Fire Department to do likewise. The Personnel Regulations did not require payment for the EMT-P course, and after review, the Board found no prohibition against doing so. Therefore, absent a formal policy at the time of this incident, both Fire Departments acted within their management prerogative and were in compliance with the established regulation. Finding no violation, it was the judgment of the Board that the appeal be denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANTS

CASE NO. 88-17

A Firefighter appealed from the decision of the Personnel Director on his grievance concerning retroactive compensation for working out of his assigned class. The parties agreed that the appellant was worked out of his assigned class and the only issues before the Board were the period of retroactive compensation and his entitlement to a promotion.

The record showed that:

1. The appellant worked out of his class from October 17, 1982 to February 8, 1988.

2. The appellant filed the grievance on August 14, 1987, after reviewing a Classification Study of Fire and Rescue classes.

3. On March 18, 1988, the Personnel Director ruled that the appellant was entitled to retroactive pay, but that Section 29 limited the period to August 14, 1986 to February 8, 1988. The Personnel Director further ruled that the promotion requested was a classification issue that was not appropriate for resolution through the grievance process.

4. Section 29 Limitations on Actions and Relief of the Appendix to the Personnel Regulations for Fire and Rescue Service Employees was implemented on April 1, 1981 and at that time stated:

> ". . .any action instituted or filed under these regulations, . . . shall be filed within three years of the date it accrues, and remedies granted hereunder shall not extend earlier than three years from the date of initiation or filing of the action."

5. Effective August 7, 1985, Section 29 was amended to read:

> "Any action instituted or filed under these regulations, . . .must be filed within thirty (30) calendar days from the date the employee knew or should have known of the occurrence upon which the action is based. . .Any remedies for actions instituted under these regulations may not extend earlier than one (1) year from the date of filing the action."

6. The Circuit Court had held (in Etterman vs Montgomery County, Maryland, Civil Action #26410) that Section 1-13(c) of the County's Personnel Regulations (similar to Section 29 cited herein) " . . . applies only to limit administrative relief available to County employees through the County's administrative process and cannot lawfully create a statute of limitations or otherwise limit the Plaintiff's right to his property, i. e., the salary differential through the judicial process. . ."

The fairness and equity in treatment of employees was of primary concern to the Board. Management was responsible for the assignment of duties and should have known it was in violation of established procedures during the period in question. Management had clearly avoided its responsibility for fairness and equity by the implementation of a regulation that limited retroactivity, and then reducing the liability to a maximum of one year. This action had effectively denied the appellant's right to the additional salary due for the performance of higher level duties and responsibilities.

Despite this situation, it was the judgment of the majority of the Board that by being part of the administrative process, the Board lacked the authority to rule contrary to established regulations. Accordingly, the Board must deny the appeal and defer to the Court on the property right issue. The relief requested by Counsel was denied.

The Board unanimously agreed that the issue of placement in the higher level position was one of classification and not grievable. If the appellant was returned to the prior position, he could pursue the issue through the appropriate channels.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 88-29

An Engineer appealed from the decision of the Chief Administrative Officer on his grievance alleging a pay inequity. The primary issues before the Board were:

1. Is the scope of pay equity limited to one operating unit within a department or is it broader than that?

2. Did the hiring of new employees at a salary within the grade range, rather than at the beginning salary of the grade, result in a pay inequity between those individuals and the appellant?

3. Is corrective action required, and if so, what type?

Before addressing the issues, the Board believed it was necessary to cite relevant provisions of existing law and regulations and to set forth some background data.

The County's policy and philosophy concerning compensation of employees was set forth in the Personnel Regulations (1986) as follows:

Section 7-1 General Policy

> "It is the policy of the Montgomery County government to classify positions on the basis of assigned duties and responsibilities and minimum qualifications required to assure equal pay for work of substantially equal value performed under essentially similar conditions. . ."

Section 7-2 Definitions

> "...(g) Occupational Class. One or more positions sufficiently similar as to:
> (1) Type of work performed;
> (2) Difficulty and complexity of duties.
> (3) Level of responsibility; and,
> (4) Knowledges , skills and abilities required, to warrant the same classification assignment."

Section 9-2 General Salary Schedule

> ". . . Each occupational class of positions must be assigned to an appropriate grade determined under the county's classification plan. . ."

On July 18, 1980 the Chief Administrative Officer issued a policy memorandum on "Within-Grade Appointments". This policy required a Department Head to submit written justification for approval of all such appointments, including ". . .A statement as to whether or not the recommended salary for the new employee is in excess of salaries being paid on-board employees in identical, or higher level, positions in the department. . "

The County had established one series for all Engineer positions in the government, consisting of several different classes, which were determined by the level of assigned duties and responsibilities. An Engineer position is the same County wide, and there was no distinction made between departments or duty assignments. Pay equity had been a major concern for the County Executive and County Council and it was noted that the current classification assignments were based on an update of the total plan by outside consultants to assure pay equity.

ISSUE #1 - SCOPE OF PAY EQUITY

Appellant argued that established procedures (1980 Policy Memorandum) required pay equity be assured department wide. The County argued that it must be maintained only within an operating unit, and if qualified applicants are scarce, it did not have to be maintained or assured at all. The Board disagreed with both parties. In the County system, similar jobs are classified in one occupational class, applicable to all departments/agencies. Therefore, it was the judgment of the Board that pay equity must be assured and maintained for all positions within an occupational class.

ISSUE #2 - DID A PAY INEQUITY OCCUR?

The record clearly showed that appellant had an equal or greater amount of education and experience than the two individuals in question, yet was paid considerably less. The County held that the differences occurred because appellant was promoted from within the system, while the others came from outside the system. The County also argued that all actions taken were consistent with established procedures and should be allowed to stand. While each individual action involving appellant may have been technically correct, systems often create problems and need manual adjustment to assure fairness and equity. This case was a prime example of how a system can fail to properly address and consider all factors, thereby creating inequities. After due consideration of each person's education, experience and occupational class assignment, it was the judgment of the Board that a pay inequity did occur and that appellant was adversely affected by the higher entry level salaries paid the two new employees.

CASE NO. 88-29 CONTINUED

ISSUE #3 - CORRECTIVE ACTION REQUIRED

Appellant requested a retroactive pay adjustment to the date he was promoted in 1985. However, the Board found that he had not been adversely affected until the actual employment of one of the individuals on February 17, 1986. Therefore, it was the judgment of the Board that appellant was only entitled to a pay adjustment retroactive to February 17, 1986. The Board noted that Section 1-13 Limitations on Actions and Relief of the Personnel Regulations was implemented on July 1, 1986, after the date of the event in this case, and found the limitations contained therein were not applicable. The retroactivity granted in this case was based on the Board's authority contained in Section 33-14 (c) of the Montgomery County Code.

In determining the amount of the pay adjustment, the Board noted that appellant had a Master's degree and approximately thirteen years of engineering experience, while the person hired in 1986 had a Bachelor's degree and nine years of engineering experience. The Board was not in a position to judge the exact value or worth of the difference in education and experience, and did not believe it was necessary to do so. The Board determined that at the time of the appointment in 1986 appellant must be paid a salary greater than the new employee, and after due consideration, established that salary as $33,500 per annum.

Accordingly, the County was directed to revise appellant's personnel records to reflect a base salary of $33,500 per annum effective February 17, 1986; to revise all subsequent personnel actions accordingly; and to reimburse appellant all additional salary monies due as the result of these changes. Payment was to be made within 45 days of the date of the decision. If payment was not made within the 45 day limit, the County shall then pay interest on the amount due at the rate of 10% per annum from the date of the decision until the date payment was received by appellant.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 88-34

A Firefighter appealed from the decision of the Chief Administrative Officer on his grievance concerning holiday pay. There was no disagreement as to the facts of the case. The issue was whether the facts and the law had been misapplied.

The report of the Fact Finder noted three things:

1. That he had no authority to alter the Personnel Regulations.

2. That the Personnel Director had correctly interpreted the Personnel Regulations.

3. That the Personnel Regulations, as presently written, could lead to unfair and arbitrary results.

After careful study and consideration, it was the judgment of the Board that the Fact Finder correctly and properly analyzed the situation. The Board found itself in the same position as the Fact Finder, and therefore, found the appellant had been properly compensated for the holiday in question. Accordingly, the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 88-39

A Fire Captain appealed from the decision of the Personnel Director on his grievance concerning additional compensation for accrued annual and compensatory leave.

The issue to be resolved was what constituted proper payment for accrued leave at the time of the appellant's retirement.

Relevant provisions of the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County were:

1. Section 9 Annual Leave

> "9.8 Maximum Accumulation. Maximum accumulation requirements apply only to the amount of annual leave that may be carried over from one leave year to the next, and do not limit accumulated leave balances during the leave year. . .(b) An employee hired on or after January 1, 1957, but prior to July 1, 1972, may accumulate annual leave up to a maximum of three hundred twenty (320) hours."

"9.9 Transfer of Annual Leave in Excess of Maximum Allowable Accumulation to Sick Leave. All annual leave forefeited (sic) at the end of a leave year for being in excess of an employee's maximum allowable accumulation shall be credited to that employee's accumulated sick leave. However, if the corporation has denied an employee the opportunity to use leave in excess of the maximum allowable accumulation during that leave year, that amount may be carried over for a period of one year, even if in excess of maximum allowable accumulation but must be forfeited to sick leave if not used during that period."

"9.10 Disposition of Accumulated Annual Leave at Separation from Fire and Rescue Service and Montgomery County Service. Upon leaving the Fire and Rescue and County service, an employee shall receive a lump-sum payment, at his/her current rate of pay for the total accrued annual leave as of the date of separation, less any indebtedness to the corporation or County Government. . ."

2. Section 13.5 Compensatory Leave

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

"(d) Disposition of Compensatory Leave at Separation. When an employee is separated from the Fire and Rescue and County service, the employee shall be paid in a lump-sum for up to eighty (80) hours of earned unused compensatory leave. . ."

The written record showed that:

1. The appellant began employment with the Fire Services in 1960 and retired in January 1988.

2. At the end of CY 1987, the appellant had 1,044 hours of accrued annual leave and 188 hours of accrued compensatory leave.

3. Prior to 1980, the appellant's excess annual and compensatory leave had been converted to sick leave, as required by the Personnel Regulations.

4. Subsequent to 1980, the appellant, and others, were routinely granted permission to carry excess annual and compensatory leave over to the next year, without limit or specific justification. This action was approved by the individual Corporations, the Fire and Rescue Commission and the County Personnel Office.

5. Other Fire Department employees had been paid for all accrued leave at the time of retirement, even though far in excess of the maximum amounts allowed.

