Merit System Protection Board Annual Report

FY 1995

Members:
Angelo M. Caputo, Chairman
Beatrice G. Chester, Vice Chairperson
Walter T. Vincent, Associate Member

Executive Secretary:
Merit System Protection Board
Waddell Longus

Prepared by:
Susan W. Goldsmith
Principal Administrative Aide

Montgomery County Government
Merit System Protection Board
100 Maryland Avenue, Room 113
Rockville, Maryland 20850
217-3470 / FAX: 217-3472

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MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

The Merit System Protection Board is composed of three members who are appointed by the County Council, pursuant to Article 4, Section 403 of the Charter of Montgomery County, Maryland. Board members must be County residents, and may not be employed by the County in any other capacity. One member is appointed each year to serve a term of three years.

The Board members in 1995 were:

Angelo M. Caputo	-	Chairman (Reappointed 1/94)
Beatrice G. Chester	-	Vice Chairperson (Appointed 1/93)
Walter T. Vincent		Associate Member (Appointed 1/95)

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, 1994.

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 and study the administration of the County classification and retirement plans and other aspects of the Merit System and transmit to the Chief Administrative Officer, County Executive and the County Council its findings and recommendations. The Board shall conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the County Council. All County agencies, departments and offices and County employees and organizations thereof shall cooperate with the Board and have adequate notice and an opportunity to participate in any such review initiated under this Section."

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

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

Section 1-12, (b) Audits, Investigations and Inquiries, of the Montgomery County Personnel Regulations, 1994 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 30.4 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 prehearing 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.

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 a hearing is granted, all parties are provided at least thirty days notice.

CONDENSED AUDIT OF MONTGOMERY COUNTY'S CLASSIFICATION

AND

COMPENSATION PLAN AND PROCEDURES

In March 1995, the Board submitted its audit report to the County Council, County Executive and the Chief Administrative Officer. The scope and purpose of the audit was to evaluate specific parts of the County's Classification and Compensation Plans and Procedures. And, to assess whether current operating procedures are efficient, timely, and cost effective.

The major concerns of the Board were:

1. Whether each occupational class in the classification plan should be reviewed every five years?

2. Whether the Merit System Protection Board should review and comment on new class creations?

3. Whether the job evaluation system conflicts with actual practices in determining salaries?

4. Whether the use of "generic" classes should be re-defined and,

5. Whether the present 40 grade pay plan should be retained or replaced with an alternative plan(s)?

The Board submitted its findings and recommendations (listed below) to the President, County Council, County Executive, and the Chief Administrative Officer in March, 1995.

ITEM #1 This concern became a moot point during the course of the audit because the requirement in the Personnel Regulations to study occupational classes every five years had been changed to read "each occupational class in the classification plan except those assigned to the minimum wage/seasonal salary schedule or the police management salary schedule would be reviewed as necessary to ensure proper grade assignment." The Chief Administrative Officer has the responsibility and authority to determine what constitutes "as necessary".

RECOMMENDATION - The Board favors studies "as necessary" with timing to be determined by the Chief Administrative Officer. The Board also recommended that consideration be given to reducing the staff effort (nine full-time employees) devoted to conducting extensive and highly documented maintenance reviews of occupational classes. Work years saved could be directed towards other needs.

ITEM #2 There is no clear benefit to be gained by requiring the Board to review and comment on each new class creation since the Board may conduct a review or audit of the Classification and Compensation Plans at any time, this requirement is unnecessary.

RECOMMENDATION - The Board recommended that Section 7-3 (c) of the Personnel Regulations and Section 33-11 (a) of the County Code be changed to eliminate this requirement.

ITEM #3 Section 7-3 (e) of the Personnel Regulations requires that the Chief Administrative Officer must establish a quantitative job evaluation system. This precludes the establishment of other methods of job evaluation and provides no leeway for adopting a more flexible systems which may be more appropriate to changes in operating needs and conditions in the job market.

RECOMMENDATION - The Board recommended that Section 7-3 (e) of the Personnel Regulations be changed to read that the Chief Administrative Officer may, rather than must, establish a quantitative job evaluation system.

ITEM #4 The specificity of the County's QES II System makes it difficult to maintain broad generic classes, constricts operating flexibility, creates problems in attracting persons with special skills and/or educational backgrounds. Expanded use of generic classes should be considered in concert with the application of salary banding, pay for performance and restructuring to achieve flatter organizations. Generic classes could be defined as positions and jobs within an occupational group that exercise similar levels of responsibility and/or authority, that require similar levels of knowledge and skill, and for which a single selection process could be used. Compensation would be determined by the generic class of work performed and the performance level achieved.

RECOMMENDATION - The Board recommended reducing the number of job classifications and increasing the County's ability to attract, maintain and better utilize employees with specialized skills through expanded use of generic classifications and salary banding. High cost work years could be substantially reduced.

ITEM #5 The present 40 grade pay plan contains pay grades which are not used. Consideration is being given to the creation of a separate Senior Management Service which, if adopted, will further reduce the need for 40 pay grades. A compensation system emphasizing broad job classes to which positions requiring similar levels of skill, effort, responsibility would be assigned recognizing a functional commonality within which individual tasks and work assignments differ. Such systems build-in the flexibility to compensate for differences in working conditions through pay premiums for specific assignment if such premiums are warranted in the market place.

RECOMMENDATION - The Board encourages the County to undertake a review of the current approach to job classification to determine its continued viability. If it is determined that the County would benefit from an alternate approach or approaches to job classification, appropriate modifications to the pay grade system and structure would result. This recommendation ties into and is consistent with recommendation #4 above.

APPEALS

COMPENSATION

Case No. 94-18

BACKGROUND

Appellants were hired by the County in December, 1987 as Client Assistance Workers in the Abused Persons Program of the Department of Addiction, Victim, and Mental Health Services (DAVMHS). Prior to their appointments, both Appellants had been under contract with the County providing similar services as victim assistance workers. As contract employees, their salaries were $10.24 per hour. At the time of their hiring by the County, Appellants were offered merit appointments, effective December 7, 1987, as Client Assistance Workers, Grade 16, at $10.05 per hour or $20,904 per annum. Although Appellants asked for within-grade appointments to coincide with their current hourly rate of $10.24 per hour, they were told that the County could not hire above the entry level. Appellants accepted the appointment at the entry level salary rate.

In August, 1992, Appellants found out that another Client Assistance Worker, appointed five months after they were appointed, started at a salary of $23,046, or $2,142 above their starting salary. The County stated that the Client Assistance Worker appointed after Appellants, had higher initial qualifications. The employee had a Master's degree in a related field, Social Work, in addition to her criminal justice experience and experience in directing a volunteer program. There was also more money available because her salary was funded from the Justice Assistance Grant, which was separate from the funding source for Appellants' positions.

In contrast, one of the Appellants has a Master's Degree in Asian Studies, which is not a related field and the other Appellant has a Paralegal Certificate, which is not equivalent to a Master's Degree. Moreover, the funding sources for the program into which Appellants were hired had only sufficient monies available to cover entry level hiring.

CONCLUSION

Based on the above facts, the Board concurs with the decision of the Deputy Chief Administrative Officer that the Department of Addiction, Victim, and Mental Health Services did not violate County Law or regulations pertaining to hiring practices and within-grade appointments. Department management retains the right to consider starting salaries above the entry level for new hires when budgetary considerations and/or the applicant's qualifications warrant such consideration.

In this case, the facts show that the Department of Addiction, Victim, and Mental Health Services exercised its prerogatives in a reasonable and appropriate manner. In accordance with Section 33-5(b)(2) of the County Regulations pertaining to merit system principles, because of her education and experience, the Department of Addiction, Victim, and Mental Health Services was justified in compensating the other employee at a higher pay level than that of Appellants. Section 33-5(b)(2) reads as follows:

> (2) The recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills, including the full and open consideration of qualified applicants for initial appointment. (emphasis supplied)

For the reasons discussed above, the Board denied the appeal.

DISMISSAL

Case No. 94-12

BACKGROUND

At the point of Appellant's termination from employment, Appellant was a full-time, 10 year employee of Montgomery County, Maryland, most recently performing as a Firefighter/Rescuer III in the Bureau of Operations of the Montgomery County Department of Fire and Rescue Services.

On September 16, 1992, Appellant was counseled for excessive use of sick leave and instructed that further use of sick leave without a doctor's certificate would not be authorized. Following this counseling, Appellant took sick leave on October 19, 28 and on November 3, 1992 and produced what was deemed by his supervisor, as a questionable doctor's certificate of treatment. On October 16, 1992, Appellant arranged a work substitution with a fellow employee that was never approved by scheduling and his absence resulted in his not taking a scheduled pulmonary function and hearing test.

On November 15, 1992, Appellant was assigned to drive a firefighting vehicle but did not respond when his vehicle was dispatched to fight an apartment fire. As a result, someone else drove the vehicle to the scene undermanned. Appellant was subsequently located and driven to the scene of the fire and where he explained that he was asleep in the bunkroom when the alarm sounded.

On November 18, 1992, Appellant advised a Lieutenant that he was too sleepy to work. Since he had slept through a call on his previous shift on November 15, had taken unauthorized sick and annual leave, and had arranged for an unapproved work substitution, a supervisor determined that a drug screening was appropriate and escorted Appellant to a lab where he was given instructions concerning the testing procedures. Both test samples of urine taken were below body temperature and running water was heard despite Appellant's being instructed not to use any water while in the bathroom.

On November 21, 1992, Appellant was instructed to take another test due to the possibility that the sample he had given on November 18th had been altered. The sample taken on November 21st was also below body temperature in measuring 94 degrees.

On November 30, 1992, the County Employee Medical Examiner, Occupational Medical Section, by memorandum to the Director, Department of Fire and Rescue Services, indicated that Appellant had a confirmed positive drug screen from the specimen collected on November 21, 1992. Appellant was placed on sick leave.

In response to a Statement of Charges dated March 18, 1993, Appellant reported that he had sought assistance through the Employee Assistance Program, obtained a referral to a drug treatment program and had entered the program in late January or early February of 1993.

Appellant was permitted to report to duty following an April 5, 1993 physical examination that determined that he was fit for duty. As an adjunct to his return to duty, the Department required Appellant to provide written confirmation of his participation in or completion of a rehabilitation program approved by the County Employee Medical Examiner; authorize weekly contact with the treatment facility to ensure current participation if in an approved program, and to have the facility appraise the Director or his designee of Appellant's successful completion of treatment as determined by the County Employee Medical Examiner.

On June 16, 1993, Appellant was directed to take another drug screening test. The specimen collected tested positive and the Appellant was dropped from a hospital's drug rehabilitation program due to lack of participation.

Because of the health and safety risks to the employee, his fellow workers and to the general public which could result if Appellant continued using drugs, the Department conditioned his return to duty on fulfillment of the terms of a seven (7) page Memorandum of Understanding which he entered into on July 12, 1993. This Agreement constituted a Second Voluntary Referral as referenced in the Department of Fire and Rescue Services, Substance Abuse Testing Rehabilitation Policy #809, and required Appellant to voluntarily admit himself to a treatment center on June 18, 1993 and to use accrued leave or approved Leave Without Pay when he participated in the treatment program during scheduled work hours. If he failed

to maintain satisfactory performance in the treatment program or was terminated from the program before he completed it, Appellant would be subject to immediate dismissal from his employment.

On March 24, 1994, the Director, Department of Fire and Rescue Services formally notified Appellant of his dismissal from employment to be effective April 4, 1994. This action was based upon a February 23, 1994 telephone notification to the department from an employee of the assistance program that Appellant had been terminated from his treatment program, that he had received a positive drug screen while in the program and that he would not be permitted to return to the treatment program. The employee followed-up her telephone notification with a confidential memorandum to the department dated March 3, 1994 concerning Appellant's non-compliance with treatment and termination from the treatment program "because of a positive drug screen."

In response to Appellant's April 4, 1994 Appeal from the Notice of Disciplinary Action - Dismissal, a Pre-Hearing was held on May 17, 1994. Due to Appellant's change in attorneys, a second Pre-Hearing was held on January 11, 1995 for the purposes of receiving Pre-Hearing submissions made on behalf of Appellant, setting a time frame for responses thereto by the County and obtaining a list of witnesses to be subpoenaed.

On February 1, 1995, Appellant's Counsel filed a Motion to Enforce Personnel Regulations and Procedures to be accomplished through the Merit System Board's ordering the County: to comply with its policies; to nullify the dismissal action and to grant Appellant's reinstatement with full back pay and attorney fees. On February 15, 1995, the Board notified Appellant's Counsel of its denial of the Motion to Enforce and noted that "should the Appellant prevail in his appeal, the Board has the authority to make him whole."

ISSUES CONSIDERED

1. Appellant's post hearing motion to strike evidence with respect to testimony received concerning allegations which were outside the parameters of the Notice of Dismissal. Objection to the entrance of such testimony was made and argued in a preliminary motion during the Hearing and continuing renewals of the objection were voiced during the Hearing.

2. Whether the Appellant's termination from his drug treatment program and subsequent termination from employment for failure to successfully complete the program was based upon over-all deficiencies in his performance while in the program or upon his failure to pass a drug test while participating in the program?

3. Whether a drug test which is not initiated by the County must meet State and County standards for drug tests when the outcome of the test results in termination from employment?

FINDINGS OF FACT AND CONCLUSIONS

Issue 1. At the Hearing, the Board indicated that it would allow the presentation of evidence relevant to but not necessarily confined to the parameters of the Notice of Dismissal and would take under advisement the Appellant's objections to the introduction of such evidence. Upon reviewing the evidence presented, the Board upheld Appellant's objections and granted Appellant's Post-Hearing motion to confine the consideration of evidence to that which was directly related to the content in the County's Notice of Disciplinary Action - Dismissal and the Appellant's alleged violation of the terms and conditions set forth in the Memorandum of Understanding between the County, the Appellant and IAFF/Local 1664.

As the County's stated grounds for dismissal establishes the parameters for the Appellant's appeal of his dismissal, the County's defense of its action must also be limited to its basis for taking that action as set forth in its Notice of Disciplinary Action.

Issue 2. The evidence presented supported Appellant's position that he was terminated from his treatment program based upon his failure to pass a drug test administered while in that program.

In his March 3, 1994 hand-written letter, Mr. Blank, Program Director of the Kolmac Clinic, informed Ms. Blank with the Employee Assistance Program that "...we administratively discharged Appellant from our treatment program on February 22, 1994 for giving us a urine that was positive for cocaine." On March 3, 1994, Ms. Blank sent a confidential memorandum to the department as follows - "This is to confirm that Appellant has been terminated from his treatment program because of a positive drug screen, and will not be allowed to return back to that particular program, as so decided by his treatment team."

In its March 25, 1994 Notice of Disciplinary Action - Dismissal, the Director, Department of Fire and Rescue Services, stated in charge #3 as follows - "Based on the fact that a confirmed positive urine test was reported to the County and FFR III Appellant being terminated from his treatment program, he has breached the terms of the July 12, 1993 Memorandum of Understanding between himself, the Department of Fire and Rescue Services and the IAFF/Local 1664 which initiates dismissal proceedings and requires the immediate issuance of a notice of Disciplinary Action - Dismissal."

A preponderance of the evidence presented both in testimony and exhibits entered into the record did not support the County's contention that over-all performance deficiencies were the basis for Appellant's being terminated from his rehabilitation program or that the combined significance of these deficiencies was communicated to the Appellant as the reason for his dismissal from the program.

The Board found that the reasons contained in the Notice of Disciplinary Action and in the March 3rd communications from the treatment facility and from the Employee Assistance Plan's representative controlling as to the basis for Appellant's dismissal from his

rehabilitation program and resulting termination from employment. Appellant's positive urine tests resulted in his dismissal from his rehabilitation program. His resulting failure to complete his rehabilitation program as agreed in the Memorandum of Understanding was the basis for his termination from employment.

Issue 3. When an employee's termination from employment results from failing a drug test ordered by a third party, the Board felt that the test must meet the same Maryland and Montgomery County standards as required for drug tests which the County orders administered to prospective and current employees.

Maryland requirements for Job Related Alcohol and Controlled Dangerous Substances Testing as set forth in the Annotated Code of Maryland, Section 17-214.1 specifies the criteria to be met by "an employer" which requires an employee to be tested for job related reasons.

Montgomery County's Department of Fire and Rescue Services' Policy and Procedure on Substance Abuse Testing and Rehabilitation, No. 809, sets forth the prescribed procedure to be followed when an employee is to be tested for substance abuse for job related reasons.

The State Code and Policy No. 809 both provide chain-of-custody procedures that define the steps taken to guarantee confidentiality and the security of the drug testing process.

Testimony presented clearly indicated that the chain-of-custody requirements were not followed in Kolmac's collection of Appellant's urine sample which tested positive. The laboratory that Kolmac used to test Appellant's sample is not certified to do employment testing which requires a chain-of-custody procedure. In fact, the laboratory specifically disclaims the use of test results to make legal decisions.

The County contended that these chain-of-custody requirements only apply to tests required by the County and not to tests performed by rehabilitation facilities administered in the course of rehabilitation programs. The County argued that rehabilitation programs are not testing programs and that, although part of the program does involve random drug testing, the goal of such programs is rehabilitation, not testing.

However, the Appellant was terminated from his treatment program for the sole stated reason of having a positive drug screen. The County based its decision to terminate the employee on his failure to complete his treatment program as agreed to in the Memorandum of Understanding. Had Kolmac specified other convincing reasons which contributed to its decision to terminate the Appellant's participation in its rehabilitation treatment program and had the County specified convincing reasons other than a confirmed positive drug test as the basis for Appellant's termination from the Kolmac program and violation of its Memorandum of Understanding with the Appellant, the Board would have agreed that strict compliance with State and County drug testing standards may not be necessary when testing is undertaken as part of a rehabilitation treatment program.

