Merit System Protection Board 1989 Annual Report

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

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1989

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 1989 were:

Fernando Bren - Chairman
(Reappointed 1/87)
Paul Corcoran - Vice Chairman
(Appointed 1/88)
Anthony W. Hudson - Associate Member
(Appointed 1/89)

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 Chief Administrative Officer 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

COMPENSATION

CASE NO. 89-16

A Firefighter appealed from the decision of the Personnel Office on his grievance concerning the rate of compensation while employed with the Kensington Volunteer Fire Department. The record showed that:

1. The appellant was a full-time employee of the Chevy Chase Fire Department during the period in question.

2. On March 23, 1986, the appellant agreed to and was hired as a part-time, temporary employee by the Kensington Volunteer Fire Department and was to be paid $7.894 per hour. This was secondary employment, as the appellant retained his full-time position.

3. The Chevy Chase Fire Department and the Kensington Volunteer Fire Department were private, independent corporations. Both corporations utilized the payroll services offered by the Montgomery County Government.

4. Both corporations turned time sheets in for the appellant, and for convenience purposes, the County combined all monies earned and issued one pay check. However, each corporation was charged for the hours reported, at the assigned pay rate on file.

5. The appellant discontinued the secondary employment on November 22, 1987, but continued the full-time employment with the Chevy Chase Fire Department.

6. Other individuals, similarly classified and employed, were paid in the same manner by the Kensington Volunteer Fire Department.

7. Paramedics, on overtime, were often loaned to the Kensington Volunteer Fire Department by other Fire Departments to meet minimum manning requirements. These individuals were never put on the Kensington Volunteer Fire Department payroll or charged to the Kensington Volunteer Fire Department payroll account by the County.

CASE NO. 89-16 CONTINUED

It was the judgment of the Board that the appellant was not entitled to additional compensation for his secondary employment. The appellant knowingly and willingly accepted secondary employment with the Kensington Volunteer Fire Department at an agreed upon hourly rate, and was paid accordingly. The fact that the two Fire Departments were independent corporations; that each reported time worked separately, and each was billed accordingly, moots the appellant's claim that it was all paid by one department and should be paid at the overtime rate, pursuant to the Fair Labor Standards Act. Accordingly, the appeal was denied.

CASE NO. 89-20

A Mechanic Supervisor appealed from the decision of the Chief Administrative Officer on his grievance concerning shift pay differential.

The appellant alleged that the modification of his shift pay differential, pursuant to the union negotiated agreement, was invalid and improper because he was exempt from representation by the union. The record showed that:

1. Section 9-4 Shift Pay Differential of the Personnel Regulations stated in part:

"The Chief Administrative Officer may establish shift pay differentials for evening work. The amount of shift pay differential, if any, must be determined by the Chief Administrative Officer. . ."

2. Prior to July 5, 1987, the policy for shift pay differential had been established at 5% of base pay.

3. On June 30, 1987, the appellant was receiving a 5% shift pay differential for working the second shift, which amounted to $1,613 per annum.

4. On April 7, 1987, the County Executive submitted a compensation package, based on the negotiated union contract, to the County Council for approval. In the transmittal memorandum, the County Executive stated:

". . .approximately 3,000 other County employees are not represented by a bargaining agent. These employees are primarily supervisory, managerial, or excluded from the bargaining unit. . .For FY 88 only, I recommend that the wage and benefit adjustments for the non-bargaining unit employees. . .be the same as the collective bargaining agreement. . ."

The agreement submitted provided for hourly shift pay differentials in lieu of the prior 5% policy.

5. The County Council approved the proposal, and effective July 5, 1987, the new shift pay differential rates were implemented.

6. Paragraph 5.3(a) of the union agreement stated as follows:

". . .(b) Employees receiving a shift differential of five percent (5%) of base salary for a permanent shift as of June 30, 1987 shall retain the dollar amount of that differential in lieu of the amounts specified in sub-paragraph (a) above. The dollar amount received as a differential as of June 30, 1986 (sic) shall remain constant during the term of this Agreement. . ."

7. On June 23, 1987 and June 29, 1987, the Personnel Office sent memoranda to Department/Agency Heads informing them of the pay changes to be effective July 5, 1987. The record did not contain any evidence of notification being given to affected employees by the Department or by the Personnel Office.

8. The County stated that the FY 89 budget recommendations did not contain anything pertaining to modification or change of shift differential pay for non-union employees.

CASE NO. 89-20 CONTINUED

After careful review of the written record and consideration of Counsel's argument, it was the judgment of the Board that the change in shift pay differentials for non-bargaining unit employees was properly accomplished for FY 88 only. While the union agreement was effective for three years, the County Executive specifically stated the changes were for FY 88 only for non-bargaining unit employees. Therefore, the freezing of shift pay rates at the June 30, 1987 level, for non-bargaining unit employees, expired at the end of FY 88. In the absence of any definitive action on extension or modification of the shift pay differential policy beyond July 1, 1988 for non-bargaining unit employees, it was the judgment of the Board that the prior policy of 5% of base pay must be considered valid from July 1, 1988 until such time as properly modified by the County.

Accordingly, the County was directed to revise the appellant's shift pay differential to 5% of base pay, effective July 1, 1988 and reimburse him all additional salary monies due as the result of the change. The appellant was also awarded reimbursement for reasonable attorney's fees incurred in pursuing the grievance.

APPEALED TO CIRCUIT COURT BY THE COUNTY

The Court overturned the Board's decision and ruled in favor of the County.

CASE NO. 89-27

An applicant appealed from allegedly not being offered the proper salary for the position of Library Assistant II. The record showed that:

1. At the time of applying for the County position, the appellant was an employee of the State of Maryland, in the Montgomery County Department of Social Services.

2. Section 9-15 Salary on Appointment or Reappointment of the Montgomery County Personnel Regulations, 1986 stated: "The base salary of a newly appointed or reappointed employee is to be fixed within the applicable grade by the appointing authority. . .".

3. Section 9-17 Salary on Demotion of the Montgomery County Personnel Regulations, 1986 sets forth the procedures to follow for the voluntary demotion of a County employee.

4. The appellant was interviewed, rated "Well-Qualified" and subsequently offered the position. She accepted the offer, without confirmation of salary level, and submitted a letter of resignation to the State. Several days later, she received the written job offer, containing the starting salary level, which she did not consider to be appropriate.

5. The appellant subsequently rescinded her resignation, and declined the County offer.

6. Other State employees have moved to County positions without loss in pay or grade.

Regrettably, this incident occurred because of poor communication between the parties and placed the appellant in a perplexing situation. However, the appellant was clearly a State employee and not covered by Section 9-17 of the Montgomery County Personnel Regulations. Therefore, it was the judgment of the Board that, pursuant to Section 9-15, the appointing authority had the prerogative to establish entry level salary at the beginning salary for the grade, as was done in this case. Accordingly, finding no violation of the Personnel Regulations, the appeal was denied.

DELAY OF INCREMENT

CASE NO. 89-34

A Financial Program Manager appealed from the decision of the Chief Administrator Officer on his grievance concerning a performance rating.

Section 8-5 Appeals From Performance Ratings of the Personnel Regulations stated: "Performance ratings are not appealable to the Merit Board. Performance ratings are not grievable except in cases of failure to follow established procedures." After careful review of the record, it was the judgment of the Board that there was no evidence of a violation of procedure in processing the performance rating. The problem was a disagreement on proper staffing levels, which the appellant contended impacted on his work performance. However, he did not take any steps, during the rating period, to have the approved and agreed upon performance plan modified. Therefore, it was the decision of the Board that the appeal be denied.

DEMOTION

CASE NO. 89-7

A Planning Manager appealed his demotion as the result of a classification study. Prior to Board action, the County agreed to settle the case in a manner that resolved the issues raised.

CASE NO 89-9

An Administrative Services Coordinator noted an appeal of his demotion as the result of a classification action. The appeal alleged a violation of established procedures.

The County, based on decisions in similar cases, subsequently withdrew the action prior to the scheduled hearing, rendering the case moot.

GRIEVABILITY

CASE NO. 89-4

A Mechanic appealed a written reprimand. The Merit System Protection Board had held this case in abeyance pending resolution of appellant's appeal of suspension and a ruling by the Circuit Court in another case.

After review of the Court's decision, it was the judgment of the Board that the appeal must be filed under the Union contract procedure. Accordingly, the Board did not have jurisdiction and dismissed the appeal.

CASE NO. 89-6

An Office Automation Administrator II appealed from the decision of the Personnel Office that it would not accept her grievance concerning the classification of her position. The record showed that:

1. Appellant's position was reclassified from Office Automation Administrator I, Grade 14, to Office Automation Administrator II, Grade 16, effective July 3, 1988. Appellant requested an administrative review of that decision.

2. On September 14, 1988, upon completion of the administrative review, the classification consultant concluded that appellant's assigned duties and responsibilities exceeded those of Grade 16, but did not equal the Grade 23 level sought. The consultant recommended that a "study should be made of the computer program field to determine whether there is a definite need to establish an intermediate grade between the Grade 16 and Grade 23 to accommodate employees such as (appellant) who have demonstrated the potential for further development. . . . In the interim, the only recommendation that can be made . . . is to retain her in the Office Automation Administrator II, Grade 16 classification until the recommended study can be accomplished."