6. In December 1987, the appellant submitted a request to be allowed to carry all excess annual and compensatory leave over to the next calendar year because he was going to retire. The Department forwarded the request to the Fire and Rescue Commission for approval.

7. On January 14, 1988, the Fire and Rescue Commission approved a motion stating: "That annual leave balances at the end of the 1987 leave year for all corporation employees in the firefighter/rescuer series be carried over." The Commission also passed a motion to pay for all excess compensatory leave, if legally permissible.

8. The County Attorney subsequently ruled the Commission lacked the authority to approve payment for excess compensatory leave.

9. The appellant was paid for 536 hours of accrued annual leave and 80 hours of accrued compensatory leave. Payment was based on the maximum carry over of 320 hours of annual leave, plus all annual leave earned in 1987 and 1988 (208 hours and 8 hours respectively) and the maximum carry over of 80 hours of compensatory leave.

CASE NO. 88-39 CONTINUED

10. The grievance was denied because the County believed the past payments to others were improper and could not be used as precedent or considered an authorized and accepted practice.

The Board believed the appellant had acted in good faith and was led to believe that he would be paid for all accrued annual and compensatory leave by the actions of management, at all levels. However, the Board noted several concerns:

1. Sections 9.9 and 13.5(c) both mandated that any annual or compensatory leave carried over to the next calendar year must be used in that year or forfeited to sick leave. There was no provision for deviating from this regulation.

2. Sections 9.9 and 13.5(c) allowed carry over if specific criteria had been met. The record did not show that the criteria was met, or even considered, prior to the blanket approval by the Fire and Rescue Commission. The Board questioned the validity of the Commission's blanket approval without reviewing each case individually to assure compliance with the Personnel Regulations.

3. Section 13.5(d) specifically limited payment to 80 hours of accrued compensatory leave. The only exception noted was the death of an active employee.

It was the judgment of the Board that the appellant had been paid for the maximum number of hours permitted by the Personnel Regulations. Any further payment, if ordered by the Board to assure fairness and equity, would constitute a violation of properly established law, and the Board may not do so knowingly. Accordingly, the Board was required to deny the appeal

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 88-45

A Firefighter appealed from the decision of the Personnel Director that he did not have right of appeal concerning employment with another Fire Department. The record showed that:

1. The appellant was employed as a full-time career firefighter with one Fire Department, and had merit system status in that position.

2. On days off, the appellant was employed by another Fire Department as a temporary firefighter, and filed the grievance in question, which involved pay for such work.

3. The grievance was filed on September 14, 1987, was answered by the Fire Department on October 29, 1987 and denied by the Personnel Office on August 25, 1988.

4. Section 2 General Provisions of the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County states that the regulations "apply to all Fire and Rescue Corporations' merit system positions and employees . . .".

5. Under Section 22 Grievances of those same regulations, a merit system employee had the right to file grievances.

6. Administrative Procedure 7-3 Grievance Procedures, issued by the Fire and Rescue Commission on February 9, 1984, required the Personnel Office to respond to the grievance within 30 days. The Personnel Office took over nine months to respond.

7. Section 5.4 of that same Administrative Procedure, gives the employee ten weekdays to appeal a Personnel Office decision to the Board.

On the issue of timeliness, raised by the County, the Board noted that neither party met established deadlines contained in the Administrative Procedure. The primary purpose of a grievance procedure is to resolve differences of opinion. Therefore, since neither party had been harmed or would be at a disadvantage because of the delay in noting the appeal, it was the judgment of the Board that the County's failure to act timely had rendered the timeliness issue moot.

The Personnel Regulations cited covered all firefighters employed by the Independent Fire Corporations in Montgomery County. Therefore, it was the judgment of the Board that as a merit system employee of one corporation, the appellant had the right to file a grievance concerning terms or conditions of employment with another corporation covered by those same regulations. Accordingly, the decision of the Personnel Director was incorrect and was reversed. The Personnel Office was directed to process the grievance in accordance with established procedures contained in Administrative Procedure 7-3.

DELAY OF INCREMENT

CASE NO. 88-58

An employee appealed a demotion, but it was subsequently determined that the action had not been taken and the appeal was premature. The matter was resolved administratively, rendering the case moot.

GRIEVABILITY/TIMELINESS

CASE NO. 88-10

A Community Health Nurse appealed from the decision of the Personnel Director that, as a probationary employee, she did not have the right to file a grievance concerning the termination of her employment. The record showed that:

1. The appellant began employment with the County on August 31, 1987 as a Community Health Nurse I. That position was assigned a six-month probationary period, which served as a continuation of the examination process.

2. On December 15, 1987, the appellant received oral notice that her employment may be terminated for failure to attain a satisfactory level of work performance.

3. On January 4, 1988, the appellant was notified in writing that her employment would be terminated on January 20, 1988.

4. On January 13, 1988, the appellant filed a grievance, alleging violation of Section 24-2 of the Personnel Regulations. The County refused to accept the grievance, stating that she did not have right of appeal.

5. Section 6-4(d) Evaluation and Counseling of the Personnel Regulations states:

> "Supervisors must observe the employee's work performance and counsel a probationary employee whose work performance is marginal or inadequate."

6. Section 6-4(e) Termination During Probation states in part:

> "Inadequate performance after counseling is justification for termination. A probationary employee must be notified in writing at least 15 days before the effective date of such action...".

7. Section 6-4(g) Merit System Status states in part:

> "A probationary employee becomes eligible for 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. . ."

8. Section 24 Termination states in part:

> "24-1 Definition. Termination is a non-disciplinary act by management to conclude an employee's service with the county. Reasons for termination include, but are not necessarily limited to the following:
>
> . . .(b) A probationary employee's failure to achieve a satisfactory level of performance during the probationary period. . ."
>
> "24-2 Management Responsibility. Prior to terminating an employee for the reasons stated in (b) and (c) above, management must inform the employee in writing of the problem; counsel the employee as to what corrective action to take; and allow the employee adequate time to improve or correct performance or attendance."
>
> "24-3 Appeals. A merit system employee who is terminated may appeal pursuant to section 28 of these regulations . . ."

9. Section 28 Grievances states in part:

> "28-2 Definitions. A grievance is a formal written complaint by an employee arising out of a misunderstanding or disagreement between a merit system employee and supervisor, which expresses the employee's dissatisfaction concerning a term or condition of employment or treatment by management, supervisors, or other employees..."

The appellant alleged that the County failed to comply with the requirements of Sections 6-4(d) and 24-2 of the Personnel Regulations by not providing counseling and explaining the reason for the termination. The County argued that it met the requirements of Section 6-4 and that the language in Section 24-2 was supposed to be changed in 1986, but was not, due to an oversight. Therefore, since the intent was to delete the requirements of Section 24-2 for probationary employees, the County believed it was not necessary to follow them, even though they are still in the Personnel Regulations.

CASE NO. 88-10 CONTINUED

There were two issues before the Board:

1. Did the appellant have the right to grieve or appeal a termination?

2. Did management have to comply with the requirements of Section 6-4(d) and Section 24-2 of the Personnel Regulations?

On the first issue, it was the judgment of the Board that the answer must be no. While it may appear to be unfair to a probationary employee, the Courts have sustained the validity of the County's position and this Board lacked the authority to overturn or amend the law, as written. Therefore, the decision of the Personnel Director was sustained.

On the second issue, it was the judgment of the Board that management must comply with the requirements of the law as written, not as it may have been intended to be revised. If an oversight occurred, management had the responsibility to take proper corrective action, which was not done in this instance. Accordingly, the County was directed to provide the appellant with written notification of the specific reasons for termination, with a copy provided to the Board. The written explanation was to be provided to the appellant within 15 days of the date of the decision.

CASE NO 88-16 & 88-19

A Mechanic appealed from the refusal of the Personnel Office to accept two grievances concerning the supply of tools and alleged denial of due process.

The Personnel Office denied acceptance of the grievances on the grounds that they were covered by the Service, Labor and Trades (SLT) Bargaining Agreement, and therefore, not grievable under the County's Merit System grievance process.

The record showed that:

1. Appellant was a member of the SLT bargaining unit, but was not a member of the Union.

2. Appellant had worked as a Mechanic II in the Equipment Maintenance Operations Center (EMOC), Department of Transportation, for over 14 years. He testified that at time of employment he was asked if he had his own tools, but was never asked to bring them to work or told that it was a requirement for employment. Over the years, he has routinely brought, and maintained, his own set of tools, that were needed to do the job, the same as other mechanics.

3. The Chief of EMOC testified that the County started providing EMOC mechanics with a small reimbursement for replacement items (files, etc.) in 1981. He also stated that there was no written policy or requirement that the mechanics provide their own tools - valued at $4-6,000, but that it was simply an accepted practice of the trade. The tools to be provided by the employee were "hand tools", but that term had never been defined and there was no list available to show what they might include or consist of.

4. The Chief of EMOC also testified that the implementation of a formal policy requiring employees to supply their own "hand tools" was for the purpose of improving the efficiency and effectiveness of operations.

5. Appellant testified that he had been trying to get an answer to the tool requirement since 1981, but his numerous inquiries were not responded to or addressed by the Department of Transportation. Upon being notified (in March 1988) that supplying his own hand tools was going to become an official requirement for the job, appellant noted the grievance in question.

6. The grievance concerning the hand tool issue was filed on March 11, 1988. On March 15, 1988 the Personnel Office issued a preliminary finding that the grievance would not be accepted for processing because it was an issue covered by the bargaining Agreement. The final decision that the grievance would not be accepted was issued on March 25, 1988.

7. On April 4, 1988 appellant filed another grievance alleging denial of due process because the first grievance had not been accepted. On April 12, 1988 the Personnel Office refused to accept the second grievance for the same reason cited previously.

8. Upon notification that the issue had been appealed to the Board, the Chief, Division of Labor Relations and Training and a Personnel Specialist both testified, under oath, that they discussed appellant's appeal with a Union representative, because they considered the Union a party.

9. The County does not require any other trade or technical employees to supply their own tools, even though it may be an accepted practice of the trade.

10. The approved class specifications for Mechanic II, maintained by the Personnel Office, do not contain any requirement concerning tools. These class specifications were dated 1966, 1973 and 1984.

11. The County and the Union entered into an agreement covering tools in the EMOC on August 8, 1988, the day before the final hearing of this case.

The issues before the Board were:

1. Was the tool issue a grievable matter under the County's Merit System grievance procedure?

2. Did the refusal to accept appellant's grievance of March 11, 1988 constitute a denial of due process?

3. Is an employee of the bargaining unit required to be represented by the Union or may he/she be represented by someone else?