Additionally, item 18 in the Memorandum of Understanding specifies a "confirmed positive urine test result." It was the Board's opinion that a "confirmed positive urine test" which, directly or indirectly, results in an employee's termination from employment should meet the requirements contained in County Policy 809. Since the Appellant's positive urine test was based upon a specimen sample not collected nor processed in compliance with the requirements specified in Policy 809, it did not qualify as a "confirmed test."

The County's action in terminating the Appellant's employment based upon his violation of the Memorandum of Understanding in not completing his treatment program due to his being dismissed from said program for the sole expressed reason of a positive non-confirming drug test does not meet the safeguards provided employees under Policy 809.

DECISION

The Board sustained Appellant's claim that his termination was in derogation of his rights under Montgomery County's Department of Fire and Rescue Services' Policy and Procedures on Substance Abuse Testing and Rehabilitation, and directed that the Appellant be reinstated to the employment status he enjoyed prior to his termination on April 4, 1994. Reinstatement was to be effective upon the Appellant's timely production of proof of his re-admission into an approved rehabilitation treatment program and conditioned on his written agreement to extend the provisions contained in the July 12, 1993 Memorandum of Understanding. Both conditions were to be met within 14 working days from the date of the Board's decision.

Back pay was awarded from April 4, 1994 to May 17, 1994 and from January 11, 1995 to the effective date of reinstatement to active employment status. Back pay was not granted from May 18, 1994 through January 10, 1995, because the Hearing of this Appeal was delayed due to Appellant's change in attorneys.

The Board awarded reasonable attorney fees for services rendered by the Appellant's current attorney in bringing this Appeal before the Merit System Protection Board.

GRIEVABILITY

Case No. 94-10

BACKGROUND

Appellants are Correctional Specialist III, Detention Center, Department of Corrections.

Appellants in their complaint dated February 1, 1994, protest the minimum qualifications for the position of Correctional Team Leader - Captain, as published in the Employment Opportunities Bulletin dated January 26, 1994. As relief, the Appellants initially requested the deletion of the minimum qualification for Correctional Team Leader - Captain requiring a Correctional Specialist III to have one year of experience supervising correctional officers. In a subsequent March 1, 1994 response, they further requested as relief a waiver of the subject one year supervisory requirement, if the requirement is not deleted. They also requested a postponement of the application process should the Personnel Office ruling be appealed to the Merit System Protection Board.

The Merit System Protection Board in a March 17, 1994 response to the Appellants denied their request for a stay of both the interview stage of the selection process for the position, as well as a stay of the final selection for the position.

ANALYSIS AND DISCUSSION

In their appeal, Appellants stated that the current minimum qualifications (specifically the requirement that the candidates have one year of experience supervising correction officers) are arbitrary and act to unreasonably limit the applicant pool. In addition, the Appellants stated that the unreasonable requirement is discriminatory in that it disqualifies all potential candidates who have not supervised correctional officers. The Appellants also appealed the refusal of the Department of Corrections to alter the minimum qualifications for the position and allow Appellants to compete for future vacancies.

The Labor/Employee Relations Manager in both his preliminary findings, memorandum dated February 24, 1994 and his final response dated March 4, 1994 as well as the April 26, 1994 response from the County state that requirements set forth in the promotional bulletin for the position are in accordance with the minimum qualifications established in the class specification for the position.

It is the County's position that minimum qualifications are an integral part of the class specification as defined in Section 7-2(d) of the Personnel Regulations. The County as the employer has the exclusive right to establish job classifications. [Section 33-107(b)(4) Montgomery County Code]

According to the County, Section 28-2 of the Personnel Regulations provides that a grievance must concern a term or condition of employment or treatment by management. Established minimum qualifications for positions in the promotional rank structure for Correctional Officer are not considered to be terms or conditions of employment and are established unilaterally by the Personnel Director after consultation with the affected operating department(s). Therefore, minimum qualifications are not grievable.

The County contends that the authority to establish minimum qualifications is a right of management and, as such, this complaint is not a subject appropriate for review through the grievance procedure. The County believes that this complaint may not be accepted for review.

Based on a review of the above referenced sections of both the Personnel Regulations and the Montgomery County Code, the County acted properly in denying the Appellants' grievance.

CONCLUSION

The Board affirmed the decision of the Labor/Employee Relations Manager.

Case No. 94-15

BACKGROUND

The Appellant, complained on February 14, 1994, regarding the announced examination procedure for promotion to the rank of Captain, requested immediate promotion to the rank of Captain retroactive to February 6, 1994, and that he be made whole in this matter. On March 8, 1994, the Appellant subsequently requested, as a minimum level of relief, the placement of his name in the 'Well Qualified' rating category to allow the Chief of Police to afford him the same consideration as others currently employed at the rank of Captain.

ANALYSIS AND DISCUSSION

In his appeal, Appellant stated that Personnel Bulletin Number 418 dated December 6, 1993, contained the examination procedure for promotion to the rank of Police Captain. The Appellant further agreed that Section II, part 2, of the document describing the process for "peer and supervisory rankings", does not conform to Section 5-6 of the Personnel Regulations. Based on the Appellant's original complaint, he was informed on February 28, 1994, by the Labor/Employee Relations Manager that, since he filed an application for promotion to Captain by the deadline of December 29, 1993, one must assume that the promotional bulletin was reviewed by him on or prior to that date. The County did not consider that his February 14, 1994, complaint was filed within the twenty calendar day time limit as required under Section 6.0 of Administrative Procedure 4-4, Grievance Procedure.

The Appellant, in his March 8, 1994, reply to the Labor/Employee Relations Manager's decision to his preliminary complaint, stated that "he is not contesting the method of peer/supervisory rating, but the method in which scores were assigned and later used for a composite total." Further, the Appellant has not alleged any wrongful or unfair act, policy violation or action that is arbitrary or capricious.

The Labor/Employee Relations Manager's April 7, 1994, final decision on Appellant's complaint determined that the complaint was not grievable and not timely filed and cannot be processed further. It was the County's position, in its June 3, 1994, response to the Merit System Protection Board's request for information on this case, that the Appellant's complaint was not grievable under Administrative Procedure 4-4, Grievance Procedure.

The County stated that, under Administrative Procedure 4-4, a grievance is defined as follows:

> A formal written complaint by an employee arising out of a disagreement between an employee and supervisor concerning a term or condition of employment in which the employee alleges that he/she has been adversely affected by an action or failure to act by a supervisor which is:
>
> A. A misinterpretation, misapplication, or violation of any policy, procedure, regulation, law or practice which is sufficiently established to have precedential value;
>
> B. A wrongful written reprimand, within grade reduction, demotion, suspension, dismissal or termination; or
>
> C. Arbitrary and capricious, i.e., without reason or merit.

A review of the Appellant's complaint by the County revealed that the Appellant failed to link his complaint to any of the above conditions, and, as a result, his complaint was found to be not grievable.

Based on a review of the record, including the above referenced sections of the Administrative Procedure, as well as pertinent Personnel Regulations and the Montgomery County Code, the Board found that the County acted properly in denying the Appellant's grievance. The Board also found that the Appellant did not take issue with the examination scoring procedure until January 27, 1994, when he became aware that his performance on the examination was less than his expectation.

CONCLUSION

The Board affirmed the decision of the Labor/Employee Relations Manager.

Case No. 94-20

BACKGROUND

Appellant, in his complaint dated May 9, 1994, requested relief after becoming aware that his current health insurance benefits under the New York Life Health Plus Family Plan would be converted to the Prudential Plus Plan and his benefits would be considerably less than those available to retirees in the Washington D.C. area when he retires and moves out of the area.

ANALYSIS AND DISCUSSION

In his appeal petition dated July 13, 1994 to the Board, the Appellant stated: "Even if the issue of my reduced health insurance benefits after I retire and move out of the Washington area cannot be legally grieved, I am attempting to bring this issue to the attention of both the Merit System Protection Board and the County Government so the issue can be resolved and all retired personnel will be treated equally and receive equal health insurance benefits regardless of where they choose to live after retirement."

In both the Appellant's initial complaint dated May 9, 1994, and his response dated June 9, 1994, to the preliminary Complaint Designation of the Labor/Employee Relations Manager, the Appellant requested relief in that after his retirement his health benefits under the Prudential Plus Plan outside the Washington D.C. area remain the same as if he chose to retire in the Montgomery County Maryland Area.

The Labor/Employee Relations Manager's preliminary Complaint Designation as well as his Final Complaint Designation dated May 31, 1994, and June 15, 1994, respectively, stated:

> Your response did not include any new information which would lead me to believe that it is an issue which is appropriate for resolution under the County Grievance Procedure. Your concerns have been noted and the policy issues pertaining to insurance coverage for retirees will be a matter of further study. However, the scope of benefits is determined by a contractual arrangement between the County and Prudential and is not a matter that is grievable. You are disputing the actual policy with regard to retirees who move out of the service area rather than contending that the policy has been violated, misapplied or misinterpreted as to you.

This is a final decision that the issue in your complaint is not grievable.

The County, in its August 5, 1994 response to Appellant's appeal to the Merit System Protection Board, stated:

> That the Board dismiss the appeal based on the finding that the Appellant does not raise a grievable issue.

In addition, the County also stated in its response:

> Although it has no bearing on the grievability of the issue in Appellant's complaint, the County government recognizes the importance of the issue and is actively exploring ways to provide comparable levels of benefits to any retiree who moves out of the Montgomery County service area.

Based on a review of the record, including relevant sections of the Administrative Procedures, as well as pertinent Personnel Regulations and the Montgomery County Code, the Board found that the County acted properly in denying the Appellant's grievance.

CONCLUSION

The Board affirmed the decision of the Labor/Employee Relations Manager. The Board brought this matter to the attention of the County Council and the County Executive.

Case No. 95-01

BACKGROUND

Appellant, a Fire Sergeant employed by the Department of Fire and Rescue Service, participated in the 1993 promotional examination consisting of an assessment center involving four exercises for the rank of Lieutenant. His scores on the examination placed him in the "Qualified" category on the eligible list.

Appellant contended that his responses to the written situational exercises were not graded fairly by the assessment panel and that he should have been graded as "Well-Qualified". He requested that his examination be regraded and that he be assigned an average score of all candidates for the categories dealing with problem analysis, decision making, planning and organization, and leadership/supervision, thereby ranking him "Well-Qualified" on the eligible list for Lieutenant.

Appellant filed a grievance on November 10, 1993, complaining that he was not graded fairly on the Lieutenant examination. By decision of June 30, 1994, the Deputy Chief Administrative Officer, denied the grievance and the relief requested. On July 14, 1994, Appellant appealed the denial of his grievance.

ANALYSIS AND DISCUSSION

Effective October 25, 1993, the Montgomery County Personnel Office certified an eligibility list for the rank of Fire/Rescue Lieutenant. Twenty-one individuals were on the "Well-Qualified" list and five individuals were on the "Qualified" list, including Appellant. By letter dated October 25, 1993, with enclosures, Appellant was notified of his score arrived at by the consensus of a group of assessors on his rating panel.

The letter explained that the assessors met to discuss his performance and agreed on an overall score for each dimension based on the behaviors exhibited by him in all four exercises. A Score Report document, enclosed with the letter, provided Appellant with his score on each of the eight dimensions (Problem Analysis, Decision Making, Planning and Organization, Leadership/Supervision, Sensitivity, Management Control, Oral Communication, and Written Communication), plus statistics for the entire group of candidates, the average, high and low score for each dimension. The formula used to determine Appellant's converted score was also provided.

A feedback document prepared by the assessors on the rating panel providing comments about Appellant's strengths and weaknesses in the assessment center process was attached to the Score Report. The feedback document stated that it was not intended to provide justification for scores received in the assessment center but to advise the applicant of strengths and weaknesses to improve performance in future assessments. However, Appellant took particular issue with the comment pertaining to the Written Situational Exercise stating that "Many decisions were incomplete or ineffective (i.e., failed to consider the need for additional help and failed to always establish command)." Appellant claims that he was downgraded in four of the eight dimensions - Problem Analysis, Decision Making, Planning and Organization, and Leadership/Supervision because of the assessors' evaluation of the written situational exercise as related to the issue of establishing command.

Appellant contended that Section 5(i) of the Incident Command System Regulation, Department of Fire/Rescue Services Executive Regulation 58-89, indicates that establishing the level of command is at "his option" and that, on his test, he chose not to establish the level of command but instead to proceed with the rescue operation. It was noted that Section 5(i) pertains only to the information requirements for the Officer in Charge (OIC) of the first arriving unit to provide an "Initial Incident Status Report (IISR)" while Section 4(b) defines the three levels of Operational Command and when it should be used. Thus, Section 5(i), relied upon by Appellant, did not appear to pertain to the standard operating procedures for using Level II command.

The Department contended that there was no information provided in Appellant's grievance that substantiates his contention that his promotional examination was incorrectly scored. The Department maintained that the written situational exercise presented represents appropriate use of Level II command as indicated in Section 4(b) of Executive Regulation 59-89. The Department further contended that Appellant should have established command and acted accordingly, in his examination response.

The assessors were provided with guidelines to interpret behaviors related to each dimension and were thoroughly trained in the rating process to administer the test, and were trained also on the relevant departmental regulations, policies, and procedures that pertained to the written situational questions. The rating guidelines, which were written and reviewed by upper management ranks within Department of Fire/Rescue Services (DFRS), included consideration of a candidate's judgment in deciding how to handle each incident, as well as the candidate's rationale to support the actions taken. The assessment center process was designed to evaluate managerial behaviors and not just knowledge of applicable DFRS regulations.

Because the consensus scores represent overall abilities in each management dimension, there is no way to know how much weight any exercise or behavior contributed to the final score.

The evaluation of Appellant's performance occurred over a two day period, encompassing several hours of independent work on the part of each assessor and included group discussion. To ensure proper interpretation of DFRS operating procedures, the rating panel also included a Fire/Rescue Captain. The comments on the feedback document, about which Appellant complains, did not pertain to the final consensus scores.

CONCLUSION

Based on the preponderance of evidence it is clear that Appellant did not show that there had been an improper application of established laws, rules, regulations, policies or procedures in the scoring of his examination for Fire/Rescue Lieutenant. Further, he did not show that there has been any improper, inequitable or unfair act with respect to the scoring of his examination. Rather, Appellant was afforded the same opportunity to test as each of the other candidates and the same scoring procedures were used to rate all applicants. There is nothing in the record to show that the assessors misapplied or violated any procedural guidelines that they were given in relation to the rating of the Fire/Rescue Lieutenant promotional examination. Also, evaluation of the examination by the assessors on a consensus basis is partially judgmental. Thus, the preponderance of evidence shows that Appellant merely disagrees with the assessors' evaluation of his examination.

The appeal was denied.

Case No. 95-03

BACKGROUND

Appellant is a Sergeant in the Police Department currently assigned to the Rockville Station.

The Appellant, complained on May 10, 1994, that he was not selected for the position of Sergeant in the Tactical Unit, Special Operations Division and requested assignment to a Sergeant SWAT position including other relief as may be fair.

The Appellant in 1990 was a Police Officer III in the Tactical Unit. He was promoted to Corporal and transferred out of the Tactical Unit. On February 8, 1994 the Appellant was promoted to Sergeant and on April 5,1994 applied for a Sergeant's position in the Tactical Unit, Special Operations Division, Vacancy Announcement No. 94-13.

ANALYSIS AND DISCUSSION

In his May 10,1994 appeal, Appellant stated "that he was the most qualified and that denial of the position was unfair." In the Police Chief's response dated May 19, 1994, the Appellant admitted that in February 1990, while on duty, and driving a female employee in an official County vehicle he engaged in improper conduct. The Appellant's admission took place in May of 1994 while being interviewed by two senior Police Department Officials. In 1990 the female employee immediately reported the incident to her supervisor but declined to file a formal complaint with either the Police Department or the Human Relations Commission. The internal investigation conducted by the two senior Police Department Officials in 1994 indicated that the incident occurred and was a violation of Departmental Rules but since under Section 730 (b) of the Law Enforcement Officers Bill of Rights (LEOBR) "Administrative charges may not be brought against a law enforcement officer unless filed within one year after the act that gives rise to the charges and comes to the attention of the appropriate law enforcement agency official." The internal report stated that the charge had to be classified as NOT SUSTAINED.

It was the Department Head's opinion that to transfer the Appellant back to Special Operations Division as a supervisor could reasonably be expected to create an intimidating hostile or offensive work environment for the female employee. The Police Chief also stated that this was a voluntary transfer which is a prerogative of management and therefore is not grievable.

On June 14, 1994 the Appellant was informed by the Labor/Employee Relations Manager that only an INVOLUNTARY TRANSFER in accordance with Section 29 of the Personnel Regulation may be appealed. Voluntary transfers are excluded from appeal under

the Personnel Regulations and the Merit System Protection Board in a December 16, 1993 decision stated "it is clear that, while promotional decisions may be grievable, voluntary transfer decisions are not grievable under the Personnel Regulations."

The Appellant on June 28, 1994 responded to the Complaint Designation decision of June 14, 1994. A Final Complaint Designation decision was issues on July 28, 1994 by the Labor/Employee Relations Manager. This decision stated "Based on a review of the Personnel Procedures, transfer of employees is considered to be a prerogative of management. There are no procedural rights provided to employees who seek voluntary transfer opportunities, therefore, the failure to grant a transfer request is not an appealable issue.

The County states that the Appellant cannot cite 1989 Merit System Protection Board cases since effective March 31, 1994 Section 29 of the Montgomery County Personnel Regulations was specifically changed to limit grievances to involuntary transfers. The County also takes exception to the Appellant's statement "that the reasons given for not transferring him are unfair, arbitrary, capricious and based on other considerations." Voluntary transfer actions are not subject to the same standards of review which would otherwise make such actions grievable.