3. On October 17, 1988, the Chief Administrative Officer approved the consultant's recommendation.

4. Appellant filed a grievance on November 9, 1988, alleging a pay inequity.

CASE NO. 89-6 CONTINUED

5. The Personnel Office subsequently ruled the issue was one of classification, which was not a grievable issue.

It was the judgment of the Board that the issue was one of proper classification, which could affect compensation. There was insufficient evidence in the record to support the claim or allegation of a pay inequity. Accordingly, the decision of the Personnel Office, that the issue was not grievable, was sustained.

The Board noted, however, that after review of the record it could find no evidence to show that the procedure had been completed, as directed by the Chief Administrative Officer. In approving the consultant's recommendation, the Chief Administrative Officer had agreed that appellant's position was not properly classified, and directed that a further study be conducted to determine the proper classification. To assure compliance with established procedures, the Board directed the Personnel Office to complete the study, as ordered by the Chief Administrative Officer, and to provide documentation of its completion and implementation by May 1, 1989.

CASE NO. 89-11

Thirty-two Firefighters appealed from the decision of the Personnel Office that it could not accept their grievance as it was not based on a grievable issue. The issue concerned the stay of promotions to Master Firefighter and Fire Sergeant that was issued by the Board.

The stay was issued to prevent irreparable harm to the appellants in other cases, and to assure that no actions would be taken until such time as it could be determined that the promotional examination process was fair and equitable and administered in accordance with established procedures. The appellants, who were on the eligible lists for promotion, had not been adversely affected as no permanent promotions had been made from those lists.

Finding no adverse impact, it was the judgment of the Board that the issue was not grievable. Accordingly, the decision of the Personnel Office was sustained and the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 89-14

A Mechanic appealed from the decision of the Personnel Office that his grievance, concerning promotion, must be filed through the Union negotiated grievance process. The record showed that:

1. The appellant was a member of the Services, Labor and Trades (SLT) bargaining unit.

2. The County had entered into an agreement that gave the Union exclusive representation rights for employees in the unit on all matters covered by the contract.

3. Section 401 of the Charter of Montgomery County stated that:

". . .Officers and employees who are members of a unit for which a collective bargaining contract exists may be excluded from provisions of the merit system . . .".

4. The County's Collective Bargaining Law excluded use of Personnel Regulation rights and privileges to unit employees if such rights and privileges were covered by the negotiated contract.

5. Promotional rights were covered by the contract. In fact, Section 24.4 Appeal of the contract, stated:

"A unit employee may appeal promotional actions under the provisions of Article 10 based upon procedural violations."

After review of applicable law, it was the judgment of the Board that the issue was covered by the Collective Bargaining Agreement. Therefore, since the appellant was a member of the SLT unit, he was required to use the negotiated grievance process contained in Section 10 of the agreement, and may not file a grievance under the Merit System. Accordingly, the decision of the Personnel Office was sustained and the appeal was denied.

CASE NO. 89-17

A Principal Administrative Aide appealed a promotional action. The Personnel Office contended that the grievance, must be filed through the Union negotiated grievance process. The record showed that:

1. The appellant was a member of the Office, Professional and Technical (OPT) bargaining unit.

2. The County had entered into an agreement that gave the Union exclusive representation rights for employees in the unit on all matters covered by the contract.

3. Section 401 of the Charter of Montgomery County stated that:

". . .Officers and employees who are members of a unit for which a collective bargaining contract exists may be exluded from provisions of the merit system . . .".

4. The County's Collective Bargaining Law excluded use of Personnel Regulation rights and privileges to unit employees if such rights and privileges were covered by the negotiated contract.

5. Promotional rights are covered by the contract. In fact, Section 24.4 Appeal of the contract, stated:

"A unit employee may appeal promotional actions under the provisions of Article 10 based upon procedural violations."

After review of applicable law, it was the judgment of the Board that the issue was covered by the Collective Bargaining Agreement. Therefore, since the appellant was a member of the OPT unit, she was required to use the negotiated grievance process contained in Section 10 of the agreement, and may not file a grievance under the Merit System. Accordingly, the position of the Personnel Office was sustained and the appeal was dismissed.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 89-24

A Police Sergeant appealed from the decision of the Personnel Office that his grievance, concerning the selection process for a transfer would not be accepted as it was not a grievable issue.

The appellant argued that under Departmental Directive (DD) #85-11, the issuance of Position Vacancy Announcement #89-03 made it a competitive process that was grievable. The County argued that transfer was the prerogative of management and was not grievable unless such a move was involuntary. The County further stated that, "the Police Department could abolish its present system of considering candidates for transfer and would not be in violation of the County Code or the Personnel Regulations". DD 85-11 stated that, "the directive will not interfere with the prerogative of the Chief of Police to transfer . . .any employee when it is deemed necessary and in the best interest of the employee, the department, or the County government".

The record showed that the Police Department had established two distinct methods for selecting employees for transfer. The Chief of Police had the option to utilize his prerogative and move an employee, or to follow the competitive process established in DD 85-11. There was no question that the competitive process was used in this case. Therefore, by making the process competitive, the established procedure had to be followed, and an allegation of failure to comply, such as in this case, was a grievable issue. Accordingly, the Board remanded the grievance to the Personnel Office for processing in accordance with established procedures.

CASE NO. 89-25

Transit Operations Supervisors appealed from the decision of the Personnel Office that their grievance, concerning an alleged pay inequity, would not be accepted.

The appellants alleged that the recent pay adjustment received by the Bus Operators, as a result of implementation of Q.E.S. II, had created an inequitable pay situation, affecting the Transit Operations Supervisors. The appellants were not challenging the Q.E.S. II results and were not seeking a review of their classification. They were seeking a 5% pay adjustment to correct the alleged inequity that they believed existed.

CASE NO. 89-25 CONTINUED

The Personnel Office held that the issue was intrinsically tied to Q.E.S. II and therefore, was not grievable because of the limitations of Bill #1-89. The County believed the matter involved a review of pay grades and Q.E.S. factors, which were not grievable matters.

In stating the case, the appellants clearly indicated they were not challenging the classification structure or changes, but were concerned about a perceived pay inequity between employees and supervisors. After consideration, it was the judgment of the Board that the issue, as stated, was grievable, as it involved an alleged pay inequity and not classification. Based on this, Bill #1-89 was not applicable. Accordingly, the grievance was remanded to the Personnel Office for processing in accordance with established procedures.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 89-36

A Physician appealed from the decision of the Personnel Office that her grievance concerning "equal pay" could not be accepted because it involved classification and was prohibited by Bill #1-89.

After due consideration, it was the judgment of the Board that the issue was one of proper classification, which allegedly resulted in a pay inequity. Therefore, the decision of the Personnel Office was in accordance with established procedures and was sustained.

CASE NO. 89-47

A Personnel Office employee appealed from the decision of the Personnel Office that one issue - the scope of advertising - in his grievance would not be addressed, as it involved a management prerogative that was not grievable. The record showed that:

1. The appellant filed the grievance on August 8, 1989.

2. In his response to the appeal, the Personnel Director stated:

> ". . .This determination does not bar the Appellant from making representations during the grievance process concerning vacancy announcement practices in the Personnel Office. However, any potential relief will not affect the Department's ability to independently determine how the position in question should be advertised. . ."

3. On October 12, 1989, the Personnel Director issued a memorandum to Personnel Office Employees informing them of the transfer of an employee and another position vacancy. He specifically stated:

> ". . .As has been my practice, I am informing Personnel Office employees to apply for the position before I proceed formally to advertise. . ."

Based on the foregoing, it was the judgment of the Board that the issue raised was an allegation of a violation or mis-application of an established procedure or policy, which was a grievable issue under Section 28-2(a) of the Personnel Regulations.

Accordingly, the Personnel Office was directed to incorporate this issue with the rest of the grievance and to continue processing in accordance with established procedures.

MEDICAL RATINGS

CASE NO. 89-33

A Transit Aide appealed the "Not Acceptable" medical rating received for the position of Mechanic Helper. The record showed that:

1. On January 6, 1989, the appellant fell from a ladder, while at work, and sustained multiple contusions, acute cervical strain and acute lumbar strain. She received medical treatment and was off work for approximately four weeks.

2. The appellant was cleared to return to light duty work, as a Transit Aide, on March 1, 1989. It was noted that on that date, she stated she was still having problems with her back and right leg.

3. On March 8, 1989, the appellant was examined by Dr. Kent Peterson, who reported that, ". . .This patient has clinical evidence of a herniated disc. . .it is my opinion that she has a nerve root compression probably secondary to a disc. . ."

4. On May 4, 1989, Dr. Peter Tanna submitted a handwritten note that the appellant could return to normal duty.

5. On May 5, 1989, the County's Employee Medical Examiner issued a "Final Rating Pending" with a note that he needed "a letter from an orthopedist regarding diagnosis, treatment and prognosis of back condition. Can (appellant) perform the full duties of a mechanic helper as per enclosed job description?" This information was to be submitted by May 19, 1989.

6. On May 15, 1989, progress notes of Dr. Sagar Nootheti were submitted, but they did not adequately respond to the issues raised by the Employee Medical Examiner.

The Employee Medical Examiner has the dual responsibility of assuring the taxpayers that County employees will be able to physically perform the jobs for which hired and trying to protect the employees from unnecessary injuries caused by job stress and strains. In this case, the doctor did not believe sufficient evidence of full recovery has been provided and, to protect the employee, would not approve a return to the Mechanic Helper position, pending receipt of that information.

CASE NO. 89-33 CONTINUED

It was the judgment of the Board that the medical rating assignment was in the best interest of all concerned. Accordingly, the decision of the Employee Medical Examiner was sustained and the appeal was denied.