4. Was appellant's right to privacy and confidentiality violated by the Personnel Office?

Appellant raised another issue concerning whether he would receive proper representation by the Union. However, under the County's Collective Bargaining Law, such issue is the responsibility of the Labor Relations Administrator, so it was not addressed by the Board.

ISSUE NO. 1 - IS THE TOOL ISSUE A GRIEVABLE MATTER UNDER THE COUNTY'S MERIT SYSTEM GRIEVANCE PROCEDURE?

Appellant was a Merit System employee and had the right to file a grievance on an issue if that issue was not covered by the SLT Agreement. Article 30 of the Agreement set up Study Groups "to develop facts and information to aid in the establishment of policies pertaining to child care, flex time, light duty work, tools and uniforms". Appellant argued that this showed the absence of a formal policy, and therefore, the issue was grievable under the County procedure.

The County held that because the issue was noted in the Study Group part of the Agreement, and tools were referenced in the Maintenance of Standards (Art. 33), the issue was part of the Agreement and must be resolved pursuant to procedures contained in the Agreement. The County also argued that the appeal was rendered moot by the signing of the August 8, 1988 policy on tools and uniforms.

Section 401 of the Charter and Section 33-112 of the Montgomery County Code assure the continuation of all provisions of the Merit System not in conflict with the Agreement. In looking at the Agreement, the Board noted that Article 30 provided clear evidence that there was no policy in effect on tools when that Agreement was implemented. Further, Article 33 referred only to "like benefits and conditions, previously in effect between the parties" and tools provided to Department of Facilities and Services employees by the County. This being the first Agreement between the parties, there could not have been any previous benefits or conditions to enforce, other than those specifically agreed to and listed therein. Additionally, the tools and equipment referenced apply to one Department only, and to those tools provided by the County - not to those to be furnished by the employee, as in this case.

The Board also noted that the stated purpose of the new policy was to improve the efficiency and effectiveness of operations. Under the Collective Bargaining Law (Section 33-107) this was clearly a right and responsibility of management that may not be impaired by the Agreement. With this in mind, the Board was puzzled by the County's position as it was totally contrary to management's stated purpose for implementing the tool policy and its rights and responsibilities under the Collective Bargaining Law.

The Board did not accept the argument on mootness for two reasons. First, the case must be decided based on the law and facts as they existed at the time the grievance was filed. Secondly, the Agreement (30.5) mandated impasse resolution procedures be implemented if the Study Group issues were not resolved by July 1, 1988. Therefore, it appeared that the August 8, 1988 agreement may be in violation of the contract and invalid.

Finally, Section 9.11 of Administrative Procedure 4-4 required the Personnel Office to issue a decision on the appropriateness of the grievance within 5 calendar days of the filing of the grievance. In this case, the Personnel Office decision on grievability was issued 14 calendar days after the first grievance was filed and 8 calendar days after the second grievance was filed. Neither decision was issued in a timely manner, and the Board had ruled previously that failure to act timely constitutes a waiver of the right to deny accepting a grievance.

After due consideration of the evidence, it was the judgment of the Board that the issue was grievable under the County Merit System grievance procedure.

ISSUE #2 - DID THE REFUSAL TO ACCEPT APPELLANT'S GRIEVANCE OF MARCH 11, 1988 CONSTITUTE A DENIAL OF DUE PROCESS?

Based on the foregoing, refusal to accept a properly filed grievance would be a denial of due process.

ISSUE #3 - WAS AN EMPLOYEE OF THE BARGAINING UNIT REQUIRED TO BE REPRESENTED BY THE UNION OR MAY HE/SHE BE REPRESENTED BY SOMEONE ELSE?

Under the County's grievance process, the employee may be represented by a person of his/her own choosing. Representation under the Agreement would be a matter for the Labor Relations Administrator to address and decide.

ISSUE #4 - WAS APPELLANT'S RIGHT TO PRIVACY AND CONFIDENTIALITY VIOLATED BY THE PERSONNEL OFFICE?

County and State laws assure an employee that personnel matters, which include grievances, will be maintained strictly confidential. In this instance, two professional level employees of the Personnel Office discussed the appeal with a Union representative, who was not a party to the action. This clearly violated established procedures and was a serious breach of ethics by the Personnel Office. If a party to an appeal believed that another person or entity should be brought into the case, it was the responsibility of that party to so notify the Board. The decision as to who should be a party, and notification thereof, rests with the Board. It was totally improper and inappropriate for the Personnel Office to discuss the matter with another person.

The Board was also concerned that such action may place the County in a questionable litigation position should any person wish to charge the Personnel Office with violating an employee's right to confidentiality by its action of notifying the Union that a grievance had been filed or by discussing the case with a person that had not been made a party to the action. The Board strongly recommended the County review the actions of the persons involved and take whatever corrective action was deemed necessary and appropriate to assure that such a violation would not be repeated.

It was the final judgment of the Board that the County:

1. Accept the grievances for processing in accordance with established Merit System procedures.

2. Reimburse appellant for reasonable attorney fees incurred in the pursuit of these grievances.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 88-22

A Department of Finance employee appealed from the decision of the Personnel Director that her grievance, alleging a pay inequity, was not filed in a timely manner. The record showed that:

1. The appellant delivered the grievance to her supervisor and the Personnel Office on April 1, 1988, alleging an impropriety in the hiring of another employee in May 1987 that created a pay inequity. The grievance was based on information brought to her attention by a March 22, 1988 decision of the Board.

2. The appellant received a preliminary ruling from the Personnel Director on April 11, 1988 and the final ruling that the grievance was not timely was dated April 26, 1988.

3. The ruling was based on an assumption of when the appellant was, or should have been aware of certain facts. There was no factual evidence in the record to support either parties position.

4. Section 1-13 Limitations on Actions and Relief of the Montgomery County Personnel Regulations, 1986, requires a Merit System employee file a grievance,". . .within 45 days from the date the employee knew or should have known of the occurrence upon which the action is based. . .".

CASE NO. 88-22 CONTINUED

5. Administrative Procedure 4-4, Grievance/Open Door Review Procedure states in part:

> .Policy
>
> 2.0 It is County policy to resolve grievances. . .in an orderly and timely manner in an environment of impartiality and mutual respect, with the objective of resolving job related problems in order to encourage excellence of work and improved level of service. . .
>
> . . .General Provisions. . .
>
> 9.11 . . .(b) Within five calendar days of receiving a grievance. . ., the Personnel Director or designee will decide whether it is appropriate for the process, has been timely filed and is otherwise in compliance with this Procedure. . ."

The Board fully supported the County policy of resolving grievances, ". . . in an orderly and timely manner in an environment of impartiality and mutual respect. . .". It was the duty of the Board to resolve issues based on factual evidence, and if there was any question or doubt, the Board believed it was fairest to rule in favor of the appellant. Therefore, lacking definitive factual evidence, it was the judgment of the Board that the ruling of untimeliness was incorrect and unfair to the employee. It was the further judgment of the Board that the failure of the Personnel Office to rule on the issue of timeliness within five calendar days, as required by Section 9.11(b) of Administrative Procedure 4-4, constituted a waiver of that review and acceptance of the grievance. Accordingly, the ruling of untimely filing was rescinded, and the Personnel Office and the Department of Finance were directed to accept and respond to the grievance in accordance with established procedures.

CASE NO. 88-28

A Police Officer appealed from the decision of the Personnel Office that his grievance, concerning educational requirements for promotion, was not filed in a timely manner. The record showed that:

1. On October 7, 1983, the County established a policy concerning the qualifications for promotion to the position of Police Sergeant. This policy was amended in September 1986.

2. On December 15, 1987, the County issued Personnel Bulletin #319, which contained the procedure and requirements for participation in the Police Sergeant examination process.

3. On April 7, 1988, the appellant filed an application to participate in the promotional process for Police Sergeant. The deadline for application was April 8, 1988.

4. On April 8, 1988, the appellant was notified that his application would not be accepted because he failed to meet specific requirements that had been contained in the policy since 1983.

5. On April 20, 1988, the appellant filed a grievance, questioning the validity and application of the policy.

6. On April 28, 1988, the Personnel Office issued a preliminary finding that the grievance was not filed in a timely manner. The final decision on timeliness was issued on May 20, 1988.

7. Section 1-13 Limitations on Actions and Relief of the Montgomery County Personnel Regulations, 1986, requires a Merit System employee file a grievance ". . .within 45 days from the date the employee knew or should have known of the occurrence upon which the action is based. . .".

8. Administrative Procedure 4-4, Grievance/Open Door Review Procedure states in part:

> ". . .General Provisions. . .9.11 . . .(b) Within five calendar days of receiving a grievance. . ., the Personnel Director or designee will decide whether it is appropriate for the process, has been timely filed and is otherwise in compliance with this Procedure. . "

The appellant contended the action or incident that caused an adverse impact on him was the refusal to accept his application on April 8, 1988. The County argued that the grievable action or incident must be either the date of implementation of the policy (1983), the amendment of the policy (1986), or the issuance of the promotional procedure (December 15, 1987), all of which were more than 45 days prior to the date of filing the grievance.

CASE NO. 88-28 CONTINUED

It was the judgment of the Board that an employee must be, or believed to be, adversely affected before being eligible to file a grievance of this nature. The appellant did not apply for promotion to Police Sergeant prior to April 7, 1988, so the policy did not adversely affect him prior to that date. Therefore, the Board found the refusal to accept the application on April 8, 1988 was the event that triggered the right to file a grievance, and his doing so on April 20, 1988, was well within the established time limits. It was the further judgment of the Board that the failure of the Personnel Office to rule on the issue of timeliness within five calendar days, as required by Section 9.11(b) of Administrative Procedure 4-4, constituted a waiver of that review and required acceptance of the grievance. Accordingly, the ruling of untimely filing was rescinded, and the Personnel Office and the Department of Police were directed to accept and respond to the grievance in accordance with established procedures.

CASE NO. 88-35

A Fire Lieutenant appealed from the decision of the Personnel Office that his grievance, concerning working out of his class, was not filed timely. The record showed that:

1. The appellant was employed as a Fire Sergeant at a Fire Department from August 1, 1987 until February 28, 1988, when he alleged he was working out of class.

2. The appellant was promoted to Fire Lieutenant, and transferred to another Fire Department, on February 29, 1988. He received the normal 5% pay increase at the time of the promotion.

3. During the next four months, the Fire Department asked its' employees on 3 or 4 occasions to notify it immediately if their pay was incorrect. Appellant did not say anything to his supervisors or file any written notification.

4. On July 20, 1988, the appellant filed a grievance requesting back pay for having worked out of class while a Fire Sergeant and an additional 5% increase at the time of promotion.

5. On August 17, 1988, the Personnel Office ruled that the grievance had not been filed within the forty-five day period provided for in Section 1-13(a) of the Personnel Regulations.