The County requested that this appeal and requested relief be denied.

The Appellant, in his response to the Merit System Protection Board, takes exception to the March 31, 1994 changes to the Montgomery County Personnel Regulations and the handling of the proposed changes to the personnel regulations by the Human Resources Department in its dealings with the County Council and the Legislative Attorney for the Council. The Appellant requests an opportunity to either have his grievance heard or be awarded the position or such other relief as may be appropriate.

CONCLUSION

Based on a review of the record, including the above referenced sections of the Montgomery County Personnel Regulations and Montgomery County Code, the Board found that this was a voluntary transfer and that the County acted properly in denying the Appellant's grievance.

The Board also found that the Human Relations Department acted properly in its dealings with the Legislative Attorney for the Council.

For the reasons stated above, the Board affirmed the decision of the Labor/Employee Relations Manager.

Case No. 95-10

BACKGROUND

Appellant is a Fire/Rescue Lieutenant assigned to fire suppression (operational firefighters), and working day work at the Rockville Volunteer Fire Department with a schedule of ten hours per day, five days a week. This is considered to be 48 regular hours and 2 hours overtime. Other Fire/Rescue Lieutenants assigned to fire suppression (operational firefighters) are assigned to shift work consisting of 24 hours working, 48 hours off, then 24 hours working.

Fire/Rescue Lieutenants assigned to administrative or non-suppression functions (staff fire fighters), such as emergency medical services (EMS), training and field support services work day work with a 40 hour workweek. In July 1994, higher level day work officers had their work week reduced to 40 hours without a significant change in responsibilities. However, Lieutenants who are station officers like Appellant continued to work day work for 48 hours and receive the same pay as Lieutenants working 40 hours, even though they work 8 additional hours per week. Appellant contends that, as a result, he is compensated at a 20% lower hourly rate that those holding staff fire fighter positions.

Appellant states that the day work station officers, of which he is one, who work a 48 hour workweek, do mostly supervisory and administrative work similar to that of the staff officers who work a 40 hour workweek, including supervising firefighters, training, payroll preparation, initiate disciplinary actions, performance appraisals as well as a myriad of other "non-emergency" activities. Appellant argues that forcing him to work an additional 8 hours every Saturday with no additional pay is, in fact, a reduction in his hourly pay, not a schedule change.

Appellant points out that the Department of Fire and Rescue Services (DFRS) has signed a Memo of Understanding with IAFF Local 1664 to support the phase-in of 40 hour day work for station personnel in the bargaining unit. In addition, DFRS has placed Appellant on a 40 hour week as of January 8, 1995. Although his original grievance requested that his position be changed to a 40 hour workweek and retroactive overtime compensation for hours worked beyond 40 hours, Appellant now seeks only retroactive compensation for hours worked in excess of 40 while on day work and the recomputation of leave.

ANALYSIS AND DISCUSSION

Section 2.10 of Administrative Procedure 4-4, Grievance Procedure, defines a grievance as a formal written complaint by an employee arising out of a disagreement between an employee and supervisor in which the employee alleges that he has been adversely affected by an action or failure to act by a supervisor which is:

A. A misinterpretation, misapplication, or violation of any policy, procedure, regulation law or practice which is sufficiently established to have precedential value;

B. A wrongful written reprimand, within grade reduction, demotion, suspension, dismissal or termination; or

C. Arbitrary and capricious, i.e., without reason or merit.

The issue which is the focus of this complaint involves the County's policy for the compensation and the scheduling of work hours for fire/rescue personnel. The remedy Appellant seeks reflects policy changes in scheduling and work hours and additional compensation for scheduled work hours. However, Appellant makes no claim of wrongful misinterpretation, misapplication or a violation of law, rule or regulation; or actions taken against him that are arbitrary and capricious.

CONCLUSION

The grievance procedure specifically does not provide for review of County procedure, law or practice that is not claimed to be a violation of law or regulation or a wrongful act. Thus, the issue presented by Appellant's grievance may not be accepted as an appropriate issue for review through the grievance procedure. Appellant's appeal was denied and the decision of the CAO was sustained.

Case No. 95-13

BACKGROUND

The Appellant is a Senior Management & Budget Specialist in the Office of Management & Budget.

Appellant, in his appeal petition dated February 10, 1995, seeks an administrative solution which will allow him and his family to have access to a health insurance plan no longer being offered by the County. In addition, the Appellant seeks to have the County continue to pay the same or a lessor share of the premiums.

ANALYSIS & DISCUSSION

The Appellant and forty-three (43) other union and non-union members, Montgomery County employees were notified on November 1, 1994 that, effective January 1, 1995, they would no longer be able to select the Columbia Medical Plan as their health insurance carrier. The Appellant felt that this decision was unfair and inequitable and adversely affected him and his family. Appellant asserted that this matter is grievable under Section 29-2, paragraph (d) of the Montgomery County Personnel Regulations.

Paragraph (d) provides that a grievance may be filed if an employee is adversely affected by an alleged "improper, inequitable or unfair application of the compensation policy and employee benefits, which may include salary, pay differentials, overtime pay, leave, insurance, retirement and holidays."

As relief, the Appellant requested that the Columbia Medical Plan be available to him and his family for the remainder of his employment with Montgomery County Government.

The County's Labor/Employee Relations Manager in his November 22, 1994 response to the Appellant stated:

> In order to meet the threshold test of grievability, a complaint must meet the requirements of Section 29-2 of the County Personnel Regulations. You cite the requirements of Section 29-2, paragraph (d), as the basis for your complaint. However, your complaint alleges an unfair, "action" by the County. Section 29-2 (d) requires a demonstration of an "improper, inequitable or unfair application of the compensation policy and employee benefits (emphasis added)." The distinction between an "action" by the Employer and an "application" of a policy is important in this context. A County policy is not appropriately addressed through the grievance process. There are other administrative channels available to register an objection to a County policy. In this instance, you have taken exception to a change in the County's policy regarding provision of health insurance benefits to its employees. You have not alleged an "improper, inequitable or unfair application" of that policy. This is the preliminary decision of this office that the matter you have submitted is not properly reviewable under the grievance procedure.

In the Appellant's December 7, 1994 response to the above preliminary decision he states "that the matter must be referred to the Merit System Protection Board." The December 9, 1994 final decision of the County's Labor/Employee Relations Manager again determined "that the complaint is not properly reviewable under the grievance procedure." Likewise, in their March 3, 1995 joint response to the Appellant's appeal to the Merit System Protection Board, both the Acting Director of the Office of Human Resources and Assistant County Attorney concluded:

> The components of the County's health benefits policy are the number of insurance plans offered, the benefits provided by each of those plans, and the cost of premiums. Once the policy is set, if any of these components are improperly, inequitably or unfairly applied, that would be the proper subject of a grievance.

If not, then the issue is not properly addressed in this forum. Case No. 94-20, the Merit System Protection Board upheld this conclusion. In MSPB Case No. 94-20, the Board upheld the Labor Relations Manager's decision that a challenge to the scope of arrangement with the County is a matter of policy, not an application of policy and, therefore, is not grievable.

CONCLUSION

Based on a review of the record, the Board found that the County acted properly in denying the Appellant's grievance. The components of the County Policy are the number of plans offered, the benefits provided by each of these plans and the cost of premiums. The Appellant has not demonstrated that the County has treated him improperly, inequitably or unfairly in applying its health benefits policy.

The Board affirmed the decision of the Labor/Employee Relations Manager.

Case No. 95-15

BACKGROUND

Appellants are non-union employees of the Department of Fire and Rescue Services (DFRS). Both filed identical grievances on December 1, 1994 contending that the County's percentage share of the premium for their Health Insurance coverage was less than that provided to other employees, that this difference was never communicated to them and that this disparate treatment toward them and toward other similarly situated members of the DFRS constitutes a violation of their rights to equal treatment under the County's Personnel Regulations.

On January 12, 1995, the Labor/Employee Relations Manager, responded to Appellants advising them that their complaints were not matters subject to review under the County's Grievance Procedure as both complaints appeared to be a challenge to the County's policy with regard to health insurance premiums rather than a claim that a policy had been misapplied. On January 31, 1995, Appellants filed a consolidated appeal to the Board.

On March 3, 1995, the County responded to the Appeal to the Board stating that all employees were given a choice as to Health Plans and coverages available to them and the costs that employees must pay for each of the Plans offered. It contended that it never had or communicated to employees a policy or followed a practice of paying a set percentage of the premium cost for all Health Plans offered. The County responded to Appellants' allegation of disparate treatment which Appellants allege is supported by the County's settlement of a grievance on this subject filed on behalf of firefighters who are members of Local 1664 of the IAFF.

The County concluded its response by contending that Appellants' complaint is a challenge to the County's Policy regarding health insurance premiums rather than a claim that the Policy had been misapplied. Since the Montgomery County Personnel Regulations do not provide a mechanism to challenge County policy, it requested that the Board dismiss the Appeal.

The Appellants contended that Montgomery County Personnel Regulations do provide a mechanism for employee grievances if an employee is adversely affected by an improper, inequitable or unfair act in the administration of a County Policy.

ISSUES

Issue #1. Whether the Appellants were adversely affected by the County's policy on health insurance or practices followed in applying that policy?

Issue #2. If the Appellants were adversely affected, was the adverse impact a result of a County policy or of a procedure followed in administering the policy?

FINDINGS OF FACT AND CONCLUSIONS

In support of their respective positions, Appellants and the County both cite Montgomery County Personnel Regulations, 1994, Section 29-2, with specific reference to sub-sections (a) and (d), which provide that a grievance may be filed if an employee is adversely affected by an alleged:

> (a) Violation, misinterpretation or improper application of established laws, rules, regulations, procedures or policies;
>
> **********
>
> (d) Improper, inequitable or unfair application of the compensation policy and employee benefits, which may include salary, pay differentials, overtime pay, leave insurance, retirement and holidays.

Under Section 29-2(d), Appellants have the burden of demonstrating that the application of the County's policy/practice concerning its contribution to their health insurance premiums was "improper, inequitable or unfair" and had an adverse affect on them.

Appellants base their grievance on their belief that it has been the County's policy and practice to pay 83% of health insurance premiums and for employees to pay 17%. They offer no convincing evidence that their belief is based upon published policy or precedential practice. Appellants freely chose the Health Plan which best fit their needs on the basis of the coverage offered and their contribution toward the cost for that coverage.

The County refutes the Appellants' beliefs with factual data presented in a variety of Exhibits as to the derivation of annual rates of contribution toward employee health coverage and notices to employees setting forth the employee costs for the various options offered. These notices do not state the County's percentage contribution which, due to the differing total premium costs for each option, varies depending upon the option the employee selects. The County states and supports its contention that it has not been the County's policy or practice to pay 83% of the premiums for all health plans.

The Appellants' attempt to support their allegation of disparate treatment by reference to the County's settlement of a union grievance concerning County contributions to health insurance premiums for unionized DFRS employees. In the Board's opinion, the County correctly responded that the Appellants are not union members or parties to the Collective Bargaining Agreement and their conditions of employment are not governed by that Agreement. The settlement of a union grievance has no relevance to or bearing upon employees who are not parties to that Agreement.

DECISION

A preponderance of the evidence contained in the record in this Appeal did not support the Appellants' contention that they were adversely affected by the County's policy on health insurance or that the practices followed in applying that policy were in derogation of their rights under Section 29-2 of the 1994 Personnel Regulations.

Since there is insufficient evidence of adverse impact, it is not necessary for the Board to decide the issue of whether this grievance concerns County policy or administrative procedures followed in implementing the policy.

The Board affirmed the denial of this Appeal on grounds of insufficient evidence of adverse impact. Since there is no dispute on material facts, the Board found no basis for holding a formal hearing in this matter.

Case No. 95-16

BACKGROUND

Ms. Blank was a candidate for the position of Montgomery County Firefighter/Rescuer I, Department of Fire/Rescue. The Candidate, under Section 5-2 of Montgomery County Personnel Regulations, is required to take and pass a physical examination and/or to provide medical records if required to. The County Employee Medical Examiner disqualified the Candidate as a result of the examination and a review of medical records.

ANALYSIS AND DISCUSSION

In her February 28, 1995 appeal, the Applicant stated "that in addition to being a Firefighter in another jurisdiction without incident, her personal physician found her fit for duty as a firefighter in 1994 and the December, 1994 pulmonary function test administered by Montgomery County showed that her performance exceeded that predicted for a female of her age and height.

In his January 4, 1995 memorandum, the County Employee Medical Examiner, determined through a physical examination and review of the Applicant's medical reports of her treating physicians, that the Applicant is medically disqualified for the position of firefighter due to an on-going respiratory condition that prohibits the use of respirators and exposure to smoke and other irritants.

The memorandum also indicates that the Applicant continues to require the use of an inhaler to control her symptoms.

After the Applicant filed her appeal with the Merit System Protection Board, the Employee Medical Examiner in a March 23, 1995 memorandum stated that even after his review of the additional submissions in her appeal "my opinion remains unchanged." He also indicated that a normal pulmonary function test result in an asthmatic merely means that the asthmatic is not having an attack at that instant.

The Director, Office of Human Resources, in her March 27, 1995, response to the Merit System Protection Board, indicated that the Applicant had incidents of asthma which coincide with her resumption of cigarette smoking. Cigarette smoke is just one of many possible irritants which the Appellant can expect to be exposed to as a firefighter.

CONCLUSION

Based on a review of the record, the Board found that the County acted properly in disqualifying the Applicant for the position of Firefighter/Rescuer I, and the Board affirmed the decision of the Acting Personnel Director.

Case No. 95-17

Nine Appellants, employed in the Department of Fire and Rescue Services (DFRS) either as a Firefighter/Rescuer III or Master Firefighter/Rescuer, appealed the decision of the Labor/Employee Relations Manager advising them that their complaints were not grievable under the County's grievance procedure.

BACKGROUND

The facts in this case are not in dispute. Appellants are firefighters in the DFRS. In the Fall of 1994, the County conducted promotional examinations for the ranks of Master Firefighter and Sergeant. As a result, two eligible lists (Nos. 94-27 and 94-31) were established in October and November 1994 for possible promotion to the ranks of Master Firefighter and to Sergeant. Each list was divided into separate categories, one for those individuals who were certified to be "Well-Qualified" and the other for those certified to be "Qualified". Appellants were ranked in the "Qualified" category.

On November 25, 1994, DFRS issued several Vacancy Announcements: No. 94-16 showing six available positions for Master Firefighter/Rescuer; No. 94-17 indicating five available positions for Master Firefighter/Rescuer requiring CRT or EMT-P certification; and No. 94-16 showing three positions for the Fire/Rescue Sergeant and fifteen positions for Fire/Rescue Sergeant requiring CRT or EMT-P certification. On November 30, DFRS issued Vacancy Announcement No. 94-18 indicating ten positions for Master Firefighter/Rescuer requiring CRT or EMT-P certification.

On December 21, 1994, personnel actions were taken promoting some individuals from the eligible list to Master Firefighter and Sergeant and on January 6, 1995, other individuals were promoted to Sergeant and Master Firefighter. However, all of the vacancies advertised in the vacancy announcements had not been filled. Appellants contend that, because there are unfilled positions which had been advertised, firefighters such as Appellants have a right to have those vacancies filled since they had been announced and since there are "qualified" persons on the eligibility list such as themselves from whom a selection can be made.

On January 12 and 13, 1995, Appellants filed grievances contending that, by not filling these announced vacancies, the County violated the rights of Appellants as guaranteed by the Federal and State Constitutions, the Montgomery County Code, and its Personnel Regulations and policies and procedures. Appellants' grievances complained that DFRS decided not to promote individuals from the "Qualified" list into the vacancies requiring CRT or EMT-P certifications over individuals in the "Well Qualified" category without CPT or EMT certifications even though the Personnel Regulations authorize selection from a lower rating category with appropriate approvals. Appellants claimed that DFRS was obligated by County regulations to immediately fill the announced vacancies with candidates from the lower rating category if there were no qualified candidates in the higher rating category.

The County contends that its regulations do not divest the DFRS of its right and responsibility to determine if a vacancy will be filled, when it will be filled, or the manner in which it will be filled (transfer, promotion or other personnel action). The County further claims that the announcement of a vacancy by the DFRS does not obligate it to fill the vacancy or to fill it within any particular time period.

DISCUSSION AND ANALYSIS

Appellants and the County both cite the relevant County regulations but interpret them differently as applied to the facts in this case, Section 6-3, Selection Procedures, of the County Regulations provides:

> When a position is to be filled, the appointing authority must be provided an eligible list that has been certified by the Personnel Office. Subject to affirmative action objectives, the appointing authority is free to choose any individual from the highest rating category. However, if an individual from a lower rating category is selected, the appointing authority must submit written justification for such action, which must then be approved by the Chief Administrative Officer and made a part of the selection record.
> (emphasis supplied)

Further, Section 23-2, Policy, states:

> Promotions must be made on a competitive basis. After an evaluation of each individual's qualifications as defined in Section 5-6 of these Regulations, the appointing authority will make the final selection in accordance with Section 6-3 of these Regulations.
> (emphasis supplied)

As contended by the County, the above regulations grant the appointing authority the discretion to decide whether to fill a vacancy, even though it has been announced, and to choose any individual from the "highest ranking category." (subject to affirmative action objectives). Even though the appointing authority may select an individual from a lower rating category, with justification and approval from the Chief Administrative Officer, the appointing authority is not required to do so.