CASE NO. 89-45

An applicant appealed the "Not Acceptable" medical rating received for the position of Public Service Worker II. The County subsequently reconsidered the medical data and changed the rating to "Acceptable", rendering the appeal moot.

CASE NO. 89-46

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

1. On August 2, 1989, the appellant underwent a County pre-employment medical examination. The examination revealed a hearing loss in the right ear, with the following test results:

RANGE	LEFT EAR	RIGHT EAR
500Hz	05 dB	10 dB
1000Hz	05 dB	05 dB
2000Hz	05 dB	55 dB
3000Hz	05 dB	50 dB
4000Hz	00 dB	45 dB
6000Hz	20 dB	40 dB
8000Hz	15 dB	15 dB

2. On August 7, 1989, the appellant was examined by an audiologist at The Hearing Center, who confirmed the hearing loss in the right ear and reported:

> ". . .It is hypothesized that the loss is congenital in nature and that he has developed excellent compensation strategies. . .as a result of the deficit in his right ear, subtle problems of sound localization and understanding speech in the presence of background noise could be anticipated. . ."

3. On August 31, 1989, the appellant received the "Not Acceptable" medical rating based on the finding that he had a hearing impairment which could interfere with his ability to perform essential tasks and could pose a high risk of injury to himself and others.

4. County Administrative Procedure 4-13 Medical Standards Section 6.0, d.2 Hearing stated:

> "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."

5. Med-Tox Associates, Inc. conducted a review of the County's Medical Standards and submitted a report on August 10, 1989. In that report, the following standard was recommended for all Public Safety positions:

> "Hearing loss attenuated by hearing aid is unacceptable.
>
> Pure tone thresholds in the worst ear not worse than 25 dB in three of the four frequencies (500 Hz, 1000Hz, 2000Hz, 3000Hz) or no greater than 30 dB at any of the first three frequencies and an average of 30dB for the four frequencies is acceptable for safety classifications."

6. The County has consistently applied the approved standard to all applicants.

After consideration of the evidence, it was the judgment of the Board that the appellant did not meet the established hearing standard, and would not meet the recommended hearing standard that had been well documented. Therefore, the "Not Acceptable" medical rating was correct, and was sustained.

MISCELLANEOUS

CASE NO. 89-1

A Senior Engineer appealed from the decision of the Chief Administrative Officer on his grievances concerning annual leave. The record showed that:

1. On July 20, 1988, the appellant was given a work assignment that was to be completed by July 25, 1988.

2. On July 21, 1988, the appellant submitted requests for approval of use of annual leave for the periods of July 26-29, 1988 and August 8-19, 1988. His supervisor subsequently approved the leave for July 26-29, but denied the request for August because of work load.

3. On July 22, 1988, the appellant submitted a handwritten draft report on the special work assignment. This draft report was discussed with his supervisor, was revised, and a second, unsigned draft was submitted on July 25, 1988.

4. On July 26, 1988, the Division Chief reviewed the draft, was not satisfied with the technical data, and directed the supervisor to contact the appellant, cancel the leave for July 27-29, and get the report in final form promptly.

5. The supervisor called the appellant's home at approximately 11:30 a.m. on July 26, and left a message for him to call the office, as it was very important. Failing to hear from the appellant, the supervisor called again at approximately 2:10 p.m. and 3:50 p.m. He again left messages, informing the appellant that his leave had been cancelled for July 27-29 and to report to work on July 27.

6. The appellant then called the Department Head and other County officials, but never called his supervisor. The appellant returned to work on July 27, as directed.

7. On July 29, 1988, the appellant submitted a letter of resignation, to be effective August 19, 1988 if his leave was approved for August 8-19, or to be effective on August 5, 1988 if the leave was not approved. After discussion with his supervisors, the appellant revised the effective date to August 12, 1988, providing the normal two week notice period.

8. Relevant provisions of Section 13 Annual Leave of the Personnel Regulations are:

> "Section 13-7 Scheduling of Use of Annual Leave.
>
> Accrued annual leave may be used, if approved by an employee's supervisor in accordance with procedures established by the department head and approved by the Chief Administrative Officer. Every effort must be made to give each employee the opportunity to use annual leave earned."
>
> "Section 13-10 Disposition of Accumulated Annual Leave at Separation from County Service.
>
> Upon leaving the County service, an employee must receive a lump-sum payment at the employees current rate of pay for the total accrued annual leave as of the date of separation, less any indebtedness to the County Government."

Use of accrued annual leave is a privilege extended to employees, subject to approval of supervisors after consideration of all relevant factors. Staffing and work load needs are a matter of judgment by the supervisors, and this Board is satisfied that the actions in this case were based on reasonable needs of the department.

The alleged interruptions on July 26 were caused by the appellant's failure to respond to an urgent phone call. If appellant had returned the initial call there would have been no further calls. Even if one considered these calls as interruptions, the Board did not find sufficient evidence to show that the appellant's use of leave on that day was hindered in any way.

Based on the record, the Board found that there was reasonable cause to cancel the approved leave for July 27-29, 1988. Finally, denial of leave for the period of August 8-19, 1988 was appropriate, based on work load needs, and entirely reasonable upon receipt of the resignation. Further, the appellant had not suffered any financial loss as the result of these actions, as he was entitled to full reimbursement for all accrued annual leave at the time of resignation.

Accordingly, the appeals on the two grievances were denied.

CASE NO. 89-2

Part-time Liquor Store Clerks appealed concerning the proper designation of a complaint. The issue was which set of Personnel Regulations was applicable to final implementation of a decision on a 1985 grievance.

The employees argued that the 1980 Personnel Regulations should be used because the decision on their grievance was issued on February 5, 1986. The County argued that since actual implementation of the decision did not occur until 1987, the Personnel Regulations, as amended on July 1, 1986 were applicable. This difference of opinion clearly involved the application rather than the fairness or equity of the Personnel Regulations.

It was the judgment of the Board that the complaint should have been designated as a grievance, not an Open Door Review. Further, based on the fact that the case occurred prior to Union representation, the employees should have been given appeal rights to the Board. Accordingly, the Board granted the request for an appeal and assumed jurisdiction, as the administrative process had been completed.

The record showed that:

1. On February 2, 1986, the Chief Administrative Officer stated, "I have reviewed the fact-finder's report of your grievance filed on July 25, 1986,(sic) and am in agreement with the recommendations contained therein. The Offices of Management and Budget and Personnel are hereby directed to work with the Department of Liquor Control to assess staffing levels within the Division of Retail Operations and by July 1, 1986, determine the appropriate balance of full-time and part-time merit system employees which will provide coverage of minimum service requirements and the most efficient basis for operations. . ."

2. On June 20, 1986, the Department of Liquor Control requested the creation of 40 part-time positions, so that it could carry out the directive of the Chief Administrative Officer. Attachment III of that request stated that, "Retroactive leave will be accorded temporary/substitute employees who are given merit status. . .".

3. On June 26, 1986, the County Council approved Resolution #10-2060, which amended the annual and sick leave sections of the Personnel Regulations, effective July 26, 1986.

4. On February 6, 1987, the Department of Liquor Control recommended the abolishment of the 40 part-time positions, as only two had been filled, to reduce the cost impact of the grievance resolution.

5. On February 18, 1987, the Chief Administrative Officer issued a memorandum to the Department of Liquor Control stating, ". . .In order to bring this long standing grievance to final resolution, I am directing that you proceed to fill these necessary positions with all dispatch. I ask that at least 5 positions be filled each three week period. Please advise me at the end of each three week period as to which dispensaries are assigned positions, the work hours scheduled, and the employee selected to fill the positions. . .".

6. It was stated that the first appointment of a grievant to a merit system position occurred on April 13, 1987, with the last one being appointed in July 1987.

7. The County had applied the 1986 Personnel Regulations to the appellants and had restricted retroactive annual and sick leave credits to 60 hours.

8. The 1980 Personnel Regulations mandated full crediting of annual and sick leave, retroactive to hire date, for temporary employees receiving a merit appointment without a break in service.

9. The 1986 Personnel Regulations limited the retroactivity to a maximum of 60 hours for annual leave and sick leave.

After careful review of the record, and consideration of the legal advice provided to the Board, it was the judgment of the Board that the 1980 Personnel Regulations must be applied in this case. The grievance was resolved on February 2, 1986, with timely implementation to follow. Therefore, the Personnel Regulations then in effect should apply to subsequent actions. Whether the change in the Personnel Regulations was intentional or unintentional, was not important. The legal foundation, as well as the fact that such change resulted in the unfair treatment of the appellants subsequent to settlement of a

CASE NO. 89-2 CONTINUED

grievance, provided sufficient basis for reversing the Chief Administrative Officer. Accordingly, to assure fairness and equity in the treatment of Merit System employees, the Board ruled that the 1980 Personnel Regulations must be used for calculating retroactive annual and sick leave accrual for all the appellants who subsequently received part-time merit system appointments.

In consideration of the time required to implement the decision and the short period of time that would be left in the leave accounting year, which included the busy year-end holiday season, the County was also directed to pay each appellant for any excess annual leave that would normally be forfeited to sick leave at the end of the 1989 leave year. This would assure complete fairness and equity as the appellants would have an insufficient period of time to reduce any accrued balance to the maximum carry over level.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 89-15

An administrative employee of a Fire Department appealed from the decision of the Personnel Office that it would not accept her grievance concerning pay for time worked.

Prior to Board action, the County agreed to accept a new Personnel Action Form showing her employment date as January 9, 1989 and compensating her for all time worked, rendering the appeal moot.