CASE NO. 88-35 CONTINUED

It was the judgment of the Board that the grievance was not filed in a timely manner. Accordingly, the decision of the Personnel Office was sustained and the appeal was denied.

CASE NO. 88-36

A Fire Lieutenant appealed the decision of the Personnel Office that his grievance concerning leave balances would not be accepted for processing. The decision was based on the belief that the issue involved the propriety of enacted legislation rather than the administration or application of the legislation.

The record showed that the County Council established specific procedures for transfer of leave balances when it enacted Bill 3-88, amending Section 21-4M Personnel Administration of the Montgomery County Code. Further, those procedures were properly followed by the County, when the appellant transferred. The grievance filed by the appellant questioned the fairness of the procedures.

After careful review, it was the judgment of the Board that the decision of the Personnel Office was correct. The issue involved the validity and fairness of legislation enacted by the County Council, which was a legal question that could not be resolved by the grievance process. Accordingly, the appeal was denied.

CASE NO. 88-44

An employee appealed from the decision of the Personnel Director that his grievance concerning alleged harassment would not be accepted for processing. The record showed that:

1. On August 12, 1988, the appellant filed a grievance alleging a pattern of harassment by the management of the Department of Environmental Protection. The relief requested was "a harassment free work environment. . . adequately compensated for the actions taken by management that disrupted my work efforts and career. . .that the management. . . be specifically instructed to do nothing to retaliate. . ."

2. On August 12, 1988, the appellant voluntarily terminated employment with the County to accept employment elsewhere.

CASE NO. 88-44 CONTINUED

3. The Personnel Office subsequently ruled the grievance was moot due to his resignation and refused to process it further. The Personnel Office also stated there was no provision in the law for awarding punitive damages sought.

It was the judgment of the Board that the decision of the Personnel Office was correct. Accordingly, the appeal was denied.

CASE NO. 88-49

A Program Manager appealed from the decision of the Personnel Office that his grievance concerning transfer had not been filed timely. The record showed that:

1. In early January 1988, the appellant submitted a request for an extended period of sick leave. That request was approved on January 29, 1988, with an effective date of January 20, 1988. The letter of approval also stated that the appellant would be transferred to another position and that another person would be transferred to assume his duties, with both reassignments being permanent.

2. In a memorandum, dated January 28, 1988, the Department Head notified the appellant of the transfer, that it was a permanent, administrative action and that it could be appealed, pursuant to Section 21.4 of the Personnel Regulations.

3. On January 29, 1988, a letter was sent to the appellant's Counsel, informing him of the permanent transfer and transmitting copies of prior documents to him.

4. In a letter of March 2, 1988, to the department, Counsel stated that the appellant had been informed of the transfer action on or about February 1, 1988. He also inquired as to where and to whom the appellant was to report when he returned to duty.

5. On May 13, 1988, the department sent Counsel a letter containing further information and clarification on the transfer.

6. Section 21-4 Appeal of Transfer of the Personnel Regulations in effect in January 1988, stated:

> "A merit system employee may appeal an involuntary transfer in accordance with Section 28 of these regulations. . ."

CASE NO. 88-49 CONTINUED

7. Section 1-13 Limitations on Actions and Relief of the Personnel Regulations in effect in January 1988, stated:

> "(a) Any action instituted or filed by an employee under these regulations, including grievances. . ., must be filed within 45 days from the date the employee knew or should have known of the occurrence upon which the action is based. . ."

The issue before the Board was whether the grievance was filed within the 45 day period allowed by Section 1-13 of the Personnel Regulations. Counsel for the appellant argued that knowledge that the transfer was a separate, grievable matter was not known until the Board ruled on the disciplinary appeal on August 23, 1988. The County argued that the appellant was told, and should have known, that it was a separate, grievable matter in late January, early February 1988.

After careful review of the documents, it was the judgment of the Board that the appellant and Counsel were properly notified and aware of the separate transfer action in early February 1988. Therefore, it was the decision of the Board that the grievance was not filed in a timely manner and the decision of the Personnel Office was affirmed.

CASE NO. 88-50

A Firefighter appealed from the decision of the Personnel Office that his grievance was not filed timely. The record showed that:

1. Personnel Bulletin #331, dated August 2, 1988 contained detailed information on the examination process for Master Firefighter and Fire Sergeant.

2. On October 25, 1988, the appellant was notified of his ineligibility to participate in Phase II of the Fire Sergeant examination process.

3. On November 7, 1988, the appellant filed the grievance in question.

4. On November 9, 1988, the Personnel Office ruled the grievance had not been filed timely and would not be accepted for processing.

5. Section 28-3 Procedure of the Personnel Regulations sets "a time limit of 20 calendar days for filing a grievance".

CASE NO. 88- 50 CONTINUED

The County argued that the appellant should have known about possible adverse impact in August 1988, when he received the bulletin containing the detailed information. Therefore, a grievance in November did not meet the time requirements. The appellant argued that there was no way to know, or anticipate adverse impact until he received his score for Phase I on October 25, 1988. Based on this, the time limit did not start until he received that notice.

It was the judgment of the Board that the time limit started on the date of an adverse impact or action. In this case, that occurred on October 25, 1988, and therefore, the grievance on November 7, was filed within established time limits. Accordingly, the Board directed the Personnel Office to accept the grievance and to process it in accordance with established procedures and time limits.

MISCELLANEOUS

CASE NO. 88-37

An employee requested an investigation of alleged merit system violations that may have adversely affected her. The appellant raised the issue of possible sex and age discrimination.

Under Section 4-2 Appeals of the Personnel Regulations, alleged violations of County policy with respect to those issues was appealable to the Human Relations Commission in accordance with the procedures established in Chapter 27 Human Relations and Civil Liberties of the Montgomery County Code, 1984, as amended. Therefore, it was the judgment of the Board that the appellant had appropriate administrative review available, which must be utilized prior to any involvement by the Board. Accordingly, the request for an investigation was denied.

CASE NO. 88-43

An employee appealed from the decision of the Personnel Office that he was not eligible to receive the Extraordinary Performance Award in question. The record showed that:

1. On August 11, 1987, after an extensive classification study, the Personnel Director notified Department Heads that he was recommending, for certain Engineering positions, "an Extraordinary Performance Award (EPA) in the form of an annual lump sum cash award equal to four percent (4%) of their annual base salary in recognition of the requirement for these incumbents to possess and regularly utilize a special license/certification in the performance of their duties."

2. The criteria for such an award included:

    a. Annual written designation by the Department Head of each position covered.

    b. Completion of twelve months of such service in compliance with the established criteria.

CASE NO. 88-43 CONTINUED

3. Prior to this time, the County did not recognize or reward incumbents with special skills or qualifications.

4. On August 21, 1987, the appellant requested that his position be designated as one entitled to receive such an award.

5. On October 7, 1987, the Department Head formally designated his position for eligibility and indicated the effective date as September 29, 1987.

6. The appellant resigned from County employment, effective August 12, 1988.

7. On September 30, 1988, the Personnel Director denied the request for the EPA since the appellant had not completed the one year service requirement from date designated.

8. The appellant stated that he had been performing the work since 1984, without additional compensation, and the least he should receive was the EPA.

The award program in question was announced on August 11, 1987, and the appellant was officially designated for eligibility on September 29, 1987. It was the judgment of the Board that the actions taken in establishing the program and designating those eligible for participation were taken properly and timely. One of the requirements for receiving the award was one year of satisfactory service after date of designation. It was quite clear that the appellant's resignation preceded completion of this requirement. Therefore, it was the judgment of the Board that the appellant failed to meet the established criteria and the decision of the Personnel Director, was correct. Accordingly, the appeal was denied.

CASE NO. 88-47

A County employee filed an appeal concerning not receiving a length of service award.

The case was resolved administratively prior to Board action, which rendered the appeal moot.

MEDICAL RATINGS

CASE NO. 88-1

An applicant appealed the "Not Acceptable" medical rating received for the position of Police Officer Candidate for alleged failure to meet vision requirements. The record showed that:

1. The appellant was given an Ishihara Color Vision Test, as part of the pre-employment medical examination, which indicated he had a "red-green deficiency".

2. Administrative Procedure 4-13 Medical Standards, subsection 6.0, G.2 Vision states: "The cause for rejection for appointment shall be: (a) Color vision. Law Officers: Failure to demonstrate normal color vision, as tested by Ishihara Plates or other equivalent test. . ."

3. The appellant's private ophthalmologist, after examination on January 16, 1988, reported: ". . .Color vision test was performed utilizing Farnsworth-Munsell 100 Hue test. The test showed a very mild degree of red-green color discrimination deficiency. With this minimal color deficiency he should be able to perform most of the job related tasks. . ."

4. On February 24, 1988, the appellant was examined by an independent ophthalmologist (at the request of the Board) who reported that the Farnsworth-Munsell test was more specific and more reliable than the Ishihara test; that he agreed with the mild red-green deficiency diagnosis; and that the deficiency was unlikely to affect job performance in any significant way.

After due consideration of the evidence, and the fact that the position in question was a training position, it was the judgment of the Board that there was insufficient cause for disqualification at this time. Further evaluation may be done during the training period that would be specifically job related and more reliable than present evidence. Therefore, it was the decision of the Board that the "Not Acceptable" medical rating received because of the mild red-green deficiency be overturned. The County was directed to continue processing him for employment in accordance with established procedures.

CASE NO. 88-8

An applicant appealed the "Not Acceptable" medical rating received for the position of Firefighter for alleged failure to meet the vision requirements. The record showed that:

1. On January 13, 1988, the appellant was given a vision test as part of the entrance medical examination, and it was determined that his uncorrected vision was 20/100 in the right eye and 20/70-1 in the left eye. His corrected vision was 20/20 in both eyes.

2. The appellant was an active volunteer Medical Attendant for a Fire Department. On October 9, 1987, he underwent a medical examination for volunteer firefighter and it revealed uncorrected vision of 20/100 in both eyes. Because of this, his volunteer participation was limited to Medical Attendant only.

3. Section 6.0,G.2 Vision of the County's Administrative Procedure 4-13 Medical Standards states in part:

"The cause for rejection for appointment shall be:

. . .(b) Standard Visual Acuity. . .Firefighters: Standard visual acuity without correction, less than 20/40 in one eye, and 20/100 in the other eye. . ."

The appellant argued that corrective facepieces are available and the standard should be eased to allow for use of such equipment. Firefighters often function in emergency situations where vision is critical to the safety and welfare of themselves, as well as others. While corrective facepieces may be available, the Board realized that they may be knocked off and lost under emergency circumstances. Therefore, they cannot be relied on as an infallible corrective instrument, which would justify easing of the standard. Accordingly, it was the judgment of the Board that the "Not Acceptable" medical rating was correct and it was sustained.

