Merit System Protection Board Annual Report

FY 1993

Members:
Anthony W. Hudson, Chairman
Angelo M. Caputo, Vice Chairman
Beatrice G. Chester, Associate Member
Executive Secretary:
Merit System Protection Board
Waddell Longus

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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 1993 were:

Anthony W. Hudson - Chairman (Reappointed 1/92)
Angelo M. Caputo - Vice Chairman (Appointed 1/91)
Beatrice G. Chester - Associate Member (Appointed 1/93)

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 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 an 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 ten work days advance notice of the pre-hearing is given, with thirty work days notice given in all other cases. Upon completion of the pre-hearing, a formal hearing date is agreed upon by all parties. After the hearing, the Board prepares and issues a written decision within thirty work days 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 fifteen work days to respond. The Board then provides the Appellant an additional fifteen 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 meeting for the purpose of receiving oral testimony. If the decision is issued based on the written record, it is prepared and released within thirty work days 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

DEMOTION

Case No. 92-18

This is the decision of the Board on the appeal of the demotion of the Appellant, who was employed as a Nurse Administrator by the County's Department of Health. The Appellant was notified of the demotion on November 15, 1991 and it was effective November 17, 1991 and caused the Appellant to suffer an annual reduction in salary from. The appeal was filed in a timely manner.

The case was referred to the Office of Zoning and Administrative Hearings for purposes of conducting a hearing and providing the Board with a report and recommendation based on the evidence of record. This was done and the parties were provided opportunity to comment on the recommendations and findings.

BACKGROUND

The Hearing Examiner for the Board concluded that the Appellant's demotion, was open to serious question because the Department did not accord her fundamental fairness in its investigation and punishment. The 'oral' admonishments did not fulfill the intent of the Personnel Regulations, or Administrative Procedure 4-10, to provide Appellant with notice of the nature and gravity of her behavior patterns and that more severe sanctions would follow. Indeed, Appellant is charged with many of the same behavior patterns to which she too was a victim. Her performance as a manager was publicly discussed at staff meetings, yet she was only evaluated once in five years. She was provided with little assistance and remedial support and was allowed to flounder in a stressful work environment. Management must share some of the culpability in Appellant's deficiencies as a Nurse Administrator.

The manner in which Appellant was allowed to function in this position prompted an extreme and overly harsh response for an employee with a previously unblemished personnel record. Had division management properly monitored her behavior, remedial approaches may have been possible or her removal secured earlier in the process in a less retributive manner. Rather, she was permitted to continue functioning in an environment that created hostility among her subordinates and, when some complaints arose that prompted the investigation, these disgruntled employees provided much of ammunition that discredited her as a Nurse Administrator.

The fairness and objectivity of the investigation is also open to serious question.

Given these considerations, Appellant's demotion must be re-evaluated. Section 26-4 of the Personnel Regulations, Involuntary Demotions, provided that an employee who receives less than satisfactory performance evaluation after written warnings, counselling and at least three months to improve may be demoted involuntarily. Administrative Procedure 4-10 provides for progressive discipline except for theft or serious health and safely risks, factors

which do not apply here. The record did not establish the necessary prerequisites for the demotion and most of the charges supporting it were not substantiated. A more lenient form of discipline therefore appeared to be in order."

The Appellant commented that the County failed to follow its own regulations. Noting also Section 26-4 of the Personnel Regulations, Involuntary Demotions, and stressing written warnings, counselling and at least three months to improve performance before involuntary demotion, the Appellant argues that the record did not establish the necessary prerequisites for the demotion and most of the charges supporting it were not substantiated.

The County in rebuttal filed two motions, both of which affirmed and modified the Hearing Examiner's report and recommendations. The County argued that, "Based on the totality of the evidence, the Board should reverse the Hearing Examiner's finding that the evidence did not substantiate the allegation that Appellant breached her duty to perform in a competent or acceptable manner. The Board should, instead, rule that Appellant failed to perform her duties in a competent or acceptable manner by improperly handling a patient's son on July 5, 1991, and in so doing presented health and safety risks which supported the Appellee's action of removing Appellant and demoting her to the Community Health Nurse II level.

The Hearing Examiner for the Board recommended that, "Based on a review of all the evidence of record, the Department's decision to remove the Appellant from the Nurse Administrator position at CVHC be sustained because the mixed findings and conclusions did not justify a reversal of the Department's ultimate decision to remove Appellant from CVHC. The facts indicate that Appellant was not performing in a competent and acceptable manner. Appellant is not entitled to full back pay because her ultimate discipline may still provide for a salary reduction.

He also recommended that the demotion of 20% of salary be reversed and a more lenient form of discipline be considered that is more consistent with the progressive discipline policy of County government given the Appellant's past employment record, the circumstances surrounding her removal, and the remaining charges substantiated by the evidence. The record did not contain adequate information to permit the examiner to make a recommendation. The Board may wish to apply its own remedy based on its' expertise. If not, the matter should be remanded to the Department to consider a suitable form of discipline consistent with these findings and conclusions.

He finally recommended that the Appellant, as a partially successful party, be awarded partial back pay, depending on the nature of her ultimate discipline, and attorney's fees."

CONCLUSION

The Board agreed with the Appellant that no materials were to be considered in this case prior to 1990.

The Board accepted the findings of fact of the Hearing Examiner who conducted this case for the Board.

The Board, based on a reading of this record, affirmed the recommendation of the Hearing Examiner that the Appellant abused her subordinates in an inappropriate manner and that her demotion to a less responsible position was based on just cause. As the examiner indicated and we agree that she was not performing in a competent and acceptable manner.

The Board accepts the alternative presented by the County for a restoration of some of the demotion and placement of the Appellant to the middle level management position of Nurse Manager. The County would also restore 10% of the reduction-in-pay that has been in effect since approximately November 15, 1991. The County would pay one half of legal fees.

DISMISSAL

Case No. 93-10

BACKGROUND

The case involves a period of time from September 8 to September 25, 1992 during which Appellant was returned to work on September 8, 1992. He was assigned to the Department of Transportation based on an order of this Board dated June 29, 1992 in resolution of an earlier dismissal appealed by the Appellant and sustained by this Board.

The Appellant was notified of his dismissal on October 19, 1992 and the reasons given were:

1. Violation of Article 32.1 of the Collective Bargaining Agreement between Montgomery County, Maryland, and the Montgomery County Government Employees' Union, Local 400, - Failure to provide a "Basis Mechanics Hand Set" as required by the Agreement and described as tools necessary to satisfactorily perform mechanical work.

2. Violation of Section 27.2(e) of the Montgomery County Personnel Regulations - Failure to perform duties in a competent or acceptable manner.

3. Violation of Section 27.2(g) of the Montgomery County Personnel Regulations - Insubordinate behavior by failure to obey lawful directions given by a supervisor.

4. Violation of Section 27.2(h) of the Montgomery County Personnel Regulations - Violation of an established policy or procedure.

   (a) Department of Transportation Procedure X - Absent Without Official Leave (AWOL)

   (b) Article 13.3 of the Collective Bargaining Agreement.

(c) Article 13.4 of the Collective Bargaining Agreement.

(d) Article 16.6 of the Collective Bargaining Agreement.

5. Violation of Section 27.2(o) of the Montgomery County Personnel Regulations - Violation of any provision of the County Charter, County laws, ordinances, regulations, state or federal laws or conviction for a criminal offense, if such violation is related to County employment.

(a) Annotated Code of Maryland Section 10-401 of the Courts and Judicial Proceedings Article - Maryland Wiretapping and Electronic Surveillance Act.

The County maintains that Appellant arrived for work without tools but carrying and using a cellular phone and tape recorder which he kept in a briefcase. Management officials from his immediate supervisor to the Division Chief made a number of attempts to get him to work. The County believes that Appellant refused to cooperate with these efforts, refused to turn off the tape recorder when he was given directions and refused to follow direct orders. It is the County's position that its agents simply attempted to communicate with Appellant, to make him aware that this assignment was a new start, to treat him as any newly assigned worker and expect him to do what any newly assigned worker is expected to do. According to the County, the Appellant did not show that he was ready, willing and able to work.

The Appellant, on the other hand, argues this dismissal is a continuation of the arbitrary and capricious actions taken by the Department of Transportation which caused his restoration to duty.

The Appellant believes that instructions provided to him were deliberately designed to confuse and harass him, that no one told him that he had to bring his tools to work, that no one told him he could not use a tape recorder, and that no one gave him a work plan even after one was required.

FINDINGS

The Merit System Protection Board finds that:

1) In accordance with a decision of this Board dated June 29, 1992, Appellant was placed in a job where the County had reasonable expectations that he would be able to perform the work based on his work history and skills.

2) The opinions of workers at the Division, as expressed in the petition otherwise, have no relevance to the determination by the County that the Appellant was insubordinate and failed to perform his duties. No evidence was presented to support Appellant's contention that employees in the Transit Division, who were dissatisfied with management because of Appellant's transfer, would attempt to harm Appellant in any way. Appellant's contention in this regard is without merit, and does not mitigate his obligation to perform his duties upon transfer on September 8, 1992.

3) Appellant did not arrive at the job site at any time from September 8, 1992 to September 25, 1992, ready and willing to perform his duties.

4) Appellant was insubordinate to management, failed to follow management directives on numerous occasions and was absent without leave.

5) Five other employees were transferred from the Heavy Equipment Section, where Appellant had worked, to the Transit Division and accomplished the move without incident. They are productive workers in the Division.

6) The County followed appropriate progressive disciplinary steps in the removal of the Appellant. In the opinion of the Board, Appellant was given more opportunities than required by the Code and precedent to bring his performance into conformity with that expected of County mechanics.

CONCLUSION

For the foregoing reasons the Board sustained the County's action in dismissing the Appellant.

Case No. 93-11

BACKGROUND

The Appellant has been employed since 1974 and at the time of his dismissal was employed at the Montgomery County Detention Center. He was dismissed according to testimony received for conduct unbecoming an officer in violation of Departmental policy and procedures 3000-7 as well as Personnel Regulations 22-7. The County proceeded with the disciplinary action on August 25, 1992 based on notification by the Appellant of the conviction of two offenses in Frederick County in 1990. The sentence was suspended and the Appellant was placed on three years probation. The Appellant was on leave during the pendency of the charges and fully cooperated with Departmental officials in providing materials in the present file as they developed.

The County believed that the incident and the conviction would compromise the Appellant's integrity and credibility with offenders, Staff, and related agencies that deal with the Detention Center. To the County, the arrest and conviction would impact on his ability to perform his duties since he was in a position of authority in supervising inmates and staff.

According to testimony of the County's principal supervisory witness, the Appellant is responsible during a shift for the operation of the entire detention facility and must have respect of staff (up to 25) and inmate population (up to 650). Management believed that his authority had been eroded. Approximately 12 inmates were between ages 16 and 18, and one-third were be under age 21. The County stresses the importance of the Appellant's responsibility for taking disciplinary actions as a supervisor. It also stresses the one-on-one and intimate contacts made with inmates by correctional officers in bathing and strip searches.

The County also provided testimony that the Correctional officer must be held to a higher standard of conduct than other employees.

The Appellant contends that other employees have been charged with certain offenses which were considered as conduct unbecoming a correctional officer which resulted in less severe disciplinary actions than the Appellant received. He contends that staff and inmates had no way to know of the charges against him, that the charges do not relate to his work with adult inmates, and that his work record is clear of problems with or offenses toward inmates. Lastly, he contends that the rank system or discipline in the chain of command precludes lower ranking officers from disobeying or questioning legitimate orders.

The Appellant was involved with a therapist since February 1992 who testified that the Appellant was temporarily depressed, has a psychosexual disorder (Sexually aggressive behavior) and had been co-dependent on alcohol. He has been in intensive treatment for nearly a year and is presently in the follow-up stage and regularly attends AA meetings twice per week. The Appellant believes that he is a professional correctional officer and can return to duty and regain the respect of coworkers.

FINDINGS OF FACT

The Appellant has a clean satisfactory record of performance up to the time of the charges and appears to have a highly satisfactory work record.

The charges involve a sexual offense with a minor of the same sex residing in another County.

The charges resulted in a conviction which was reported to County officials.

Disciplinary action was appropriate under the rules and procedures.

There is no indication that the Appellant has been treated in an arbitrary and capricious manner or that the County has violated its rules and procedures.

The Appellant appears to have a treatable disorder and has been involved in treatment.

The Appellant is anxious to return to duty to restore his good name and reputation.

CONCLUSION

The Board cannot find a basis to overturn the decision of the County in this matter. We are being asked to restore the employee to duty and substitute a lesser penalty than a dismissal based on allegations which resulted in a conviction. We do not find any ameliorating circumstances which would ease the burden of the Appellant. There are no violations of procedures. The Appellant was aware of his actions and the consequences; he may not have been aware of the severity of the disciplinary action.

We agree that the charges are grave, that the conviction increases the severity of the action, and that a sexual offense involving a minor of the same sex aggravates the ability of the County to take any other action than a dismissal. We do not see a need for management to have to speculate over who knew about the charges or to undertake an effort to rehabilitate other coworkers who would take the "wrong" attitude toward the Appellant if he were returned to duty after less severe disciplinary action.

The Appeal was denied.

Case No. 93-27

BACKGROUND

The Appellant began working for the Department of Fire and Rescue Services on May, 1977. He was promoted to Master Firefighter on February 11, 1990. He had received no disciplinary actions before the events leading to this dismissal.

On January, 1993, the Appellant was notified that he would be placed on immediate suspension pending investigation of charges for dismissal based on Section 27-4 of the Personnel Regulations encompassing theft of County property. A response was required in five days. An extension was requested and granted for January, 1993. The Appellant responded to the charges on January, 1993, in a timely manner, giving specific answers to each charge.

Additional written materials were provided to the Department by the Appellant in February, 1993, and the Department deferred its final decision until these materials were considered. On March 8, 1993, the Appellant was dismissed and notified of his appeal rights.

The Appellant was charged with violation of policies of the Department (502, Sec. 3.1, 5.0, 5.8 and 5.13), theft or misappropriation of property pursuant to Section 27-2(j) of the County Personnel Regulations, violation of an established County policy or procedure under Section 27-2(h), and violation of State Law pursuant to Section 27-2(o) of the Personnel Regulations.

Concerning the Kensington Fire Department equipment, the Appellant responded that the charges against him were first made on a criminal basis and he was found not guilty. He contended that he did not steal any items. He was not certain if the supply box (KVFD, BOX, A219) was given to him or was junk. He recalled that the firetruck declared surplus was the one he qualified on and the items associated with it had sentimental value for him. He claimed that the old journal was in a trash container when he found it. He stated in his written response that it was not his intention to misappropriate or steal any property that belonged to the Department. Supervisory officials of this Department wrote in response to the charges that it was common knowledge that equipment on a surplus fire engine which was scheduled to be sold as junk was fair game for purposes of nostalgia and memorabilia. The Appellant claimed that he was going to make lamps from some of the items and return them

as gifts to the fire station. It was also noted that old records had been disposed of and that certain old items would be of interest to collectors of Departmental momentos.