CASE NO. 89-19

A Deputy Sheriff appealed from the decision of the Chief Administrative Officer on her grievance concerning the use of an assigned County take-home vehicle. The appeal was subsequently withdrawn by the appellant.

CASE NO. 89-28

A Deputy Sheriff appealed from the Chief Administrative Officer's interpretation of Section 33-53 Protection Against Fraud of the Employees' Retirement System for Montgomery County.

Section 33-53 stated:

> "Any person who shall knowingly make any false statement or shall falsify or permit to be falsified any record or records of this retirement system in any attempt to defraud such system as a result of such act, shall be charged with a misdemeanor, and may be punishable under the laws of the county and the state. Should any change or error in the records result in any member or beneficiary receiving from the retirement system more or less than entitled to receive had the records been correct, the error shall be corrected and as far as practicable the payment shall be adjusted in such manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled will be paid. Any member or beneficiary who has received payment from the retirement system of any monies to which not entitled under the provisions of this act, shall be required to refund such monies to the system."

It was the Chief Administrative Officer's position that "should disability retirement status be rescinded as a result of the reversal on appeal of the grant of disability retirement, the County has the option to require that the employee refund such money to the retirement system. This determination would, however, be made on a case by case basis."

The appellant argued that benefits paid pending appeal constituted entitlement under the provisions of the act and precluded the County from seeking a refund if the award was subsequently overturned. The County argued that a recission of an award on appeal would nullify any entitlement, making a recipient liable for refunding the money, if so requested by the County.

CASE NO. 89-28 CONTINUED

Section 33-53 clearly required repayment of funds received if fraud was involved. If an individual applied for and was awarded disability retirement benefits by the Plan Administrator, then that person would be properly entitled to receive those benefits, under the law. Therefore, it was the judgment of the Board that, absent fraud an individual would not be required to refund benefits received as the result of a subsequent recission of an award. Accordingly, the interpretation of the Chief Administrative Officer was overruled and, Section 33-53 was to be administered as outlined herein.

CASE NO. 89-35

An employee of the Department of Social Services appealed from the decision of the Personnel Office that she could not file a grievance concerning termination of her County health insurance coverage. The grievance alleged a misinterpretation and misapplication of a County policy applicable to Department of Social Services employees.

It was the County's position that, under the mutual agreement with the State of Maryland, the appellant could only grieve a salary supplement, and since this did not involve salary, she had no right to file a grievance. After careful review and consideration of the documentation, it was the judgment of the Board that the issue raised was a valid, grievable matter. The agreement with the State of Maryland was implemented to avoid conflicts and to assure fairness and consistency in resolving problems that may arise in a dual system. The State was clearly given the authority and responsibility to revolve issues affecting both systems, while the County retained the authority and responsibility to resolve matters involving its' system only.

The issue raised in this case involved the County only and could not be resolved by the State. The County's refusal to accept the grievance had effectively denied the appellant an avenue of redress. The role of the Board is to assure fairness and equity in the resolution of legitimate complaints. Therefore, it was the judgment of the Board that the County's action was inappropriate and unreasonable and must be overturned. Accordingly, the County was directed to accept the grievance and process it in accordance with established procedures.

PROMOTION

CASE NO. 87-17

The 1987 appeal of 17 Police Officers was remanded to the Board by the Courts.

The Courts overturned the Board's decision and remanded the case for further determination on necessary corrective action to be taken. The Courts held that the absence of established guidelines and procedures to assure fairness and consistency of review and selection of candidates for promotion, in addition to the written examination scores, violated the County Code. Based on this, the only reasonable method of selection for promotion, at the time, was the rank order method.

This appeal involved 17 employees and the following promotional eligibility lists:

Master Police Officer - certified on 1/2/86

Police Sergeant - certified on 3/6/85

Police Lieutenant - certified on 9/23/85

The County had requested relief be granted to all adversely affected employees, whether appellants or not, and that it be applied similarly to subsequent eligible lists. This position deviated from the County's position on prior cases, which was to limit applicability of decisions to the appellants only. It was the judgment of the Board that such action would be inappropriate and could trammel appeal rights of other employees. Therefore, any relief granted would be applied to the appellants only.

In determining proper relief, the Board utilized the rank order method based on the rounded-off scores certified by the County. The actual score, to two decimal places, was not used because the County had announced it would round-off the scores prior to establishment and certification of the eligible lists.

The effective date of any promotion or pay change was to be based on the date the appellant would have been promoted, had the rank order method been used initially. In cases where the scores were the same, all individuals with that score were promoted as there was no valid criteria to determine which one should have been promoted. This was consistent with Clarke, Et Al, in which all the appellants were promoted on the same date based on their rank order and the number of vacancies available. Additionally, this same date was to be applied in determining experience eligibility for participation in future examinations.

After due consideration, the Board ordered the County to take the following corrective actions for each appellant listed:

1. Appellant #1 - none required as he was promoted to Master Police Officer approximately four months prior to rank order date.

2. Appellant #2 - change the date of promotion to Master Police Officer from July 20, 1986 to May 11, 1986 and reimburse him for all additional salary monies due for that period.

3. Appellant #3 - change the date of promotion to Master Police Officer from June 7, 1987 to January 19, 1986 and reimburse her for all additional salary monies due for that period.

4. Appellant #4 - change the date of promotion to Master Police Officer from July 20, 1986 to January 19, 1986 and reimburse her for all additional salary monies due for that period.

5. Appellant #5 - none required as he was promoted to Master Police Officer on the date he should have been.

6. Appellant #6 - change the date of promotion to Master Police Officer from January 31, 1988 to January 18, 1987 and reimburse him for all additional salary monies due for that period.

7. Appellant #7 - change the date of promotion to Master Police Officer from April 26, 1987 to July 20, 1986 and reimburse him for all additional salary monies due for that period.

8. Appellant #8 - promote to Master Police Officer effective January 18, 1987 and reimburse him for all additional salary monies due from that date to the present time.

9. Appellant #9 - change the date of promotion to Police Sergeant from October 23, 1988 to May 11, 1986 and reimburse him for all additional salary monies due for that period.

10. Appellant #10 - none required as he would not have been promoted from the list in question.

11. Appellant #11 - promote to Police Sergeant effective May 11, 1986 and reimburse him for all additional salary monies due from that date to the present time.

12. Appellant #12 - none required as he would not have been promoted from the list in question.

13. Appellant #13 - none required as he would not have been promoted from the list in question.

14. Appellant #14 - change the date of promotion to Police Sergeant from January 18, 1987 to May 11, 1986 and reimburse him for all additional salary monies due from that date to the present time.

15. Appellant #15 - promote him to Police Sergeant, effective May 11, 1986 and reimburse him for all additional salary monies due for that period.

16. Appellant #16 - none required as he would not have been promoted from the list in question.

17. Appellant #17 - Change the date of promotion to Police Lieutenant from June 7, 1987 to November 10, 1985 and reimburse him for all additional salary monies due for that period.

In addition to the foregoing, the County was directed to revise all subsequent personnel actions on each affected appellant, and if salary changes resulted, to reimburse them accordingly. Due to the loss of possible investment income on the monies due, the County was directed to pay the appellants 8 1/2% annual interest on all monies due from the date of change to date paid.

CASE NO. 87-17 CONTINUED

On the issue of attorney's fees, the Board ruled as follows:

1. The appellants were entitled to reimbursement for reasonable fees incurred in presenting the original appeal to this Board.

2. The Board had no jurisdiction or authority to award fees for the appellants' appeal to Circuit Court.

3. Under Section 33-15(c) of the Montgomery Code, the County was responsible for the appellants' legal expenses when it sought a judicial review. Therefore, the expenses for the County's appeal to the Court of Special Appeals were to be submitted directly to the County Attorney for appropriate action in accordance with the law.

4. The appellants were entitled to reimbursement for reasonable fees incurred for finalizing this case, subsequent to the Court remand.

APPEALED TO CIRCUIT COURT BY FOUR OF THE APPELLANTS

CASE NO. 89-18

A Firefighter appealed from the decision of the Chief Administrative Officer on his grievance concerning a temporary promotion to the position of Fire/Rescue Sergeant. The record showed that:

1. From January 16, 1988 to August 13, 1988, the appellant (a Master Firefighter/Rescuer) performed the higher level duties of a Fire/Rescue Sergeant approximately 70% of the time.

2. Since August 13, 1988, the appellant had been assigned the higher level duties about 20% of the time.

3. The Department of Fire and Rescue Services had an established practice of granting additional compensation to a person performing higher level duties more than 50% of the time.

4. On December 16, 1988, the appellant was paid an additional 5% of base pay for being worked out of class during the period of January 16, 1988 to August 13, 1988.

5. The appellant's request to be given a temporary promotion to Fire/Rescue Sergeant was denied by the Department Head on September 16, 1988 and the Personnel Director on November 10, 1988.

6. On February 17, 1989, the Fact-Finder recommended that the appellant be given a temporary promotion, beginning August 13, 1988 and continuing until he no longer worked out of class.

7. The Chief Administrative Officer disagreed with the Fact-Finder's recommendation, and on March 10, 1989, denied the request for a temporary promotion.

8. In establishing the Classification and Compensation Plan for the Fire and Rescue Services, the Fire and Rescue Commission, stated it's intent for the creation of the new class of Master Firefighter/Rescuer was for the incumbents to serve as backup unit officers on a limited basis.

9. The Master Firefighter/Rescuer class is assigned to Grade 19, while a Firefighter/Rescuer III is a Grade 17. The Fire/Rescue Sergeant is assigned to Grade 21.