Appellants' reliance on the DFRS's Policy and Procedure No. 512 entitled, "Promotion Procedure" which states that it is the DFRS's goal to fill all vacancies within a period not to exceed 30 days is misplaced. This is simply a statement of the DFRS's "goal" to fill vacancies promptly after a decision is made to fill the positions. It is not a regulation obligating the DFRS to fill all vacancies or to do so within 30 days. The announcement of a vacancy and the decision to fill a vacancy are separate decisions. The announcement of a vacancy does not create an entitlement in employees to be considered for promotion or an obligation on the part of the DFRS to fill the position.

CONCLUSION

The Board agreed with the County that DFRS did not violate any legal requirement, and its failure to fill the remaining announced vacancies was not a grievable issue. Rather, DFRS exercised its management prerogative to not fill the remaining vacancies, which is not prohibited by the applicable regulations. The Board affirmed the decision of the County that the Appellants' complaints did not contain a grievable issue and denied the appeal.

PROMOTION

Case No. 92-09

Civil 88125

This case was remanded to the Merit System Protection Board from the Circuit Court for issuance of a remedial order consistent with the remedies directed in the decision of the Court of Special Appeals in Montgomery County v. Anastasi, 77 Md. App. 126, 549 A.2d 753 (1988) and in the Merit System Protection Board's decision in Re: Appeals of E. Clark W. Fryer, J. Logan and J. Quinn.

BACKGROUND

Appellants are eight Deputy Sheriffs in the Sheriff's Department of Montgomery County. They originally appealed the decision of the Chief Administrative Officer denying their grievances regarding the impropriety of promotional procedures used to fill vacancies in the rank of Deputy Sheriff II (Corporal). They sought retroactive promotions to the rank of Corporal and back pay and attorney fees.

The Board sustained their appeal, on the merits but modified the remedy requested. Instead, the Board directed the County to award the Appellants, in rank order of their scores on the existing list, the next appropriate vacancies to Corporal, plus attorney fees. The County appealed the Board's decision to the Circuit Court. At the same time, the grievants filed a cross-appeal requesting that the merits of the decision be sustained but that the remedy directed by the Board be modified.

The Circuit Court's Order of June 15, 1994 sustained the Board's decision on the merits but ordered that the remedial portion of the Board's decision be vacated. The Court remanded the case to the Board for issuance of a remedial order consistent with the remedies directed by the Court of Special Appeals in Montgomery County v. Anastasi, 77,Md. App. 126, 549 A.2d 753 (1988) and in the Board's decision in Re: Appeals of E. Clark, W. Fryer, J. Logan and J. Quinn.

After hearing oral argument, in a bench decision, the Circuit Court determined that the Board failed to apply the remedy directed in the Clark and Anastasi cases. The Court held that the Board's failure to issue the indicated remedy violates its duty to follow merit system principles and its responsibility to fully exercise its remedial and enforcement powers to rectify personnel actions found to be improper. The Court found that the promotion of six individuals, who had scores higher than those of any of the cross-appellants, were proper promotions. However, the Court found that the evidence shows that four other individuals were promoted instead of cross-appellants.

The Court further determined that, had the rank order method continued to be used after the first group was promoted, five of the Appellants would have been promoted. The Court held that these promotions must be made retroactive to the date the grievants would have been promoted but for the abandonment of the rank order system. In addition, the Court ruled that these grievants should have back pay. The Court determined that the remaining Appellants would continue to be eligible for the next available promotions as per the Board's present remedial order since the individuals promoted had scores lower than all grievants.

ANALYSIS AND DISCUSSION

The Court determined that the facts of this case were similar to those of Clarke and Anastasi. Section 33-7 (a) of the Montgomery County Code provides that the remedial and enforcement powers of the Board shall be fully exercised as needed to rectify personnel actions found to be improper. As the Court noted, in Clarke, the Board found that there was an absence of guidelines or standards provided to the persons used in the final selection process to assure fairness and consistency of review and selection. Therefore, the Board ordered the promotion of the Appellants in that case.

In Anastasi, the Court noted that the past practice had been to promote from the list in rank order of their scores. Accordingly, in that case, the Board granted promotions in rank order of their scores to those employees who had been improperly considered in the promotion process. Similarly, in this case, the Court ruled that the Board had failed to grant retroactive promotions to those who had the next highest scores in a rank order system, with appropriate back pay.

CONCLUSION

In accordance with the decision of the Circuit Court in this case, the Board directs that five (5) Appellants be given retroactive promotions, with back pay, to the date each would otherwise have been promoted on the basis of their rank order of scores, together with appropriate attorney fees.

BACKGROUND

According to the record, the Appellant filed a complaint in accordance with Section 4.8, Freedom from Harassment/Retaliation, Administrative Procedure 4-4, Grievance Procedure on December 27, 1991. The Appellant alleged that he had been treated unfairly, that is, denied a promotion to Captain in the Corrections and Rehabilitation Department, for exercising his right to file a grievance. The Appellant states that his grievance for working out of his classification specification resulted in a settlement on June 29, 1992, which the Appellant reports as a temporary promotion to the rank of Captain. The Personnel Director agrees that the grievance has been resolved.

The Appellant also filed a sexual harassment complaint with the Human Relations Commission on February 4, 1992, because of the circumstance surrounding the order of promotions from the ranked list of applicants eligible for consideration as Captain. The Appellant was advised by the Personnel Director that this allegation of sexual harassment would be handled properly by the Human Relations Commission under the County's rules.

Specifically, the Appellant alleges in his March 12, 1993, appeal that he disagrees with the decision of the Personnel Director because, "I feel everything I stated has been corroborated. I must also add that there are currently two Captain positions vacant, and only one full-duty Captain working at the Detention Center at this time. In light of these facts, I am requesting that I be promoted to Captain effective May 10, 1992."

On the critical issue in this appeal, the County asserts in its written representations as follows.

> In his appeal the Appellant references the Personnel Director's conclusion that comments regarding the subject of promotion made by the Assistant Warden raised an unrealistic expectation on the part of the Appellant, as no promotions had ever been approved by the Acting Director or officially extended by the Personnel Office. The Appellant then states that every promotion that is made is verbalized by the Director of the Detention Center or the Chief of Custody and Security after notification by the Director's Office. This statement is incorrect. The former Acting Director, who was the appointing authority at that time, had indicated during the course of the investigation that he never approved the promotion of the Appellant.
>
> Further in the appeal, the Appellant enumerates his qualifications for Captain which are not a subject of contention in this appeal. However, in reference to his record he fails to include that he was suspended for five days effective February 5, 1990 for violations of the Montgomery County Sexual Harassment Policy.

In reference to the allegation made by the Appellant that the Assistant Warden asked if he would drop his complaint, Mr. Blank admitted asking the Appellant if he would drop his complaint. However, Mr. Blank said he did so merely to obtain the status of such and his comment was in no way linked to whether or not the Appellant was to be promoted to the rank of Captain. Mr. Blank was interviewed on January 19, 1993 regarding his involvement with any promotional offers that were made to the Appellant. Mr. Blank, who was present at the time with Mr. Blank and the Appellant, remembered the Appellant being asked to drop his grievance. However, Mr. Blank further stated that this was not done in a threatening way, but more in a fashion that "since you are being promoted why don't you drop the grievances, as they are now moot. That is where I thought Mr. Blank was coming from." Both Blank and Mr. Blank have stated that the comment was not made as a threat.

The County concedes that the comments concerning the withdrawal of grievances made by management at the time a promotion was under consideration were inappropriate. Given the context in which the comments were made, it is understandable that an inference could be drawn that the complaints must be dropped. However, the poor judgment of management in discussing the issue while discussing promotion does not entitle the Appellant to a promotion.

As part of this investigation the then Acting Director, who was the appointing authority, was interviewed on February 16, 1993. He enumerated several factors as considerations for not filling the Captain vacancies at issue during his term as Acting Director. Among the reasons provided were budgetary problems and the fact that when he accepted the assignment of Acting Director of the Department of Correction and Rehabilitation it was with the understanding that he would not reorganize the Detention Center. Reorganization was to be left to the new Director as his ability to staff these key Captain vacancies was needed to provide flexibility. Thirdly, he felt the promotional examination for the job classification of Captain did not adequately measure candidates' supervisory, administrative or decision making abilities.

In conclusion, the County maintains that discussions by management with the Appellant regarding promotional actions, which were not officially approved by the Director, were inappropriate and raised false expectations. A legitimate promotional job offer was never proffered. Further discussion of the withdrawal of a grievance while discussing the subject of promotion was inappropriate. However, even if management erred, promotion of the Appellant is not the appropriate remedy.

Finally, in his decision not to staff the vacancies, Mr. Blank considered factors which he deemed to be in the overall long term best interest of the Department. He chose to leave the promotional decision to the new Director of the Department. Presently, the Appellant's name remains on the active promotional eligibility list for the position of Captain and the positions remain vacant.

On this same issue, the Appellant through his representative contends as follows.

The memorandum alleges, essentially, that the threatening remarks were not perceived as a threat by a witness to the conversation between my client and the Assistant Warden, but more as a sort of suggestion that the grievances be dropped.

We take the position that the comments were directed to the Appellant and not the witness. It is the Appellant's perception of the remarks that is critical; it was his right to grieve that was at issue. Whether "threat" or "suggestion" be the proper term, the comment should never have been made by the Assistant Warden.

The County Attorney contends that other, legitimate factors existed for not filling the Captains' vacancies. The undisputed fact remains that one of the positions was staffed, by the live-in lover of the Acting Warden; apparently no "budgetary problems" existed with respect to funding her position.

What constitutes a "legitimate promotional offer" is a matter of serious dispute. The County's memorandum suggests that no such offer was made. There is, however, no testimony in this record that states the precise manner in which a job promotion is communicated to Detention Center employees. It was perfectly reasonable for the Appellant to assume that the Assistant Warden possessed authority to offer him the promotion. This raises serious concerns, which should be aired during the hearing process, as to the circumstances under which the Assistant Warden came to discuss the job promotion and the dropping of grievances in the same meeting.

In short, the County, by its April 22 memorandum concedes:

1) Appellant is qualified for promotion to Captain (see attached letters from various citizens commendatory of the Appellant);

2) he was, at the least, informed of an imminent promotion;

3) that the promotion information was coupled with a threat or suggestion by his superior that he drop his previously - filed grievances; and

4) that he was thereafter not promoted.

FINDINGS OF FACT

The matter of sexual harassment is properly handled by the Human Relations Commission which has received a complaint filed by the Appellant. We will not consider these allegations in this decision.

The Appellant had settled his grievance concerning working out of his job specification which resulted in his temporary promotion to Captain from November 13, 1990 through July 18, 1992.

Since his temporary promotion ended on July 18, 1992, the Appellant has been available for consideration for permanent promotion to Captain.

Employees have a right under the merit system to participate in the examination and consideration process for promotion. They do not have a right to promotion.

The grievance here at issue was resolved by the temporary promotion of the Appellant.

The other employee promoted permanently through the merit promotion procedures had a higher score than the Appellant and it is the selection of this person, not the score, per se, which is at issue here.

Casual conversation about the possible availability of a position at some time in the future by acting management officials is not an offer of promotion.

Certain comments made by management officials (the Assistant Warden) while a promotion was under consideration were inappropriate, but not binding by the County.

CONCLUSION

We can understand the expectation of the grievant that his promotion was imminent as a result of conversations with management officials. We agree with the County that certain remarks made by management officials were inappropriate. Nevertheless, in view of the fluid nature of the positions which may be available and future management changes, we do not believe that permanent promotion is appropriate.

The record does not clearly show a causal relationship between the remarks as perceived by the Appellant and the subsequent actions taken by management. The appeal was denied.

Case No. 95-11

BACKGROUND

The Appellants are Montgomery County Master Police Officers (MPO) in the Department of Police.

In their appeal petition, Appellants assert that the County violated the Montgomery County Charter, the Montgomery County Code, Article 44 of the Collective Bargaining Agreement and other relevant laws, regulations, practices and procedures by not promoting Appellants to the position of Sergeant from the Sergeant eligible list before it expired on July 1, 1994.

In his preliminary response, dated November 2nd and 9th 1994, the County Labor/Employee Relations Manager stated:

> The facts and circumstances as outlined in the grievance statement concern decisions to temporarily promote and establish temporary overages pertaining to certain proposed or existing vacancies. While the County's promotional system is premised on the principles of fairness, respect for the individual employee, and merit based advancement, there is no entitlement to promotion. The Employer is under no obligation to promote an employee or fill a position, even when a promotional eligibility list exists. Moreover, the Court of Special Appeals of Maryland, recently upheld a decision of the Merit System Protection Board (MSPB) which held that the County retains the 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." Jones, Et Al. v. Montgomery County, Maryland, (1994). Furthermore, the court, in Jones, upheld the MSPB's decision that the timing of promotions is not a grievable issue.

For the aforementioned reasons, it is the preliminary decision of this office that the matter you have submitted is not properly reviewable under the grievance procedure.

The Appellants, in their November 21, 1994 response to the County, restated the arguments outlined in their original grievances:

These grievances involve employee Blank who was the last remaining eligible on the well qualified list and employee Blank, the highest ranked eligible on the qualified list for promotion to the rank of police Sergeant.

The County had cited the unreported decision of the Court of Special Appeals in the case **Jones v. Montgomery County, Maryland (1994)** as authority for the proposition that this matter is not grievable. Appellants state that reliance on Jones is misplaced and that Jones and other Master Firefighters who were not promoted to the rank of fire Sergeant grieved their non-promotion to existing vacancies.

In the instant cases, Appellants allege that the merit system was manipulated by management for the purpose of promoting a favored eligible for political and patronage purposes at the expense of fair, efficient, equitable, and equal treatment to Grievants. There being no vacancies for promotion to sergeant before the June 30 expiration of the eligible list, management wanted to fulfill its desire to promote a single individual and did so under the pretext of an expired "policy" while treating other individual situations in a wholly different manner.

Appellants allege that this violates both the spirit and intent of the County Charter, the Merit System, and Merit System Law including SS 35-5(b)(6); 33-5(b)(1) and (2); 33-5(c); 33-8; and 33-9. Also the application and examination procedures required at MCPR SS 5 were not followed. Specifically, there was no announcement of the opportunity for promotion to a temporary overage, etc.

And, as stated in the Appellants' grievance statement, "[t]his treatment and the semantics of the circumstances have resulted in Grievant[s] being denied promotion under a situation similar to that of another officer who was promoted. Grievants situation is more unique, for just as Sergeant Blank's disability retirement was projected, so too could other sergeants' retirements be projected.

Appellants allege that the Labor/Employee Relations Manager's decision is arbitrary and capricious; devoid of merit, due process, and fairness; and violative of **inter alia**, the above referenced charter provisions, contract, laws, regulations, procedures, and practices."

In addition, in making his decision on these complaints, there are no guidelines or standards to assure fairness and consistency of review and selection. Similarly, procedures to protect and comply with the merit system law and Charter are absent.

Both in the December 1, 1994 final response from the Labor Relations Manager and the February 10, 1995 joint response from the Acting Director, Office of Human Resources and Senior Assistant County Attorney the County restated that:

The crux of your grievance statement in each case is that the Department chose not to offer an opportunity for promotion/temporary promotion to either grievant while it had offered such an opportunity to another officer who was similarly situated to employee Blank and Blank.

Section 23-4 of the County's Personnel Regulations provides that "the Chief Administrative Officer may approve a temporary promotion on a noncompetitive basis, not to exceed 12 months without the approval of the Merit System Protection Board when it is in the best interest of the County." Jones is applicable in that it affirms the County's 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." Furthermore, Jones addresses the issue of temporary promotions as well as the issue of announcing vacancies. Specifically, Jones states the following:

> The regulatory scheme allows the County to fill a merit system vacancy with an individual temporarily promoted to that position.... Thus, the County' utilizes temporary promotions to fill vacancies, pending announcement of the vacancy to qualified candidates.
>
> The regulatory scheme does not explicitly place any time limitation between when a position is vacated and when that vacancy must be announced as a "promotion opportunity." The only limitation placed upon filling a position is that the vacancy cannot be filled by a temporary incumbent for more than twelve months without approval of the Merit Board.

In regard to the issue of announcing vacancies, the Jones court upheld the Merit System Protection Board, stating:

> The Merit Board ... determined that the County did not violate any legal requirement and that the failure to announce a vacancy was not a grievable issue (emphasis provided). Examination of the framework for the merit system confirms that the decision to announce a vacancy is reserved to the Chief Administrative Officer.

Neither Jones nor Section 23-4 of the Personnel Regulations makes any distinction between a temporary promotion to an existing vacancy and a temporary promotion to a temporary overage. However, both scenarios represent temporary reassignments to higher classified grades as a means of maintaining departmental operations with minimal disruption. Additionally, both scenarios may occur at the discretion of the Chief Administrative Officer.

In conclusion, the County Labor/Employee Relations Manager reiterated language from his preliminary decision in both of the complaints at issue: "The facts and circumstances as outlined in the grievance statement concern decisions to temporarily promote and establish temporary overages pertaining to certain proposed or existing vacancies.

While the County's promotional system is premised on the principles of fairness, respect for the individual employee, and merit based advancement, there is no entitlement to promotion. The Employer is under no obligation to promote an employee or fill a position, even when a promotional eligibility list exists."

For all of the aforementioned reasons, it is the final decision of this office that the matter you have submitted is not properly reviewable under the grievance procedure.

In its February 10, 1995 memorandum concludes, that the Appellants have not raised a grievable issue. The establishment of temporary overages and the decision to fill or not to fill those overages are a prerogative of management, and not an issue of promotion, non-promotion and, thus, are not grievable under the language of Administrative Procedure 4-4.

CONCLUSION

Based on a review of the record, the Board found that the County acted properly in denying the Appellants' grievance.

The Appellants did not demonstrated that the County violated any rules, regulations, laws, practices or procedures.