During the course of this appeal and hearing certain other issues arose concerning the authority of the County to take disciplinary action against an employee of the Department and Rescue services who had been brought over into the career service of Montgomery County as a merit system employee under Bill 42-87.

FINDINGS OF FACT

The Appellant is a merit system employee and the County is able to take disciplinary action even for matters which occurred before the date of the transfer. The Montgomery County Code, Sec. 2l-4M(i)(1)b., governs this matter. It states, "The probationary or disciplinary status of an employee is not affected by the transfer."

The record and testimony in this appeal reveal that the Department of Fire and Rescue Services needs to develop and promulgate policies and procedures which make clear what is disposable property and the circumstances under which employees are entitled to possess such property.

The Appellant had in his possession property which the County had reported as missing and for which the County had been reimbursed by its insurers.

The Appellant had in his possession property which deprived the County of its value in any sale of the fire engine as a total and complete item.

The Appellant knowingly concealed or abandoned County property and intended to use it in such a manner as to deprive the County of its use.

The Appellant has not denied any connection with the property which the County reported as stolen.

The insured value of certain of the items found in the possession of the Appellant was reported as $3,500.

The Appellant is a collector of memorabilia of fire departments.

The regulations of the County state that disciplinary action must be progressive in severity except in cases of theft or serious violations of policy or procedure that create a health or safety risk. (Sec, 27-1).

Regardless of whether some of the items were not needed, the Appellant converted the property to his own purposes and treated as his own.

CONCLUSION

The Board believes that the Appellant has developed habits which are not conducive to the good order and discipline of a critical public service. We cannot imagine the potential cost to the citizens of the County if employees in a Department are allowed to "borrow" publically owned equipment and use it indefinitely or to cannibalize items from disposable equipment which has resale value as a whole piece.

The Board finds that the conduct of the Appellant is deserving of discipline, but that the past practice of the Department as evidenced by testimony of management officials has severely eroded good order and standards of conduct by employees.

The Board finds that the Appellant has violated established polices and procedures of the County and that he has misappropriated County property.

The Board directed the County to:

1. Suspend the Appellant for 90 days beginning the date of the suspension in his initial disciplinary action (January 14, 1993.),

2. after the 90 day suspension, demote the Appellant to Firefighter/Rescuer II with at least a 10 % reduction in base pay,

3. pay one-half of the reasonable legal fees incurred in pursuit of this appeal.

GRIEVABILITY

Case No. 93-01

Appellants assert that the County does not have the authority to impose furloughs on employees of the independent fire corporations. Appellants are employees of the Kensington Volunteer Fire Department, Inc., not the Montgomery County Government.

The County maintains that under Emergency Regulation No. 83-91E, Amendments to the Fire and Rescue Corporation Personnel Regulations, were issued on November 27, 1991 by the Fire and Rescue Commission by authority of Section 21-4M(b)(3) of the County Code. Emergency Regulation No. 83-91E gives the Chief Administrative Officer authority to furlough Fire and Rescue Corporation employees. By memorandum dated December 6, 1991, the Chairman of the Fire and Rescue Commission (FRC) conveyed this information to the department heads in the FRC. On December 18, 1991, a memorandum issued detailing the procedures to be followed in furloughing corporation employees.

Appellants allege that Emergency Regulation No. 83-91E violates Section 21-4M(g) of

the County Code. In summary, the relevant part of section 21-4M(g) states that the County government does not have authority over who is employed, who is terminated, duty assignments or day-to-day supervision over employees of the local corporations. It also states that employees of local corporations are not employees of the County.

The Board holds that the Emergency Regulation did not violate Section 21-4M(g) because it related only to the furlough of FRC employees, and was promulgated properly pursuant to Section 21-4M(b)(3) of the County Code. The FRC, subsequent to the adoption of the emergency regulation, adopted a substantially similar emergency regulation as required by law. The regulations were uniformly applied, and administered by the Chief Administrative Officer in accordance with the authority contained in the FRC Personnel Regulations. The appeal was denied.

Case No. 93-03

This is a decision on the record in the above referenced appeal filed on August 24, 1992. Appellant is appealing the decision of the Deputy Chief Administrative Officer, denying his grievance and the relief requested.

BACKGROUND

The subject of this appeal is a written reprimand issued him on November 20, 1991 for alleged violation of Departmental and County Administrative Procedures. Policy and Procedure 3000-7, Standards of Conduct, Section VI, D, 6, b, c, d state the following:

> b. Employees will not consume, or be under the influence of any alcoholic beverage while on duty.
>
> c. Employees will refrain from consuming alcoholic beverages within four hours of reporting for scheduled duty.
>
> d. Alcoholic beverages will not be consumed while wearing any part of the Department issued uniform. Employees are prohibited from consuming alcoholic beverages on County property and from operating a County vehicle while, or within four hours after, consuming alcoholic beverages. (Emphasis added)

Specifically the written reprimand states that on April, 1991 the Appellant attended a Secretaries Day function at the Chesapeake Seafood House from 2:00 p.m. until 4:30 p.m. during which time he consumed beer. The Appellant then drove a County car back to the Detention Center with his secretary as a passenger.

According to the County Personnel Officer, " The Appellant does not dispute that he consumed alcohol, but he contends that he did not drive, his secretary drove the car. The Appellant further contends that when he and his secretary left the restaurant, the others had left as he had to make a few calls before leaving the restaurant and was, therefore, late in

departing. Contrary to the Appellant's statement, three Detention Center staff members and observed the Appellant leaving and driving a County car after drinking beer.

It is clear that the Appellant violated Departmental policy when he consumed alcohol on County time while on duty. Additionally, based on the testimony of three witnesses as opposed to his one, he drove a County car within four hours of consuming alcohol.

It is expected that as a manager, the Appellant's conduct should exemplify a high standard for subordinates to follow. Given his integral role in development and enforcement of departmental standards, his conduct should exemplify adherence to policy in all respects and he should avoid the appearance of any violation.

A written reprimand is the minimal level of formal disciplinary action to impose. It is our position that in consideration of the severity of the infraction the written reprimand is fully appropriate. Therefore, it is requested that this appeal be denied."

The Appellant's grievance was heard by a designee for the Chief Administrative Officer (CAO) on April 15, 1992. The CAO concluded that the, "Appellant's time sheet indicates that he worked eight hours on the day in question. As the Appellant never indicated that he reported to work early that day and he stated that he was not on duty after the two and one-half hour luncheon, he must have been on duty at least part of the period during which time he admittedly consumed alcohol. This was in violation of the Departmental Standards of Conduct."

The CAO noted further that, "Based on the facts and conclusions as stated above, it is clear that the Appellant violated Departmental policy when he consumed alcohol on County time while on duty. Additionally, based on the testimony of three witnesses as opposed to his one, he drove a County car within four hours of consuming alcohol."

In his appeal, the Appellant stated as follows:

Let the facts show that I was on call 24 hours a day, 7 days a week because of the nature of my job. Therefore, am I to believe that I can never drink a beer or should I believe that I must use caution and never lose control of my good judgement?"

The Appellant asked the Board to dismiss the charges and expunge them from his records.

FINDINGS

The Appellant has not denied ordering and consuming alcoholic beverages (beer) at a Secretaries Day function from approximately 2:00 p.m. till 4:30 p.m. He believes that being charged with "Returning to work after consuming beer 'is inaccurate'."

In the statement of charges, which originally proposed a ten day suspension, the Department head states that, "You have admitted to drinking beer and returning to duty at the Detention Center."

A written reprimand is a minimal level of formal discipline.

CONCLUSIONS

There is sufficient material in this file to reach a decision without a hearing.

The Appellant is charged with violating Departmental and Administrative policies and procedures concerning consuming alcohol. The charges are not denied.

Minimal disciplinary action has been taken after more severe action had been proposed.

The Board finds that the action taken by the County was for just cause, and in accordance with the Personnel Rule and Regulations. The Appellant was provided opportunity for review of the matter and the County reduced the proposed penalty.

The appeal was denied.

Case No. 93-04

Appellant alleges violation of Montgomery County Personnel Regulations, Section 12.1, Work Schedules; Attendance; Hours of Work. Appellant request relief as follows: " Return to 7:00 a.m. to 3:30 p.m. work schedule." Appellant also alleges the County's actions are arbitrary and capricious and that this is a "Management Issue" under Section 28, Grievances, not the Collective Bargaining Agreement.

The Appellant is a Principal Administrative Aide, in the Department of Transportation.

The County has stated that the above position is covered by the Office, Professional and Technical (OPT) bargaining unit. The County Collective Bargaining Agreement covers all positions in the (OPT) bargaining unit. The County adopted the Collective Bargaining Law effective September 29, 1986.

The Board notes that Sections 10.1; 3-107(a) (5) and 10.3 of the Collective Bargaining Law & Agreement, as well as Section 4.5(B) of the County Grievance Procedure provide as follows;

"A bargaining unit employee may not file a grievance under this procedure if the subject matter of the grievance is covered by the collective bargaining agreement." Article 13 of the Office, Professional, and Technical (OPT) Agreement covers work schedules, attendance, and hours of work.

Therefore, it is the opinion of the Board that the Appellant's position is covered by the agreement and complaint is not grievable under Section 28 of the Personnel Regulations. The grievance should be initiated through Montgomery County Government Employees

Organization/Local 400, in accordance with the steps outlined under Article 10 of the (OPT) Agreement.

The appeal was denied.

Case No. 93-08

This is a decision on the record in the above referenced appeal which was received by the Board on August 18, 1992. The appeal was made as a result of the decision of the Chief Administrative Officer (CAO) on a grievance filed on February 12, 1992. The Appellant believes that the decision of the CAO is not consistent with the evidence of record. The grievance concerns the transfer of the Appellant. The Appellant claimed that the transfer was retaliation for his having appealed to the Circuit Court in the denial of a grievance filed in 1989 over alleged irregularities in the rating and selection process for the position of Deputy Chief of Police. As relief, the Appellant requested freedom from restraint, harassment, retaliation and violations of his civil rights and reassignment to his previous position as Commander of a District.

The provisions of Section 21 of the Personnel Regulations apply. Under these explanations, transfer of an employee is a prerogative of management and nine explanations are provided as possible reasons. This list of reasons is not all inclusive.

In his representations to the Board, received on October 13, 1992, the Appellant contended that the conclusions of the CAO are not based on reasonable inferences from the findings of fact. Section 21-6 required that the employee must show that the action was arbitrary and capricious.

FINDINGS

First, the Appellant alleges that the "...Chief did not consider the information that he alleged he had considered (and which he should have considered) and, therefore, the transfer was arbitrary and capricious." (Appellant's memorandum, October 7, 1992) The Appellant noted that whether the Chief's failure to be consistent in his reasons for the transfer was deliberate or negligent was irrelevant. The lack of consistency is sufficient cause for finding the transfer itself, "arbitrary and capricious". We do not agree. The Appellant can be transferred by the Chief. The Appellant cannot be transferred solely because he had filed a grievance. The Appellant wanted the Chief to reach a conclusion which is in his favor. This did not happen.

The issue is whether the failure of the Chief to be consistent is fatal. In our view, the Chief's authority is clear and the inconsistency in explanation is not fatal. As long as notice provided and some reason was given which in its totality related to the operational efficiency of the Department, the Chief's authority is supportable. This allegation is not persuasive.

Second, the Appellant finds certain of the reasons given by the County concerning his statements on retirement are "illogical and absurd". Granted truth to this assertion, the Appellant is arguing that, therefore, we must believe that the County's only reason must have

been retaliation. We do not reach that conclusion.

Third, the Appellant argues that a reason proffered by the County is not substantiated by documentation and was not timely filed. This is further evidence that these reasons (number of brutality complaints) were probably not considered. We do not believe the County had to go to this extent to transfer a management official under the governing regulations.

Fourth, the Appellant does not argue that the County must show operational deficiencies in his performance in order to justify a transfer or that the County could transfer him to resolve a grievance. He argues that there is no evidence of any operational deficiencies and "...there is abundant undisputed evidence in the record that my transfer was retaliatory, arbitrary and capricious." We do not reach that conclusion.

What the Appellant is asking the Board to do is to substitute its judgement for that of the CAO. In summary, the Appellant argues for this Board to agree that his transfer is either improper, on a whim, or without standard.

CONCLUSION

We find no violation of regulations, no denial of benefit, and no adverse effect in terms of loss of pay or rank within the Department. The transfer was processed properly. The Appellant has not been denied any benefits to which he is entitled.

We are not convinced by the materials presented by the Appellant that his transfer was made on a whim - just because a previous grievance existed, or without application of any standard.

Other Department officials were also transferred. The high levels of the officials involved in the transfers and the close and apparent confidential nature of the working relationships at these levels cause this Board to look for very clear and compelling reasons proffered by an Appellant before it would overturn transfers of top managers.

We do not find evidence submitted by the Appellant which would lead us to conclude that the only reason the Chief had was the grievance previously filed. The burden here is on the employee. We cannot get into the mind of the selecting official. At the high levels of these managerial officials, transfers among districts may be made because of differences in managerial style and approach of incumbents. The Chief was new to his job and was not involved in the grievance originally. The Chief could have a policy of rotation or wanted to try such a policy. The Chief could have directions to try some methods which were experimental. Another Chief may have acted differently.

The Appellant, if he were Chief, may have used different criteria or carried on conversations differently. This is a judgement call. We are not persuaded that the transfer of the Appellant under these circumstances and conditions constitute retaliation, or arbitrary and capricious action. The appeal was denied.

Case No. 93-13

This is a decision on the record in the appeals filed by the Appellants. By letter of November 12, 1992, Appellants' attorney requested that the Board consolidate these appeals since they raise similar issues. Appellants are appealing the October 23 and 26, 1992 decisions of the Labor/Employee Relations Manager that the issue they raise is not a matter which is subject to review under the County Grievance Procedure.

BACKGROUND

Appellants filed identical grievances on or about October 20, 1992. Therefore, as requested by their attorney and in the interest of efficiency, the Board is consolidating these appeals for the purpose of review. Appellants are Master Firefighters employed in the Department of Fire and Rescue Services. They stated that their names remained on the "Qualified" list, resulting from the 1990 promotional examination for Sergeant, before the list expired on November 23, 1992. They contend that, as a result of procedural violations by the County, they were not promoted although vacancies existed. They seek promotions for themselves and other individuals whose names remained on the 1990 eligibility list.

The County denied the grievance on the ground that the decision to fill a vacancy is a prerogative of management, unilaterally made after considering staffing, organizational and budget implications. The Labor/Employee Relations Manager stated that the County has a right to determine if a vacancy will be filled, when it will be filled, and if it will be filled by promotion or by some other personnel action. He further stated that, although Appellants' names are on the eligibility list for Sergeant, they are entitled to consideration only after the Department determines that a vacancy will be filled by promotion.

DISCUSSION

The Board agrees with the County that management has the unilateral right to determine if and when a vacancy will be filled, and whether it will be filled by promotion or some other personnel action. However, in this case, Appellants contend that the County violated certain regulations in the administration of the merit system which affected their promotional opportunities.