CASE NO. 88-9

An applicant appealed the "Not Acceptable" medical rating received for the position of Firefighter for alleged failure to meet the vision requirements. The record showed that:

1. On January 26, 1988, the appellant was given a vision test, as part of the entrance medical examination, and it was determined that his uncorrected vision was 20/200 in both eyes. His corrected vision was 20/20 in both eyes.

CASE NO. 88-9 CONTINUED

2. The appellant had served as a volunteer Firefighter since 1981.

3. Section 6.0,G.2 Vision of the County's Administrative Procedure 4-13 Medical Standards states in part:

> "The cause for rejection for appointment shall be:
>
> . . .(b) Standard Visual Acuity. . .Firefighters: Standard visual acuity without correction, less than 20/40 in one eye, and 20/100 in the other eye. . ."

4. On January 15, 1988, paid firefighters became County employees and the County now applies the same entry level vision standard to all new members, whether paid or volunteer.

The Board was aware that some of the independent Fire Corporations, prior to January 15, 1988, did not require volunteers to meet the same medical standards as applied to paid members. However, in the Board's judgment, prior practice and the present visual acuity of individuals hired previously does not negate the current vision standard. Firefighters often function in emergency situations where vision is critical to the safety and welfare of themselves as well as others. Therefore, the Board found the standard to be reasonable and necessary. Accordingly, since the appellant failed to meet the established standard, it was the ruling of the Board that the "Not Acceptable" medical rating was correct and it was sustained.

CASE NO. 88-13

An applicant appealed the "Not Acceptable" medical rating received for the position of Firefighter for alleged failure to meet the vision requirements. The record showed that:

1. On January 22, 1988, the appellant was given a vision test as part of the entrance medical examination, and it was determined that his uncorrected vision was 20/70 in the right eye and 20/100 in the left eye. His corrected vision was 20/20 in both eyes.

2. The appellant was a certified paramedic and had been a volunteer, for four years, with a Baltimore County Fire Department.

CASE NO. 88-13 CONTINUED

3. Section 6.0, G.2 Vision of the County's Administrative Procedure 4-13 Medical Standards states in part:

> "The cause for rejection for appointment shall be:
>
> . . .(b) Standard Visual Acuity. . .Firefighters: Standard visual acuity without correction, less than 20/40 in one eye, and 20/100 in the other eye. . ."

In Montgomery County, individuals must be qualified and able to perform full firefighting duties, even though they may be assigned as a paramedic. Firefighters often function in emergency situations where vision is critical to the safety and welfare of themselves as well as others. Therefore, the Board found the vision standard to be reasonable and necessary, and since the appellant failed to meet that standard, the rating of "Not Acceptable" was sustained.

CASE NO. 88-23

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

1. The appellant was rated "Not Acceptable" for failure to meet NFPA Medical Standard 2-2.11.3 Nontuberculous Lesions.

2. Section 5-12 Medical Requirements for Employees/Applicants of the Montgomery County Personnel Regulations, 1986, required the Chief Administrative Officer (CAO) to establish specific medical standards. The medical standards established by the CAO were contained in Administrative Procedure 4-13 and there was no evidence to show the NFPA 1001 Standards were approved or adopted by the CAO subsequent to the transfer of the firefighters to the County in January 1988.

3. Section 6.0, K.3 Nontuberculous Lesions of A.P. 4-13 states "The causes for rejection for appointment shall be:

> . . .(b) Bronchial Asthma, except for childhood asthma with a trustworthy history of freedom from symptoms since the 12th birthday. . "

4. Section 6.0, R.2 General and Miscellaneous Conditions and Defects of A.P. 4-13 states "The causes for rejection for appointment shall be:

> . . .2. Asthma (see also K.3 (b)). . ."

CASE NO. 88-23 CONTINUED

5. On March 8, 1988, the appellant's personal physician reported that she had "a history of allergies and asthma since childhood. Currently she is asymtomatic. Episodes of asthma are very infrequent and seem to be related to upper respiratory infection rather than to inhalents. The last symptom occurred in October of 1986. . ."

6. On June 17, 1988, the appellant's personal physician submitted a clarifying letter stating ". . .I expect her to have decreased episodes in the future consistent with this being primarily a childhood problem. I see no health risk to her working with the fire department."

The medical records clearly showed that the appellant had asthma problems within the last two years, and while asymtomatic at this time, she could have problems in the future. After consideration of the doctor's prognosis, and careful review of the applicable Medical Standards, it was the judgment of the Board that the appellant did not meet the medical requirements for the position of firefighter. Accordingly, the "Not Acceptable" medical rating was affirmed and the appeal was denied.

CASE NO. 88-40

A grievant appealed from the failure of the Personnel Office to schedule a hearing on his grievance in a timely manner. The Board noted that he had subsequently agreed to a Fact-Finder and the case was proceeding at the administrative level.

Accordingly, it was the judgment of the Board that the appeal had been rendered moot by the subsequent events.

CASE NO. 88-18

A Firefighter appealed from the decision of the Personnel Director on his grievance concerning the selection process for promotion to Master Firefighter.

The case was settled prior to the scheduled hearing and Board action was not required.

CASE NO. 88-25

A Firefighter appealed from the decision of the Personnel Director on his grievance concerning the selection process for promotion to Master Firefighter.

The case was settled prior to the scheduled hearing and Board action was not required.

CASE NO. 88-30

A Firefighter appeal from the decision of the Personnel Director on his grievance concerning promotion to Master Firefighter.

The case was settled prior to Board action and the appeal was withdrawn.

RECRUITMENT

CASE NO. 88-24

An applicant appealed from the "Not Acceptable" medical rating received for the position of Firefighter for alleged failure to meet established hearing standards. The record showed that:

1. On November 23, 1982, the appellant's doctor reported that the appellant had "a history of significant loud noise exposure ... moderate sensorineural hearing loss in the high frequencies including 2000 Hz. in the left ear ...".

2. On February 5, 1988, the appellant was examined by the County's Employee Medical Examiner, who noted a hearing loss in his left ear in excess of that allowed at the 2000 and 3000 frequency cycles. The County also noted speech reception of less than 90%.

3. The established hearing standards for the position of Firefighter are contained in Administrative Procedure 4-13 Medical Standards. Section 6.0, D.2 Hearing of Admin. Proc. 4-13 states:

> "The cause for rejection for appointment shall be:
>
> Hearing Acuity Loss by audiometric test of 20 decibels or more for the speech frequencies (500-1000-2000 cycles) in either ear, or loss of speech reception of phonetically balanced words at or below 90 percent normal reception for either ear.
>
> High frequency hearing loss of greater than 40 decibels in either ear shall require complete audiological evaluation to determine if the disorder is progressive or disabling."

CASE NO. 88-24 CONTINUED

4. On August 23, 1988, the appellant's doctor filed another report stating:

> "... A complete Audiogram was done on June 7, 1988 which revealed a severe high frequency sensorineural hearing loss at 2,000, 4,000, 6,000, and 8,000 Hertz in the left ear. His hearing in the right ear is normal all across. In addition, his hearing in the left ear from 250 to 1,000 Hertz is also normal. His discrimination scores are slightly lower in the left ear 76% compared to 100% in the right ear. ... Comparing his Audiogram to 1982 there is no significant change in his hearing. I feel that at this time this condition should not interfere with his regular activities including any periodic exposure to the fire alarms. He does know that constant exposure to loud noises could affect his hearing in the high frequencies."

After due consideration, it was the judgment of the Board that the appellant did not meet the established hearing standards and that continued exposure to loud noises associated with employment as a Firefighter could be detrimental to his hearing. Therefore, the Board sustained the medical rating assigned and denied the appeal.

CASE NO. 88-26

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

1. The appellant was rated "Not Acceptable" for failure to meet NFPA Medical Standard 2-2.10.2 Vascular System.

2. Section 5-12 Medical Requirements for Employees/Applicants of the Montgomery County Personnel Regulations, 1986, required the Chief Administrative Officer (CAO) to establish specific medical standards. The medical standards established by the CAO are contained in Administrative Procedure 4-13 and there was no evidence to show the NFPA 1001 Standards were approved or adopted by the CAO subsequent to the transfer of the firefighters to the County in January 1988.

3. Section 6.0, J.2 Vascular System of Administrative Procedure 4-13 states:

" The causes for rejection for appointment shall be:

. . .(b) Hypertension evidenced by preponderant blood pressure readings of 150-mm or more systolic in an individual over 35 years of age or preponderant readings of 140-mm or more systolic in an individual 35 years of age or less. Preponderant diastolic pressure over 90-mm diastolic is cause for rejection at any age. Treatment with anti-hypertensive medication, within the preceding five (5) years, for blood pressure in excess of the above levels, regardless of current readings, with or without medication. . ."

4. At the time of the physical examination on February 18, 1988, the appellant's blood pressure was 128/95. The Pre-Exercise blood pressure, on that same date, was 140/86.

5. On April 13, 1988, the appellant's personal physician reported that he had been treating him for hypertension since June 15, 1985 and that it had been well controlled over the last year. He also reported that the appellant was taking two medications daily to control his blood pressure and the last three readings were 130/86, 130/86 and 120/90.

Firefighting duties involve strenuous and stressful activity that puts a strain on a person's cardio-vascular system. While present blood pressure readings were at the top end of the acceptable range, this had only occurred within the last year, and then only through the daily use of medication. Therefore, it was the judgment of the Board that the appellant failed to meet the established standard because of the recent treatment for hypertension and the need for daily medication. Accordingly, the "Not Acceptable" medical rating was affirmed and the appeal was denied.

CASE NO. 88-27

An applicant appealed from the "Not Acceptable" medical rating received for the position of Firefighter for alleged failure to meet established hearing standards. The record showed that:

1. The established hearing standards for the position of Firefighter contained in Administrative Procedure 4-13 Medical Standards. Section 6.0, D.2 Hearing of Admin. Proc. 4-13 states:

> "The cause for rejection for appointment shall be:
>
> Hearing Acuity Loss by audiometric test of 20 decibels or more for the speech frequencies (500-1000-2000 cycles) in either ear, or loss of speech reception of phonetically balanced words at or below 90 percent normal reception for either ear.
>
> High frequency hearing loss of greater than 40 decibels in either ear shall require complete audiological evaluation to determine if the disorder is progressive or disabling."

2. The appellant was examined by the County's Employee Medical Examiner on April 14, 1988, and a high level hearing loss of greater than 40 decibels was noted at 3000-8000Hz. His hearing was found to be normal through 2000Hz.

3. The appellant underwent another examination at the Treatment Center on April 16, 1988, with the same results. His discrimination exceeded 90% in both ears.