The Board affirmed the decision of the Labor/Employee Relations Manager that the Appellants' complaints did not contain a grievable issue.

REDUCTION-IN-FORCE

Case No. 94-19

BACKGROUND

Appellant formerly occupied the position of Shop Supervisor, Grade 21, in the Department of Fire and Rescue Services until he was terminated as a result of a Reduction-In-Force (RIF) in accordance with the procedures of Administrative Procedure 4-19 and the decision of the Merit System Protection Board denying his subsequent appeal of his termination.

Appellant appealed the fact that he was not appointed to the position of Program Manager I (Announcement #0834401E), with the Department of Transportation. He contends that the creation, classification, interview and selection processes for the new position of Program Manager I, Grade 23, in the Heavy Equipment Section, Division of Equipment Management, Department of Transportation were specifically for the purpose of circumventing and denying him his priority consideration rights under the County's RIF procedures.

The County notes that, the request to create the Program Manager I position was the result of an organizational restructuring and downsizing effort approved by the Director, Office of Management and Budget.

The County believes that the restructuring of the Division of Equipment Management called for the abolishment of the Heavy Equipment Manager, Grade 27, and the Shop Supervisor, Grade 21. Since the new position would be responsible for the restructured workload previously performed by the Equipment Manager, Grade 27, and the Shop Supervisor, Grade 21, positions, it was determined that the proper classification would be Program Manager I, Grade 23, in accordance with Section 7, Classification, of the Personnel Regulations. Appellant's priority consideration rights under Administrative Procedure 4-19 are for positions Grade 21 and below. Therefore, he did not have priority consideration rights for a Grade 23 position.

The County notes that in his appeal petition, the Appellant claims that the employee selected for the Program Manager I position had an "unfair advantage as he had been in the position on an acting basis receiving specialized training not available to [Appellant], for in excess of one (1) year." In fact, the selected candidate had been in the position of acting Shop Supervisor, Grade 21, not in the Grade 23 position at issue. In addition, the Appellant occupied the position of Shop Supervisor in the Department of Transportation in the Equipment Section from May, 1979 to December, 1981 and in the Heavy Equipment Section from September, 1987 to May, 1989. He, therefore, had access to the same training that the selected applicant may have had. The County believes that the Appellant was given fair consideration for the position of Program Manager I as were all of the candidates.

Finally, the County contends with respect to the examination and selection process, the interview (oral examination) panel was fair and impartial. Appellant was rated "Qualified" along with the other two applicants. He was subsequently invited to a selection interview with the Department of Transportation. Pursuant to the Personnel Regulations, Section 6-3, Selection Procedures, the appointing authority may select whomever he wishes from the highest rating category, subject to affirmative action objectives. Appellant was not selected for the position.

The Appellant, on the other hand, contends that:

> Human Resources has announced a job with duties historically relevant to a Shop Supervisor and is calling it a Program Manager. Appellant suggests that it is the first shot in trying to circumvent Appellant's rights.
>
> Appellant is the only applicant that has served in both positions and has been rated either exceeded or outstanding in performance of duties for the duration of tenure in either position.

For the Appellant to be rated qualified and having been the only applicant to have served in both positions is absolutely ludicrous. By classifying the position above Grade 21, the Personnel Director seeks to deny his priority consideration rights.

Had applicant been rated in a fair and accurate method, his rating would be no less than well qualified. It is amazing that when Appellant applied for the Equipment Manager position, he was rated well qualified and now when applying for a position four (4) grades lower but performing some of the same duties, he is rated only qualified. It is very apparent that the ratings were preordained, were not administered in good faith and without discrimination , and that the application and examination were not properly evaluated.

The Appellant cites Section 25-4 of the Personnel Regulations as pertinent to his appeal which states as follows:

A merit system employee who is terminated as a result of a Reduction-In-Force must be placed on a reemployment list for two years and given priority consideration for any position for which qualified subject to the provisions of Section 33-7(b) (4) of the Montgomery County Code. A new employee may not be hired for any vacant position as long as there is a qualified person for that position on the reemployment list.

The Appellant states that:

Personnel Regulations do not limit priority consideration to a specific grade. They say bluntly that a riffee "must (emphasis added) be placed on a reemployment list for two years and given priority consideration for any (emphasis added) position for which qualified."

He further states that:

Furthermore, Section 25-4 goes on to say - "A new employee may not be hired for any vacant position as long as there is a qualified person for that position on the reemployment list." The actions taken by Department of Transportation and supported by the Office of Human Resources is a flagrant violation of Personnel Regulations.

We note Administrative Procedure 4-19 issued in November, 1991 did not state that Section 25-4 of the Montgomery County Personnel Regulations is being changed from its plain language concerning eligibility for priority consideration for which a riffed employee is qualified. An Administrative Procedure cannot amend a personnel regulation to the point of delimiting an employee's right under the regulation. As a consequence, the Appellant did not receive priority consideration but applied for the position as an applicant.

FINDINGS OF FACT

The two year period during which the Appellant had priority consideration rights began on March 19, 1992 and ended on March 19, 1994. The County filled a position during that time with a person already on the rolls who is not a new employee contrary to Section 25-4 of the Personnel Regulations.

Even though Administrative Procedure 4-19, states that his priority consideration rights are limited to positions at Grade 21 and below. The Appellant is qualified for priority consideration under Section 25-4, Reinstatement, of the Section on Reduction-In-Force of the Personnel Regulations for any position for which he is qualified.

The Appellant was qualified for and did not receive priority consideration for the grade 23 position.

CONCLUSION

We agree with the Appellant that he has not received priority consideration as required under the regulations. As relief, the Appellant has requested appointment to the Program Manager I position, Announcement 0834401E, as well as legal fees and expenses. However, we see no evidence that Appellant was represented by Counsel. We order instead that the period for priority consideration for any position for which qualified be extended until March, 1996. The County is directed to Amend Administrative Procedure 4-19 and change its provisions to conform to the plain language of Section 25-4 of the Montgomery County Personnel Regulations.

RETIREMENT

Case No. 91-31

Civil Case No. 114463

This is a decision of the Merit System Protection Board (Board) in the above case after the matter was remanded to County Hearing Examiner from the Circuit Court for Montgomery County, on February 3, 1995, for reconsideration in light of the Court of Appeals decision of Montgomery County v. Paul A. Buckman, (Buchman II), 333 Md. 516, 636 A. 2nd 448 (1994). The issue on remand is whether the permanent disability of Appellant was partial or total.

In his earlier August 11, 1993 decision, after a July 29, 1993 hearing, the County Hearing Examiner previously recommended that, based an the Court of Special Appeals

decision in Montgomery County v. Paul A. Buckman, (Buckman I), 96 Md. App. 206, 624 A.2d 1274 (1993), which was subsequently reversed by the Court of Appeals in (Buckman II), the estate of the Appellant should be granted a total, service connected disability retirement plus reasonable attorney fees. In his recommendation on remand from the Circuit Court, dated June 2, 1995, based on the Court of Appeals decision in Buckman II, the Hearing Examiner found that the Appellant was entitled to a partial permanent service-connected disability retirement.

BACKGROUND

The Appellant (who died on December 29, 1991) served first as a paramedic and then a firefighter with Montgomery County for about 15 years, eventually holding the rank of Sergeant. On December 9, 1989, while carrying out his regular duties, he was assisting in carrying a 250 pound heart attack patient from a residence on a stretcher when his foot slipped on a snow covered concrete porch. As a result, the Appellant twisted his back while trying to keep his balance and avoid dropping the stretcher. The injury caused him to miss work for about a six-month period.

During this six-month period, the Appellant was examined several times by Dr. Blank, an orthopedic surgeon. Dr. Blank concluded that the Appellant was not fit for duty as a firefighter and needed to be assigned to an occupation without strenuous lifting, climbing or strenuous activities. The Appellant returned to light duty work until the first hearing on October 28, 1990 before the Prudential Hearing Examiner. On November 30, 1990, the County's Employee Medical Examiner, advised the Director of the Department of Fire and Rescue Services (Department), that the Appellant had a permanent medical condition that required significant accommodation and his return to work would be restricted to activities without repetitive bending, stooping, straining or lifting of weights greater than 20 pounds.

The Director testified that the Department did not have permanent light duty positions and that, if firefighters do not recuperate from an injury and cannot assume their full-time duties, as a matter of Department policy, they seek disability retirement. During 1991, the Appellant was seen by Dr. Blank on six occasions, his last examination being on December 23, 1991. Dr. Blank concluded that the Appellant's back condition resulted in a permanent and total disability from the performance of any duties as a firefighter.

The Board's decision of November 10, 1993 had been based on the Hearing Examiner's findings in light of the Court of Special Appeals decision in Buckman I. Buckman I held that Section 33-43(e) means that a worker who sustains a work-related injury is totally incapacitated if the incapacity prevents the employee from continuing his job or a position of comparable status. However, in Buckman II, the Court of Appeals held that if an employee is only partially incapacitated for duty, then the amount of disability retirement benefits that the County Council has deemed to be sufficient to satisfy the purposes of section 33-43(e) is a function of the percentage of the employee's permanent disability, but at least 25 percent of

final earnings. Section 33-43(h)(2). According to the court's interpretation in Buckman II, in his June 2, 1995 reconsideration, on remand from the Circuit Court, that the Hearing Examiner concluded that the Appellant's incapacity for duty was only partial within the meaning of Section 33-43(e)(1).

ANALYSIS AND DISCUSSION

In Buckman II, the Court of Appeals held that a differentiation must be made between a total or partial incapacity for duty under Section 33-43(e)(1). Prior to Buckman II, in accordance with Buckman I, a determination of incapacity for duty with respect to the employee's existing job classification also meant a total incapacity for duty. However, as applied to this case, Buckman II now requires an analysis of whether the Appellant's incapacity for duty amounted to an incapacity to perform any job for which he could reasonably qualify, given his background and market availability. The court did not establish any hard and fast rules to follow in making this determination, but permitted flexibility for the administrative agency in its analysis, which could take into account conditions in the labor market.

In his June 2, 1995 reconsidered recommendation, the Hearing Examiner found that the record contained a range of medical opinions about the nature of the Appellant's injury and the likelihood that he could return to work as a firefighter or in some other gainful employment, i.e., opinions of six (6) doctors. The Hearing Examiner concluded that these medical assessments indicated that the Appellant could perform sedentary or light duty work in some capacity, other than as a firefighter. He noted that several medical evaluations estimated that the Appellant's disability fall within a range of 5 to 16% for Workmen's Compensation purposes based on his duties as a firefighter, without taking into account his ability to do other work.

The Hearing Examiner also concluded that the current state of the record does contain information about the Appellant's ability to perform light duty or sedentary work. In fact, the Appellant did perform light duty assignments for three different offices of Montgomery County Government during a seven month period between June 1990 and February 1, 1991, which involved some management and administrative work. The Hearing Examiner believed that the Appellant's educational level (Associate degree in Fire Science, Montgomery College, 1982) rendered him eligible for consideration for some management level or administrative position with a fire service or fire prevention organization.

The Hearing Examiner concluded that, given the state of the record involving the Appellant's untimely death, it is not possible to draw any meaningful inferences about the employment market for a person of the Appellant's background or to engage in speculation about his employability within that market. However, the Hearing Examiner reasoned, a determination of the Appellant's partial or total incapacity for duty must be based on the existing evidence of record, however incomplete that record may be. Since the medical evidence here considered that the Appellant was able to perform light duty or sedentary work and, in fact, he performed light duty assignments for Montgomery County before his

retirement, the Hearing Examiner concluded that the evidence requires findings that the Appellant's incapacity for duty was not total, that he possessed potential for alternative work assignments, and that he had a partial incapacity for duty in the amount of 15%.

Based on the evidence of record, the Board agrees with the Hearing Examiner's above-stated conclusions in his reconsidered decision. Where the retiree is seeking to obtain a determination of total incapacity for duty, the retiree carries the burden of proof and persuasion on the relevant issues. There is no evidence in this case that the Appellant made any effort to seek alternative work either with Montgomery County or elsewhere, or that the state of the labor market would support a finding that a person of the Appellant's background would have unreasonable difficulty securing alternative employment. However, the record does indicate that the Appellant's medical condition would permit him to engage in light duty work and, indeed, he successfully performed such work for about seven months prior to his retirement.

CONCLUSION

Based on the Court of Appeals interpretation of Section 33-43(e)(1) in Buckman II, and the evidence of record, the Board agrees with the reconsidered recommendation of the Hearing Examiner on remand from the Circuit Court, and concludes that the estate of the Appellant is entitled to a partial, permanent service connected disability retirement benefit and denies the request for a total permanent service-connected disability retirement benefit and for attorney fees.

Case No. 92-11

Civil No. 115479

ISSUE

This case was remanded to the Board "for a determination by it as to whether or not the experience of March 16, 1989, while the Appellant was in the performance of his duties as a fire fighter aggravated his cardiac neurosis so as to qualify him for a service-connected disability retirement pursuant to Section 33-43 of the Montgomery County Code 1984, as amended."

BACKGROUND

The Appellant was a Master Fire Fighter for Montgomery County from 1972 until he stopped working on March 16, 1989. On that day, while fighting a fire, Appellant felt chest pains, was taken to the hospital and never returned to work again. In March 1990, the County filed an application for an administrative disability retirement for Appellant. In February 1991, the Plan Administrator for the Prudential Insurance Company notified the County that

Appellant was entitled to a non-service connected disability retirement benefit under Section 33-43(d) of the Montgomery County Code.

Pursuant to an appeal, a hearing was held before the Administrator's Hearing Examiner who granted Appellant a temporary non-service connected disability retirement benefit. On September 30, 1991, Appellant appealed the Examiner's determination to the Merit System Protection Board. The Board referred the matter to the Hearing Examiner, in the Office of Zoning and Administrative Hearings (OZA) for Montgomery County. After conducting a hearing, in his June 19, 1992 Report and Recommendation, this Examiner recommended that Appellant be granted a total service connected disability retirement benefit.

In its October 15, 1992 decision, the Board agreed that Appellant is totally disabled from performing his assigned duties but rejected the OZA Examiner's recommendation. Instead, the Board determined that Appellant was entitled only to a non-service connected disability retirement benefit.

Appellant appealed the Board's October 15, 1992 decision to the Circuit Court, Montgomery County. By Order of May 21, 1993, the Court remanded the case to the Board for a determination as to whether or not the Appellant's experience of March 16, 1989 in the performance of his duties as fire fighter aggravated his cardiac neurosis so as to qualify him for a service-connected disability.

The Board reviewed the evidence of record and concluded, in its December 16, 1993 decision, that the Appellant's March 16, 1989 experience in the performance of his fire fighter duties did not aggravate his cardiac neurosis "any more that any other event or other life activities," so as to qualify him for a service connected disability retirement benefit pursuant to Section 3343(e) of the Montgomery County Code 1984, as amended.

Upon consideration of Appellant's second petition for judicial review, on June 20, 1994, the Circuit Court again remanded the case to the Board "for the conduct of an evidentiary hearing for the Board to determine the issue referred to it by this Court's Order of Remand dated May 21, 1993, in Civil No. 98223." The Board conducted an evidentiary hearing on November 17, 1994 on the issue remanded to it by the Court. Based on the evidence submitted to the Board on the issue to be decided on remand, the Board established the factual findings and conclusions set forth below.

FINDINGS OF FACT

1. On April 16, 1979, after a treadmill test and medical examination, Dr. Blank concluded that there was no clinical suspicion of disease in Appellant, and the only significant coronary risk factor was his smoking which he had been advised to discontinue.

2. Although he had no prior history of chest pains, on February 29, 1988, Appellant claimed he awoke about 2:30 a.m. with chest pains. He arrived at work at 6:30 a.m. complaining of chest pains and was advised by his coworkers to go to the hospital. He was admitted to the hospital and examined by Dr. Blank. Dr. Blank concluded that Appellant's heart sounds were normal and there was no cardiomegaly. The report noted that Appellant was a heavy cigarette smoker, smoking more than two packs per day.

3. On March 24, 1989, Appellant was examined by Dr. Blank, a cardiologist. Dr. Blank concluded that Appellant's chest pain syndrome is noncardiovascular in origin but that he did have the beginnings of arteriosclerosis. As risk factor modifications, he advised Appellant to avoid smoking, pursue a low fat diet and discontinue caffeine intake. Dr. Blank advised that Appellant would be able to return to full time work.

4. Appellant testified that he returned to work thereafter, that he was concerned that something was not normal about his heart but, since he was cleared, he did not fear a heart attack.

5. Prior to March 16, 1989, Appellant testified that when he mowed the lawn or performed fire fighting duties, he did not experience chest pain and had no fear that overexertion might cause a heart attack.

6. On March 16, 1989, for the first time, Appellant was the lead fireman in charge of an entire second alarm fire of a high magnitude in an apartment building. After a few moments in the building, Appellant came out for air and, when he returned to the building, he started to get chest pains, a headache and felt dizzy. Other firemen helped him out of the building and took him to the hospital where he was admitted that same day. Appellant testified that he thought he was having a heart attack.

7. The hospital report, signed by Dr. Blank, diagnosed Appellant's condition as Cardiac Arrhythmia, but ruled out coronary heart disease. After Appellant was discharged from the hospital he never returned to work.

8. On May 8, 1989, Dr. Blank, Cardiologist, reported that Appellant did not have significant coronary heart disease and did not suffer a myocardial infarction (the usual type of "heart attack") on, March 16, 1989. He concluded that Appellant showed no objective evidence of congestive heart failure but, rather, that the diagnosis of cardiomyopathy, a common explanation for his electrocardiographic abnormality, appeared reasonable. Appellant described exertional symptoms, e.g. walking up inclines or mowing the lawn, which were consistent with impairment of the left ventricular function. The report noted that Appellant had been smoking from 1 1/2 - 2 packs of cigarettes per day. Dr. Blank believed that Appellant's cardiomyopathy precluded him from performing the full duties of fire fighter. Dr. Blank concluded, based on Appellant's symptoms, that he had a permanent partial disability of approximately 25-30%.