In his November, 1992 letters to the Board, Appellants' attorney contends that Section 33-12(b) authorizes the filing of a grievance arising out of a disagreement between a merit system employee and a supervisor with respect to a term or condition of employment. Further, he noted that Section 28-2(c) permits a grievance to be filed if an employee is adversely affected by, "improper, inequitable or unfair act in the administration of the merit system, which may include promotional opportunities....", and complaints with respect to the promotional process are not excluded from the grievance procedure under Administrative Procedure 4-4, Section 4.10.

Additionally, Appellants' attorney points out that Section 22-6 provides, "A merit employee may appeal promotional action pursuant to Section 28 of these regulations. The

employee must show that the action was arbitrary and capricious or in violation of established procedures."

Appellants' grievances also refer to Section 3-11 of the Personnel Regulations, which states that "Temporary positions must not be used to circumvent the requirement to provide benefits to which merit system employees are entitled." Appellants claim that this section was violated by temporary appointments made by the County before the 1900 eligibility list expired. In his December, 1992 letter to the Board, Appellants' attorney contends that the issuance of Vacancy Announcement 92-14 on December 14, 1992, shortly after the list expired, advertising 15 promotions to Sergeant, indicates that the promotional process had not been followed as required by the various provisions of the Merit System laws.

In the opinion of the Board, the Appellants assert a right to upward mobility and consideration for promotion. A merit system provides an orderly and systematic method for administering filling vacancies. We do not find a basis for concluding that the County is obligated to assure that all eligible candidates on a list are advanced to the rank(s) for which they have applied. Any eligible should know that she has been considered. This knowledge lends credence to the operation of the merit system and indicates good faith action by management. In the instant case, the Appellant was told that he would not be advancing. This is a minimum indication that he was considered. The Appellant seem to believe that if the number of vacancies and the number of candidates are the same number, it follows that the candidates deserve the positions. This belief is further supported, in their view, by the opening of a new examination while candidates were on the expired list.

FINDING OF FACT

The Board does not find that management has violated any regulation or rule. The Appellants have not pointed to a specific violation which indicated that a procedure has not been followed or some action has been taken which is in clear violation of the Code or the Regulations.

Management's obligations extend to consideration of employees for vacancies based on the procedures which are spelled out in promotion announcements and examination programs.

It is clear management has the authority to determine if a vacancy will be filled, when it will be filled, and if it will be filled by promotion or by some other personnel action.

It would have been helpful to employees if the County would let employees know if they have been considered. In the instant case, this could have been the answer to the original question of the Appellants' complaint which the County did not process but denied as a grievable matter. Absent the assertion that the Appellant was told that he would not be getting promoted, this Board would have had no knowledge of what consideration had been provided employees.

CONCLUSION

For the reasons discussed above, the Appellants' complaints are not grievable. The appeal was denied.

Case No. 93-15

This is a decision on the record in the above appeal filed on December 14, 1992. Appellant appealed the decision of the Labor/Employee Relations Manager, denying his complaint as not grievable.

BACKGROUND

Appellant was a probationary employee with the Department of Liquor Control occupying the position of Truck Driver Helper/Warehouse Worker. On November 16, 1992, he filed a grievance complaining that the County's procedures relating to performance evaluations were not followed in that he was not given an opportunity to sign his performance evaluation, provide comments, and receive a copy.

By memorandum of November, 1992, the Labor/Employee Relations Manager denied the grievance on the grounds that Appellant is a probationary employee, without merit status, and, since no disciplinary action had been taken against him, the complaint was not grievable. The Labor/Employee Relations Manager based his decision on the provisions of Section 4.5 (e) of Administrative Procedure 4-4 which permits a probationary employee to use the grievance procedure only to appeal a disciplinary action, a deduction of compensatory leave for disciplinary reasons or a deduction of compensatory leave to repay a debt to the County. In addition, the Labor E/R Manager cited Section 28-2 of the Personnel Regulations which defines a grievance as a formal complaint arising out of a misunderstanding or disagreement between a "merit system employee" and a supervisor.

In Appellant's memorandum of January, 1993 to the Board, he argued that Section 8-5 of the Personnel Regulations, which provides that performance ratings are not grievable "except in cases of failure to follow established procedures", does not exclude probationary employees. However, since Section 28-2 defines a grievance as a complaint filed by a "merit system employee", a complaint by a probationary employee, is not authorized under Section 8-5 of the Personnel Regulations. In short, only a "merit system employee" may file a complaint in connection with a failure to follow established performance rating procedures under Section 8-5.

The fact that Appellant contends that his performance appraisal was not given according to County procedures does not constitute a disciplinary action, nor does it negate the fact that he was a probationary employee at the time of his performance evaluation.

CONCLUSION

Accordingly, it is the opinion of the Board that Appellant's complaint is not grievable. The appeal was denied.

Case No. 93-17

This is a decision of the Merit System Protection Board on the record in the above appeal filed on January 12, 1993. The Appellant, a Montgomery Police supervisor, appealed a refusal by the County to process her grievance filed on September 17, 1992. The refusal is based on a conflict of interest in that the costs of representing Appellant are being paid in whole or in part by the Fraternal Order of Police, Lodge 35, Inc. (FOP), a labor organization certified under the Police Labor Relations Law to represent employees in the police bargaining unit.

BACKGROUND

Appellant occupies the position of a Police Sergeant, and Supervisor. She filed a grievance on October, 1992 requesting retroactive roll-call pay for her specific position.

The Personnel Office was notified on or about November, 1992 that Appellant was being represented in her grievance by her attorney who has provided representation to the FOP and its members. The FOP is the certified collective bargaining representative for non-supervisory Montgomery County police officers, representing them in matters pertaining to wages, hours and working conditions.

On December 18, 1992, the Labor/Employee Relations Manager advised her attorney that if Appellant is represented by legal counsel whose fees are being paid in whole or in part by the FOP, this is in violation of Section 28-1 of the Montgomery County Personnel Regulations and 4.9, Representation, of Administrative Procedure 4-4 which state in pertinent part:

> ...a supervisor or other management official may not be represented by a labor organization which is certified under the County collective bargaining laws to represent any employees who are under the supervision or control of the supervisor or management official.

The County contends that its determination is based on a Circuit Court decision, Case No. 73303, Montgomery County v. Blank, et al., dated March 18, 1992, holding that it is an inherent conflict of interest, and a violation of Section 28-1 of the Personnel Regulations, for the head of the FOP to represent management or supervisory officials in the Police Department. It is the County's position that union representation of supervisors would include representation by union officers, by employees of the union, or by anyone whose fees for the representation are paid in whole or in part from union funds derived from the dues of bargaining unit employees.

However, although asked by the County, neither the Appellant nor Counsel would state the source of funds for paying the costs of Appellant's representation. Absent a direct response, the County presumed that Appellant's representation costs are being paid from funds of the FOP. Accordingly, because it is the County's position that this constitutes a violation of the Grievance Administrative Procedure and Personnel Regulations, it has taken no further action to process the Appellant's grievance.

Appellant's brief on appeal argued that the Appellant's representative is a duly admitted Maryland attorney, who has represented many different clients as an employment and labor law specialist, including FOP Lodge 35 and its members as well as Montgomery County Police Department supervisors, without objection. Appellant argued that he is not a "labor organization" or an officer, shareholder, principal or member of FOP, Lodge 35 and, therefore, is not within the prohibition of Section 28-1 of the Personnel Regulations.

Appellant argued that the County's decision violates Section 29-9 that "Appellant may be represented by an individual of personal choice..." Appellant further contends that the County's interference with Appellant's choice of representative violates her constitutional rights of due process, equal protection, free speech and freedom of association. Appellant stated that only the Court of Appeals may determine what constitutes a "conflict of interest", and the County's demand to know who is paying Appellant's counsel's fees violates her attorney's duty of confidentiality and Appellant's First Amendment rights of Association and Privacy. Appellant requests that the County: withdraw its requirement that Appellant or her Counsel inform the County who is paying counsel fees, process Appellant's grievance on its merits, recognize as Appellant's attorney, and pay Appellant's attorney fee and costs.

DISCUSSION

Attorney, while representing the FOP, Lodge 35 and its members, has done so as an "independent contractor" and not as an officer or agent of the union. There is no claim that is an officer of FOP Lodge 35 in the same way as is the head of FOP Lodge 35. The Blank case cited by the County prohibits the union or its officers from representing supervisors as an inherent conflict of interest.

However, on July 8, 1992, the County had interpreted Section 28-1 and the Blank decision to also proscribe the payment of attorney fees by a union to anyone representing a supervisor, whoever that person may be, as a similar inherent conflict of interest when the union represents employees under the control of the supervisor.

There is a presumption that the County's contemporaneous interpretation of its own regulations in accordance with the Blank decision is valid, unless it can be clearly shown that it is unreasonable or arbitrary and capricious. That interpretation does not have any bearing on the fact that, as in this case, Appellant's attorney happens to be an "independent contractor" and not an officer or agent of the union. The sole criteria is whether the union is paying counsel fees for the supervisor's representation. The County's interpretation is that the union's payment of a supervisor's legal fees to anyone is tantamount to representation of the supervisor by the union or its agent and, accordingly, constitutes an inherent conflict of interest.

CONCLUSION

The Board is not persuaded that the County's interpretation of its own regulations is clearly unreasonable, arbitrary or capricious. Because the attorney has represented FOP and its members in the past, it is reasonable for the County to inquire as to whether the FOP is paying fees for representing Appellant. After being given a reasonable opportunity to respond, both Appellant and her attorney declined to do so. Therefore, the County was justified in presuming that legal fees for representing Appellant are being funded by the FOP. Accordingly, the Board sustains the County's decision that, unless Appellant presents evidence that bargaining unit dues/fees are not being used to fund her representation, the County is not required to process Appellant's grievance. For this reason, attorney fees are not appropriate in this appeal.

Case No. 93-19

This is a decision on the record to the above referenced appeal. The Appellant has been employed for eight years at the Kensington Volunteer Fire Department, Inc. This appeal was filed because of a letter dated January 7, 1993 from the Division of Employment of the Personnel Office. That letter returned an application which he filed for the position of Administrative Services Coordinator for the Department of Fire and Rescue Services, Announcement No. 0132201E, indicating that the position was opened to Montgomery County employees only. The Appellant is an applicant for employment with the County and has standing to file this appeal. The Appellant contends that for purposes of employment opportunities, he is a Montgomery County employee.

BACKGROUND

According to the County, Section 5-2, Announcements, of the Montgomery County Personnel Regulations states that the, "Announcement of employment opportunities must receive appropriate distribution to enable and encourage qualified candidates to apply." (emphasis added).

The County notes that, on September 11, 1991, the Chief Administrative Officer, issued a memorandum concerning expenditure guidelines, and appended to this memorandum was a position management program. This program encourages inside only recruitment to maximize the upward and lateral mobility of existing County employees.

In the opinion of the County, the Employment Opportunities Bulletin containing the Administrative Services Coordinator announcement, Bulletin #25-92E, carried on the banner the clear statement, "For Employees Only." The restriction of some job opportunities to County Employees only has been a practice of the County Government for many years. Every two weeks two separate Bulletins are published: one for County employees and one for the general public. Only Montgomery County Government employees may apply for Employees Only announcements. Employees of the 'School Board, Maryland National Capital Park and Planning Commission, Housing Opportunities Commission, Circuit Court, State's Attorney, Revenue Authority, Independent Fire Corporations, and other employees not under

the County merit system are not permitted to apply under "employees only" announcements, notwithstanding the fact that such positions are funded by County revenues.

The County has entered reciprocal transfer agreements with some Independent Fire and Rescue Corporations which provide for the transfer of all benefits when employees move from one merit system to the other. Transfer is a prerogative of management and not an employee right. The Appellant applied for a competitive position and must meet all requirements including status as a Montgomery County employee.

The language of the Personnel Regulations requiring "appropriate" distribution of job announcements, the Chief Administrative Officer's directive to fill positions with existing County employees, and the longstanding practice of announcing to County merit system employees only, clearly demonstrate that the rejection of Appellant's application was not arbitrary, capricious, or contrary to law.

Finally, Appellant asserts that for promotional purposes he is a County employee. Section 21-4M(g) of the Montgomery County Code states emphatically and unequivocally that employees of local corporations are not County employees.

According to the Appellant, on the other hand, the reasons advanced by the Personnel Director do not justify or allow any derogation of the Merit System rights which are guaranteed to applicants for employment with Montgomery County, Maryland.

The first response made by the Personnel Director is that Section 5-2 of the Personnel Regulations dealing with announcements states that the announcement of employment opportunities must receive appropriate distribution to enable and encourage qualified candidates to apply. That section simply deals with distribution of announcements for a position. That section does not diminish the requirements contained in Article 4 of the County's Charter to undertake personnel actions based on demonstrated merit and fitness. Also, it does not provide a basis to violate the provisions of Section 33-9 of the County Code dealing with equal employment opportunities. Further, a mechanism for the distribution of position announcements does not abrogate Section 4 of the Personnel Regulations dealing with equal employment opportunities.

The Chief Administrator Officer's memorandum of September 11, 1991 deals with procedures to be utilized for controlling personnel expenditures. As a result, the Chief Administrative Officer indicated inter alia that a position management program would be employed as a part of the County's endeavors to stay within available funds. Even a cursory review of that memorandum will show that its purpose was to control the expenditures of County dollars in order to avoid the effects of revenue reductions to the County's fiscal position. The accompanying position management program does not prohibit making employment opportunities available to individuals who are not currently County employees. Rather, it contains general principles under which OMB will approve all vacant positions for recruitment except with certain limited exceptions. The position management program indicates that inside-only recruitment will be "maximized" but it does not preclude promotional opportunities to persons who are not currently County employees.

In the opinion of the Appellant under the circumstances of this case, involving an individual paid with the County tax funds, the purpose of the Position Management Program does not apply. Even assuming that it did apply, the County acted unreasonably in not obtaining an exception for the position from OMB. Moreover, the provision of the County's Charter, Code and Personnel Regulations dealing with equal employment opportunities have not been followed. Additionally, the County has ignored the provisions of the Montgomery County Code contained in Chapter 21, as well as the agreement of February 28, 1989 between the County and the various fire departments with respect to the ability of their respective employees to transfer.

FINDINGS OF FACT

Under Section 21-4M(g) of the Montgomery County Code. "...Nothing in this subtitle shall be construed to mean that any employees of the local corporations are County employees either on a de jure or de facto basis nor that the County government or any representative of the County government shall have authority over: (1) Who is employed; (2) who is terminated; (3) duty assignments; and (4) day-to-day supervision." Appellant is not a County employee for any purposes. We have attached a copy of this provision.

The contentions concerning position management, upward mobility, and equality of opportunity do not apply nor counter balance the clear language of the code.

CONCLUSION

The appeal was denied.

Case No. 93-20

This is a decision on the record in the above referenced appeal filed with the Merit System Protection Board on December 7, 1992. You appealed the decision and determination of the Deputy Chief Administrative Officer who denied your grievance.

BACKGROUND

The Appellant was employed part-time in the Department of Addiction, Victim and Mental Health Services (DAVHMS) since July 3, 1989. On May, 1992, he resigned from his position with the County Government.