10. Fire and Rescue Service employees are generally worked out of their assigned class 20-30% of the time for career development and training purposes.

11. Section 22 Promotion of the Personnel Regulations states:

". . .22-4 Temporary Promotion

On the recommendation of a Department Head, the Chief Administrative Officer may approve a temporary promotion on a non-competitive basis, not to exceed 12 months without approval of the Merit Board, when it is determined to be in the best interest of the County . . .employees who are temporarily reassigned to a higher classified job for a period of more than 45 days shall receive the rate of pay of the higher classified job. . ."

12. The approved class specification for Master Firefighter Rescuer, under Examples of Duties, states that the incumbent "Assumes higher level duties and responsibilities as required."

In the instant case, the record showed that the County recognized it had an ongoing, intermittent problem in maintaining adequate supervisory coverage at the Fire/Rescue Sergeant level. In an effort to alleviate this situation, the County created the new class of Master Firefighter/Rescuer, two grades higher than the Firefighter/Rescuer III level, to provide additional compensation and qualified people to fill in as needed. The practice of providing additional compensation beyond this level, if an employee worked more than 50% of the time at the higher level, was designed to protect the employee from misuse and to minimize abuse of the system.

After due consideration, it was the judgment of the Board that the appellant had been treated fairly under the existing practice and regulations. As a Master Firefighter/Rescuer, it was part of his assigned duties to function at the higher level, as needed, and the 20-25% of the time that had been documented was not deemed to be excessive or improper. The assignment of temporary promotions was a prerogative of management, and then, only for a specified time. The open ended recommendation of the Fact-Finder was inconsistent with the Personnel Regulations.

Accordingly, it was the decision of the Board that the appeal be denied.

CASE NO. 89-22

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning eligibility for the Police Sergeant's examination. The record showed that:

1. In 1978, Montgomery County established an entry level educational requirement of an A.A. Degree or 60 hours of college level credits for all new Police Officers.

2. The County had provided a Tuition Assistance Program for its employees, with many courses for Police Officers being given at the Public Service Training Academy.

3. According to the Fact-Finder, the appellant had 60 hours of college level courses (an A.A. Degree) and received an additional 6 hours credit through a CLEP examination.

4. The appellant had been a County Police Officer since July 3, 1973. He was promoted to Master Police Officer in 1983. He participated in the 1985 examination and was rated "Well-Qualified" for promotion to Police Sergeant.

5. The County implemented a new Police Career Development System in 1979 that included a college degree requirement for all ranks of Sergeant and above. Substitution of experience for education was permitted.

6. In 1983, the Department of Police implemented updated procedures for promotions and released the information to all Police Officers via Department Directive #83-57. This procedure set forth a minimum number of college credits that would be necessary prior to allowing substitution of experience for education. The schedule showed the following:

DATE	NO. OF HOURS REQUIRED
1/1/83	12
1/1/84	24
1/1/85	36
1/1/86	48
1/1/87	60
1/1/88	72
1/1/89	84
1/1/90	96
1/1/91	108
1/1/92	120

7. The appellant met the educational requirements until January 1, 1988.

8. The December 1987 announcement for the Police Sergeant's examination clearly stated that a minimum of 72 hours of college credits were required.

9. The appellant was denied access to the examination process because he did not have the 72 credit hours required .

It was the judgment of the Board that the educational requirement was properly established and the gradual implementation schedule provided adequate time for employees to meet the higher levels, as well as assuring the County of the desired upgrading of its officer ranks. The appellant, as well as other employees, was provided a fair and reasonable opportunity and time to attain the necessary minimum requirements. Therefore, it was the decision of the Board that the appeal be denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 89-23

A group of Firefighters appealed from the decision of the Chief Administrative Officer on their grievance concerning the scoring of test results for the rank of Fire/Rescue Sergeant. The issues to be addressed were:

1. Were the examinations scored in accordance with the announced procedures?

2. Should a late applicant's score be utilized in the scoring process?

3. Were certain questions job related?

4. Were the final scores based upon a proper assessment?

The Board agreed with the Fact-Finder's conclusion that, while the scoring procedure was not clearly stated and may be interpreted differently, the application was done in accordance with the announced procedures. The rescoring suggestion by the Fact-Finder was an attempt to offer a reasonable and fair resolution, but was not a binding recommendation. Management rejected the suggestion and affirmed the original scores. While the Board may not agree with this decision, it was a prerogative of management and the Board may not substitute its judgment for that exercised in this case.

The participation of a person who filed a late application was permitted by favorable resolution of a grievance. Grievances are confidential matters, and the appellants in this case had no right to be parties to or to be provided documents of that case. Resolution at a lower level ended the grievance and it was not subject to review or modification at this time by anybody. Therefore, the participation of that person was correct and in accordance with established procedures.

CASE NO. 89-23 CONTINUED

The appellants must bear the burden of proving whether certain questions were not job related and whether their scores were based on a proper evaluation/assessment. It was the Board's judgment that the appellants had not proven either point, as the record did not contain sufficient evidence or argument to rebut the County's stated position.

Accordingly, it was the majority decision of the Board that the appeal be denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANTS

CASE NO. 89-30

A Fire/Rescue Lieutenant appealed from the decision of the Chief Administrative Officer on his grievance concerning eligibility for the Fire/Rescue Captain's promotional examination. The record showed that:

1. On October 24, 1988, the County released Personnel Bulletin #338, announcing procedures for the 1988 Promotional Examination for the Rank of Fire/Rescue Captain. The announcement stated that applications had to be submitted by November 18, 1988 and that each applicant must have completed 3 years in-grade as a Montgomery County Fire/Rescue Lieutenant as of that same date.

2. The appellant submitted a timely application. His application was denied, as he had been promoted to a Fire/Rescue Lieutenant in February 1986 and did not meet the 3 years in-grade experience requirement.

3. The appellant was allowed to participate in the examination process, with the results being sealed, pending resolution of his grievance.

4. For many years prior to this specific examination, Fire and Rescue employees had been permitted to participate in promotional examinations, even though not fully qualified at the time of the examination, if they would meet all requirements for promotion within the anticipated life of the eligible list. While all names of successful candidates were placed on the eligible list, a person could not be promoted until all requirements were met.

5. This practice of "conditional eligibility" had been developed, approved and implemented by the Fire and Rescue Commission, and applied to all ranks and positions, including those in the County's Department of Fire and Rescue Services.

6. At the time of the grievance, the class specification for Fire/Rescue Captain required individuals to have 3 years experience as a Fire/Rescue Lieutenant before being eligible for promotion. This same experience requirement was in effect at the time of prior examinations, but the applicants were only required to have one year of experience at the time of the examination because the list was expected to be used for 2 years.

7. On May 2, 1989, the County issued Personnel Bulletin #346 announcing procedures for the 1989 Promotional Examination for the Rank of Fire/Rescue Lieutenant. This examination required only 2 years experience be completed by the time of application, even though the class specification submitted by the County (approved in July 1987) showed that 3 years was required.

8. All paid Firefighters/Rescuers became County employees in January 1988, and were subsequently subject to the County's Personnel Regulations. Personnel Regulations of the two systems were similar, by law; so there were no major changes at the time of the changeover.

9. The Fact-Finder noted that "grievant had a reasonable expectation, based on history, . . .that conditional qualification for a promotion would be allowed. . .", but he did not have a vested right to the continuation of those procedures. He ruled that the County had the authority to alter the process, even though it disadvantaged the appellant.

10. The Chief Administrative Officer agreed with the Fact-Finder and denied the grievance on May 18, 1989.

CASE NO. 89-30 CONTINUED

11. On June 15, 1989, in its response to the appeal, the County stated that, "it would not be possible to change requirements for one job classification and not consider the others".

12. In reviewing the County's approved classification plan and the class specifications, it was noted that the experience requirement for both Fire/Rescue Captain and Fire/Rescue Lieutenant were reduced from 3 years to 2 years in April 1989.

13. Section 21-4B Fire and Rescue Commission, (e) Duties, Responsibilities and authority of the Montgomery County Code states that the Commission shall, "adopt County-wide policies, standards, procedures, plans and programs applicable to all fire, rescue and emergency medical service operations".

The appellant argued that he should be allowed to participate in the promotional process on the same basis as before, and that failure to allow him to do so would violate established procedures and deny him his rights as set forth in the approved Career Development Plan. The County argued that it was not responsible for the prior procedures, and with the change in employment status in January 1988, it had the right to amend the promotional procedures in any manner deemed appropriate and reasonable. The County also argued that it was not reasonable or possible to change the experience requirements for the class in question.

It was the judgment of the Board that the County had the prerogative to change the procedure for promotional examinations within the Fire/Rescue Services. Further, once changed, they were applied to all applicants in an equal and equitable manner. While the appellant may perceive he was treated unfairly, based on past practices, the Board did not find any violation of Personnel Regulations or procedures. Accordingly, the decision of the Chief Administrative Officer was sustained and the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

The Court overturned the Board's decision and allowed the appellant to participate in the examination process.

CASE NO. 89-38

Five Firefighters appealed from the decision of the Chief Administrative Officer on their grievances concerning the promotional process for Master Firefighter/Rescuer and Fire/Rescue Sergeant.

After careful review and discussion of the extensive documentation, it was the judgment of the Board that there had been no violation of law or established procedures. Although review of the files revealed deficiencies and inadequacies in how the process was managed, these management deficiencies did not constitute a violation of law or procedure and did not result in unfair treatment of a particular person or group. Therefore, the Board denied the appeal.