4. On June 1, 1988 Dr. Gerald Reed examined the appellant and concurred with the prior findings, including the discrimination rating in excess of 90%. Dr. Reed did say that he should avoid acoustic trauma.

5. On August 1, 1988 Dr. Maureen Healy examined the appellant and also concurred with all of the prior findings.

It was the judgment of the Board that the appellant met the established standards for normal hearing. Further, while there was a documented high level hearing loss, there was no evidence to show that it was progressive or disabling. Accordingly, it was the decision of the Board that the rating of "Not Acceptable" was incorrect, and the County was directed to rescind that rating and to continue processing the appellant for employment in accordance with established procedures.

CASE NO. 88-31

An applicant appealed from the "Not Acceptable" medical rating received for the position of Firefighter. The County subsequently changed the rating to "Acceptable", which rendered the appeal moot.

CASE NO. 88-33

An applicant appealed a "Not Acceptable" medical rating received for the position of Police Officer Candidate for alleged failure to meet established vision requirements. Prior to Board action, the County re-examined him and changed the rating to "Acceptable", rendering the appeal moot.

CASE NO. 88-38

An applicant for the position of Police Officer Candidate appealed from the "Not Acceptable" medical rating received for failure to meet established vision standards.

The applicant was re-examined by the County, prior to Board action, and passed the test, thereby nullifying the appeal.

CASE NO. 88-42

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

1. The appellant was given a pre-employment medical examination on August 29, 1988 and the County asked him to submit a report from his doctor.

2. On September 1, 1988, the doctor sent a letter to the County stating that he had been treating the appellant for "atypical depression with panic attack" since March 17, 1983. He stated that the appellant was presently on medication, but that he saw no reason why his treatment would interfere with the duties of a firefighter.

3. On September 19, 1988, the Employee Medical Examiner rated the appellant "Not Acceptable" because of the personality disorder.

4. Section 6.0, L Mental, Emotional and Personality Disorders of the County's Administrative Procedure 4-13 Medical Standards stated:

> "As determined by various modalities of examination, including personal interview and physical and mental status examination, together with such oral or written psychological and personality tests and psychiatric consultation as may be elsewhere required, the causes for rejection for appointment shall be:
>
> (a) Psychosis. Current or documented history thereof, including, but not limited to schizophrenic and manic depressive disorders.
>
> (b) Psychoneurosis. Current or documented history of any psychoneurotic disorder, including, but not limited to acrophobia, claustrophobia, anxiety, and obsessive compulsion, which is of such a nature or degree as to reasonably be expected to preclude the satisfactory performance of duties.
>
> (c) Personality Disorders, of any recognized type, current evidence or history thereof, of such nature or degree as to constitute a handicap to job performance or to satisfactory interpersonal work relationships. . "

An individual's ability to perform satisfactorily was a judgment call, and based on his direct knowledge and experience with the County, the Board believed the Employee Medical Examiner's ruling was reasonable. Therefore, it was the judgment of the Board that the "Not Acceptable" medical rating be sustained because of the ongoing treatment and medication.

CASE NO. 88-48

An applicant for the position of Firefighter appealed the "Not Acceptable" medical rating received for failure to meet the vision standards.

The County retested the applicant, prior to Board action, and rated her "Acceptable", rendering the appeal moot.

RETIREMENT

CASE NO. 88-4

A Bus Operator appealed from the decision of the Administrator on her application for a service connected disability retirement. The record showed that:

1. The appellant began employment with Montgomery County, as a Bus Operator, on February 19, 1985.

2. The appellant allegedly injured her back on July 19, 1986 while performing normal bus operator duties and there was insufficient evidence to show a direct trauma or accident on that date.

3. The appellant allegedly reinjured her back on August 8, 1986 when the County car she was driving was bumped from the rear by another vehicle. The only damage to the County car was a possible bent rear license plate.

4. There was extensive medical evidence that showed the appellant had a degenerative disc disease. However, the appellant's personal physician's diagnosis and prognosis was highly negative and contrary to the findings and conclusions of the numerous specialists that had examined her. The medical findings indicate the degenerative disc disease predated the appellant's employment with the County and the majority of physicians believed she may continue employment, provided there was no heavy lifting.

5. The appellant was a member of the U.S. Army Reserves and had participated in all required weekend and annual drills since September 1986. She underwent a physical exam for the Reserves in May 1987 and had been allowed to continue with her obligation.

CASE NO. 88-4 CONTINUED

After due consideration of the extensive evidence of record, it was the judgment of the Board that the appellant was not disabled from work as the result of "an accident occurring, or an occupational disease incurred or condition aggravated while in the actual performance of duty", and therefore, was not eligible for a service connected disability retirement. Based on the medical evidence, the Board was not convinced that either of the two incidents in 1986, could have, or would have aggravated the appellant's condition. The issue of non-service connected disability was moot as she had insufficient service for eligibility. Accordingly, the Board sustained the decision of the Administrator and the appeal was denied.

CASE NO. 88-12

A Deputy Sheriff appealed from the decision of the Chief Administrative Officer that her resignation constituted a withdrawal of her prior application for a service connected disability retirement. The issues before the Board were:

1. Did the Board have jurisdiction?

2. Did the appellant's resignation render the application for a service connected disability retirement moot?

On the issue of jurisdiction, the Board noted that:

1. Section 33-56 Interpretations of the Employees' Retirement System for Montgomery County states that ". . .Decisions by the Chief Administrative Officer may be appealed within fifteen days to the Merit System Protection Board. . .".

2. On October 5, 1987, the Administrator of the Disability Retirement Program wrote to the County and asked ". . .if the circumstances surrounding the suspension of (the appellant) from duty modifies in any way her eligibility for benefits under the Disability Retirement Program. . " A decision on the claim was deferred pending clarification of this question.

3. On November 5, 1987, the appellant was notified by the County that ". . .In the event that you are given notice that the application will not be processed, such would constitute a denial of disability retirement benefits and appropriate recourse is provided under the County's Retirement Law for an appeal, initially with the Prudential Insurance Co. and then the Merit System Protection Board, if necessary. . ."

4. On February 11, 1988, the Chief Administrative Officer notified the Personnel Office that ". . . it is my decision that the action of resignation by an employee constitutes a withdrawal of that employee's application for disability retirement when the resignation comes prior to a final decision on the disability retirement application. (The appellant) is not eligible for disability retirement under the circumstances."

5. On March 2, 1988, the Administrator notified the County that it had received the Chief Administrative Officer's decision and that ". . .Based on this information, Prudential will take no further action in regard to this matter. . ."

The County argued that the Board lacked jurisdiction to hear the appeal because it did not involve an appealable issue. The County contended the Chief Administrative Officer's decision of February 11, 1988 was simply a response to an inquiry from the Administrator, and therefore, not a final decision of the Administrator that was appealable to the Board. It was the judgment of the Board that the February 11, 1988 decision of the Chief Administrative Officer was clearly an interpretation of the Employees' Retirement System for Montgomery County, as requested by the Administrator, which was appealable to the Board under Section 33-56. Accordingly, it was the judgment of the Board that the decision of the Chief Administrative Officer was appealable and the appeal noted with the Board was properly and timely filed.

The record on the issue of the effect of the resignation showed the following:

1. The appellant's status as a member prior to the date of her resignation was not disputed.

2. On June 26, 1987, Counsel for the appellant sent a letter to the County asking ". . .whether a resignation. . .would in any way affect a pending application for disability retirement. . ." The County never answered that inquiry.

3. The application for a service connected disability retirement was filed on July 2, 1987.

4. On September 25, 1987, the appellant submitted a letter of resignation, noting a request for continuation of the disability retirement review.

5. The Chief Administrative Officer's decision to deny further eligibility, subsequent to resignation, was based primarily on his concern for the appellant's employment status should the application be denied, and/or the ability of the Administrator to make a proper determination of eligibility under the law.

6. The Employees' Retirement System for Montgomery County does not contain any provisions concerning involuntary withdrawal of an application for a disability retirement.

7. The delays in processing the application were caused by the County and were completely outside the control of the appellant.

The application for a service connected disability retirement was filed approximately 80 days prior to the letter of resignation and there was no evidence to show that the County and/or the Administrator took reasonable, prompt action on the application or responded to inquiries of Counsel. Further, the decision of the Chief Administrative Officer was not based on, or supported by, provisions of law. After due consideration, it was the judgment of the Board that the decision of the Chief Administrative Officer was incorrect and unjustified. In fact, it was the Board's judgment that the February 11, 1988 decision addressed the appellant's eligibility for a disability retirement rather than her continued eligibility for consideration for such a retirement. Such a decision is the responsibility of the Administrator based on proper evidence and appropriate due process procedures.

Therefore, the County was directed to reinstate processing the application for a service connected disability retirement and to reimburse appellant for reasonable attorney's fees incurred.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 88-32

A Building Attendant appealed from the decision of the Disability Retirement Administrator on his application for a service-connected disability retirement.

The Disability Retirement Administrator, in his decision of June 15, 1988, stated: " ... The medical evidence does not suggest that (the appellant) is disabled from his employment as a building worker. None of the physicians have indicated that his injury is permanent and that he is actually disabled from his job. ... For all of these reasons, it is the opinion of this Hearing Examiner that (the appellant) does not qualify for a disability retirement."

The record showed that:

1. Appellant sustained a work connected injury in 1977, but there was no indication of the nature of that injury and no medical evidence to show any permanent disability from that injury.

2. On March 9, 1981 appellant fell out of a rolling chair while performing the duties of a Building Attendant, which resulted in low back discomfort. There was no evidence to show any mechanical problem with the chair or what caused appellant to fall.

3. On April 7, 1981, Dr. Robert Roberts reported that all x-rays were within normal limits and that appellant had full range motion of the lumbosacral spine.

4. On April 30, 1981, Dr. Paul Meyer reported: "I find no convincing evidence of a radiculopathy. ... he has a chronic low back strain ... he may have had a nerve root contusion, but again, there is no evidence of any type of concrete findings...".

5. On August 10, 1982, appellant underwent a myelogram and a CT scan. Dr. Meyer reported that they were both within normal limits and there was no evidence of discogenic problems.

6. On March 13, 1983, appellant allegedly fell again when he stood up, pushed the chair away with his legs, and then missed the chair when he went to sit down. Dr. Roberts did not note any further problems as a result of this fall.

7. On July 20, 1984, appellant underwent another myelogram and CT scan. On Sept. 21, 1984, Dr. Meyers reported that "...The CT scan showed a small questionable defect at L4-5 on the right but he did not complain of any pain or symptoms referable to the L4 nerve root. There was a small central disc at L4-5 but no evidence of any type of lateral root compression. ... All in all, he does not have a very convincing story for any type of discogenic problems...".