On May 14, 1992, Appellant filed a complaint alleging violations of Administrative Procedure 4-4, Grievance Procedures. On September 8, 1992, a meeting was held between County officials and as a result of that meeting a Finding of Fact Report was issued with an October 6, 1992 cover letter from the Labor/Employee Relations Manager.

The Deputy CAO'S decision and determination on the grievance was sent on December, 1992 and appealed this decision to the Board on December, 1992.

DISCUSSION

The grievance, in part, is covered by Administrative Procedure 4-4, Grievance Procedure. The Board finds that the appeal was filed in a timely manner.

(1) Concerning accusations made relating to discriminatory practices by the Staff and the DAVHMS Crisis Center and the welfare of patients being jeopardized by the Staff's failure to adhere to established medical practices and procedures, these are currently under review by the Montgomery County Human Relations Commission.

(2) Concerning the matter of the four hours pay due for compensatory time, this was granted by the County.

(3) Concerning the allegation that confidential materials including a letter of reprimand was with counseling memorandums and were used by the Department for training purposes, the Board finds no evidence or testimony to support this accusation. The evidence shows that a secretary did not remove the memorandum referred to above from her computer file. The normal procedure for filing documents of this nature is to remove them from the computer file and store them onto disk.

(4) Concerning an allegation of deprivation of supplementary income for bilingual services performed for the County, we find as follows. According to a Memorandum dated May 8, 1987 from the Director of Personnel to all Department and Agency Heads on the subject of Multilingual Pay Differential. In order for a position to qualify for multilingual pay differential, the position must be identified by the department as requiring multilingual skills as well as the Supervisor must certify language skills are required for work performance.

It is the opinion of the Board that even though the Appellant possessed these skills and from time to time provided services to Spanish Speaking clients, Appellant was neither hired to perform these services nor was the language skill a requirement for the part- time Physician II position. In addition, Section D, Appeals, on page 3 of the above referred memo states, "The designation of positions requiring multilingual skills and the levels of compensation are non-grievable and non-arbitrable."

(5) Concerning a claim of having to carry a larger patient load than other staff members who were full-time employees resulted from filing a discrimination complaint in September, 1991, we find the County has demonstrated to the Board that examples and comparisons presented do not take into account a) administrative tasks performed by full-time staff, b) supervisory tasks performed by full-time staff, and c) full-time staff who are required to accommodate new patients due to both walk-ins and emergencies.

(6) Lastly concerning charges that the internal memorandum regarding Appellant and a patient's Medical Assistance Card was circulated "around the office" and "among the staff", the Board finds no evidence in the record to sustain this charge. In fact the above referred memorandum appears to have been seen by you on doctor's desk.

CONCLUSION

The Board for the reasons stated above sustain the decision of the Deputy Chief Administrative Officer. The appeal was denied.

Case No. 93-25

This is a decision on the record in the above appeal filed on March 16, 1993. The Appellant appealed the January 22, 1993 determination by the Labor/Employee Relations Manager, that the complaint he filed under the County grievance procedure is not grievable because it raises allegations of discrimination on the basis of race and disability that may be raised with the Office of the Human Relations Commission. Appellant requests that the County be instructed to process his grievance on the merits, a hearing and an award of reasonable attorney fees.

BACKGROUND

Appellant was employed as a firefighter since August, 1987. In June of 1991, as a result of sustaining a herniated disc in the course of his employment, he went on disability leave until December, 1992. Upon reporting to his work station, he was advised that his Emergency Medical Technician (EMT) status had lapsed and that, as a result, he could not be assigned to ride an ambulance. He was sent to the Training Academy for written and physical tests and then instructed to attend Recruit Class.

On January, 1993, Appellant filed a County grievance objecting to his being sent to a recruit class alleging that he is being "discriminated against on racial grounds and because of my health status." He requested that an appropriate position be found for him within the Fire Service and "reasonable accommodations should be made for me, if necessary, until such time as I can obtain my EMT status."

By letter of January, 1993, the Labor/Employee Relations Manager, advised Appellant that the complaint he filed under the County grievance procedure will not be processed because it raises allegations of discrimination on the basis of race and disability that may be raised with the Office of the Human Relations Commission. Therefore, the issues he raised are not grievable under the County grievance procedure. The Labor/Employee Relations Manager also acknowledged that the County received a grievance filed on Appellant's behalf by Montgomery County Career Firefighters Association, IAFF/Local 1664 under the Local 1664 collective bargaining agreement concerning Appellant's assignment to the Training Academy and overtime pay.

In his March 16, 1993 appeal letter, Appellant contends his complaint is grievable because Section 33-12(b) of the Montgomery Code authorizes the filing of a grievance based on a disagreement between an employee and supervisor, and Section 28 of the Personnel Regulations authorizes the filing of a grievance by an employee who is adversely affected by an alleged improper or unfair act in the administration of the merit system. Appellant

requests a reversal of the Labor/Employee Relations Manager's decision, that his grievance be processed on the merits, a hearing and reasonable attorney fees.

In his April 15, 1993 letter to the Board, Appellant further contends that Section 4-2 of the Personnel Regulations does not mandate that an appeal be filed with the County's Human Relations Commission but, rather, the use of the word "may" indicates that the employee has an option of forums. Appellant suggested that the Merit System Protection Board's November 1983 interpretation, requiring that discrimination complaints based on race or handicapping conditions filed under Section 4-2 of the Personnel Regulations must be filed directly with the Human Relations Commission, is incorrect. Appellant further contends that a Court of Special Appeals unreported decision, Montgomery County, Maryland v. Blank, SeptemberTerm, 1991, No. 481. (June 5, 1992) is likewise erroneous. This decision upholds the Board's interpretation.

In its March 31, 1993 response to Appellant's appeal, the County pointed out that Section 33-12 (b) also provides that grievances do not include "other employment matters for which another forum is available to provide relief or the Board determines are not suitable matters for the grievance resolution process." The County argued that the word "may" in Section 4-2 of the Personnel Regulations refers to the choice an employee has to file an appeal with the OHRC or not to file an appeal at all and that the regulations do not provide for an optional forum.

The County also stated that Appellant's complaint is duplicative of the grievance filed by the union which is based on the same facts and requests similar relief. However, the union grievance does not claim discrimination based on race and handicapping condition but raises issues covered by the collective bargaining agreement.

DISCUSSION

Section 33-12(b) specifically precludes the filing of grievances where "another forum is available to provide relief" or the Board determines that the employment matters "are not suitable matters for the grievance resolution process." In this case, both conditions have been met.

Since Appellant raised the issue of discrimination based on race and handicapping condition as the basis for his complaint, there is clearly another forum, the County's Human Relations Commission, available to resolve these issues. Thus, the County grievance procedure is not an appropriate forum to resolve complaints based on discrimination.

In addition, the Board issued an interpretation of Section 4-2 of the Personnel Regulations in November, 1983 which provides that discrimination complaints based on race or handicapping conditions must be filed directly with the Human Relations Commission. As stated by the court in the Blank case, this interpretation carries the presumption of validity and, since it is reasonable, should not be disturbed by a reviewing authority.

CONCLUSION

For the reasons stated above, the Board finds that Appellant's complaint is not grievable under Section 33-12(b) of the regulations because it contains allegations of discrimination based on race and handicapping condition which must be filed directly with the County's Human Relations Commission. Therefore, the County was justified in refusing to process the Appellant's complaint. Accordingly, Appellant is not entitled to a hearing or reasonable attorney fees.

GRIEVANCE/PERFORMANCE APPRAISAL

Case No. 93-06

Appellant alleges violations of Montgomery County Personnel Regulations, Section 8, Performance, Planning and Appraisal; Administrative Procedure 4-12, Performance, Planning and Appraisal and Department of Fire and Rescue Services (DFRS) Procedure #523, Performance, Planning and Appraisal. Appellant requests relief as follows, "Acknowledge by memorandum under Director's signature that DFRS and his supervisor, knowingly, willfully and with preordination failed to establish any performance plan, conduct any performance reviews and provide any performance appraisal for the appraisal period March 24, 1991 through March 23, 1992."

The County has admitted that DFRS was remiss in the performance planning and appraisal process relating to the Grievant's position. The Department failed to write a performance plan and conduct evaluations on Grievant's position. The Board fails to understand how the element of intent would affect Appellant's claim or requested remedy. Appellant received all yearly increments when due, and was placed at no monetary disadvantage by the Department's administrative failure.

The Board declines to rule on the tangential and questionably relevant issue of intent, but finds that the County violated its own procedures by failing for over one year to conduct a performance appraisal of Appellant or to establish a performance plan.

The County is ordered to immediately commence the requisite steps for complying with the procedure noted in Appellant's grievance, and shall complete this process within thirty days.

PAY INEQUITY/TIMELINESS

Case No. 93-30

This is a decision on the record in the above appeal filed on April 29, 1993. The Appellants appealed the decision of the Labor/,Employee Relations Manager, dated March 30, 1993, determining that their complaint, dated February 26, 1993, was not timely filed and could not be processed further.

BACKGROUND

Appellants are employed by the Montgomery County Department of Fire and Rescue Services in positions ranked as Fire/Rescue Lieutenants. In January 1990, Appellants wrote to the Director, Department of Fire and Rescue Services, complaining about what they considered a pay inequity when they were promoted on October 30, 1989 to the rank of Fire/Rescue Sergeant from the rank of Firefighter/Rescuer III. In their letter, Appellants indicated they should have received a 15% pay increase instead of 10% because other employees who were later promoted to Master Firefighter/ Rescuer first and then to Sergeant received a 15% increase overall in pay.

By memorandum dated May 30, the Director acknowledged that there was an inequity between Appellants' promotion and the promotion of other employees under the collective bargaining agreement but offered no relief. Appellants took no action to file a grievance at the time of their promotion in October 1989, nor after receiving the May 1990 response from the Director offering no relief.

On February, 1993, a Firefighter-III, was promoted to Master Firefighter and from Master Firefighter to Sergeant on the same day, effective February 7, 1993. In accordance with the collective bargaining agreement, the Firefighter III received a 10% pay increase for the first promotion and a 5% increase for the second promotion, thereby totaling 15% overall. On February 26, 1993, Appellants filed grievances claiming that, since they were members of the collective bargaining unit on October 30, 1989 and eligible for the promotion to Master Firefighter, they should have received an extra 5% increase in pay retroactive to October 30, 1989 similar to that received by other employees.

The Labor/Employee Relations Manager determined that the grievance was not timely filed under Section 6.0 of Administrative Procedure 4-4 (Grievance Procedure) within 20 days from the date Appellants knew, or should have known that the problem existed. Appellants knew that an issue pertaining to the appropriate wage increases existed as early as October 1989, and certainly by January 1990 when they petitioned the Director but he offered no relief in his May 1990 response. Nevertheless, Appellants took no action at that time to file a grievance.

DISCUSSION

Section 6.0 of Administrative Procedure 4-4, Grievance Procedure, referring to the time requirements for filing a grievance, states in relevant part:

> If unable to informally resolve the problem and wish to file a grievance, submit the grievance on the appropriate form to the immediate supervisor. (This must be done within 20 calendar days from the date the employee knew, or should have known, that the problem existed.)

It is clear that Appellants knew, by their own letter to the Director in January 1990, and certainly by his failure to offer relief in his May 1990 memorandum, that there was a problem with the amount of their pay increase. Thus, if they wished to file a grievance, it should have been done, at the very latest, within 20 days from the date they received the Director's memorandum of May 30, 1990 denying relief.

The Appellants' grievance filed February 26, 1993 complaining about the 15% increase received by the Firefighter III in February 1993 cannot form the basis for a "new" grievance since it is merely a repetition of other similar pay actions previously taken about which Appellants complained in their January 1990 memorandum to the Director.

CONCLUSION

Because Appellants failed to file grievances within 20 calendar days from the date they first became aware of the problem with their pay increases in January 1990, and certainly by May 1990, their February 26, 1993 grievances are clearly untimely and cannot be processed. Appellants, cannot rely on the February 1993 pay increase granted to Firefighter Landry as the basis for filing a new grievance because this pay action by their own admissions, is merely a continuation of the prior pay actions about which they complained to the Director in January 1990. The appeal was denied.

PROMOTION

Case No. 93-09

This is a decision on the record on the above referenced appeal which was filed with this Board on September 30, 1992. The appeal was initially stated as follows:

> "This is an appeal from decision of the Chief Administrative Officer that Appellant and similarly affected police officers participating in the 1992 examination for the rank of Sergeant would not be provided copies of the 1990

promotional examination for the rank of Sergeant, notwithstanding the fact that the Director of Personnel postponed the 1992 examination partly because 'it had been brought to [the Personnel Director's] attention that some, but not all, candidates may have access to the 1990 written multiple-choice examination for Sergeant.' [Emphasis Added]. The grievance was filed prior to the administration of the examination. That examination has since been given and an eligible list established. Appellant has not been promoted.

Further, this is an appeal from the procedures utilized during the grievance process where the previously utilized procedure involving an impartial third party who took testimony, compelled witnesses to testify, accepted evidence, and made an independent decision on the basis of facts, was unilaterally replaced with an informal, unstructured review involving an unrecorded, unmethodical process where an employee of the Personnel Director served as 'fact-finder'."

In the County's disposition of the grievance on August 20, 1992, the Chief Administrative Officer (CAO) summarized the grievances as follows:

"In this complaint the Fraternal Order of Police (FOP) has alleged on behalf of Grievant that other applicants for promotion to the rank of Sergeant have obtained a copy of the 1990 written multiple choice promotional examination for that job class. The Union further alleged that those applicants who have a copy of the examination had an undue advantage. As relief it was requested that the Grievant and all other candidates be provided a copy of the 1990 Sergeant examination."

The CAO concluded as follows:

1. There is no legal requirement that the County release copies of prior promotional examinations. The County was in compliance with State law in not releasing the 1990 promotional examination.

2. The Grievant has alleged that certain applicants had an unfair advantage in that they have obtained a copy of the 1990 Sergeant's examination. However, to address this concern the County has constructed a whole new examination. None of the 1990 examination questions were used.

3. The document submitted by the Union Representative is purported to represent the contents of the 1990 Sergeant's Promotional Examination. It is difficult to conclude what the document submitted represents. The statements cannot be determined to be answers or questions. The document is not the 1990 Sergeant Examination and it is difficult to believe that the purported document has any value as a study tool.

4. After conducting an inquiry, the Police Department's Office of Internal Affairs recommended that copies of the 1990 examination be distributed to all applicants for the 1992 Sergeant Promotional Examination. The Personnel Office disagreed with this recommendation stating that the examination review process utilized is entirely consistent with Maryland Freedom of Information Act.

5. Given the fact that none of the questions on the 1990 promotional examination were utilized on the 1992 promotional examination and that the alleged copy of the 1990 promotional examination is incomplete, fragmented, and bears no resemblance to the actual 1990 Sergeant Examination, there is no evidence to support a conclusion that possession of such a document would advantage any particular employee or group of employees.