APPEALED TO CIRCUIT COURT BY THE APPELLANTS

CASE NO. 89-39

A Firefighter appealed from the decision of the Chief Administrative Officer on his grievance concerning the promotional process for Master Firefighter.

It was the judgment of the Board that the findings and conclusions of the Fact-Finder, that were adopted by the Chief Administrative Officer, were accurate and in accordance with the law. Accordingly, the Board affirmed the decision of the Chief Administrative Officer and denied the appeal.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

RECRUITMENT

CASE NO. 89-43

An applicant appealed from the decision of the Chief Administrative Officer on his grievance concerning the selection process for the position of Environmental Protection Manager in Stormwater Management.

The appellant alleged pre-selection and personal bias by one supervisor who participated in the selection process. The Fact-Finder did not find sufficient evidence to support the allegations.

It was the judgment of the Board that the conclusions and recommendations of the Fact-Finder, which were adopted by the Chief Administrative Officer, were well-founded and in accordance with established law and regulations.

Accordingly, the Board affirmed the decision of the Chief Administrative Officer and denied the appeal.

RETIREMENT

CASE NO. 89-5

A Police Sergeant noted an appeal of the decision on his application for a Service Connected Disability Retirement. The Personnel Office subsequently notified him that it had provided incorrect appeal information, as the decision of the insurance carrier was appealable to the Administrator of the disability retirement program, prior to appeal to the Board.

The case was rendered moot by this action.

CASE NO. 89-12

An Accounting Assistant appealed from the decision and action on her application for a service-connected disability retirement. Prior to considering the merits of the appeal, the Board considered and discussed the "Motion to Strike Opinion of Hearing Examiner", the "Motion for Approval of Disability Determination by Default", and the request for a hearing on the merits of the appeal.

Appellant argued that a service-connected disability retirement should be granted, by default, solely because the administrator did not issue a decision until more than one year after holding a hearing and eight months after receipt of final arguments. This position was based on the language of Section 8 (a)(19) of Executive Regulation 13-86, which stated "The Administrator must render a decision on the appeal . . . no later than fourteen (14) calendar days after the record is closed . . .", and Section I., C.19 of Exhibit A to Administrative Services Contract No. 39231 which required a decision to be issued within "fourteen (14) calendar days after the hearing date".

The County argued that there was no provision in law to allow for an award by default and that Executive Regulation 13-86 and Section I., C.19, of Exhibit A to Contract No. 39231 do not apply to appellant, as she never transferred to the new Disability Benefits Program. The County believed that Section I., B. of Exhibit A applied to this case, and it did not contain any time limits or procedures for appeals of preliminary decisions by the administrator

In reviewing the Retirement Law, the Board noted two specific provisions:

1. Section 33-43 (c) stated: "All disability retirements shall be approved by the administrator."

2. Section 33-43 (k)(2) stated: "The County or the employee may appeal on the record the final decision of the administrator. . .".

The Board also noted that part of the delay was agreed to by Counsel at the administrative hearing on January 28, 1988, based on the complicated nature of the case and the desire to submit detailed, final written argument. Counsel for appellant formally raised the timeliness issue with the Hearing Examiner on November 15, 1988. The final decision of the Hearing Examiner was issued on January 31, 1989.

It was the judgment of the Board that when services are being performed by the County or a contractor, the County has an obligation to assure prompt and timely action on all applications for disability retirement. There was no doubt, based on the documented record, that this case was not monitored properly or processed in a timely fashion. Despite the County's argument that Section I., C.19 of Exhibit A did not apply, the Board noted that it was the only section in the contract that contained provisions related to the Hearing Examiner and that that procedure had been followed in all previous disability cases before the Board. The application of Section I., C.19, in all cases, had assured employees of a written, fair procedure for resolution of appeals, as required by law.

A subsequent award of a disability retirement would be retroactive, under the County's Retirement Law. Therefore, the Board found insufficient evidence to show that appellant had been harmed by the delay. The Board also noted that there was no exception in the law to override the necessity for approval of the administrator, as required in Section 33-43 (c), or for appeal to this Board in any fashion, other than "on the record" of the administrator. It should also be noted that under the County's grievance process, failure to act timely resulted in the matter moving to the next level of review, not in automatic default or resolution.

Accordingly, it was the judgment of the Board that the "Motion to Strike Opinion of Hearing Examiner " and the "Motion for Approval of Disability Determination by Default" be denied.

In response to the request for a hearing, the Board noted the voluminous written record, the transcripts of testimony given to the Hearing Examiner and the extensive, written arguments by Counsel. The only issue to be resolved was the extent of job-aggravation of her condition, if any. There was no indication of any new or different evidence that would be presented or obtained, than what was already available. Therefore, the request for a hearing was denied.

In reviewing the record, the Board found that:

1. According to the February 16, 1984 report of Dr. Reginald Davis of the John Hopkins Hospital and the May 18, 1986 report of Dr. Steven Kittner, University of Maryland Medical System, appellant suffered her first episode of right optic neuritis three months after an automobile accident in 1974. In 1976, while pregnant, she noted a left hemisensory loss and multiple sclerosis was diagnosed. Dr. Kittner noted the next exacerbation occurred in 1979, with optic neuritis.

2. Appellant began employment with Montgomery County in July 1979 as an Office Assistant II. She was promoted to an Administrative Aide III position in March 1980 and to the Accounting Assistant position in February 1983. She began working with a personal computer in 1984.

3. In a February 14, 1984 letter, Dr. Neil R. Miller stated that appellant had ". . . multiple sclerosis and a progressive bilateral optic neuropathy that has worsened from the 20/40 range in May of 1983 to 20/100's . . . on January 30, 1984 . . . there appears to have been no visual improvement from a short course of high dose of Prednisone . . .".

4. On March 15, 1984, Dr. Miller reported that ". this patient has had a marked improvement in visual function in both eyes since a three-day treatment with intravenous Methyl-prednisolone. At issue is whether she will stabilize or not . . .".

5. On May 21, 1985, Dr. Miller reported that appellant had been treated by another physician "who put her on a very slowly tapering dose of Prednisone . . . on Friday, May 17, 1985 . . . she had the abrupt onset of reduced vision in her right eye . . . I really believe that the exacerbation probably had nothing at all to do with the level of Prednisone but simply was the natural history of her disease. Thus, the longer we taper her, the more likely it is that an exacerbation will occur . . .".

6. On June 14, 1985, Dr. Kenneth P. Johnson reported that "She has had continued problems with her vision, which became quite severe yesterday . . . she did note some increase in fatigue, but no orbital pain . . . I made a diagnosis of a new attack of left optic neuritis . . .".

7. On June 21, 1985, Dr. Johnson reported that " . . . She carries a diagnosis of clinically definite multiple sclerosis which has primarily affected her vision. She has had long standing decreased vision in the right eye. Between May 20 and June 13, 1985 there was a significant decrease in vision in the left eye as well . . .".

8. On August 12, 1985, Dr. Johnson reported that " . . . Late this spring she had a new, major attack involving vision and was placed on high dose corticosteroids at that time. She had had a number of complications from this therapy . . . The complications of therapy have made the ability to work even less likely . . .".

9. On December 13, 1985, Dr. Johnson reported that " . . . During the summer and fall of 1985 she had increased disease activity with a marked decrease in visual acuity . . . she is able to work 4-6 hours per day but becomes unduly fatigued with a full 8 hour day . . . ".

10. On February 6, 1986, Dr. Johnson reported that appellant ". . . does have periods of severe fatigue which is a typical feature of the disease . . ." but suggested that she be allowed to continue to work part time because it was an important aspect of her life.

11. Appellant was hospitalized on May 15, 1986 because of another attack of optic neuritis and underwent a high dose of intravenous steroid therapy.

12. On September 29, 1986, Dr. Johnson reported that, since 1976, appellant ". . . has had repeated bouts of optic neuritis in both eyes and has had some difficulty with weakness on each side of the body from time to time. In addition, she has suffered many of the nonspecific symptoms of MS, such as fatigue and heat intolerance. She is currently undergoing a major new attack involving the spinal cord . . .".

13. On October 3, 1986, appellant was admitted to the hospital for "Multiple sclerosis, acute exacerbation associated with paraplegia". Dr. Norman Bass, the attending physician, noted a prior complaint of tingling and numbness in the lower extremities (on May 15, 1986) which made ambulation difficult. He also stated that " . . . patient has noted some difficulties in balance and claims that she has fallen down stairs several times. She has also had decreased food intake, insomnia, and increased use of cigarettes (2 packs per day) . . .". His stated impression was: "Multiple sclerosis, acute exacerbation with recent onset of difficulty walking associated with lesion of the posterior columus at the conus medullaris. Old bilateral optic neuritis, relatively stable.".

14. On October 13, 1986, Dr. Johnson reported that ". . . Over the last month, she has developed a spinal cord attack with numbness and weakness in the legs. This attack was treated with high dose steroid therapy while she was an inpatient . . .".

15. After reviewing appellant's medical history, and examining her on March 10, 1987, Dr. David Satinsky reported that she ". . . is suffering multiple sclerosis which is in a relatively unstable state. She is unable to work full time because of fatiguability which is very characteristic of this disease. She is also unable to keep a job because of exacerbations that require her to leave work for days or weeks on end . . .".