8. After an examination on Dec. 3, 1985, Dr James Hooper reported his diagnosis as "acute and chronic lumbosacral strain with possible impingement or radiculopathy as a result of either scarring or some additional protusion of the disc...". It was noted that Dr. Hooper was under the impression that surgery had been performed prior to his examination and did not correct the record until August 1986.

9. On July 10, 1987, appellant underwent an MRI examination. The Montgomery Imaging Center reported its impression as "disc degeneration at L4-5 and L5-S1 with associated generalized annular bulging. No nerve root compromise."

10. On July 13, 1987, Dr. Frank Nisenfeld examined appellant and reported his diagnosis as degenerative disc disease of the lumbo-sacral spine. Dr. Nisenfeld also stated: " ... The patient is not disabled according to the definition of being unable to perform any and every duty of his usual occupation as a building attendant...".

The issue before the Board was whether the appellant was able to perform the duties of a Building Attendant or was he disabled from such employment. After careful review of the written record, it was the judgment of the Board that the finding of the Administrator was reasonable and based on the medical evidence of record. The Board could find no evidence of permanent incapacity or injury that would prevent appellant from performing the duties of a Building Attendant. Accordingly, the decision of the Administrator was sustained and the appeal was denied.

CASE NO. 88-41

A Police Officer appealed from the decision of the Administrator on his application for a service connected disability retirement. The record showed that:

1. On January 21, 1972, when completing a Report of Medical History form, the appellant certified that he was in excellent health and had not been treated for any illness within the previous five years. He was subsequently employed as a Police Officer.

2. On March 14, 1975, the appellant was admitted to the hospital for surgery because of duodenal ulcer disease. The hospital subsequently reported that the patient had a nine year history of the disease; had experienced a massive upper GI bleed in 1968 that required transfusion of 7 units of blood; had another bleed in 1970; and had intractable ulcer disease.

3. The appellant was later returned to duty, but it was limited to sedentary work and day time hours only. He was later trained and assigned as a polygraph operator.

4. The appellant had stated that the job became very stressful as the work level increased, due to the lack of cooperation and assistance from others assigned to work with him.

5. On August 27, 1987, the appellant's doctor recommended the patient be retired or given a fundamental change in his work situation.

6. On December 14, 1987, a second doctor reported that, with the elimination of stress, the appellant should be able to perform almost any type of work.

7. On March 17, 1988, another doctor also reported that the appellant could continue as a Police Officer III, as long as it was in a different environment.

8. The Police Department indicated that it was willing to accommodate the appellant and had a Police Officer III position available in the Warrants Section, which would be in a non-stressful environment. The assignment would not affect his salary, benefits or classification.

9. The appellant did not consider the position in the Warrants Section to be of "comparable status" and preferred to be retired.

CASE NO. 88-41 CONTINUED

10. Section 33-43 (e)(2) of the Employees' Retirement System for Montgomery County stated that in order to be eligible for a service connected disability retirement, the member must be "unable to perform the duties of the occupational classification to which assigned. . .or a position of comparable status within the same department . . . .

It was the judgment of the Board that the record supported the finding of the Administrator. The appellant may be employed and the County had agreed to a transfer to a non-stressful position without any affect on his salary, benefits or classification. While the duties may differ from prior assignments, the position was a Police Officer III, and therefore, was not only comparable, but identical to his current assignment. Accordingly, the decision of the Administrator was affirmed.

The Board also questioned the appellant's eligibility for such retirement for two reasons. First, the illness was clearly a pre-existing condition, and secondly, medical information he provided at the time of employment was apparently false, which could invalidate any subsequent claim for disability. However, it was not necessary to address either of these issues at the time.

APPEALED TO CIRCUIT COURT BY THE APPELLANT, BUT SUBSEQUENTLY WITHDRAWN WITHOUT COURT ACTION

CASE NO. 88-46

An Office Services Manager appealed from the decision of the Administrator on her application for a service-connected disability retirement. The record showed that:

1. The appellant began employment with the County in 1975 and was transferred to the position of Office Services Manager, Grade 13 in 1986. In this position, she served as sole administrative support for the Division Chief and eight engineers, was in charge of the energy account system and handled all reservations for use of all meeting facilities in the central Rockville complex.

2. The appellant alleged that the work load was extremely heavy and stressful, causing severe health problems. The work load and stress were affirmed by one of the engineers and the Deputy Director of the Department.

3. The appellant started having health problems on-the-job, in the latter part of 1986. She started receiving medical treatment in January 1987, on the recommendation of the Deputy Director.

4. On December 4, 1987, a doctor submitted a report stating:

> "There is no objective evidence that she is disabled from performing the physical duties of her occupation as an office services manager.
>
> Subjectively however, she reports developing headache, palpitations and chest pain as a result of the stressful aspects of her job, especially late in the day when she is fatigued and less able to cope. It is likely that her heart rate and blood pressure are elevated at these times and that she does get Angina Pectoris which is occupation induced. When her disease progresses to the point where she is physically disabled, that disability could be considered job related.
>
> Her physicians are aware of the above and will no doubt advise her to reduce her work load . . . Therefore she might be considered disabled as a result of her physicians ordering her not to perform the full duties of her occupation. Whether this form of disability is compensable, I leave to the judgment of others."

5. On December 6, 1987, another doctor reported as follows:

> ". . .I believe that she is completely unable to perform her tasks as an office service manager. Again I believe that her prognosis to return for her usual occupation does not appear to be good. Specific factors that would prevent her usual occupation are rather more diffuse, related to stress and her hypertensive atherosclerotic cardiovascular disease. As regards to limitations and restrictions, perhaps a job of much lesser responsibility and stress could possibly be satisfactory for her. As regards to medications, she is presently on those which are necessary for control of blood pressure and heart disease. In regards to other type of work, as already stated, possibly one of less stressful demands. It would appear that her condition is job related although not the organic aspect of it. . ."

6. On February 4, 1988, a doctor submitted a report stating that the appellant was suffering from right aortic-iliac disease; had severe limitation of functional capacity; was totally and permanently disabled from work; and was not a suitable candidate for rehabilitation services.

7. On February 5, 1988, a doctor reported that he had been treating the appellant since February 25, 1987. His diagnosis was "coronary artery disease, hypertension, peripheral vascular disease". He also reported that a cardiac catheterization was done on April 9, 1987 and revealed triple vessel coronary disease. He noted that the appellant was taking three kinds of medication; had severe limitation of functional capacity and was totally and permanently disabled from work.

8. On January 20, 1988, the appellant was awarded a non-service connected disability retirement by the County's claim service. The retirement was effective January 30, 1988. This decision was appealed to the Administrator.

9. On March 25, 1988, one doctor submitted a supplemental letter stating:

> ". . .I have had an opportunity to discuss (her) work environment with her and review her job description. Based on this information, it is my understanding that (she) has either been totally incapacitated for duty or partially and permanently incapacitated for duty as a Montgomery County employee as a result of the stressful work conditions associated with the actual performance of her duties
> . . ."

10. The Administrator held a hearing on April 11, 1988, and after hearing testimony and reviewing the documentation ruled as follows:

> ". . .It is (the appellant's) position that her employment caused an aggravation of her medical condition while in the performance of her duties as an employee of Montgomery County rendering her incapable of performing those duties as she had previously performed. In order for a service connected disability to be awarded, the Code states that the condition be aggravated. Webster's Dictionary defines aggravate as to worsen. Other conventional dictionaries subscribe to this definition."

"Based upon all of the evidence, medical reports, and other exhibits, I find that (the appellant's) condition was not aggravated or worsened by her employment. However, I do find that (the appellant) experienced temporary symptoms of the disease during certain times when she was working. I also believe that some of the stress associated with her job caused her to experience those symptoms, but, that the stress experienced while working did not aggravate her medical condition.

I find that the evidence in this case suggests that (the appellant) had a condition, the natural and proximate result of which caused her to be incapable to performing her duties as she had previously performed them. As such, I believe (the appellant) is entitled to a non-service connected disability."

11. Section 33-43 Disability Retirement of the Employees' Retirement System for Montgomery County states in part:

"(c) Service Connected Disability Retirement. A member may be retired by the Disability Retirement Hearing Board on a service connected disability retirement if:

(1) the member is totally incapacitated for duty or partially and permanently incapacitated for duty as the natural and proximate result of an accident occurring, or an occupational disease incurred or condition aggravated while in the actual performance of duty; that the incapacity is not due to willful negligence, and the incapacity is likely to be permanent. In extenuating circumstances, the Disability Retirement Hearing Board may waive the requirement that a member's incapacity is likely to be permanent and may approve a temporary disability retirement for one or more one-year periods until the incapacity is either removed or it becomes apparent that it is likely to be permanent.

(2) The member or the member's department head has made application for disability retirement at least thirty days before the date the retirement is to be effective. The Disability Retirement Hearing Board may waive the thirty day application requirement period.

(3) The member is unable to perform the duties of the occupational classification to which assigned at the time disability occurred or a position of comparable status within the same department, if qualified."

CASE NO. 88-46 CONTINUED

The issue before the Board was whether the appellant was eligible for a service-connected disability retirement. Under Section 33-43(c), in order to be eligible for a service-connected disability retirement, an individual must be "incapacitated for duty as the natural and proximate result of . . .condition aggravated while in the actual performance of duty. . ." and "unable to perform the duties of the occupational classification to which assigned at the time disability occurred or a position of comparable status. . ."

The majority of the Board found the medical evidence supported the claim of aggravation while in the actual performance of duty, and the doctors all agreed that the appellant could not perform at the level to which assigned at the time of retirement. Additionally, the County was aware of the problems and failed to take any step to ease the stress or reduce the work load. The Board further noted that in Whitaker vs Montgomery County, the Circuit Court had held that if the County was unable to place such a person in a comparable position, then a service-connected disability must be awarded.

Therefore, after due consideration of all of these factors, it was the judgment of the majority of the Board that the appellant met the requirements for a service-connected disability, under Section 33-43(c) of the Employees' Retirement System for Montgomery County. Accordingly, the County was directed to:

1. Change the disability retirement from non-service connected to service-connected, with the same effective date.

2. Re-calculate benefits due under Section 33-43(h)(1) and reimburse the appellant additional benefits due as the result of this change.

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

The dissenting member of the Board was concerned about the lack of documentation of a sustained medical problem, the lack of any indication that the condition had been aggravated and the absence of a specific time or cause of the change in the condition. Because of these concerns, he could not support the awarding of a service-connected disability retirement.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 88-52

An employee appealed from the decision of the Chief Administrative Officer on his request to transfer retirement credits. The facts were undisputed. The issues to be resolved were:

1. Did the appellant rely, to his detriment, on incomplete or incorrect advice or information provided by the Personnel Office?