On the other hand, the Appellant argued in his initial appeal as follows:

1. The grievance procedure and merit system law empower the County, and this Board to order relief to accomplish the remedial objectives of the Merit System Law. Chapter 33, Article II SS 33-7, 33-12 and 33-14. The Maryland Freedom of Information Act does not preclude the relief sought by Appellant. On the contrary, it permits denials under that law and for purposes of that law. The Act in no way prohibits the resolution of grievances. Assuming arguendo that the Act does prohibit the release of such materials under all circumstances, the County was in violation of the same law it hides behind here when it permitted and allowed the unauthorized release of the 1990 test.

2. The simple restructuring of examination questions does not rectify the unfair advantage others may have gained from the 1990 examination. Question content, subject matter emphasis, and other traits of testing processes are valuable to serious test takes. However restructured, the value of the 1990 examination to any individual cannot be measured nor disregarded by the County. Further, the County leaves it to Appellant to take its word that the 1990 examination would not have advantaged him.

3. Appellant's representative made a good faith effort to obtain copies of questions from prior tests that were being circulated at the time. However incomplete and fragmented these questions may have been, the fact that he produced them demonstrates that test questions have been leaked and serve to validate Appellant's claim that examination security is lax. Further, by failing to provide Appellant access to the 1990 examination, the County leaves it to its own unilateral judgment that the questions Appellant submitted are not derived in whole, or in part, from the 1990 examination.

4. Appellant agrees with the Police Department recommendation. Although Appellant has been denied access to the Internal Affairs file, he believes that those who had access to the investigative file were in a position to make an informed recommendation.

5. The County chooses to ignore the facts known only to it and the probability that the 1990 examination or parts thereof were leaked and that examination security procedures in effect were violated.

In final arguments to the Board filed on October 22, 1992, the County further responded as follows:

There is no legal requirement that the County release copies of prior promotional examinations. The County was in compliance with State law in not releasing the 1990 promotional examination. The Appellant has alleged that certain applicants had an unfair advantage in that they have obtained a copy of the 1990 Sergeant's Examination. However, to address this concern, the County has constructed a whole new examination. None of the 1990 examination questions were used.

Assuming that both the old and new examinations were "based on a written plan" and "resulted from a job analysis documenting required skills and knowledges" [SS 5-6 Examination, MCPR 1986], the design and subject content of one examination must be similar to that of a newer examination for the same position. Unfortunately, until and unless the County submits the two examinations to outside analysis by this independent Board and/or Appellant, the magnitude of the serious violation and arbitrary response to it will not be determined. In any event, the County's refusal to provide the documents sought in the Appeal petition must be construed against it and in favor of Appellant.

The Board conducted a proceeding on Tuesday, February 23, 1993, to review the 1990 and 1992 examination questions and answers.

FINDINGS OF FACT

1. The alleged copy of the 1990 promotional examination has been identified as a 1988 examination and does not apply to the matter before the Board. The materials submitted by the Appellant in Exhibit #3 do not pertain to the 1990 or 1992 examinations. The Appellant agrees that these materials pertain to the 1988 examination.

2. By conducting the review proceeding in the presence of both parties, the Board has responded to the Appellant's desire for an independent review to determine if the County's assertions concerning the 1992 examination are correct.

3. We find that question 6 of the 1990 examination and question 38 of the 1992 examination cover the same subject but the choices of answers are different for each examination.

4. We find that questions number 76 of the 1990 examination and questions number 87 in the 1992 examination have the same answer although the choices of answers are not in the same order for each examination.

5. The questions asked in 1992 bear no resemblance to the actual 1990 Sergeants' Examination. In our judgement, one question identified above (1990 #76) can be considered as an exception to this statement. That is, the questions are similar and the correct answer is similar. the choices os answers do not appear in the same order in 1992 as in 1990. Assuming that a person taking the 1992 test recognized the question as similar to the 1990 test, rote recording of the 1990 answer as the letter "m", for example, would not help since that 1992 answer is the letter "o:, (given choices m,m,o,p). This judgement in no way supports a conclusion that the 1992 examination is flawed in any way. The 1992 examination is a different examination.

CONCLUSION

The appeal was denied.

Case No. 93-12

A Police Officer filed an appeal from the decision of the Labor/Employye Relations Manager denying a grievance conecceming a promotional examination. The appeal was subsequently withdrawn by the Appellant.

Case No. 93-35

This is a decision of the Merit System Protection Board in the appeal from the June, 1993 decision of Deputy Chief Administrative Officer, denying Appellant's October, 1992 grievance. Appellant grieved the County's failure to promote him to the rank of Sergeant in the Department of Fire and Rescue Services.

BACKGROUND

Appellant, employed as a Master Firefighter in the Department of Fire and Rescue Services (Department), took the promotional examination for the rank of Sergeant in the Fall of 1990. His name had been placed on the certified list in the "Qualified" category. Candidates for the examination were ranked in broad categories of "Qualified" or "Well Qualified". In October 1992, the Department announced certain promotions, including those employees promoted to the rank of Sergeant, which did not include Appellant. Upon inquiry, Appellant was not able to ascertain why he did not receive a promotion. He also determined that various letters of commendation and his recent performance planning and appraisal were not in his personnel file.

In his October, 1992 grievance, Appellant complained that the County's Policies and Procedures No. 512 regarding promotions do not provide a fair and reasonable mechanism by which individual relative standings can be reviewed. Appellant requested that he receive a promotion to the rank of Sergeant, that appropriate procedures be adopted which comply with the Merit System, that there be no retaliation for filing the grievance, and for other relief which may include an award of attorney fees.

On April, 1993, the Labor/Employee Relations Manager prepared Findings of Fact. Personnel Bulletin 367, dated June 29, 1990, outlining the requirements for the 1990 promotional examination for Fire/Rescue Sergeant, states that Section 6.3 of the Personnel Regulations provides that the appointing authority, subject to affirmative action objectives, "is free to choose any individual from the highest rating category" on the certified eligible list. In 1988, Section 6.3 of the Personnel Regulations was amended by the County Council to eliminate a list of elements that the appointing authority must consider when selecting from the eligibility list, namely, the person's overall rating, character, knowledge, skill, ability and physical fitness for the job as well as possible future advancement.

The "Request for Promotion" form submitted by Appellant, in response to the vacancy announcements, asked for basic information such as name, position desired, bureau, present duty assignment and a qualifications category which included standing on eligibility list, training and education. Appellant contends that the failure of the Personnel Regulations to require selection based on specific criteria conflicts with the mandates of Section 402 of the County Charter requiring the adoption of personnel regulations for the implementation of the merit system law.

In an April, 1993 letter to the Labor E/R Manager, the County Attorney concluded that the Appellant did not show that the use of certain selection criteria proposed by Appellant would lead to better or fairer selections, or would have resulted in his promotion.

In his June, 1993 decision, the Deputy Chief Administrative Officer, concluded that Promotion Procedure No. 52 of the Department of Fire and Rescue Services states that the Promotion Board will review all application forms submitted for a vacancy, but there is no reference to the Board's review of personnel files. Thus, the Deputy Chief Administrative Officer concluded, missing documents from Appellant's personnel files had no bearing on his not being selected for promotion. In the absence of information that nonmerit factors, or information outside of the application form, have been considered by the Promotion Board, Deputy Chief Administrative Officer determined that there was no basis on which to conclude that Appellant was denied fair consideration for promotion to a Sergeant.

CONCLUSION

The Merit System Protection Board concludes that Appellant has not presented any evidence to show that the County violated personnel regulations or acted unfairly by failing to select him for promotion to a Sergeant in the Department of Fire and Rescue Services. The 1988 amendments to Section 6.3 clearly show the County Council intended that the appointing authority be free to choose any individual from the highest rating category without utilizing specific selection criteria. Appellant's arguments are with the existing laws, which would be better addressed in the legislative arena. Therefore, the Board sustains the decision of the Deputy Chief Administrative Officer denying Appellant's grievance.

Case No. 93-37

This is a decision on the record on the appeal which was received by the Board on July, 1993. The appeal results from the decision on a grievance which was issued on June, 1993. A letter of intent was filed in a timely manner with the Board in June, 1993.

As relief, the Appellant asked that the results of the promotional examination for the Rank of Captain administered on October, 1992 and October, 1992 be declared null and void and that a fair and appropriate examination be administered.

BACKGROUND

The 1992 promotional examination for the rank of Deputy Sheriff VI (Captain) was announced in Promotional Bulletin No. 397, dated September, 1992. Minimum qualifications were identified in terms of experience, education or an equivalent combination of education and experience. The composition of the promotional examination was described in the bulletin. The written and oral portions of the examination were to consist of "...several exercises designed to evaluate candidates..." on five dimensions including job knowledge/experience. Source materials were identified. A three member panel consisting of "...Deputy Sheriff's (sic) of the rank of Captain or above from outside law enforcement agencies ... will evaluate each applicant's performance in both the oral and written examination." The scoring methodology was described and the cut off score for "Well Qualified" was set at 80 and above.

All previous promotional examinations for deputy sheriffs were comprised mostly, if not entirely, of questions with objective answers.

After the written examination conducted on October 13, 1992, six applicants participated in the oral portion of the examination on October, 1992. On October, 1992, the panel graded the written examination. Two were initially ranked "Well Qualified".

As a result of grievances filed, two of the six candidates had their scores rounded off in such a manner that their combined scores raised them from the "Qualified" to the "Well Qualified" group. This appears to have happened after a selection was made.

This is not a group appeal. The Appellant has filed for himself only. We will not consider the effect of management actions on other applicants.

ISSUES OF THE APPEAL

The Appellant has raised five objections to the examination:

- o Source materials identified in the promotion bulletin were not used exclusively as the basis for questions with objective answers on the written

portion nor in the oral portion.

o Previous Promotional examinations may not have allowed sergeants to compete for the rank of captain and may have provided more detail on how the examination would be ranked.

o No questions were asked regarding job knowledge and experience which was identified as one of the five evaluation dimensions for the written and oral portions of the examination.

o The scoring procedure was not discrete enough to distinguish large numeric differences between candidates and, when it did, the "well qualified" group was too large. Resolution of a grievance resulted in two candidates having their scores changed enough to be rated "well qualified".

o The promotional panel consisted of outsiders who did not fully understand the inner workings of the Department and the same panel conducted both portions of the examination leading them to know whose written examination each was rating.

The County has responded to each charge as follows:

o The source materials identified were basic to the successful performance duties as a captain. The questions were designed to test for management skills and to draw from a broad application of knowledge and experience. The Appellant is not objecting to materials used which are not relevant to successful performance at the captain level.

o Previous promotional examinations, like the current examination were based on the duties of the position being filled. The announcement stated that there would be several exercises used to evaluate the job dimensions. Details provided were followed and the previous examination had a written portion.

o The examination was designed to test for the application of knowledge through evaluating decision making skills, written and oral communication, and good judgement. The "job knowledge/experience" dimension was captured indirectly through the evaluation of the candidate's skills in these areas.

o The scores given are based on a consensus among the raters on the panel. No evidence was provided that the raters acted improperly or with any bias to the candidates. The methodology is consistent with standard exam administration.

o Extensive training was provided to the panel members to provide accurate evaluations of each candidate's responses. The fact that raters were not from within the Department was a protection against bias. No evidence of an individual or collective bias against any candidate has been provided.

FINDINGS AND CONCLUSIONS

The procedures used in this examination were announced prior to the examination as required in Section 5-9 of the Personnel Regulations.

The examination itself appears to be based on a consideration of the duties and responsibilities of the Captain position and the dimensions used in the examination are consistent with the requirements of Section 5-6 of the Regulations.

There is no evidence that the members of the panel have acted in an arbitrary, capricious or discriminatory manner.

There is little, if any, direct evidence that the examination process itself was designed in advance or in operation to favor any one candidate.

The appeal was denied.

RETIREMENT CREDITS

Case No. 93-32

This is a decision of the Merit System Protection Board on the appeal from the Deputy Chief Administrative Officer's April 23, 1993 decision denying Appellant's grievance filed on September 12, 1992. In his grievance, Appellant requested that the Employees' Retirement System of Montgomery County be directed to accept the transfer of his years of retirement service credits from the State of Maryland. The Deputy Chief Administrative Officer denied the grievance because there was a one-year break in service between Appellant's employment with the State ending in January 1979 and his return to employment with the County in January 1980.

BACKGROUND

The facts in this case are not in dispute. Appellant is currently employed and initially worked for the Montgomery County Government as an elected official for four years from December 1970 to December 1974. He subsequently worked for the State of Maryland as an appointed official for four years from January 1975 to January 1979 and transferred prior retirement credits from the County to the State for a total of eight years retirement credits with the State. Appellant returned to work for Montgomery County in a merit position on January 21, 1980 and has worked continuously for the County through the present. Between the time he left the State in January 1979 and January 1980, he was unemployed and in the process of seeking employment.

On July, 1980, Appellant requested the County to transfer his retirement credits from the State but his request was denied. On June, 1991, Appellant again applied for the transfer of his retirement credits from the State under the 1990 Maryland law providing for a one-year window for transfer of certain retirement credits if made on or before June 30, 1991. The Division of Employee Services of the County Personnel Office, which administers the Employees' Retirement System of Montgomery County, determined that the break in service from January 1979 through January 1980, during which time Appellant was unemployed, disqualified him from the special transfer option. By Memorandum of July 13, 1992, the County Attorney concurred with the decision of the Personnel Office.

Both the State and County Bulletins advised employees that, in order to transfer retirement credits under the 1990 Maryland law, there is still a requirement that the employee must have become a member of the current retirement system immediately following the termination from the previous employment. In a February, 1993 letter to the Labor/Employee Relations Manager, Montgomery County the Special Assistant to the Retirement Administrator, Maryland State Retirement Agency, advised that his office has consistently viewed the credit transfer provisions of the State retirement law to mean that the person must be an "actively employed member of a retirement system when he finds new employment, the acceptance ofwhich makes it impossible to continue his then current membership. Therefore, the only break in employment that would be permissible would be one consistent with what a new employer would allow before a new employee reports for work."

Appellant disputes this interpretation, claiming that he had identical circumstances when he transferred credits from the County to the State in 1975 and, since he had no intervening employment between his separation from the State and his County employment in January 1980, there was no break in service. In a November 26, 1991 letter to the County Attorney, Maryland State Delegate opined that no conditions were intended in either the existing law or the amendments which would require that an employee become a member of the transferee retirement system without a break or interval in service, between employment with two public sector employers.

In his June, 1993 Memorandum, Appellant pointed out that Section 2-210 of Article 73B of the Maryland Code specifies when membership ceases in the State Retirement System as follows:

Membership ceases if the member:

(1) Is absent from service for more than 2 years;
(2) Withdraws the member's accumulated contributions;
(3) Becomes a retiree; or
(4) Dies

Appellant argued that he did not meet any of the conditions cited above for cessation of membership in the State's Retirement System. Therefore, he claims entitlement to the rights of a member to transfer his State retirement credits to the County's retirement system.

ISSUE

Whether the one year lapse of time between Appellant's termination of employment with the State in January 1979 and his resumption of employment with the County in January 1980 disqualifies him from transferring his retirement service credits from the State to the County.