16. On July 17, 1987, in response to Counsel's direct inquiry, Dr. Johnson wrote: ". . . Multiple sclerosis is a disease of unknown cause which produces specific areas of damage throughout the central nervous system in a variable pattern, both in terms of anatomic location and of time. Most patients in (appellant's) age group have a series of specific attacks in which they suffer neurologic damage sometimes with later improvement. Over time, however, each attack leaves some amount of disability which is additive and produces significant neurologic problems for the patient . . . (appellant) was called upon to use a computer or to look at financial reports with great regularity . . . This type of constant visual activity could lead to the stimulation of the disease process in multiple sclerosis to produce further visual damage and is consistent with what we know about multiple sclerosis occurring often in areas of neurologic mobility such as the eyes or the cervical spinal cord. Thus, I would state that it is medically reasonable, in my experience, to conclude that the type of employment (appellant) engaged in aggravated the effects of multiple sclerosis which were primarily on the optic system. . .".

17. On September 30, 1987, Dr. Richard M. Restak filed a report stating: ". . . In essence, the patient shows considerable emotional lability today at least on this exam. The history and her neurologic material would be consistent with multiple sclerosis. I would feel that she would have a difficult time in the employment that she was in previously. I do not feel however, that employment would aggravate her condition. I specifically know of no evidence that would support the contention that has been put forth that "constant visual activity could lead to stimulation of the disease process in multiple sclerosis". I am not aware of this and do not think this is an accepted medical opinion that necessarily reading and other activities would exacerbate multiple sclerosis in the visual system. . .".

18. Appellant's supervisor testified that her major duties involved working with a personal computer and developing programs to facilitate easier analysis of data. This often required six to eight hours a day at the computer terminal. A special, non-glare screen was provided and employees were encouraged to take a 15 minute break, at least every two hours when working at a terminal.

19. Appellant testified that she started using a personal computer terminal in 1984, and subsequently spent the majority of her time at the terminal. She stated that she had vision problems shortly after attending a computer training class in May 1985 and missed a lot of work time thereafter. She has not been able to work since October 1986. She has had one flare-up with her eyes since October 1986.

20. Dr. Johnson testified about several hypothesis he and colleagues were working on and indicated that the ability to document them will be markedly increased in the next few years. He stated that, at the present time, he is unable to quantify the type of visual movement necessary to produce the plaque in the upper part of the spine or in the optic nerve area. He noted the timing of the episodes coincided with a return to work, or change in work hours, but could not make a direct medical connection. It was his opinion that the two were inter-related.

21. In denying the initial claim for a service-connected disability retirement, the administrator noted that in the Merck Manual, under Etiology and Incidence for Multiple Sclerosis, it stated: "The cause is unknown but an immunologic abnormality is suspected, with few clues that presently indicate a specific mechanism . . .". The administrator found appellant to be disabled, but not as the result of any job aggravation.

There was no question or doubt that appellant was totally and permanently disabled, from her position of Accounting Assistant, as the direct result of multiple sclerosis. The issue before the Board was whether that condition was aggravated by her employment with Montgomery County.

The medical evidence of record indicated that the exacerbations, which appellant alleges were caused by or aggravated by her employment, may have been as the result of the steroid therapy; other nerve problems, particularly the lower extremities; or the natural progression of the disease. In fact, the bilateral optic neuritis was deemed relatively stable at the time of disability in October 1986.

CASE NO. 89-12 CONTINUED

The Board recognized Dr. Johnson's extensive experience with multiple sclerosis and personal treatment of appellant. It also noted that, in August 1985, he was the one who raised the concern about complications from the steroid therapy. He also pointed out the spinal cord problems in 1986. Dr. Johnson considered it "medically reasonable" that appellant's type of work could have aggravated her condition. He had put forth an interesting hypothesis for discussion, but stated that it had not been fully documented or proven, at this time. Therefore, that hypothesis could be given very little weight in this decision.

The Hearing Examiner (administrator), and this Board, are required to render decisions on the basis of the medical evidence and documented facts. The hypothesis that the optic neuritis was aggravated by appellant's job activities had not been verified or proven beyond a reasonable doubt by any studies or tests. Therefore, it was the judgment of the Board that the conclusions and decision of the Hearing Examiner were reasonable and consistent with the evidence of record. Accordingly, that decision was affirmed and the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 89-29

A Police Sergeant appealed from the decision of the Hearing Examiner on his application for a service connected disability retirement.

After careful review of the documentation, it was the judgment of the Board that the Hearing Examiner's decision was correct and based on a fair and reasonable evaluation of the medical evidence. The Board agreed that there was no clear causal relationship between the hypertension and the appellant's employment. Further, there was a question as to the extent of disability. Accordingly, the Board found the appellant did not meet the requirements for a service connected disability and the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 89-31

An employee noted an appeal of a decision on her application for a disability retirement. The County's Personnel Regulations set forth certain requirements that must be met when noting an appeal. Specifically, Section 29-4 Appeal Period requires an employee to note an appeal and to provide specific information within ten working days of noting an appeal.

The appeal was noted on Friday, May 26, 1989, when the Board received a Mailgram from the appellant's husband. On May 30, 1989, the Board's staff notified her that the additional information had to be filed on or before Monday, June 12, 1989. On June 15, 1989, subsequent to the appellant's failure to respond by the date required, the Board's staff sent her another letter, concerning possible dismissal of the appeal, and gave her until June 29, 1989 to respond. On July 12, 1989, her husband telephoned the Board's office and informed the staff that she had not responded because she had been trying to contact the Personnel Office on possible alternative placement, but had not received a response to her calls.

After due consideration, it was the judgment of the Board that filing an appeal and pursuing alternative placement were separate and distinct actions, even though both were trying to resolve the disability issue.

Therefore, due to the appellant's failure to file the information required by Section 29-4 in a timely manner and subsequent failure to respond to an inquiry in like manner, it was the decision of the Board that the appeal be dismissed with prejudice.

CASE NO. 89-32

An employee appealed from the decision of the Plan Administrator that its' November 4, 1988 ruling was not appealed in a timely manner. The record showed that:

1. On November 4, 1988, the Plan Administrator notified the County that the appellant was "not disabled pursuant to Section 33-43(b) Non-Service Connected Disability Retirement."

2. The County notified the appellant of this decision in a letter (dated November 9, 1988) that was received on November 15, 1988. The letter stated that an appeal had to be filed within fourteen calendar days.

CASE NO. 89-32 CONTINUED

3. Counsel for the appellant sent a letter of appeal to the Plan Administrator. The letter was dated November 24, 1988 and the envelope was date stamped "Suburban Md. GMF, P.M. December 7, 1988." The letter was received by the Plan Administrator on December 13, 1988.

4. On May 12, 1989, Counsel for the appellant contacted the Plan Administrator to check on the status of the appeal. On May 16, 1989, the Plan Administrator notified the County that the appeal had not been filed timely. On May 28, 1989, the County informed the appellant of this information.

5. The time limit for appealing a decision of the Plan Administrator was not contained in the Personnel Regulations or the Montgomery County Code.

The Board had two concerns about this case. First, both parties were very lax in the handling of the appeal, to the detriment of the appellant. Secondly, the Board did not find any legal basis for the time limit imposed. Based on this, it was the judgment of the Board that the appeal must be accepted. Accordingly, the County and the Plan Administrator were directed to accept the appeal and process it in accordance with established procedures.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 89-40

The County appealed the award of a service connected disability retirement to a Correctional Officer. The County subsequently withdrew its' appeal.

CASE NO. 89-41

An administrative employee asked the Board to rule on a request for a service connected disability retirement because the Hearing Officer for the Disability Plan Administrator had failed to issue a decision. The record showed that:

1. The Disability Retirement Plan was administered by the Prudential Insurance Company, pursuant to a contract with the County.

2. Appellant filed an application for a service connected disability retirement on August 25, 1988. She was awarded a non-service connected disability retirement on December 16, 1988, to be effective on December 18, 1988. That decision was appealed to the Hearing Officer.

3. Subsequent to additional medical evaluations in early 1989, the County and the appellant filed a joint Stipulation and Motion with the Hearing Officer, in late March, 1989, and asked that he rule the disability to be service connected.

4. To date, the Hearing Officer had not acted and the Prudential Insurance Company refused to take any action pending receipt of his decision.

The problem in this case was clearly one of contract enforcement and the Board believed that reason and prudence would dictate prompt attention to the matter. Accordingly, the case was remanded to the Chief Administrative Officer for immediate action to enforce the terms of the contract and to bring this matter to a final resolution.

SUSPENSION

CASE NO. 89-13

A Mechanic appealed a two-day suspension.

Section 27-4 Notification of the Personnel Regulations states that ". . .an employee must receive written notice of the disciplinary action at least five working days prior to the effective date, except in cases of theft of County property or serious violations of policy or procedure that creates a health or safety risk. . ." Evidence and testimony showed that the appellant received written notification of the suspension on January 23, 1989 and was suspended on January 26 and 27, 1989. The action clearly violated the mandatory requirements of Section 27-4, which management had an obligation and responsibility to follow.

In view of the violation of required notification, it was the judgment of the Board that the action was null and void and must be rescinded. The violation also rendered further discussion on the issues moot. Accordingly, the County was directed to:

1. Rescind the two-day suspension action and reimburse the appellant for all lost wages as a result of that action.

2. Remove all documentation related to the suspension from all County files.

3. Reimburse the appellant for reasonable attorney's fees incurred as a result of this appeal.

CASE NO. 89-37

A Correctional Officer appealed a suspension.

Due to his failure to comply with Board directives, and to pursue the appeal in a timely manner, it was the judgment of the Board that he had forfeited his right of appeal. Accordingly, pursuant to Section 29-5 Dismissal of an Appeal of the Personnel Regulations, the appeal was dismissed.