2. If so, should he be allowed to purchase the retirement service in question at the transfer cost, in lieu of the full actuarial cost?

On the first issue, the Board concurred with the Fact-Finder that "the grievant relied to his detriment on improper advice and information from the Personnel Office." In the Board's judgment, the Personnel Office staff had the responsibility to ascertain the exact nature of the appellant's situation - i.e. - purchase or transfer - as the County Retirement Law has a different procedure for each. A new member coming into a complex retirement system could not reasonably be expected to know and understand the intricate details of a transfer. The role of the Personnel Office was to facilitate such actions and to provide employees with complete, accurate information in a given situation. This clearly did not happen in this case, and resulted in an illusory benefit for the appellant.

The second issue involved attaining a balance of fairness and equity. The Board was satisfied that the appellant made a good faith effort to achieve the transfer in a timely manner, but was unable to do so because of a lack of proper information and assistance from the Personnel Office. On balance, the employee had too great a burden to meet, considering the obstacles placed in his way by management, as documented by the record. Therefore, it was the judgment of the Board that the appellant should receive full retirement credit at the transfer cost. Accordingly, the County was directed to:

1. Rescind the March 14, 1986 agreement for purchase of three years, seven months of State service at a cost of $12,309.08.

2. Process the necessary paper work to allow the appellant to receive full credit for three years, eleven months of State service at a cost of $3,569.93 (The amount of refund received from the State).

CASE NO. 88-52 CONTINUED

3. Credit monies paid under the purchase agreement (#1 above) towards the amount due (#2 above) and arrange for payment of the balance due, pursuant to Section 33-41(m) of the Employees' Retirement System for Montgomery County.

4. Complete all transactions necessary to implement this decision within 30 days of the date of this decision.

The County was further ordered to reimburse the appellant for reasonable attorney's fees incurred in pursuing this matter,

APPEALED TO CIRCUIT COURT BY THE COUNTY

SUSPENSION

CASE NO. 88-6

A Bus Operator appealed his suspension without pay. Prior to the hearing, the case was settled and the appeal withdrawn.

WITHIN-GRADE REDUCTION

CASE NO. 88-7

A Truck Driver appealed a 5% Within-Grade Reduction for 20 work days for alleged tardiness. The record showed that:

1. The appellant admitted the numerous instances of tardiness during the last three years because of personal problems.

2. The appellant received counseling about his tardiness on May 30, 1986 and again on September 4, 1986.

3. The appellant received a Written Reprimand on January 29, 1987 for being tardy 16 times during the period of August 1, 1986 to December 26, 1986. The letter of reprimand warned that further violations of attendance policy would result in a reduction in pay.

4. The appellant was tardy on 7 or 8 occasions between December 26, 1986 and February 20, 1987. He received a Statement of Charges on March 5, 1987, with the 5% Reduction in pay occurring on April 23, 1987.

5. The decision of the Chief Administrative Officer was mailed to the appellant on December 2, 1987 (certified mail), and was returned to the County on January 5, 1988 as undeliverable. The decision was then sent to the Department and handed to him on February 2, 1988.

6. The Department had issued Department Procedure No. 1-3 Tardiness and Reporting Requirements on August 1, 1986. This procedure states in part:

> ". . .2.4 All occurrences of tardiness shall be documented. Any employee who is tardy for work more than five (5) times during any consecutive 12-month period will be subject to progressive disciplinary action for continued incidences of tardiness (i.e., the sixth (6th) time an employee is tardy in any consecutive 12-month period becomes the first incident of abuse; the seventh (7th) time becomes the second incidence of abuse, etc.). The fact that the amount of time late may be made up does not negate the instance of tardiness."

" .3.4 Second Incident of Abuse (7th time tardy in any 12-month period) - Reprimand. Forward a memorandum to the employee summarizing the circumstances and action taken, and place a copy in the employee's personnel file.

3.5 Third Incident of Abuse (8th time tardy in any 12-month period) - Five percent (5%) reduction in pay for twenty (20) working days. Forward a memorandum to the employee summarizing the circumstances and action taken and place a copy in the employee's personnel file.

3.6 Fourth Incident of Abuse (9th time tardy in any 12-month period) - Five percent (5) reduction in pay for one hundred twenty (120) working days. Forward a memorandum to the employee summarizing the circumstances and action taken and place a copy in the employee's personnel file.

3.7 Fifth Incident of Abuse (10th time tardy in any 12-month period) - Dismissal. Prepare, justify and submit through departmental channels, a request for dismissal. . ."

There were two issues before the Board. The appellant believed the action was inappropriate and wanted it rescinded, while the County wanted the appeal dismissed for lack of filing a timely appeal. On the timeliness issue, the County contended the appellant's failure to pick-up the certified mail and appeal within 10 days of the date of the Post Office notification, made the appeal untimely. Section 29-4 Appeal Period of the Personnel Regulations gives an employee "10 working days from receipt of a written decision of the Chief Administrative Officer" to note an appeal. Responsibility for delivery of that decision rests with management and the record showed that delivery was not accomplished until February 2, 1988. The appellant's appeal of February 12, 1988 was filed within the period allowed. Therefore, it was the judgment of the Board that the County's request for dismissal be denied.

CASE NO. 88-7 CONTINUED

There was no question that the appellant was tardy on numerous occasions subsequent to August 1, 1986, the date the new policy was put into effect, and that the tardiness problem spanned a period of approximately three years. It was also clear that, due to the personal nature of the problem, management was fairly lenient prior to the implementation of the new policy, and even after its implementation. The policy called for dismissal after 10 instances of tardiness in a 12-month period, yet after 24 instances of tardiness in approximately 7 months, the action taken was a 5% reduction in pay for 20 work days.

Attendance at work in a proper and timely manner is the responsibility of the employee. The appellant indicated the tardiness was caused by personal problems and it was his duty to take appropriate action to allow timely reporting for work. Simply providing an explanation for the tardiness does not justify it, as he seemed to believe. Based on the record, it was the judgment of the Board that the appellant received adequate notice, proper counseling and reasonable warning of the consequences of continued tardiness. Therefore, the continued tardiness in January and February 1987 were sufficient and justifiable cause for the action taken. Accordingly, the action was sustained and the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 88-11

A Recreation Specialist appealed a 2% Within-Grade Reduction for one year for alleged:

1. Failure to perform duties in a competent or acceptable manner.
2. Violation of an established policy or procedure.
3. Theft and misappropriation of County funds and property.

The record showed that:

1. From November 1986 to April 1987 the appellant was responsible for obtaining and distributing Capital Center tickets to the Outreach staff.

2. On January 16, 1987 the Department issued and implemented new "Recreation Outreach Policies". The Revenues section of that policy stated: "...Revenues from any activity where tickets are purchased through an advance request form are due in to the Recreation Supervisor not later than two work days after the activity. Revenues from all other activities will be reconciled through the regular close out advance cash flow process every other week...".

3. From February to June 1987 the appellant's supervisor made repeated attempts to resolve the ticket problem with him, but without success.

4. The appellant admitted that the money was intermingled with his personal funds in his checking account and alleged that he wrote a check to withdraw $600.00 to give to the County in mid-May 1987, but subsequently lost the money and the check book. Despite several requests, the appellant refused to provide documentation to prove this allegation and there was no evidence in the record to support such contention.

5. On July 30, 1987 the appellant was notified that he owed the County $801.00 for lost ticket money. Subsequent to an audit being performed, the amount was reduced to $778.00.

6. At time of the audit it was noted that the appellant had received inadequate supervision, had failed to maintain permanent records of the transactions and failed to remit funds to the County in a timely manner.

The handling of public funds is a very serious responsibility that cannot be ignored. It was quite evident that all parties in this case failed to take timely action in accounting for the funds. However, that did not justify or excuse the appellant's action of placing the funds in his personal checking account instead of remitting to the County in a timely manner. After due consideration, it was the judgment of the Board that the record clearly supported the charges. Accordingly, the disciplinary action was sustained and the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT.

CASE NO. 88-20

A management official appealed his Within-Grade Reduction. The case was settled prior to Board action and the appeal was withdrawn.

WRITTEN REPRIMAND

CASE NO. 88-21

A Program Manager appealed a Written Reprimand and asked that the action be dismissed.

The appellant argued that the disciplinary action should be dismissed as it was not taken in a timely manner. The County argued that the appellant requested several extensions and that an extended period of time was required to properly investigate the issues and to verify information supplied by the appellant. The record showed that:

1. The specific incident, that began the chain of events that led to the disciplinary action, occurred on October 30, 1987, but did not come to the County's attention until early December 1987.

2. On December 15, 1987, the appellant's supervisor met with him to discuss the allegations. On December 22, 1988, the supervisor asked the appellant to confirm his earlier statement by putting it in written form.

3. The appellant was informed orally on December 24, 1987 that he would be receiving a Statement of Charges. The Statement of Charges was prepared on December 31, 1987 and given to the appellant on January 6, 1988.

4. The appellant and his Counsel met with management on January 21, 1988 to respond to the charges.

5. Having heard nothing, on March 2, 1988, Counsel sent a letter to the Department of Transportation inquiring on the status of the situation. The Department of Transportation did not respond to Counsel.

6. On April 22, 1988, the appellant was given the Notice of Disciplinary Action, dated April 1, 1988.

7. There was nothing in the record to show that the County conducted any further investigation after January 21, 1988 or obtained any further information or verification of prior information from any source.

8. Section 27 Disciplinary Actions, subsection 27-1 Policy of the Personnel Regulations, 1986, states, "A disciplinary action against an employee must be initiated promptly when it is evident that the action is necessary to maintain an orderly and productive work environment. . ."

After due consideration of the record, it was the judgment of the Board that the Department, without any justifiable reason or excuse, failed to take a reasonably timely action in this case. The evidence was known in early December 1987; all persons involved were County or State/County employees and readily available; and the nature of the situation and the facts did not require or warrant extensive analysis and lengthy time to make a decision.

The Board was also concerned about the Department's failure to respond to Counsel's inquiry in early March 1988. Employees, and Counsel, are entitled to such information and the failure to respond only added to the appellant's apprehension. The Board was very concerned that such action may result in a de facto type of punishment from which the employee had no effective form of appeal or redress. The delay in making a decision and the delay in taking action denied the appellant's right to a timely resolution of this case. In the Board's judgment, justice delayed was justice denied.

Accordingly, the Motion to Dismiss was granted and the County was directed to rescind the written reprimand and to remove all documentation related thereto from the appellant's personnel records. The County was further ordered to reimburse the appellant for reasonable attorney's fees incurred in presenting this appeal.