ANALYSIS AND DISCUSSION

Appellant claims that Section 1-401 of the Maryland Code grants him the right, as a member of the State retirement system, to transfer his retirement service credits to the Montgomery County retirement system. That section provides as follows:

> Any person who is a member of any retirement or pension system, operated on an actuarial basis, with contributions being made during the active service of members which are computed to be sufficient to provide the reserves needed to cover the benefits payable on their account, either under the laws of the state or under the Laws of any political subdivision of this State, may transfer that membership to any other such retirement or pension system upon accepting office or employment which makes it possible or mandatory for the member to participate in the other system and if acceptance of the office or employment would make it impossible for the member to continue as a contributing member of the retirement system from which the member transfers. (emphasis supplied)

The above statute, as a condition for transferring retirement credits to another system, requires that acceptance of the other employment would make it impossible for the member to "continue as a contributing member" of the retirement system from which the member transferred. Section 1, paragraph (23) of Article 73B of the Maryland Code (1989 Cumulative Supplement) defines "regular contributions" as meaning the amounts deducted from the compensation of a member and credited to the member's individual account in the Annuity Savings Fund prior to January 1, 1989.

In this case, when Appellant resumed employment with the County in January 1980, he was not a "contributing member" of the State retirement system because his employment had been terminated in January 1979. Thus, upon commencing County employment, while he may have been a member of the State retirement system, Appellant did not meet the additional requirement that it would be impossible for him to "continue as a contributing member" of the State retirement system to be eligible for transfer of retirement credits to the County.

Appellant's reference to Section 2-210 cited above is misplaced. That section does not apply because it does not address the additional requirement that the employee must be a "contributing member" of the retirement system from which he is transferring. Nor is Subsection B of Article 73B, Section 32 of the Maryland Code applicable. That section requires for transfer of credits that: (1) the former member is serving as an "elected or appointed official" in the State at the time of the request for transfer of service credit, whereas Appellant was and is in a merit position in the County; and (2) the former member's current

office makes it impossible for him to "continue as a contributing member" of the system from which the service credit is to be transferred, whereas Appellant had ceased to be a "contributing member" of the State retirement system one year before he accepted County employment. Moreover, by specifically including a former member who had a break in service prevented him from transferring credits. Subsection B confirms the interpretation that a break in service specifically prevents an employee from transferring retirement service credits under Subsection A. In fact, Sections 4 and 5 of Article 73B authorize an elected or appointed official to "continue membership" in the State system following termination of office contingent upon his making all the payments which would have been made by him and the State, had he "continued" to be a member of the system by holding office.

The Board has reviewed the controlling statutory language in the full context within which the language appears in order to determine the legislative intent. Morris v. Prince Georges, County, Maryland (Morris), 319 Md. 597, 573 A.2d 1346, 1349 (Md. 1990). In addition, the long-standing administrative construction by the agency charged with administering the statute is entitled to deference, giving rise to the presumption that the interpretation is correct. Morris, 319 A.2d at 1354.

Therefore, for the reasons stated above, we agree with the State and County's interpretation of the controlling statute. Appellant is not eligible to have his State retirement credits transferred to the County's retirement system because of the one year break in service between his State and County employments. For this reason, we sustain the decision of the County denying Appellant's grievance.

RETIREMENT/DISABILITY

Case No. 91-29

This is a decision of the Merit System Protection Board on the above referenced appeal from the January, 1991 decision of the Administrator of the Disability Retirement Benefit Program, who determined that the Appellant was qualified for a Service-Connected Temporary Partial Disability Benefit but not a Total Permanent Disability Benefit based on the decision of Hearing Examiner. On June 17, 1991 the Merit System Protection Board issued a decision sustaining the Hearing Examiner's decision.

The Appellant appealed the decision to the Montgomery County Circuit Court and on November, 1991, this case was remanded to the Montgomery County Merit System Protection Board for a de novo hearing on all issues.

On September, 1992, the Circuit Court for Montgomery County Maryland reaffirmed its earlier decision and the Board was again ordered to conduct a de novo hearing on all the issues.

On March, 1993 the Merit System Protection Board held a hearing. At the hearing it was agreed by both attorneys to stipulate to the record. In addition, the County submitted an Independent Medical Examination of the Appellant dated September, 1992 from the doctor. Appellant did not object to the report. Likewise, Appellant submitted an October, 1992 medical examination report from the doctor. The County did not object to this additional exhibit. The Merit System Protection Board agreed to accept these two additional exhibits.

BACKGROUND

The Appellant is a 51 year old Master Firefighter/Rescuer with the Montgomery County Fire and Rescue Service. He started his employment in 1966 and is currently a member of the Montgomery County Merit and Retirement Systems.

On December, 1986 while on duty both as a Firefighter/ Rescuer and Acting Officer in charge of an engine company he responded to a call and, as a result of a vehicle fire and explosion, was knocked back and down on the road. The Appellant was taken by ambulance to the hospital where he was X-rayed and given some pain medication. He was then sent home and referred to an orthopedic specialist, Doctor. In December 1986 the Appellant came under the care of neurologists.

In February, 1987 he returned to full duty while under the care of these two physicians. Appellant indicated that he missed about 130 hours from work during 1987 because of pain and headaches.

In 1989 the Appellant was treated by a doctor who also performed an M.R.I. He also saw doctors in 1989. One doctor recommended surgery to relieve the pain, but the Appellant refused to have the surgery.

The Appellant says that his present complaints are a tingling in the foot, pain in his thighs, pain in the shoulder down to his elbow, clicks in the neck, blurred vision and minor headaches.

The record reflects that the Appellant stated that he was recommended to Dr. A because Dr. B could do no more for him.

The record indicates that on June, 1989, the County Medical Examiner returned the Appellant to full regular duty. The medical history application completed by the Appellant on the above date shows that he did not miss any work due to either accident or illness since his last County examination and he checked "yes" on the form when asked if he was currently in good health.

The Appellant acknowledges in his testimony that he has been operating a passenger van and bus since February, 1987.

Dr. B, an orthopedist who was the Appellant's treating physician, found pain in the lower back with certain movements but normal gait and heel and toe walking. He found his neurological examination to be full and normal.

The Orthopedic examination done by Dr. C on March, 1990 found that there was pain in certain movements of the back, but did not find any neurological deficits. Dr. C described two M.R.I's.

In 1990 Dr. C performed an independent medical examination. Dr. C concluded there was low back strain with no neurological findings. Dr. C concluded that the Appellant could perform his previous occupation as a firefighter with no limitations.

Dr. D, a neurosurgeon, on December, 1989, noted that the M.R.I. showed a mild bulging. He felt that the Appellant should be investigated further before being considered for surgery. He said that Appellant has normal neurologic performance with no evidence of neural entrapments. Dr. D also said that the symptoms suggested sciatic irritation but that the M.R.I. study was not adequate to establish the correlation required.

Dr. E in November, 1989, found moderate movement restrictions in the Appellant's lower back, but normal heel and toe standing. Abnormal heel and toe capability would indicate some neurological dysfunction. Dr. E felt that the applicant should retire from the fire service.

In his October, 1990 report, Dr. F stated that the Appellant continued to complain that the back pain was continuing to worsen. He also concluded that Appellant was unable to work and was at that time disabled.

Dr. G, M.D. in his Independent Medical Examination dated September, 1992 concluded that "I find no objective symptoms to substantiate Appellant's incapacity for the further performance of duty. His current condition is not permanent nor is it disabling."

Dr. H, M.D. states in his October, 1992 letter "The patient should recommence physical therapy and be reevaluated at some time when the therapist feels that he has reached maximum medical improvement. I also do not feel that it would be appropriate for this patient to undergo a spinal fusion at present."

ISSUES

1) Whether the Appellant is entitled to a Total Permanent Service Connected Disability Retirement Benefit under Section 33-43 (e) of the Montgomery County Code.

2) Whether the Appellant is entitled to a Temporary Partial Service Connected Disability Retirement Benefit under Section 33-43 (e) of the Montgomery County Code.

3) Whether the Appellant has met the burden of proof under Section 2A-8 (b) and under Section 2A-10 (b) of the Montgomery County Code.

4) Whether the Appellant has met the burden of proof under Section 33-43 (e) of the Montgomery County Code.

FINDINGS OF FACT

The Merit System Protection Board finds the record complete enough to reach a decision based upon both the March 4, 1993 hearing and the record stipulated to by both attorneys at said hearing.

A review of the testimony as well as the exhibits fails to indicate that the Appellant has met evidentiary standards set forth in Section 33-43 (e) of the Montgomery County Code.

A review of the testimony indicates that the Appellant has not met the burden of proof under Sections 2A-8 & 2A-10 (b) of the Montgomery County Code.

The Appellant did sustain a work related back injury.

The Appellant has been working regularly as a bus operator.

There are conflicting medical reports as to the extent of the injuries and whether surgery would correct the problem.

The Appellant has refused the advice of both Dr. D in his December, 1989 neurosurgical evaluation and Dr. F in his letter dated November, 1989 that he consider the need for surgical intervention. As late as December, 1991, Dr. I recommended surgery.

The Appellant refuses to participate in physical therapy since the later part of 1989. As recently as October 16, 1992 Dr. H recommended physical therapy.

The two additional medical reports presented and accepted by the Merit System Protection Board at the March 4, 1993 hearing add nothing new to this case.

CONCLUSION

It is the opinion of the Board, that the testimony indicates by a preponderance of the evidence that the Appellant is not entitled to a Total Permanent Service Connected Disability Retirement Benefit.

Accordingly, the Board reaffirms its decision of June 17, 1991 sustaining the decision of the County.

Case No. 92-20

This is a decision of the Merit System Protection Board on the above referenced appeal from the November 25, 1991 decision of the Administrator of the Disability Retirement Benefit Program, who determined that the Appellant was qualified for a Temporary Non-Service Connected Disability Retirement to be reevaluated after one year.

On December, 1991, the Appellant filed an appeal of the Administrator's final decision with the Merit System Protection Board pursuant to SS 33-43(k)(2). The County filed a Response to the Petition on Appeal on January, 1992. The Appellant filed a Memorandum in Support of the Appeal on February, 1992. On March, 1992 the Board referred the matter to the Office of Zoning and Administrative Hearings for purposes of conducting a hearing, formulating an administrative record, and providing the Board with a Report and Recommendation based on the evidence of record. Following a pre-hearing conference, the Parties were provided notice on April, 1992 of a hearing scheduled for May, 1992. The hearing took place as scheduled and the record closed following the submission of additional materials on August, 1992. On August, 1992, the Administrative Hearing Examiner recommended a denial of either a Permanent Service Connected or Non-Service Connected Disability Retirement Benefit.

In accordance with review procedures, Counsels were provided opportunity for response which resulted in oral presentations before the Board on January 15, 1993.

BACKGROUND

The Appellant is a 46 year old Equipment Operator with the Montgomery County Department of Transportation. He started working for the County in 1971. In November, 1988 while operating a County vehicle he was injured in an auto accident. The Appellant was taken to the hospital. He was off work until March, 1989. When he returned he was assigned to light duty. The Appellant was prohibited from operating a jackhammer or lifting more than 20 pounds. After the accident the Appellant was treated by his family doctor and an orthopedic surgeon. The record indicates that both the hospital and doctors' reports state that the Appellant had moderate soft tissue swelling of his left wrist and some mild cortex over the radius compatible with an old injury. The CAT scan and examinations were generally negative. The doctor discharged the Appellant from his care because nothing was found wrong with him.

Dr. A an orthopedist, examined the Appellant on January, 1989 and indicated he was an obese man and needed to lose weight. Dr. A also recommended physical therapy and exercise to relieve the cervical and lumbar strain from his accident. The Appellant continued to be overweight at this time.

At the hearing the Appellant testified he was in "terrible shape" in December, 1989. Also during December, 1989 while he was changing an overhead light from a truck bucket, the buckets controls became locked and it took approximately one hour to lower the bucket.

At this time it should be noted that prior to working for Montgomery County, the Appellant was in an auto accident which injured his upper extremity and elbow.

Dr. A again examined the Appellant on January, 1990. The doctors report indicated that the Appellant was quite heavy and did not lose any weight since his visit one year ago. Because the Appellant was again complaining of neck, shoulder and back pains as well as a weakness in his legs, Dr. A ordered 10 days of bed rest.

Dr. A concluded that he was still quite obese and urged him to exercise and lose weight.

The Appellant continued to perform light duty including approximately four hours per day on the road and four hours a day in the shop. In July, 1990 the County Department of Transportation informed Appellant that it no longer had any light duty assignments available.

In August, 1990 Dr. A again encouraged the Appellant to return to his diet since he was again gaining weight. One month later on September, 1990 Dr. B, an orthopedic surgeon, examined the Appellant and concluded that the Appellant was obese, and his prognosis for return to his job was dependent primarily on adequate weight loss.

These same findings were reported on March, 1991 by another orthopedic surgeon, Dr. C.

ISSUES

1) Whether the Appellant is entitled to a Total Permanent Service Connected Disability Retirement Benefit.

2) Whether the Appellant is entitled to a Permanent Non-Service Connected Disability Retirement Benefit.

3) Whether the Appellant has met the burden of proof under Section 2A-8 (b) and under Section 2A-10 (b) of the Montgomery County Code.

4) Whether the Appellant has met the burden of proof under Section 33-43(e) of the Montgomery County Code.

The Board finds the record complete enough to reach a decision based upon it.

FINDINGS OF FACT

A review of the testimony as well as the exhibits fails to indicate that the Appellant has met evidentiary standards set forth in Section 33-43(e) and 33-43(d) of the Montgomery County Code.

A review of the medical records of Drs. D, E as well as the County Medical Examiner, concludes that the Appellant's excessive weight causes pain to his back, neck and shoulder. Their reports also indicates that any increase in tension or stress causes the pain.

The doctors conclude that Appellant's condition will not improve until he controls his weight and physical condition.

In consideration of the written representations provided by the parties in response to our inquiry at the oral presentation made on January, 1993 on the issue of which party has the 'burden of proof' of the elements in a disability retirement case, the Board agrees with the County. An applicant for disability retirement benefits has the burden of proving and persuading (burden of persuasion) the finder of fact that he/she has met those elements. The County does not bear the burden of proving the negative. The burden of going forward is addressed in Section 2A-8(d) of the Montgomery County Code. The same Section does not address the burden of persuasion.

CONCLUSION

In the opinion of the Board the testimony and the record indicate by a preponderance of the evidence that the Appellant is not entitled to either a Permanent Service Connected Disability Retirement Benefit or a Permanent Non-Service Connected Disability Retirement Benefit.

The Appellant cannot return to work as an Equipment Operator not because of his injuries as a result of the 1988 accident, but because of significant obesity and being in poor physical shape. These are not permanent disabilities.

Accordingly, the Board adopts the Report and Recommendation of the Hearing Examiner. The Appellant's application for a Permanent Service Connected Disability Retirement Benefit and a Permanent Non-Service Connected Disability Retirement Benefit is denied.