9. On February 13, 1990, Appellant was examined by Dr. Blank, PH.D. Psychologist. Dr. Blank's report indicated that Appellant's responses suggested moderate to severe depression and noted that Appellant smoked tobacco heavily. He diagnosed Appellant as anxious, depressed and in pain. Both emotional disorders resulted from injuries (prior disk surgery) and hearing condition. Dr. Blank concluded that Appellant was severely impaired both physically and psychologically and unable to work and that he was not a good candidate for psychotherapy.

10. On August 17, 1990, Appellant was next evaluated by Dr. Blank, a Cardiologist. He complained of chest pains while mowing the grass and his main symptom was breathlessness. Dr. Blank stated that the presence of left bundle branch block "is probably connected with organic cardiovascular disease." The report also noted that Appellant smoked about 1/2 packs of cigarettes per day despite numerous warnings to the contrary. Dr. Blank diagnosed Appellant's condition as likely to be cardiomyopathy with unknown risk of significant cardiac arrhythmia as well as left ventricular dysfunction and heart failure. In his opinion, these conditions precluded Appellant's ability to function as an active fire fighter but he could possibly participate in more sedentary employment. In his September 25, 1990 letter, Dr. Blank stated that Appellant's cardiomyopathy was not caused by his occupation as a fighter, but could have been aggravated by it.

11. On August 20, 1990, Appellant underwent a psychiatric evaluation by two doctors. Dr. Blank diagnosed Appellant's condition of chronic pain syndrome with moderately severe behavioral dysfunction as Cardiac Neurosis, a greater than normal fear of suffering a cardiac arrest or sustaining cardiac damage as a result of normal activity. Dr. Blank concluded that, as a result of Appellant's condition, including depression and anxiety, he is unable to perform the minimal qualifications in his job description, which include any kind of stressful or emergency situations that might generate anxiety and those which involve learning. They felt that these conditions were job related and that Appellant would not be able to return to being a fire fighter. Appellant was advised to avoid activities that would include exertion or stress likely to bring about an attack of angina. Appellant was further advised to consult a Cardiologist to determine further tests, explore Appellant's fears and explain that his condition is not likely in the near future to be terminal or progressive. Dr. Blank also felt that an appropriate antidepressant medication would be an important part of Appellant's rehabilitation. With appropriate treatment, Dr. Blank believed there could be some improvement in Appellant's Cardiac Neurosis.

12. On October 15, 1990, Appellant complained to Dr. Blank of constant, dull chest-wall pain with physical exertion and was depressed over his apparent deteriorating functional status. Dr. Blank concluded that Appellant had total impairment to the body as a whole of 57%, including his heart, cervical spine, lumbar spine, and right knee. Dr. Blank concluded that Appellant would not be able to perform his duties as a fire fighter presently or in the future.

13. On December 19, 1990, Dr. Blank prepared a psychophysiologic evaluation of Appellant, which included an interview, psychological testing, physical examination and examination of medical records. Dr. Blank found Appellant to be anxious and depressed, with a fixed fear of

a cardiac event which prevented him from returning to work as a fire fighter. Dr. Blank believed that Appellant's primary disability was not the result of an injury on the job, but that his condition probably had been aggravated by the strenuous demands of a master fire fighter position. Dr. Blank stated that Appellant's condition "did begin after the date of the fire on July 3, 1982." According to Dr. Blank, Appellant was not prevented from returning to the work of a master fire fighter because of physical pain but rather, because of his persistent belief that he will have a cardiac event, which may make him less efficient in his job.

14. In an April 30, 1991 letter, Dr. Blank stated that his follow-up examination of Appellant showed him still having problems with congested heart failure, which totally incapacitated him to perform his job related duties. Dr. Blank stated that "Since his symptoms increased while he was working, I am led to believe that his job aggravated his condition to the point that he could not perform what was expected of him." Therefore, Dr. Blank recommended that Appellant refrain from working permanently and obtain disability retirement.

15. On February 14, 1992, Dr. Blank repeated his assessment that Appellant was not a candidate for his job as a fire fighter. In addition to extensive musculoskeletal disorders and the development of a severe reactive depression, stress disorder and mental anguish from long term physical and functional disability, Dr. Blank concluded that Appellant was not capable of any work at all. Dr. Blank opined that Appellant would be a poor candidate for vocational rehabilitation but recommended that he receive continual psychiatric care in the future.

16. The class specification for the position of Master Firefighter/Rescuer requires the incumbent to have the ability to engage in strenuous physical effort for prolonged periods as required, and "have the ability to cope with stressful situations."

17. In his October 31, 1994 letter, Dr. Blank, Licensed Psychologist stated that he continued to believe that Appellant's Cardiac Neurosis are tied to the duties and experiences as a fire fighter. Dr. Blank concludes that "the specific events of March 16, 1989, are the only apparent direct causes of his aggravated fears of a heart attack." Dr. Blank stated that, when he examined Appellant, he was of the view that his dysthymia and anxiety were the result of the chest pain and related distress that began on February 29, 1988 and that "his fire fighting experience of March 16, 1989 aggravated his existing emotional impairment."

18. Appellant testified that he had no emotional problems, that it was not necessary for him to be under the care of a psychiatrist, and that he was not taking any anti-depressant medication. He also testified that he feared that overexertion,such as fighting fires, might cause him to have a heart attack. However, although he was aware that smoking was bad for his health, he had no fear that smoking might cause a heart attack.

DISCUSSION AND ANALYSIS

The Board concluded that the above medical evidence shows that Appellant is totally and permanently disabled from continuing to work as a Master Firefighter. However, the preponderance of the evidence demonstrates that Appellant's duties as a fire fighter were not the proximate cause of either his heart condition or his Cardiac Neurosis. The issue presented on remand is whether Appellant's experience on March 16, 1989 in the performance of his duties as a fire fighter aggravated his Cardiac Neurosis.

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. 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 there are probable facts to show that the condition of the employee could have been caused by the job-related activity and that no other cause has intervened between the disablement and the job-related activity. Yellow Cab Co. v. Bisasky, 11 Md. App. 491, 275 A.2d 193 (1971).

In determining the scope of the term "proximate cause", the Board considered the interpretation in analogous tort law contained in Prosser on Torts, Chapter 7, "Proximate Cause". Causation is a matter of what in fact has occurred. The term embraces all things which have so far contributed to the result that without them it would not have occurred. Specific facts are a cause of the result if they were a material element and a substantial factor in bringing it about.

In this case, Appellant had the burden of proof to present evidence which affords a reasonable basis for the conclusion that it is more likely than not that Appellant's March 16, 1989 experience was a substantial factor in aggravating his Cardiac Neurosis condition. A mere possibility of such causation is not enough. Also, the result must not be due to an "intervening" cause, which refers to an event later in time.

The medical evidence and the testimony of Appellant show, by a preponderance of the evidence, that there is a reasonable basis to conclude that it is more likely than not that Appellant's March 16, 1989 experience in performing his duties as a fire fighter was a substantial factor in aggravating Appellant's Cardiac Neurosis condition. While his Cardiac Neurosis evidently started in February 1988 when he first experienced and was hospitalized for chest pains, he continued to work thereafter until his fire fighting experience of March 16, 1989, after which he was no longer able to perform his duties as a fire fighter. The fact that Appellant experienced physical symptoms of chest pains, headache and dizziness during his performance of fire fighting duties on March 16, 1989 lends credence to the resulting aggravation of his Cardiac Neurosis.

Given Appellant's heart condition (cardiomyopathy), this conclusion finds support in a preponderance of the medical evidence which attributes Appellant's genuine fears of having a heart attack directly to the strenuous and stressful activities involved in his job as a fire fighter. Further, the medical evidence shows that Appellant's physical and emotional condition began to progressively deteriorate after his March 16, 1989 experience. Dr. Blank, a licensed psychologist, concluded that Appellant's March 16, 1989 fire fighting experience had aggravated his existing emotional impairment.

The Board's determination is not affected by the fact that Appellant may have also experienced chest pains while engaged in other life pursuits, such as mowing the grass, which Appellant could stop when he feels too much exertion. Such activities do not constitute an "intervening cause" (meaning a later event) since it is reasonable to conclude that Appellant's March 16, 1989 fire fighting experience more likely than not was a substantial first cause in aggravating Appellant's Cardiac Neurosis.

The Board did not believe that Appellant's failure to stop smoking affected his Cardiac Neurosis (fear of a heart attack). Nor was it material that Appellant denied that he had an emotional condition, since denials are a matter of common knowledge in such type of cases. The Board did not believe that Appellant's credibility was adversely affected by that denial.

CONCLUSION

Based on the preponderance of all the evidence and testimony of record pursuant to this remand, the Board reversed its prior decisions. The Board now determines that Appellant's fire fighting experience of March 16, 1989 aggravated his Cardiac Neurosis condition so as to entitle him to a service connected disability retirement benefit pursuant to Section 33-43(e) of the Montgomery County Code 1984, as amended, retroactive to the date of his retirement.

Case No. 93-18

Civil Case No. 110497

BACKGROUND

On July 24, 1991, the Director of the Department of Fire and Rescue Services (DFRS) requested a disability retirement on behalf of the Appellant under Sec. 33-43(j), Montgomery County Code (1984), as the Appellant was determined to be incapacitated with respect to performing his duties and responsibilities as a Master Firefighter/Rescuer. On December 9, 1991, the Montgomery County Office of Personnel notified the Appellant that the Administrator of the Disability Retirement Benefit Program, the Prudential Insurance Company of America, granted the Appellant a temporary, non-service connected disability retirement effective December 7, 1991. The Appellant disagreed with the Administrator's determination

and filed an appeal under the provisions of SS 33-43(k) in which he contended that he is eligible for a permanent, service-connected disability retirement. The Administrator appointed a Hearing Examiner to evaluate the claim and a hearing was subsequently convened on August 27, 1992. The Hearing Examiner's Opinion, issued October 27, 1992, determined that the Appellant is entitled to a temporary, non-service connected disability retirement and he should be reevaluated after one year. This decision was transmitted to the Appellant on November 24, 1992, and he was provided with notice of his right to appeal to the Merit System Protection Board under the provisions of SS 33-43(k).

The Appellant filed an appeal with the Merit System Protection Board on December 16, 1992. The Board considered the appeal on the pleadings and affirmed the Administrator's decision by Order dated July 22, 1993. The Appellant appealed the Board's Order to the Circuit Court for Montgomery County on August 19, 1993. On March 7, 1994, the Circuit Court ordered a remand to the Board for a de novo hearing to be held on all issues. The Board referred the matter to the Office of Zoning and Administrative Hearings (OAZ) on April 24, 1994, for purposes of conducting a de novo hearing, formulating an administrative record, and providing the Board with a Report and Recommendation based on the evidence of record. Following a prehearing conference and notice, a hearing was convened on September 16, 1994. The record closed at the conclusion of the hearing.

ANALYSIS AND FINDINGS

The Board's Order of Referral provided for review by counsels and written briefs or memoranda to affirm, reject or modify the Examiner's report and recommendation. Each parties filed a post-hearing memorandum.

The County argued as follows:

> The three primary points of contention at the hearing were:
>
> (A) whether the Appellant was "willfully negligent" within the meaning of Section 33-43(d)(2) of the Montgomery County Code by failing to control his weight;
>
> (B) whether the Appellant is entitled to a permanent or temporary disability; and
>
> (C) whether the Appellant is entitled to a service-connected or non-service-connected disability.
>
> The Office of Zoning and Appeals Examiner found that the Appellant was not willfully negligent and, therefore, that the Appellant is not precluded from receiving retirement benefits. He also found that the Appellant is permanently disabled as a result of his osteoarthritis, but that his disability is not connected to his County service. The County will address each of these issues

in turn.

(A) Sections 33-43 (d)(2) and (e)(1) provide that a County employee may be retired on a service or non-service-connected disability if, inter alia, the employee's incapacity is not caused by that employee's "willful negligence." At the hearing in the instant matter, the County argued that the Appellant was willfully negligent by failing to control and, ultimately, to reduce his weight. There was substantial evidence presented that the Appellant had been obese prior to the first manifestation of his alleged disability. Two doctors described the Appellant as "obese." At the hearing, the County presented an excerpt from the Cecil Textbook of Medicine. The excerpt states, in pertinent part, that "abnormal stresses", like obesity, can augment or accelerate the "wear" caused by osteoarthritis. The Appellant was instructed by his physician to lose weight, but he did so only temporarily. In view of the foregoing, the County contends that the Appellant was willfully negligent and should be denied disability benefits.

(B) In support of its argument that the Appellant is temporarily disabled, the County relied upon the independent medical examination conducted by Dr. Blank. Dr. Blank found that the Appellant suffered from mild degenerative arthritis and that his arthritis was "in no way in proportion" to his symptoms. Dr. Blank stated that the Appellant was not permanently disabled and that his condition could be ameliorated with two-four months of intensive physical therapy. Dr. Blank's findings were objective and in conformity with the other medical evidence submitted and provide ample grounds to support a determination that the Appellant is temporarily disabled.

(C) The County agrees with the OZA Examiner's finding that the Appellant's disability, and any aggravation thereof, is non-service-connected. The Appellant's own physician Dr. Blank, in his report dated July 24, 1991, concedes that the Appellant's disability was not caused by the performance of his fire fighting duties. Moreover, the Appellant admitted that his condition is aggravated by daily activities that are unrelated to the duties performed by a fire fighter. As stated by the OZA Examiner, the evidence does not "remotely suggest" the possibility that the Appellant is incapacitated for duty as the natural and proximate result of a condition aggravated in the performance of his job. The OZA Examiner's ruling fully comports with the language of the governing statue.

On the other hand, the Appellant argued as follows:

At the hearings, the Appellant testified that he suffered from a condition known as osteoarthritis. He further testified that he began having problems in February of 1991 and that his neck was bothering him, and that his knees and

legs were bothering him. He testified that he could not fulfill his duties as a Master Firefighter and that the performance of those duties and responsibilities had an adverse affect upon his condition. He clearly testified that "Well, it was an aggravation of the osteoarthritis that I had that kept me from doing my duties." Specifically, the Appellant testified that by being on concrete floors, and up and down ladders, and in and out of apparatus, and all other types of activity just aggravated his condition and he could not perform his duties. He further testified that his pain and discomfort would increase as a result of the demands of his job.

The Appellant submits that the Hearing Examiner has incorrectly found that the aggravation of his condition must be the natural and proximate cause of the total incapacity if the Appellant is to prevail. The language of the statute does not impose that requirement upon an applicant for a Service-Connected Disability Retirement. There are three events which trigger entitlement to a disability retirement: (1) an accident occurring; (2) an occupational disease; or (3) or condition aggravated. The term "aggravated" is not the object of the sentence utilized in Section 33-43(e)(1). The object or event triggering eligibility for retirement is a condition. That condition must be aggravated while in the actual performance of duty. Had the Montgomery County Council intended an aggravation to be required as the cause of the incapacity the language would have been "aggravation of a condition." However, the language in the statute is "condition aggravated". The Appellant's disability results from his osteoarthritis which was aggravated in the actual performance of duty. That aggravation was to such an extent that he was prevented from performing his duties and responsibilities as a Master Firefighter. That is all that is required under Section 33-43(e). A fair reading of the statute does not require that an applicant show that the aggravation of a condition was the natural and proximate cause of the total incapacity.

Assuming, without conceding, that the interpretation of the statute made by the Hearing Examiner is correct, the facts in this case show that the aggravation of the Appellant's condition was indeed the natural and proximate cause of his total incapacity. The Appellant has repeatedly testified that the performance of his duties and responsibilities, including being on concrete floors, climbing up and down ladders and being in and out of apparatus, aggravated his condition to such an extent that he could not perform his duties as a Master Firefighter. His testimony was corroborated by Captain in the Department as a fact witness and supported by the medical opinions of Dr. Blank and Dr. Blank. The Hearing Examiner noted that the code provision requires an aggravation which is so significant that it has a causal effect on the totality and permanence of the incapacity. Such is the case here. In that regard, the County has not produced testimony from any witness which disputes or diminishes the evidence advanced by the Appellant.

In reaching his determination that Appellant was not entitled to a Service-Connected Disability Retirement, the Hearing Examiner misinterpreted the requirements of Section 43-33(e). Assuming that he did not misinterpret those provisions, the evidence in this case indicates that the Appellant had met his burden of showing that the aggravation of his osteoarthritis caused his incapacity. Accordingly, the Board should award the Appellant a Service Connected Disability Retirement.

In his report, the Hearing Examiner correctly determined that the Appellant suffered a permanent, rather than a temporary disability. In that regard, the medical evidence presented by Dr. Blank and Dr. Blank are entitled to great weight. Additionally, since osteoarthritis is a degenerative condition, it is incorrect to determine that it is not permanent in nature.

For all of the above reasons, the Appellant submits that he has met the burdens imposed upon him in connection with showing his entitlement to a Permanent Service-Connected Disability Retirement. The Board is respectfully requested to review the transcript of the two hearings conducted in this case, review the exhibits of record and make a determination affording the Appellant a Permanent Service-Connected Disability Retirement. In that connection the Appellant seeks such benefits, together with back retirement payments and an award of reasonable attorney's fees. He also requests oral argument before the Board.

FINDINGS

The Appellant is eligible for a permanent, non-service connected disability retirement under SS 33-43(d). The County Attorney in argument conceded the likelihood that the Appellant suffers a permanent disability. The preponderance of evidence supports a determination that the Appellant's disability is permanent.