TIMELINESS

CASE NO. 89-3

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

1. The appellant was placed on the Fire Department's eligible list for promotion to Master Firefighter/Rescuer on September 17, 1987. This list was subsequently approved by the Fire and Rescue Commission.

2. Promotions were made in February and April 1988.

3. An examination process for promotion to Master Firefighter/Rescuer was administered in the Fall of 1988 and the new eligible list was certified on November 23, 1988.

4. The appellant filed his grievance on November 5, 1988.

5. On November 17, 1988, the Personnel Office ruled the grievance was not filed timely. This decision was based on the position that he had 20 days from the date of the last promotion (April 10, 1988) to file such a complaint.

The Board had previously ruled that the time limit for filing grievances starts on the date of the alleged adverse action. In this case, the appellant had a reasonable expectation of promotion as long as the initial eligible list was valid and in effect.

Therefore, it was the judgment of the Board that the grievance was filed timely, as it was within 20 days of the expiration of the appellant's eligibility for promotion. Accordingly, the decision of the Personnel Office was rescinded and the grievance was remanded for processing in accordance with established procedures.

CASE NO. 89-8

A Firefighter appealed from the decision of the Personnel Office that his grievance, concerning promotion, had not been filed timely. The record showed that:

1. The appellant had applied for promotion in 1987. He completed a course in March 1988, hoping to be placed in the Well-Qualified category for promotion.

2. On April 1, 1988, a list of persons being promoted was released, but did not include the appellant. The appellant stated that he had been working informally, since that time, to find out why he wasn't promoted.

3. In June 1988, additional promotions were announced, but did not include the appellant. The appellant subsequently discussed his concerns with a Department of Fire and Rescue Services official, and filed the grievance, in question, based on that conversation. This conversation occurred in mid-October or early November, but neither party could document the date.

4. Under Section 28-3(b) of the Personnel Regulations, an employee has 20 calendar days from the date or knowledge of an incident to file a grievance.

5. The Personnel Office ruled that the grievable incident occurred in April and June 1988. Therefore, a grievance in November could not be considered timely.

6. The appellant argued that his conversation with the Department of Fire and Rescue Services official should be the controlling date and the grievance should be accepted as timely.

7. There was no indication that any promotions were made subsequent to June 1988.

It was the judgment of the Board that the grievance was not filed timely. The appellant believed he should have been promoted in either April or June 1988, but did not file a timely grievance subsequent to either announcement. An informal discussion with an individual, who was not the appointing authority, six to seven months after an action has been taken, could not be used to reset the clock for filing a grievance. Accordingly, the decision of the Personnel Office was sustained and the appeal was denied.

CASE NO. 89-10

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

1. Appellant's name was placed on the eligible list for Master Firefighter in late 1987, in the "Qualified" rating category.

2. In November 1988, appellant talked to the Department Head and an Assistant Fire Chief about promotional opportunities.

3. The 1987 eligible list expired on November 23, 1988, when the Personnel Office certified a new list, based on a written examination.

4. On December 1, 1988, appellant filed a grievance concerning the failure to achieve promotion from the 1987 eligible list.

5. The Personnel Office ruled that the grievance was not timely, because two of appellant's concerns involved incidents that happened in 1985 and 1987.

As long as the 1987 eligible list was in effect, appellant had reasonable cause to believe he could be promoted. The expiration of that list, on Nov. 23, ended those expectations, and, in the Board's judgment, was the event that adversely affected his chances for promotion. Therefore, he had 20 days from that date to file a grievance, and did so on Dec. 1. Accordingly, the Board found the grievance was filed timely; overturned the decision of the Personnel Office; and remanded the grievance to the Personnel Office for processing in accordance with established procedures. Appellant was also awarded reasonable attorney.

CASE NO. 89-21

A School Health Worker appealed from the decision of the Personnel Office that her grievance, concerning the purchase of retirement service credits, was not filed in a timely manner. The record showed that:

1. The appellant began County employment, as a part-time School Health Worker, on August 27, 1973. On September 4, 1973, she signed a form authorizing a retirement deduction.

2. Part-time employees were not eligible to participate in the County's retirement system until January 1974. Sometime after January 1, 1974, an undated memorandum was allegedly sent to all part-time employees, explaining the options available and requesting new signatures for enrollment. There was no evidence to show if this was received by the appellant and she did not sign or return it to the Personnel Office.

3. In mid-1978, the appellant inquired about her retirement status, and on September 3, 1978, was enrolled in the plan based on the 1973 signed authorization. There was no evidence to show that either party addressed the issue of the five years of prior service.

4. On December 30, 1983, the appellant was notified of her right to purchase retirement service credits for prior service.

5. On January 17, 1984, she filed a request to purchase the prior part-time service that had not been credited for retirement purposes. The record showed that cost figures were developed during 1984-85.

6. On July 2, 1985, the County notified the appellant that she was not eligible to purchase the prior part-time service because she failed to exercise the option in January 1974.

7. On August 20, 1985, the appellant was sent a check for $2,617.95 for refund of contributions withheld incorrectly. The County determined that she had been enrolled in the wrong plan in 1978, revised her records accordingly, and refunded the overpayment.

8. On June 21, 1988, the appellant again contacted the Personnel Office about the uncredited service and was instructed to put the request in writing.

9. On February 4, 1989, she filed a written request with the Personnel Office.

10. On February 18, 1989, the Personnel Office denied the request.

11. The appellant filed grievances on February 24 and March 3, 1989.

CASE NO. 89-21 CONTINUED

The Board recognized that communications may have been hindered by the fact that the appellant was based in a school and not in the usual government office setting. The record reflected that she was aware of the possible right to buy the service in 1984, when she filed an application to do so, but did not appeal or follow-up the July 2, 1985 denial. Further, the appellant should have been aware of the change in retirement groups in August 1985 when she received the refund of contributions, but she took no action at that time. Based on the foregoing, it was the judgment of the Board that the actions being grieved occurred in 1985, and that grievances filed in 1989 would not be timely. Accordingly, the decision of the Personnel Office was sustained and the appeal was denied.

CASE NO. 89-26

A Deputy Sheriff appealed from the decision of the Personnel Office that his grievance, concerning the purchase of retirement service credits, was not filed timely. The record showed that:

1. Section 33-41 (a) Member's Credited Service of the Employees' Retirement System for Montgomery County, enacted on July 1, 1978, stated in part:

". . .The Chief Administrative Officer shall cause notice to be given to each eligible employee attaining five years County service of the opportunity provided herein to purchase credited service. . .".

2. The appellant began County employment on August 20, 1975.

3. The appellant stated he moved in May 1980 and notified his department of the address change immediately.

4. On July 3, 1980, the Personnel Office sent a certified letter to the appellant, containing the notice of eligibility to purchase retirement service credits. The letter was returned to the Personnel Office as undeliverable.

5. According to the Personnel Office, the department did not submit the change of address until August 21, 1980, and it was processed on September 23, 1980.

CASE NO. 89-26 CONTINUED

6. There was no indication of any follow-up by the Personnel Office to obtain the proper address and deliver the certified letter to the appellant.

7. On March 30, 1989, the appellant filed a grievance concerning the purchase of retirement service credits for four years of military service. The grievance was considered not timely and was not accepted for processing.

After careful consideration, the Board found that under Section 33-41 (a) of the Employees' Retirement System for Montgomery County, the County had a mandated responsibility to assure that each person be notified of the right to purchase retirement service credits. That responsibility clearly was not met in this case, as no appropriate effort was made to follow-up on the address change for an active employee. Therefore, it was the judgment of the Board that the County's failure to meet the legal mandate must result in the acceptance of a grievance, irrespective of when filed after such violation. Accordingly, the Board ruled the grievance timely, and remanded the case to the Personnel Office for processing in accordance with established procedures.

CASE NO. 89-44

A Deputy Sheriff appealed from the decision of the Personnel Office that his grievance, concerning the purchase of retirement service credits, was not filed in a timely manner. The record showed that:

1. The appellant began County employment, and entered the County's retirement system, on February 22, 1972.

2. The retirement law in effect from 1972 to 1978, gave an employee the right to purchase retirement service credits for prior military service, provided such option was exercised within 30 days of the fifth anniversary of that employee's continuous County service.

3. Under that law, the appellant's eligibility period would have been from January 23, 1977 to March 21, 1977. He did not exercise the option during this period.

4. On July 1, 1978, the County amended the retirement law again. The major changes were the establishment of a new integrated plan; an open application period for the purchase of prior service credits, including military for all employees with five or more years of service; and a requirement for the County to formally notify all subsequent members of eligibility to purchase prior service credits on their fifth anniversary date.

5. The 1978 changes were communicated to County employees via local media stories, the June 1978 Employee Newsletter and a Personnel Bulletin dated July 13, 1978.

6. The appellant alleges he never received any of the bulletins and was unaware of his rights until the date of his grievance - August 3, 1989.

7. A check of the appellant's personnel records showed that he elected to join the Integrated Retirement Plan on January 30, 1979.

After consideration of the record, the Board did not accept the appellant's allegation concerning knowledge of his rights. The information on the Integrated Plan was contained in the same material that explained the rights to purchase prior service credits. Therefore, since the appellant availed himself of the one option, he certainly was aware of, or should have been aware of, the second opportunity he had to purchase the service credits in 1978.

Based on this, it was the judgment of the Board that the grievance was not filed in a timely manner, and the decision of the Personnel Office was sustained.