Case No. 93-02

This is a decision on the record in the appeal filed on August, 1992. The Appellant appealed the decision of Hearing Examiner denying her a continued Service Connected Disability Retirement Benefit, under Section 33-43 (e) of the Montgomery County Code, since the Appellant is no longer disabled from the performance of her duty as a ride-on bus operator.

BACKGROUND

Appellant is a 38 year old former ride-on bus operator for the Montgomery County Department of Transportation, at the Silver Spring depot.

The Appellant's testimony indicated that her longest route was five miles and takes about 45 minutes and her shortest route would take ten minutes. In February 1986 while standing to change her route destination sign, her bus was hit in the rear, injuring the Appellant. She was taken to Holy Cross Hospital and did not return to work that day. She came under the care of Dr. A, Orthopaedic Surgeon. When she returned to work, she was assigned light-duty since she indicated she could no longer operate a bus.

In September 1986 the Appellant had neck surgery (anterior disectomy of C6-7). Approximately eight weeks later she returned to work and was assigned light-duty. The Appellant did not return to full-duty and could not operate a County ride-on bus until January, 1987 according to Dr. A, January, 1987 progress report. His January, 1987 report states that, "She is back driving the bus, feeling quite good." On February, 1987, while operating the bus, she developed pain in her neck and left arm. She then returned to light-duty until June, 1988 when she was granted a Service Connected Disability Retirement Benefit and has not worked for the County since.

In August, 1988, two months after her disability retirement was granted, Appellant had another automobile accident while driving her car. Her testimony indicates her condition was aggravated by the second accident. The Appellant changed doctors about this time and was seeing another Orthopaedic Surgeon, Dr. B. His notes dated August, 1988 state that the second accident caused further injury to her neck and left hand.

The Appellant's testimony disputes this physician's notes of August, 1988. These notes of October, 1989 (14 months later) conclude that Appellant was able to drive a bus and was also able to drive a car. Since her disability retirement, Appellant has spent most of her time at home watching television after breakfast, doing light cleaning and watching more television. Her testimony indicates she has not visited either doctor since 1989.

In March, 1991 the County contracted with Dr. C, an Orthopaedic Surgeon, to perform an I.M.E (Independent Medical Examination). He, a Board Certified Orthopedist, concluded that the Appellant is fully recovered and he would not place any restrictions on her in terms of being a bus operator.

In August, 1991 the Plan Administrator performed a follow - up disability review to determine the Appellant's eligibility for continuation of benefits. The review included a claim investigation of all available medical records including Dr. C's report. The Administrator concluded that the Appellant was no longer totally disabled and, therefore, no longer eligible for either a Service Connected Disability Retirement Benefit or a Non-Service Connected Disability Retirement Benefit.

FINDINGS OF FACT

A review of the record, including both the Appellant's testimony and the exhibits, indicates there are inconsistencies in the findings and conclusions as well as the Appellant's testimony. The record shows that the Appellant was disabled as a result of the February, 1986 rear-end accident while on duty.

Both Dr. B's report of October, 1989 and Dr. C's I.M.E. of March, 1991 place no restrictions on the Appellant's return to work as a ride-on bus operator.

A preponderance of the credible evidence contained in the record supports the conclusion that the Appellant is no longer incapacitated for duty.

CONCLUSION

The Board finds the record complete enough to reach a decision based upon it.

In the opinion of the Board, the testimony does not indicate by a preponderance of the evidence that the Appellant is disabled from the performance of her duty as a bus operator.

Both the definitions and conditions under Section 33-43 (e), Service Connected Disability Retirement Benefit and/or Section 33-43 (d) Non-Service Connected Disability Retirement Benefit of the Montgomery Code have not been met.

Accordingly, the decision of the Hearing Examiner, is sustained and the Appellant's application for a continuation of a Service Connected Disability Retirement Benefit is denied. The Appellant is not disabled and, therefore, is not entitled to a Non-Service Connected Disability Retirement Benefit.

No legal fees or costs are appropriate in this case.

Case No. 93-14

An employee filed an appeal from the decision of the Prudential Hearing Examiner denying him a Service Connected and a Non-Service Connected Disability Retirement Benefit. The appeal was subsequently withdrawn by the Appellant.

Case No. 93-16

This is a decision on the record in the above appeal filed on December 17, 1992. The Appellant appealed the denial of a Service Connected Disability Retirement Benefit based on a decision of the Hearing Examiner dated October, 1992. The Appellant requests that a Service Connected Disability Retirement Benefit be granted effective November, 1988, together with attorney fees for this appeal.

BACKGROUND

Appellant was employed by the Department of Liquor Control as a warehouse worker and truck driver. Appellant appealed the preliminary decision of the Prudential Insurance Company of America (Prudential) claiming that he was entitled to a Service Connected Disability Retirement pursuant to Section 33-43(e) of the Montgomery County Code.

On February, 1989, a hearing was held before The Prudential's Hearing Examiner. At the hearing, Appellant testified on his own behalf and also submitted medical records from Drs. Blank and Blank and Shady Grove Hospital. The County submitted a class specification for truck driver/warehouse worker, which was Appellant's position, and a report from an independent medical examination.

Since the Examiner did not render a decision on the appeal, the case was transferred to Prudential's Hearing Examiner who reviewed the entire file. He determined that, upon consideration of the testimony and the medical records, Appellant was disabled for non-work related reasons because of his Parkinson's Syndrome and Osteoarthritis conditions. However, the Examiner found that the provisions of Section 33-43(e), Montgomery County Code for a Service Connected Disability, including aggravation, have not been met.

DISCUSSION

The Examiner found that the evidence did not show that either of Appellant's diseases, Parkinsons or Osteoarthritis, were caused by his employment with the County. He further found that, while symptoms may have been more noticeable at times, the greater weight of the evidence shows that the basic diseases were not worsened by Appellant's work, He thus concluded that the underlying basis diseases were not aggravated by Appellant's work.

While a doctor letter of July, 1988 opines that "there is an aggravating factor existing in his work of his present disease syndrome", the letter addresses the symptoms of Appellant's Parkinsonian's syndrome and disease. It states that the Appellant's problem is aggravated by his constant working on a cement floor, his inability to walk properly, and the inability and problems he has in climbing in and out of trucks. Likewise, another doctor's August, 1988 letter refers to the same problems, concluding that the work the Appellant was doing aggravated his Osteoarthritis problems as well as his Parkinson's disease.

However, a third doctor's letter concluded that the Parkinson's disease is "completely unrelated to his work." With respect to the Osteoarthritis, he concluded that the "problem is more inherent in the patient than in the job." The physician found that the Appellant was performing his work with some difficulty, "and with aggravation of his underlying symptoms by virtue of his work." (emphasis supplied)

The plain meaning of "condition aggravated" in Section 33-43(e) of the Code is that the underlying condition or disease has worsened as a result of the work, thus causing the disability and not merely that some of the symptoms of the condition were aggravated. The preponderance of the medical evidence in this case does not establish that Appellant's underlying Parkinson's disease or his Osteoarthritis condition have been caused or aggravated by his work.

CONCLUSION

The Board finds that Appellant has not proven, by a preponderance of the credible evidence, that his disability from Parkinson's disease or Osteoarthritis was caused or aggravated by his work as a truck driver or warehouse worker with the County pursuant to

Section 33-43(e) of the County Code. Accordingly, the decision of the Hearing Examiner determining that Appellant's disability is Non-Service Connected is sustained. Thus, legal fees are not appropriate in this appeal.

Case No. 93-22

This is a decision on the record in the above appeal filed on February, 1993. The Appellant appealed the denial of a Total Service Connected Disability Benefit based on a decision of Hearing Examiner. The Hearing Examiner found that Appellant is temporarily disabled from the performance of her job duties on a non-service connected basis and recommended that she be re-evaluated after a year to see if she could return to work.

On December, 1992, based on the Examiner's recommendation, the Administrator determined that Appellant would be entitled to a Temporary Non-Service Connected Disability Retirement Benefit pursuant to Section 33-43(d) of the Montgomery County Disability Retirement System and that a re-evaluation would be scheduled in one year. Appellant seeks a reversal of the County's decision and a finding that Appellant is permanently disabled from employment.

BACKGROUND

Appellant was employed by the Department of Environmental Protection. In 1991, Appellant made a claim for a Service Connected Disability Retirement Benefit. On May, 1992, Appellant's claim was originally approved for a Non-Service Connected Disability Retirement Benefit. On September, 1992, the Examiner conducted a hearing to determine Appellant's disability status.

After reviewing all the evidence, in his November, 1992 opinion, the Hearing Examiner recommended that there was not enough evidence to conclude that Appellant's condition was caused or aggravated, by her employment. Taking into account that Appellant had a long history of difficulties including periods of hospitalization, beginning in childhood, he found that there was insufficient evidence to show that the County was on notice of her psychiatric difficulties when she was hired, or that the County mishandled her situation so as to contribute to her psychiatric disorders, or treated her differently from other employees.

The Examiner also found that the evidence was not clear that Appellant is permanently disabled because of her psychiatric problems. Appellant testified that she continues to see her physician. In his April, 1993 letter, the doctor stated that Appellant is totally disabled from working "at this time due to her borderline personality disorder," but he was unable to determine at that point the duration of the disability.

CONCLUSION

The Board finds that Appellant has not proven, by a preponderance of the credible evidence, that her borderline personality disorder condition was caused or aggravated by her work with the County pursuant to Section 33-43(e) of the County Code. The Board also

finds that the evidence shows Appellant's disability is not permanent. Accordingly, the decision of the County determining that Appellant's disability is Non-Service Connected and temporary is sustained.

Case No. 93-24

This is a decision in the above referenced appeal. The Appellant has appealed the decision of the Hearing Examiner denying a Service Connected Disability Retirement. He disagrees with the decision because the Police Department has no permanent position available due to his medical restrictions and limitations caused by being shot in the line of duty in 1968. In addition, he believes that there was insufficient evidence to support the decision by the Examiner and that he has new medical evidence to support his claim.

BACKGROUND

The Appellant has been a police officer since July, 1968. Five months after being hired while responding to a domestic fight, he was hit by a rifle bullet leaving shell fragments in his left shoulder, arm and hand. After recovery he drove a motorcycle and in 1978 he was transferred to other duties and was involved in various assignments, including investigations of crimes and in 1990 he transferred to Bethesda where he is now an investigator of crimes against property and persons. He has investigated crimes against persons, bombings, homicides, sex crimes, as well as crimes against property. Since 1984 he has made about 30 arrests, although he indicates the onset of more noticeable pain since that time. He did not miss any work from 1988 to 1991. His medical records do not show any significant periods of work time loss due to accident or injury. He has received ratings on his performance appraisals at the highest levels. He does not presently have arrest authority nor does he wear a uniform or drive a marked car. Rather than return the Appellant to an investigator's position which requires the ability to respond to a violent confrontation, on June 28, 1993, the Appellant was notified of formal suspension of his police powers. Specifically, he was ordered to return his handgun, police radio, police badge and identification card and his County issued police car. A memorandum of Suspension dated June 28,1993, formally notified the Appellant of the suspension of his police powers due to his injury.

Dr. A noted that the Appellant has pain in his left arm and side but has not suffered any structural damage nor has his normal daily duties been significantly impaired. In September 1992, the Appellant visited Dr. B who issued a report which was reviewed at the hearing. Dr. B recommended an electromyography and, after seeing the results, diagnosed a worsening of a longstanding injury to soft tissue and also recommended "light duty". The Appellant was placed on light duty temporarily. A neurologist examined the Appellant and found that there were no significant neurological problems. Dr. C suggested the Appellant be restricted from the "on the street" job requirements to avoid physical strain or hand-to-hand combat but found the Appellant capable of performing the intellectual aspects of his profession. After examining the EMG and nerve conduction results, Dr. C ruled out nerve poisoning as a possible cause of any residual neuropathy that may exist.

The Appellant applied for both a Service Connected and a Non-Service Connected Disability Retirement. The Administrator determined that he is not totally disabled pursuant to Section 33-43 (e) of the Montgomery County Code. At the hearing before the Examiner in November 1992, testimony was received from the Appellant, one witness, and medical reports were reviewed from four physicians. The Examiner determined that the Appellant is not disabled from the performance of the duties to which he has been regularly assigned.

Specifically with regard to his physical condition, his 1992 EMG was normal and a nerve conduction test showed a mild slowing, indicative of mild neuropathy. His recent report from the County medical section in October 1992 indicated that his status is temporary with no known duration. Two physicians have opined that the Appellant should be on more sedentary assignments. The Appellant contends that his physical condition would not render him qualified to apply for an entry level police officer.

In his written representations to the Board, the Appellant contends that: (1) Because the Appellant is able to do some but not all his job duties as a result of his disability, he is eligible for a service connected disability under Maryland v.Blank.; (2) Because the County in fact transferred the Appellant on April 19, 1993 to the Restricted Duty/Disability Section of the Police Department in order to comply with its own internal stated disability policy of 1991, it acknowledged his inability to perform the duties of his official specification which he had not performed since 1980; and (3) Because the County suspended the Appellant's police powers in June 1993, it acknowledged its inability to permanently accommodate the disability of the Appellant under its own regulations.

FINDINGS OF FACT

The employee was injured in the performance of duty and is still aware of residual pain from the injury which left bullet fragments in his body.

The Appellant cannot perform all of the duties of a police officer generally assigned to regular patrol assignment with Police powers.

The Police Department has chosen to allow Appellant to perform partial/alternate duties for a substantial time taking into consideration his limitations.

The Appellant has performed these partial/alternate duties in a manner which generally exceeds expectations and has received appraisals and commendations which indicate his fine work.

The Department has reassigned the Appellant out of the partial/alternate assignment in June 1993 as a result of implementation of its 1991 policy on accommodation, thus raising a question of whether the Appellant was ever accommodated in terms of his recognized disablement (having sustained a wound from a bullet and its fragments in 1968). No one seems to doubt his inability to perform the duties of the specification to which he was initially assigned.

CONCLUSION

The Board believes that the decision in Maryland v. Blank applies to the facts of this case. As we understand it, the decision is as follows:

> "We hold as a matter of law that under Section 33-43(e), an employee who sustains a work-related injury, and otherwise qualifies for a service connected disability retirement, is totally incapacitated for duty and therefore entitled to benefits under Section 33-43(h)(1) if the extent of incapacity prevents the employee from continuing employment in his occupational classification or a position of comparable status within the same department, if qualified."

Although this matter is still in appeal, the facts of the instant case fall within the above decision. We assume that the position of comparable status involved the partial substitute duties which the Appellant so ably performed. He is no longer in that position.

In view of the long and dedicated service of the Appellant in the partial/alternate assignment and the nature of the injury which he sustained, unfortunately so early in his career, we believe that the preponderance of the credible evidence in this case leads us to conclude that a service-connected disability should be granted. Any other decision would not be in the interests of justice or fairness in this matter.

Case No. 93-29

This is a decision of the Merit System Protection Board in the above referenced appeal from the March, 1993 decision of the Hearing Examiner for the Prudential Insurance Company, to deny the Appellant both a Service Connected Disability Retirement Benefit and a Non-Service Connected Disability Retirement Benefit.