An issue of obesity was introduced by the County in its contention that the Appellant was willfully negligent and therefore disqualified from any consideration for a service connected disability. However, there is no evidence that the Appellant's weight was considered a significant cause for his medical condition and no one recommended to him that weight loss was critical to his recovery. The Appellant was therefore not given notice of any responsibility for weight loss and it would be speculative to conclude that weight loss would improve his condition. These facts did not support a finding of willful negligence and the Board's Examiner concluded that the Appellant's condition, osteoarthritis, was the underlying cause of his total incapacity based on uncontradicted medical evidence. The total incapacity was not caused by whatever aggravation the Appellant's job may have produced. This aggravation must be the natural and proximate cause of the total incapacity if the Appellant is to prevail and the evidence does not remotely suggest this possibility. It is clear that the Code provision requires

an aggravation which is so significant that it has a causal effect on the totality and permanence of the incapacity.

It is also clear that the objectives of the service connected disability provision are designed to provide retirement benefits for those employees who suffer a disability resulting from some causal event in the workplace. Under the Appellant's theory, an unrelated, non-causal aggravation of minimum degree can substitute for a causal event to trigger benefits for a service connected disability. Such an interpretation seems to distort the purpose of the law and is not consistent with its plain language. See, Montgomery County v. Buckman, 333 Md. 516, 636 A.2d 448 (1994). The Board does not find the Appellant willfully negligent.

CONCLUSION

The Board found the Appellant by a preponderance of credible evidence met the criteria for a Non-Service-Connected Disability Retirement Benefit.

Case No. 93-18

Continued

This is a final decision on the hearing record in the above referenced case following oral argument on March 7, 1995. Due to its oversight in failing to grant your request for oral argument, the Board vacated its January 19, 1995 decision and reviewed and discussed the Appeal again after hearing the oral arguments of Counsel for the Appellant and Counsel for the County.

BACKGROUND

On July 24, 1991, the Director of the Department of Fire and Rescue Services (DFRS) requested a disability retirement for Appellant under Section 33-43(j) as he was determined to be incapacitated to perform his duties and responsibilities as a Master Firefighter/Rescuer. The Administrator of the Disability Retirement Benefit Program, the Prudential Insurance Company of America, granted Appellant a temporary, non-service connected disability retirement, effective December 7, 1991.

Appellant appealed the Administrator's determination, contending the he is eligible for a permanent, service-connected disability retirement. A Hearing Examiner appointed by the Administrator issued an opinion on October 27, 1992 determining that Appellant is entitled to a temporary, non-service connected disability retirement and that he should be reevaluated after one year. Appellant appealed this decision on December 16, 1992. The Board considered the appeal on the pleadings and affirmed the Administrator's decision on July 22, 1993.

Appellant appealed the Board's Order to the Circuit Court for Montgomery County on August 19, 1993. On March 7, 1994, the Circuit Court ordered the case remanded to the Board for a de novo hearing on all issues. The Board referred the matter to the Office of Zoning and Administrative Hearings on April 24, 1994 for the purposes of conducting a de novo hearing formulating an administrative record, and providing the Board with a Report and Recommendation based on the evidence of record. A hearing was convened on September 16, 1994 and the record was closed at the conclusion of the hearing. Pursuant to the Board's Order of Referral, both Counsels were afforded the opportunity and did file post-hearing briefs.

Based on three issues in contention, the County Hearing Examiner, found that: (a) Appellant was not willfully negligent and, therefore, was not precluded from receiving retirement benefits; (b) Appellant is permanently disabled as a result of his osteoarthritis; (c) Appellant's disability is not connected to his County service; and Appellant's condition made him totally and permanently incapacitated for duty.

The Hearing Examiner concluded that the determinative issue on the Appellant's eligibility for a service connected disability retirement is purely a question of law and turns on whether or not the Appellant must show a link between his total incapacity and the aggravation of his condition in the work environment. The controlling provisions of law, as relevant herein, are found in the Montgomery County Code, Section 33-43(e), requiring an affirmative finding that:

> (1) The member is totally incapacitated for duty or partially and permanently incapacitated for duty as the natural and proximate result of .... condition aggravated while in the actual performance of duty; ... and the incapacity is likely to be permanent... (emphasis supplied)

The Hearing Examiner concluded that Appellant's total incapacity "was not caused by whatever aggravation the Appellant's job may have produced. This aggravation must be the natural and proximate cause of the total incapacity if the Appellant is to prevail and the evidence does not remotely suggest this possibility. It is clear that the Code provision requires and aggravation which is so significant that it has a causal effect on the totality and permanence of the incapacity. (emphasis supplied) The Hearing Examiner concluded that Appellant is not entitled to the relief sought because his disability is not service connected.

Although the Appellant testified that his condition was aggravated by performing duties which require climbing ladders, getting in and out of fire fighting apparatus and standing on concrete floors, he admitted that his condition was also aggravated by daily activities unrelated to his duties performed as a firefighter.

No examining physician concluded that Appellant's performance of his duties so aggravated his osteoarthritic condition as to be the cause of his disability. Dr. Blank expressed his opinion that the physical activity of Appellant's employment undoubtedly aggravated his

underlying arthritic condition. Dr. Blank was even less definitive in noting that it is possible that the physical requirements of a firefighter did aggravate Appellant's condition.

The treating physicians identify osteoarthritis as the underlying cause of the Appellant's disability. Insufficient evidence was presented to conclude that it is more likely than not that the duties of Appellant's position were a substantial factor in aggravating his osteoarthritic condition to the point of his permanent incapacity for duty. Appellant's condition was also aggravated by daily activities that were unrelated to his duties performed as a firefighter. Prosser on Torts, Ch. 7, Proximate Cause, p. 237, sets forth the premise that an act or an omission is not regarded as a cause of an event if the particular event would have occurred without it.

Section 33-43(e) of the Montgomery County Code provides retirement benefits for employees who suffer a disability resulting from some causal event in the workplace. Under the Appellant's interpretation of this Section, an unrelated, non-causal aggravation of a minimum degree can substitute for a causal event to trigger benefits for a service connected disability. The Board felt that this interpretation distorts the purpose and intent of Section 33-43.

CONCLUSION

Since a preponderance of the evidence did not support Appellant's contention that the duties of his employment were a substantial factor in causing the aggravation of his osteoarthritis which resulted in his permanent incapacity to perform his duties and responsibilities as a Master Firefighter/Rescuer, the Board affirmed the Administrator's determination that the Appellant was entitled to a non-service connected disability retirement as modified by the County Hearing Examiner's finding that the disability is permanent rather than temporary.

Case No. 94-07

BACKGROUND

The Appellant was employed by Montgomery County, Maryland for 22 years, most recently as a Master Firefighter/Rescuer performing the kind of duties generally associated firefighting.

While responding to a hazardous materials leak at a Coca Cola plant on December 7, 1990, Appellant injured himself in the process of crawling on his hands and knees in search of a valve which was leaking ammonia. In the course of twisting to look up at the valve, he felt a

sharp pain between his shoulder blades. He notified his supervisors, completed an incident report and, when the pain failed to subside, Appellant's daughter was called to pick him up to take him to see Dr. Blank. Following x-rays and a physical examination, Appellant was diagnosed as sustaining a sprain and strain injury to the Rhomboid muscles on his right side, treated through anti-inflammatory and muscle relaxant medication and given a week off from work to allow the affected muscles to heal. Appellant testified that he never had a problem with his neck before the injury sustained on December 7th.

Upon returning to work, Appellant contended that he continued to experience neck pain whenever he exerted himself in performing his job duties but did not report these symptoms to his doctors or supervisors.

On June 11, 1991, Appellant underwent an annual physical during which he completed an interval medical history form on which he did not report any neck pain.

On January 4, 1992, Appellant awoke with a stiff neck while he was on a ski vacation. Although he was able to ski that evening, the pain got progressively worse, radiating into both shoulders and arms, to the point where he was unable to sleep at night. He sought medical treatment which was rendered on January 18, 1992 by Dr. Blank, an associate of Dr. Blank who administered treatment for his on-the-job injury on December 7, 1990. Following MRI and other testing, Appellant was diagnosed as suffering from cervical degenerative disc disease and, on March 11, 1992, Dr. Blank performed a successful anterior cervical dissectomy and fusion at C4-5 and C5-6, with iliac bone graft. Subsequent x-rays revealed that the graft at C5-6 failed to heal producing a pseudarthrosis which necessitated Appellant's occasional use of anti-inflammatory and pain killing medication. Appellant was released from Dr. Blank's care in January, 1993 and has not worked since January 15, 1992.

At the County's request, Appellant was examined on October 29, 1992 by an orthopedist, Dr. Blank, who concluded that Appellant's underlying condition did not result from any acute episode but rather was caused by the natural degenerative progression of his degenerative disc disease.

On December 21, 1992, Appellant applied for a service connected disability retirement.

At the County's request, on January 25, 1993, Appellant was examined by orthopedic surgeon Dr. Blank who essentially concurred with Dr. Blank's findings in October 1992. Dr. Blank found Appellant incapacitated for further performance of duty as a firefighter and, from his report, ... "I do not feel that the Appellant's condition is a result of an accident, but due to a progressive degenerative condition. This condition was pre-existing and is not related to his occupation."

By letter dated March 26, 1993, Appellant was notified that the County's Disability Retirement Administrator, The Prudential Insurance Company of America, awarded him a

permanent non-service-connected disability retirement effective March 25, 1993. Appellant filed a timely appeal of this award.

On May 29, 1993, Dr. Blank responded to an inquiry from Appellant's attorney and reported in pertinent part... "There was no specific injury that produced this condition. I suppose it is possible to argue that the strenuous demands of this occupation, including the carrying of heavy equipment, aggravated a natural degenerative process."

In responding to a subsequent inquiry from Appellant's attorney, on October 8, 1993, Dr. Blank reported - "The Appellant is clearly incapacitated for the normal activities of his job as a firefighter. I do not feel that the incident of December 7, 1990, was significant in itself with respect to the development of his condition, but it is possible that the cumulative effects of the strenuous nature of his job may have contributed to his disc disease, but there is no way of quantitating that condition."

On October 14, 1993, Appellant's appeal of Prudential's March 26, 1993 award of a non-service-connected disability retirement was heard by a Hearing Examiner appointed by Prudential. At this Hearing, the parties stipulated that the only issue for resolution was whether Appellant's incapacity was service-connected. On October 25, 1993, the Examiner issued his written finding that Appellant was not entitled to a service-connected disability retirement under Section 33-43(d) of the Montgomery County Code (1984), as amended. On December 9, 1993, Prudential notified Appellant of its concurrence with the Hearing Examiner's finding.

On January 6, 1994, Appellant appealed the Examiner's finding and Prudential's concurrence with that finding to the Merit System Protection Board.

Following submission of briefs by both parties, the Board referred this appeal to the Office of Zoning and Administrative Hearings for the 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 and notice, a Hearing was convened on September 29, 1994 before the County's Hearing Examiner. On December 6, 1994, the Examiner recommenced to the Board that Appellant's appeal for a service-connected disability retirement be denied.

The Appellant and the County responded to the Examiner's recommendation with initial and rebuttal briefs filed with the Merit System Protection Board. Appellant's request that the Board conduct oral arguments on his case was granted and oral arguments were heard by the Board on March 7, 1995.

ISSUES CONSIDERED

1. Whether the Appellant's disability is service-connected?

Whether the procedural steps followed in considering Appellant's request for a service-connected disability retirement benefits denied Appellant's rights to due process?

FINDINGS OF FACT AND CONCLUSIONS

Section 33-43(e) of the Montgomery County Code sets forth the criteria upon which a member may obtain a Service-Connected Disability Retirement. That Section provides in pertinent part as follows:

> "(1) The member is totally incapacitated for duty or partially and permanently incapacitated for duty as the natural and proximate result of an accident occurring, or an occupational disease incurred or condition aggravated while in the actual performance of duty; that the incapacity is not due to wilful negligence, and the incapacity is likely to be permanent ....
>
> (2) The member is unable to perform the duties of the occupational classification to which assigned at the time disability occurred or a position of comparable status within the same department, if qualified."

Issue #1 focuses on whether Appellant's disability meets the requirements for a Service Connected Disability Retirement under the requirements of Section 33-43(e) as set forth above. Both parties agreed in oral argument and in supporting briefs that Appellant's claim for service-connected disability retirement benefits rests entirely on the interpretation of subsection (1) of Section 33-43(e) of the Montgomery County Code, specifically the intent of the words "condition aggravated." Is Appellant's total and permanent incapacity for duty a natural and proximate result of his cervical degenerative disc disease being aggravated by the actual performance of his work duties?

All of the doctors who examined and treated the Appellant agree that there is no single specific injury which caused Appellant's degenerative disc disease.

Most favorable to Appellant's contention that his work duties aggravated his degenerative disc disease and thereby totally and permanently incapacitated him for duty was Dr. Blank's May 29, 1993 response to Appellant's attorney which stated, in pertinent part, ... "I suppose it is possible to argue that the strenuous demands of this occupation aggravated a natural degenerative process," and his subsequent October 8, 1993 response to another inquiry by Appellant's attorney which stated, in pertinent part, ... "it is possible that the cumulative effects of the strenuous nature of his job may have contributed to his disc disease, but there is no way of quantitating the contribution."

The Board interprets the statutory requirement that the "condition aggravated" be a natural and proximate cause of the Appellant's total and permanent incapacity for duty. We believe this interpretation and application are consistent with the alternate requirements that either a job-related accident or occupational disease must be established by a preponderance of the medical evidence as the cause of total and permanent incapacity for duty necessary to sustain a claim for service-connected disability retirement benefits.

A supposition of "possibility," lacking any medical quantification or means for such relative to the contribution of Appellant's duties in aggravating his physical condition, does not constitute a preponderance of the medical evidence in this case and is not sufficient to support Appellant's contention that his job-related injury or duties were such as to cause or contribute to his degenerative disc disease to the extent that they resulted in his permanent incapacity for duty.

Issue #2 is premised on the Appellant's assertion that the procedural steps followed in considering his request for a service-connected disability retirement denied him his due process rights through a procedure that provides for a hearing before a non-governmental agency which does not have the authority to subpoena the attendance of witnesses, compel the production of documents and does not guarantee the opportunity for a new hearing before a governmental agency possessing the authority sought and considered by the Appellant as necessary to his case.

The Board believes that a protected property interest must exist before a party can claim a deprivation of that interest. In this Appeal, the Appellant does not appear to have a property interest in service-connected disability retirement benefits until those benefits are awarded.

DECISION

The Board was not persuaded by a preponderance of the evidence presented that the Appellant met the requirements for a permanent service connected disability retirement and concurs with the granting of a permanent non-service-connected disability retirement as recommended on December 6, 1994 by the County's Hearing Examiner.

Case No. 94-08

BACKGROUND AND DISCUSSION

The Appellant was employed by the Department of Fire and Rescue Services, Montgomery County, having achieved the rank of a Firefighter/Rescuer III at the time of his temporary service connected disability retirement. Since approximately 1984, the Appellant had been injured on the job approximately four times. During this period, he had been under the care of his personal physician, Dr. Blank, mostly for injuries to his back. On August 22, 1992, while on the job, he slipped and fell on his back. Since that time, the Appellant has not

gone back to his regular full-duty as a firefighter but did do some light duty work. The Appellant's regular duties as a fireman include putting out fires, rescuing, using ladders and hoses, and driving an ambulance.

The Appellant described another incident that occurred on October 26, 1993 when he was at the training academy and felt strain while putting on an air tank. The Hearing Examiner noted that two doctors suggested that the Appellant's problems may be motivational or due to lack of physical conditioning rather than primarily physical. However, without deciding that he is permanently incapacitated from the performance of his firefighting duties, the Hearing Examiner concluded that the Appellant is temporarily disabled and that this temporary disability is service connected because of the fall in August 1992 and the strain at the academy in October 1993.

The Hearing Examiner noted that he did not suggest that the Appellant had not had actual sprains, strains or bruises, or problems with his lower back. In his October 1992 report, Dr. Blank advised the Appellant to stay off work because his back pain was not improving. Therefore, the Hearing Examiner was justified in giving the Appellant the benefit of any doubt by granting him only temporary service connected disability for up to one year.

Additionally, the Hearing Examiner directed that, during the temporary disability, the Appellant is to participate in rehabilitation regimens or programs as recommended by the County physician and his regular doctor. Evaluation should be made before the end of the temporary disability period to determine if the Appellant is permanently incapacitated or if he is able to return to duty. If it is determined that he is permanently incapacitated, it should be supported by satisfactory evidence.

CONCLUSION

The Hearing Examiner reviewed the medical evidence and heard the Appellant's testimony. Based on the extenuating circumstances presented, the Hearing Examiner was not arbitrary and capricious in concluding that there was sufficient evidence to show that the Appellant was temporarily disabled from the regular performance of firefighting duties due to injuries sustained during his work. By granting the Appellant only a one-year temporary disability retirement, the Hearing Examiner provided a short period during which to determine and evaluate further whether his disability is permanent.

Since the end of the one-year period will be in December 1994, the Appellant's medical condition will be soon subject to reevaluation. At that time, the County should also be allowed to conduct an independent medical examination of the Appellant's condition. The appeal by Montgomery County was denied.

The Appellant is seeking a total permanent disability retirement benefit. He also claims that Prudential's Hearing Examiner erred in not recusing himself because certain matters raised an issue as to his impartiality.

ISSUES

1. Whether the decision granting Appellant a temporary, partial disability retirement in supported by a preponderance of the evidence.