A hearing was held before the Hearing Examiner on January, 1993. From the testimony and exhibits, the Hearing Examiner found that the Appellant is not disabled and is not incapacitated from the performance of his assigned duties.

The Appellant filed an appeal with the Merit System Protection Board on April, 1993 seeking a reversal of the Hearing Examiner's decision and the granting of a Service Connected Retirement Benefit.

BACKGROUND & FINDINGS

1. Appellant is a 45 year old male who is employed by the Montgomery County Maryland Police Department as a police officer. The Appellant started with the police department in 1968, 25 years ago.

2. During his career, the Appellant injured his left knee (hyperextension) in 1987 while serving a warrant. In 1989, he tripped and again hurt his knee while at a staff meeting

conducted by his Captain.

3. In 1988 the Appellant had an arthroscopic examination since there was pain and swelling in the left knee. A rehabilitation program was begun including refereeing basketball and long walks. The Appellant continued to work even after the 1989 incident. In April of 1990 due to the continued swelling, tenderness and pain a second arthroscopy was performed. The Appellant returned to duty in July 1990 as a crime prevention officer.

4. In 1990 the Appellant applied for a Service Connected Disability Retirement Benefit. The Plan Administrator denied his application and that decision was appealed. The appeal was heard before Hearing Examiner, on October 22, 1990. The Hearing Examiner concluded that the Appellant's claim for either a Service Connected Disability Retirement Benefit or a Non-Service Connected Disability Retirement Benefit should be denied. That decision was appealed to the Merit System Protection Board.

5. On September, 1991 the Merit System Protection Board denied the appeal and sustained the decision of the Hearing Examiner on the grounds that the preponderance of the evidence of record indicated that the Appellant does not qualify for a Disability Retirement Benefit.

6. Appellant then appealed the decision to the Montgomery County Circuit Court at which time the parties stipulated to a remand for a de novo hearing before the Hearing Examiner.

7. The Hearing Examiner, held a second hearing on January, 1993 and from the testimony and exhibits found that the Appellant is not disabled and is not incapacitated from the performance of his assigned duties. The Appellant then filed an appeal with the Merit System Protection Board of the March, 1993 decision.

8. On March, 1992 while on duty the Appellant twisted his left knee as he stepped from carpeting onto a newly - washed floor. Back in 1990 the Appellant was fitted with a knee brace that gave his left knee more stability. The Appellant used the brace from time to time since 1990. After the March, 1992 incident the Appellant returned to work wearing the brace. His Superior noticed the brace under his uniform and told the Appellant that he was not allowed to wear the brace and his uniform at the same time.

9. The Appellant was then scheduled by the Montgomery County Medical Examiner, for an orthopedic examination (which was requested by the Montgomery County Police Department. As a result of the examination, the Appellant was assigned to a light-duty position which is appropriate for a sworn police officer on the staff of the Police Department Training Academy. It is both a temporary and light-duty position, according to the testimony of the Supervisor of the Academy who also testified that the position is for a sworn police officer, not a civilian employee.

DISCUSSION & CONCLUSION

Since the Appellant's first injury in 1987, the file contains many medical reports and examinations performed by Orthopaedic Surgeons. The most recent medical reports one dated December, 1992 from Dr. A M.D. Board Certified Orthopaedic Surgeon and one dated December, 1992 from Dr. B M.D. Orthopaedic Surgeon, both of whom state that the Appellant is precluded for now, from performing the full duties as a police officer.

In April 1992, Dr. C, an Orthopaedic Surgeon, also concluded that at this time the Appellant should continue his present light-duty activities. Dr. C also refers to the April 30, 1990 orthroscopy, by Dr. D as the basis for his findings and conclusions. Dr. D also concludes that the Appellant's overall physical examination at this time is normal. During these latent series of examinations, Dr. A also concludes that he sees no need for a knee replacement at this time.

Dr. E, M.D., Orthopaedic Surgeon, who examined the Appellant at the request of the County in 1990 recommends that he avoid contact sports and running, but concludes that he can perform the duties of a sworn police officer.

The County Medical Examiner, after reviewing the April, 1992 report of Dr. C (requested by the County) recommended to Police Chief that the Appellant be considered fit for light-duty.

After reviewing the record,the preponderance of the evidence demonstrates that the Appellant can not currently perform the full duties of a police officer. There is some contrary evidence in the record as to the Appellant's long-term recovery, extent of his injuries and as to whether his condition has improved. The Board concludes that the Appellant has a weakness in his left knee which precludes his argument to regular police duties. He is able to fully perform the duties to which he has been assigned at the Police Academy.

Based on the preponderance of the credible evidence, the Merit System Protection Board sustains the decision of the Hearing Examiner, that the Appellant is not disabled from the performance of his assigned duties and therefore is ineligible for either Service Connected Disability Retirement Benefit or a Non-Service Connected Disability Retirement Benefit.

Case No. 93-33

This is a decision on the appeal of an employee from the final decision of The Prudential Insurance Company of America, the Administrator of Montgomery County's disability retirement plan, concerning his application for disability retirement. The appeal was remanded.

BACKGROUND

In July, 1990, the Appellant, an employee of the Montgomery County Police Department (MCPD), applied for a Service Connected Ddisability Retirement. The Administrator, after reviewing the medical evidence, made a preliminary determination that Appellant was not disabled pursuant to Section 33-43 of the Montgomery County Code. Appellant, Pursuant to Section 33-43 (k), appealed the preliminary decision of the Administrator and a hearing was held before the Administrator's Hearing Examiner, on April, 1991 and on July, 1991 the Hearing Examiner issued his Opinion which concluded that the Appellant was totally and permanently incapacitated from the further performance of his last duties as a Police Officer II and that his incapacity for duty was not service-connected. The Administrator then made its final determination in accordance with Hearing Examiner's Opinion.

Pursuant to Section 33-43(k), the Appellant appealed the final determination of the Administrator to this Board. The Board reviewed the written record and the evidence in the record supported the final determination of the Administrator and sustained the award of a Non-Service Connected Disability Retirement to the Appellant.

The Appellant appealed the Board's decision to the Circuit Court for Montgomery County, Maryland. While the case was pending before the Circuit Court, the parties agreed to remand the case to the Hearing Examiner level for a de novo hearing.

Thereafter, a new, de novo hearing was held before the Administrator's Hearing Examiner, on December, 1992.

On March, 1993, the Hearing Examiner issued his second Opinion. He again concluded that the Appellant was permanently and totally incapacitated for duty and that his incapacity for duty was not service-connected. The Administrator then issued its final determination.

It is from this decision that the Appellant appeals to the Board for the second time.

PRELIMINARY MATTER - CONFLICT OF INTEREST OF HEARING EXAMINER

According to the Appellant: ...the hearing conducted in this case was not conducted in accord with the requirements of the contract between Montgomery County and Prudential to ensure the impartiality of the hearing process. No procedures exist at the contract level to assure the impartiality of the hearing process. It was apparent at the hearing that the appearance of a conflict of interest existed on the part of the Hearing Examiner. He refused to disqualify himself. He was the same Hearing Examiner who previously denied the application for service-connected disability retirements of this applicant which was remanded back for a de novo hearing by the Circuit Court for Montgomery County.

On the other hand, the County contends as follows:

At the outset of the December, 1992 rehearing, he disclosed to both parties that his wife was employed by Montgomery County. The issue of whether he should have recused himself from hearing this case on the basis of an allegation that his wife is an employee of Montgomery County can be analyzed and addressed in light of the Supreme Court case of Marcello v. Bonds, 349 U.S. 302 (1955).

> He is not employed by Montgomery County and his salary is not paid by Montgomery County. His income does not depend on the type of decision he makes or for whom he decides. His wife does not deal with employee services or disabilities and does not deal with applications for disability retirement. The Hearing Examiner does not discuss any of the cases he hears with his wife.
>
> There is no evidence to establish that the Hearing Examiner or his spouse had any interest, financial or otherwise, in the outcome of the hearing. He has performed the function of the Hearing Examiner for the Administrator for quite some time and has rendered decision both favorable and unfavorable to Montgomery County. In fact, in the present case, he disagreed with the first preliminary decision of the Administrator and found that Appellant was incapacitated for duty and further opined that he should receive a Non-Service Connected Disability Retirement.

FINDINGS AND CONCLUSIONS ON CONFLICT OF INTEREST OF HEARING EXAMINER

The Board is not persuaded on the basis of Appellant's arguments that an actual conflict exists. The Examiner has stated on the record his present circumstance and that of his wife. Since this was a consensual remand, the matter of another Examiner should have been raised by Appellant before the second hearing rather than after it was conducted.

MERITS OF APPEAL

> According to the Appellant: ...it was stipulated between the parties and accepted by the Hearing Examiner, that the sole issue for determination was whether Appellant was entitled to full service-connected benefits or full non-service connected benefits. It was undisputed that his condition is permanent, and the Hearing Examiner found that the Appellant was totally disabled from the performance of duty as a police officer.
>
> The Hearing Examiner found that the applicant has had a significant and sever diabetic neuropathy which has progressively worsened as time has passed. He then proceeds to opine that the evidence does not lead to the conclusion that his regular activities at work made his condition worsen. This opinion by the Hearing Examiner is not based on any facts, and totally ignores the opinions of Dr. A, who found aggravation. It totally ignores the findings of

Dr. B, who found aggravation. It totally ignores the finding of Dr. C, who found aggravation. Treating physicians stated medical opinions that the conditions at work (constant walking on an uncarpeted floor) aggravated Appellant's condition. Dr. D found that applicants walking on a hard tile floor was an aggravating factor.

Appellant's position, in a nutshell, is that if he proved that the actual performance of his duty has aggravated his condition, AT ALL, he is entitled to a service-connected disability retirement. Implicit within the findings of the Hearing Examiner is that some aggravation has occurred. That Appellant has other conditions or problems which also aggravate his condition is totally and completely irrelevant if he successfully proved at the hearing that anything associated with the actual performance of his dutyaggravated his condition. To make an analogy to tort law, what we have here is the pure opposite of comparative negligence. According to Appellant, he has to prove only 1% negligence in order to prevail (or, more precisely, 1% of his condition has been aggravated while in the actual performance of his duty). So long as he is totally incapacitated (stipulated) as a result of the condition, he is entitled to a service-connected disability retirement.

The County in response contends: ...that the last medical condition from which Appellant suffers is diabetes. It is undisputed that Appellant's diabetic condition is not service-connected; i.e., his diabetes was not caused by his job. It also cannot be disputed that his diabetic condition worsened over the successive years - Appellant required increasing dosages of Diabinese to control his diabetes until 1984, when he began taking insulin injections. Further, it cannot be disputed that the diabetes-related condition, diabetic sensory neuropathy, which had its onset in 1988, is the reason Appellant claims he is unable to work.

FINDINGS OF FACT AND CONCLUSIONS

Appellant is permanently disabled.

The issue is whether his actual job performance aggravated his physical condition. His physical condition (diabetic neuropathy) is such that aggravation is possibly caused by certain life activities (walking, standing, sitting, using extremities in any way) as well as some work activities (walking, standing, sitting, lifting).

For there to be aggravation, there should be evidence that an existing condition was aggravated to the point where there is an additional disability beyond that which already existed. [See Bethlehem Steel Co. v. Ruff, 101 A.2d 218 (1953)] In the Board's opinion, the proof presented must be sufficient to meet the preponderance of the evidence standard.

Next, the retirement law requires that there be a connection between the aggravated condition or disease and the Appellant's work. A work-related activity must be the proximate cause of the aggravation. Proximate cause means that the condition of the employee could

have been caused by the job-related accident or injury and that no other cause has intervened between the accident or the injury. [See Reeves Motor Co. v. Reeves, 204 Md. 576, 105 A.2d 236 (1954) and Yellow Cab Co. v. Bisasky, 11 Md. App. 491 (1971), 275 A.2d 193 (1971)] There should be sufficient evidence in the record to support a conclusion that the Appellant's performance of his job was in fact the cause of the worsening of the Appellant's condition.

When, as in the instant case, there is conflicting testimony as to the cause of the worsening of a preexisting condition or disease, the Board will apply the preponderance of the evidence test to decide whether, based on all the evidence presented, it believes that the job performance contributed to the aggravation. This Board will not apply a "but for" or "sole cause" standard.

Here the Appellant argues that there is a possibility, a chance, or at most, some possible causal connection, and concludes that any causal connection however remotely possible is sufficient to persuade this Board.

We are not persuaded by Appellant's argument. The medical testimony presented does not show by a preponderance of evidence that the aggravation of the Appellant's physical condition was in fact caused or contributed to, by the performance of his job.

The appeal was denied. Non-Service Connected Disability is appropriate.

Case No. 93-36

ISSUE

Whether Appellant is no longer disabled and his disability retirement benefits should stop.

BACKGROUND AND FINDINGS

1. Appellant, who is about 40 years old, started his own business in Marland in 1973. He worked as a corrections officer for the State of Virginia from late 1976 or early 1977 until the end of June 1978. He began working for Montgomery County as a corrections officer in 1978 and retired on a disability in 1986.

2. In December 1985, while lifting and moving water containers, Appellant had a momentary loss of control in his left leg and limped some. The next day, he could not get out of bed. He never went back to work as a corrections officer thereafter. He was allowed to work as a traffic counter temporarily until he started his disability retirement sometime in 1986.

3. Appellant operates a business in an addition to his home. He testified that he works 20 hours or less per week. The Hearing Examiner found Appellant's testimony to be not believable and concluded that, when business is available,

Appellant probably works more than 20 hours per week. Contrary to Appellant's assertions, the Hearing Examiner observed that, at the hearing, Appellant did not appear to be in distress and did not move in his chair any more than other people in the room.

DISCUSSION AND CONCLUSION

While there is some contrary evidence in the record as to Appellant's current medical condition, the preponderance of the evidence demonstrates that Appellant's condition has improved and that he is currently able to resume his duties as a corrections officer. The results of the consistent annual medical examinations of Appellant by Dr. A should be given more weight than the isolated 1992 examination conducted by Dr. B, since he last examined Appellant in 1986. Thus, Dr. A's December 1991 medical evaluation of Appellant should be controlling because it was based on a comparison of that examination with records from his previous annual examinations of Appellant.

Following the general rule that credibility is a determination for the trier of the facts, who had an opportunity to directly observe the witness, the Hearing Examiner's evaluation that Appellant's testimony is not credible is not subject to scrutiny by this Board. The Board sustains the July, 1993 objection of the County Attorney to hearsay material contained in Appellant's July, 1993 letter concerning telephone comments attributed to a Dr. C. Accordingly, such hearsay comments have not been considered by this Board. The Board takes official notice as a public record of the decision of the Board of Appeals for Montgomery County granting a special exception to Appellant to construct and maintain a business. However the Board concludes that it has no bearing on the issue of Appellant's actual and current work activities as a and his current medical condition.

Based on the preponderance of the credible evidence, the Board sustains the decision of the Hearing Examiner that the Appellant's medical condition has improved, that he is no longer disabled from performing the duties of a corrections officer and that, accordingly, his disability retirement benefits were properly stopped.