2. Whether the Hearing Examiner erred in not recusing himself.

BACKGROUND

Appellant, a 27 year old truck driver/warehouse worker employed by the Department of Liquor Control, he was injured in an accident while at work. As he got out of his truck, he slipped on the icy step below the door and fell off onto the cement driveway, landing on his left knee. He said he popped his knee out of joint. After being treated at a hospital emergency room, he was referred to Dr. Blank, who performed arthroscopic surgery an his left knee on January 3, 1991. He was released by his doctor to return to work on February 25, 1991.

Following the advice of Dr. Blank, the County Medical Examiner, Appellant saw Dr. Blank, who suggested an MRI and told Appellant to stay off work. He also saw Dr. Blank, an orthopedic surgeon, who examined him on two occasions. In March 1991, Dr. Blank reported that Appellant was not incapacitated and could perform light duty work. In October 1991, Dr. Blank reported that, at the time of arthroscopy a month after the injury, arthritic changes were noted in the knee, not likely due to the injury. Dr. Blank recognized that Appellant's obesity could be a contributing factor to his knee problem and recommended another arthroscopic examination.

During the rest of 1991 Appellant saw Dr. Blank and, in January 1992, with the approval of Dr. Blank, he returned to light duty. Appellant returned to full duty an February 14, 1992. He remained on full duty for eight months until October 13, 1992, when Dr. Blank took him off duty. By October 13, 1992, Appellant had complained that his knee was swollen, painful and was clicking.

After requesting an alternative job, Appellant was assigned as a forklift operator in June 1993. On June 7, 1993, Appellant was required to load beer kegs on to pallets and use the lift to put the pallets on trucks. He claims he twisted his left knee by doing so and was off work again for over a month.

Appellant returned to light duty on July 23, 1993, as a truck driver with two helpers on the truck until he was terminated on November 8, 1993. The department advised Appellant that, because he could no longer perform the strenuous manual duties of a driver/warehouse worker, and because his department was unable reasonably to accommodate his limitations, he was terminated effective December 3, 1993.

The hearing examiner noted that Appellant's work history since the accident on December 3, 1990, shows periods of time off from work, some light duty work, and eight months of full time duty from February 14, 1992, to October 13, 1992. The examiner pointed out that Appellant is able to sit and drive for long hours, get in and out of a truck, and carry money. Appellant complained that he could not do his assigned work because his knee pains him when he stoops or bends and pops. As of the time of the hearing, Appellant weighed 280 pounds. Several physicians who examined Appellant, including Drs. Blank and Blank, believed that Appellant's obesity placed his left knee in jeopardy.

Although Appellant testified that he regularly performed the exercises prescribed by his doctor, the examiner did not believe that Appellant had performed the exercises prescribed by his physician. Appellant stated that he did not know prior to the hearing of a recommendation for a second surgery. However, the examiner found that Appellant knew of the recommendations for additional surgery which could solve much or all of his problem. Dr. Blank also stated that Appellant's symptoms could be relieved with anti-inflammatory medications and avoidance of certain body positions.

ANALYSIS AND DISCUSSION

The Hearing Examiner considered all of the medical evidence presented, including Dr. Blank's notes revealing the subjective reactions of Appellant showing discomfort and tenderness and, objectively, some swelling and movement restrictions.

The Hearing Examiner also considered the conflicting medical reports of Drs. Blank and Blank who concluded that Appellant's condition is not so severe. Dr. Blank concluded that Appellant's obesity contributed to his left knee strain and both physicians felt that, even before surgery, Appellant could maintain his full duty program. Although the hearing examiner found that Appellant suffered a work-related injury on December 3, 1990, he also found that Appellant had been developing arthritis in his left knee before that date.

Considering all the above evidence, the examiner concluded that Appellant is disabled from work at this time. However, based on a preponderance of the evidence, the examiner properly concluded that this disability is not permanent or total since the custom in Appellant's job is to have a helper who does the heavy work, leaving Appellant as driver to do lighter things. Therefore, the examiner's conclusion that Appellant has a temporary partial service-connected disability of 20% of the body is supported by the evidence of record. Since there were functions of his job which Appellant could perform, a grant of a partial service

connected disability is appropriate. Montgomery County v. Buckman, 333 Md. 516, 636 A.2d 448 (1994).

The Examiner further recommended the following as part of this temporary disability award:

1. Serious consideration by Appellant of further surgery.

2. A substantial weight reduction program, including proper diet and exercise.

3. Conditioning program in number 2 should be combined with appropriate medications as prescribed by Appellant's physicians to help alleviate inflammation and swelling of the left knee. If he does not have surgery, Appellant must make a genuine effort to rehabilitate his left knee and leg.

The examiner reasonably determined that this temporary service-connected disability is approved for one-year and may be renewed for additional one-year periods until incapacity is either removed or it becomes apparent that it is likely to become permanent. Considering the Appellant's relatively young age, his preexisting condition, and the conflicting medical evidence, it is appropriate that the final decision as to whether Appellant is disabled, either totally or partially, should be reevaluated after the one-year period (which is close at hand), or renewals thereof. The Board further agreed with the examiner's above conditions which Appellant should seriously consider as part of the rehabilitation process.

CONCLUSION

Based on the above described evidence, the Board concurs with the decision of the Hearing Examiner, that Appellant be granted a temporary, partial service-connected disability for a one-year period, with renewal for additional one-year periods until the disability is removed or it becomes apparent that it likely to be permanent. The Board also concur with the conditions for rehabilitation recommended by the Hearing Examiner cited above as part of the temporary disability award.

Appellant has not produced any facts warranting the recusal of the Hearing Examiner. The Examiner further, this issue was not raised at the hearing before the Examiner, who heard the testimony without objection.

The Board also referred the Appellant to Montgomery County Circuit Court Civil Case No. 75332 which addressed the issue concerning the Hearing Examiner.

The Board denied the appeal.

Case No. 94-17

On May 12, 1994, the Board issued an interim decision in the above appeal to hold the appeal in abeyance until after the decision is issued by the Circuit Court on the appeal of Blank, and his former spouse, from a decision of the Board in Case No. 93-34. Mr. Blank appealed the Board's decision that Blank, his former wife, is entitled to a 50% marital share of his retirement pension when he is eligible for retirement.

By letter of May 18, 1994, the Board was advised by a Judge of the Circuit Court that he had before him as consolidated cases Mr. Blank's appeal from the Board's decision in Case No. 93-34 (Civil Action No. 114060) and a related domestic relations matter, Blank v. Blank (Civil Action No. 30617). The Judge indicated that he would like to have the Board's decision in this appeal (Case No. 94-17) by the end of July because it concerns many of the same issues as those in the consolidated cases.

In a June 15, 1994 letter, an Assistant County Attorney, stated that it was his understanding that the Judge would like to dispose of the two consolidated cases before him and the anticipated appeal from the losing party in this case in one proceeding. For that reason, notwithstanding its May 12, 1994 abeyance decision, the Board decided to issue a decision on the merits of this appeal in accordance with the Judge's request.

BACKGROUND

Mr. Blank is a former Montgomery County Police Officer. At the time he began service with Montgomery County in August 1977, he had recently married Ms. Blank (former spouse). Following a separation in July 1988, Mr. and Mrs. Blank executed a separation agreement, dated February 14, 1990. The separation agreement provides, as relevant to the issues here, that the "husband's pension and retirement benefits earned during the marriage are marital property, and as such, are to be divided equally between them." (emphasis supplied) Therefore, "if, as, and when" the husband retires, or is eligible for retirement, the wife shall receive one-half of the monthly pension and retirement benefits, including all cost of living adjustments (COLAS) "earned during the marriage" to be calculated by a formula, i.e., 1/2 the monthly pension benefit, reduced by a multiplier factor in which years of marriage were divided by years of the husband's service.

On February 21, 1990, a Judgment of Absolute Divorce was entered in which the Circuit Court retained jurisdiction over the $11,942.37, representing 50% of Mr. Blank's vested accrued benefit, beginning on February 1, 2002, Mr. Blank's normal retirement date. As an alternative, Ms. Blank could elect to receive a reduced annual benefit of $9,553.90 beginning February 1, 1997, Mr. Blank's early retirement date. However, approximately two years after the divorce, Mr. Blank retired on a service connected disability.

In her April 25, 1994 appeal from a decision of the Chief Administrative Officer (CAO), concerning her entitlement to pension benefits, Ms. Blank contends she should receive a percentage of her former husband's disability benefits when he began to receive them. The County determined that, since Mr. Blank's disability occurred after the divorce, Ms. Blank is not entitled to any portion of Mr. Blank's disability benefits. Rather, Ms. Blank may only receive her portion of Mr. Blank's normal retirement benefits on the date that he would normally have retired, or the date that would have been his early retirement date.

ANALYSIS AND DISCUSSION

In his decision in Case No. 93-34 (Appeal of Mr. Blank), the CAO followed the normal rule of marital property division that property or benefits earned after dissolution of the marriage should ordinarily not be counted as marital property. That rule should apply here, particularly since it is followed in the language of the parties, separation agreement, that the parties intend to divide only those benefits "earned during the marriage." Thus, the County is correct in its conclusion that the disability benefits which Mr. Blank received approximately two years after the divorce were outside the contemplation of the separation agreement and, thus, outside the benefits which had already vested during the marriage.

On the second issue, Ms. Blank contends that she should receive a 100% survivor annuity, by an election to be made by member Blank, and that the cost of the annuity should be paid entirely by him, or from his share of pension and retirement benefits. However, Ms. Blank does not qualify for a survivor annuity since the Retirement Law, Montgomery County Code, Section 33-44 authorizes only certain persons to be designated by member as surviving beneficiaries, namely "spouse or children only". Since Ms. Blank ceased to be the spouse of member Blank in 1990, several years prior to her present demand of survivor benefits, and former spouses are not among the designated beneficiaries, she is not eligible for a survivor annuity under the designation of "spouse". Therefore, even though this may have been contemplated by the separation agreement, the Retirement Law does not permit the County to accept any late designation of Ms. Blank as "spouse".

CONCLUSION

The Board determines that Ms. Blank is not entitled to a share of Mr. Blank's present disability benefits but only of his normal retirement pension benefits as of the date of his normal or early if she so elects, retirement. The formula to be applied when pension benefits are divided should look only to those benefits earned during the marriage and fixed and vested as of the date of the divorce. In addition, because Ms. Blank is no longer the "spouse" of Mr. Blank, pursuant to Section 33-44 of the Montgomery County Code, she is not eligible to be designated a surviving spouse to receive a 100% survivor annuity under the Employees' Retirement System.

Case No. 95-02

This is a final decision on the record in the above referenced appeal. The Appellant was denied a service connected disability retirement benefit.

The Appellant noted an appeal from the Administrator's decision, as permitted by Code Section 33-43(k). A hearing was held before the Administrator's Hearing Examiner, on April 21, 1994. In a written decision dated May 27, 1994, the Hearing Examiner concluded that the Appellant was totally and permanently incapacitated for duty, but that the incapacity was not the result of an occupational disease incurred in the actual performance of duty and was not a condition aggravated while in the actual performance of duty. A non-service connected disability retirement was granted.

BACKGROUND

Appellant is a fifty-one year old female who began employment with the County in November, 1987. Appellant was responsible for running the maintenance and trouble-shooting aspects of the financial system which controlled disbursements for the County from November 1989 until March 1993, when her disability was officially recognized by the County.

During her five year tenure as Computer Analyst/Programmer, she was sometimes required to work after hours and be on-call. She received telephone calls in the middle of the night from employees who asked for her professional assistance in running the system. During the hearing she was unable to remember how frequently she was called at home, nor could she remember whether the frequency of calls decreased after her colleagues learned of her illness.

Appellant began experiencing medical difficulties in June 1989, and "seizure-type problems" were recognized. Appellant's condition worsened and in April 1992, Appellant was diagnosed as having Systemic Lupus Erythematosus (SLE). SLE has related multisystem failures, namely kidney failure, congestive heart failure, idiopathic convulsive disorder and labile hypertension. SLE is characterized by periods of remission as well as activity. The Appellant also suffers from breast cancer and anemia, as well as impaired memory resulting from the SLE. The evidence pertaining to the diagnosis of the Appellant's condition was not being challenged by the County. Subsequently, the Appellant lost one kidney, had a heart attack and had neurological difficulties. From June 1992, until March 1993, Appellant's duties remained the same.

During that same period, treating physicians provided written letters to her supervisor indicating that Appellant's condition would be aggravated if she were not removed from her position involving particular stressors.

The Examiner concluded that:

Evidence is lacking that the applicant's job actually and in fact caused a worsening of this employee's disease. The evidence shows to the Examiner that the doctors believe there may be a connection between stress and progression of Lupus, but the evidence does not make that connection, and the medical opinions deal more with speculation and possibility than with actuality. Human existence involves stress. Stress of itself has many forms and many degrees.

In this case, it is possible to believe that this disease began, for whatever reason, before the applicant was hired by the County, although the applicant says she began to feel ill after she was hired, and the actual diagnosis was not made until after that. Therefore, although it is suggested that the disease began earlier, it is clear, at least, that the diagnosis was made after her enrollment as a member of the County retirement system which would make the applicant eligible for non-service-connected benefits. The Examiner will find that she is eligible for non-service connected disability. On the other hand, the Examiner finds that she is not eligible for service-connected disability retirement. While the examiner believes and finds that the applicant is totally, permanently incapacitated for duty, the examiner finds that this is not the result of an occupational disease incurred in the actual performance of duty and is not a condition aggravated while in the actual performance of duty.

The County concludes that the Examiner is correct in finding that the Appellant is disabled from working, but that the disability is not service connected. The medical evidence states that stress is one of many factors which can aggravate SLE. What the evidence does not and cannot show, however, is that job-related stress caused additional aggravation beyond that being experienced by her as a result of her medical condition and related treatments, and the personal stress resulting from her husband's death and concern for remaining family members in Iran. Because she has failed to establish by a preponderance of the evidence that her disability is service connected, the County contends that her appeal should be denied and the Administrator's decision should be affirmed.

The Appellant, on the other hand, finds that the Examiner's conclusion was based upon unreasonable assumptions which contradicted the weight of the evidence. All physicians, including the County doctor, agree that Lupus is aggravated by stress. In fact, none concluded that Applicant's Lupus was not aggravated by work stress. On the contrary, two (2) of the physicians stated that her Lupus was in fact aggravated by work stress.

Moreover, Appellant's testimony corroborated the doctors' findings. In sum, there is a preponderance of the credible evidence to support the finding that Applicant's condition was actually aggravated by work-related stress.

Additionally, an affidavit recently submitted by a former co-worker of Appellant, who still is employed by the County, clearly and unequivocally establishes the fact that Appellant was suffering the effects of stress as a result of her work, which all the doctors conclude aggravates Lupus.

FINDINGS OF FACT AND CONCLUSION

The issue before the Board is whether the Appellant's condition of Systemic Lupus Erythematosus for which non-service connected disability benefits have been granted has been aggravated by the performance of her official duties.

The Board notes that the Appellant's physical condition has been aggravated by and affected by a number of factors. The Examiner reached this conclusion also. However, he was not able to isolate work stress as a factor unconnected to other factors known to influence her physical condition.

The Board also notes that the record developed by the Examiner does not give adequate attention to aspects of the Appellant's physical condition which probably affected the testimony she presented in this case. We refer to the inability of the Appellant to fully remember events as a result of her physical condition. With this in mind we believe that the Examiner should have obtained the Appellant's leave records or other testimony which may have clarified her daytime attendance on duty and the frequency of her being called to answer questions about a computer system which was running when she was at home at night and in the early hours of the morning. Absent testimony of a supervisory official, to the contrary we believe the facts show that Appellant was under stress caused by her work.

We understand why the Examiner speculated that the Appellant must have been concerned about the safety of her family in another country but concluded that this concern was a non-work stressor. However, he did not seek leave records or other records or testimony from supervisors to corroborate Appellant's spotty memory concerning her work-related stress.

The interests of justice alone would cause a reasonable person to conclude that the Appellant deserves the benefit of doubt in view of the seriousness of the multiple breakdowns in her physical health and well-being. Although this is a close call, we conclude that the preponderance of evidence demonstrates that Appellant suffered from a work-related breakdown which aggravated her physical condition. It is more probable than not that one basis for Appellant's stressful condition is work-related. Further, such stress aggravated her existing condition so that the work-related stress was the proximate cause of such aggravated condition.

Therefore, it was the opinion of the Board, based on a preponderance of the credible evidence, and for the reasons discussed above, that the Appellant was permanently disabled from performing her duties.

The Board also found, based on the record, that Appellant has met the burden of proof under Section 2A-10 (b) of the Montgomery County Code.

The Board disagreed with the recommendation of the Hearing Examiner that the Appellant is only entitled to a non-service connected disability retirement benefit. Therefore, the Board granted the Appellant a total service connected disability retirement benefit.

Case No. 95-04

The Appellant's application for retirement was approved on April 6, 1993. At that time, the Appellant was awarded a Total Permanent Non-Service Connected Disability Retirement Benefit. The Appellant noted an appeal from the Administrator's decision, as permitted by Code Section 33-43(k). A hearing was held before the Prudential's Hearing Examiner. A written decision dated June 22, 1994, was issued by the Hearing Examiner, in which he concluded that the "the evidence falls short of persuading that the applicant developed diabetes or coronary artery disease because of his employment and falls short of persuading that once he had developed those disorders, his job so worsened then that they contributed to or caused his heart attack. The applicant has not shown satisfactorily that his present incapacity is service-connected, and, therefore, a service connected disability will be denied." A Total Permanent Non-Service Connected Disability Retirement Benefit was granted.

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 Total Permanent Non-Service Connected Disability Retirement Benefit under Section 33-43(d) of the Montgomery County Code?

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

BACKGROUND

Appellant is a 47 year old male who began employment with the County in July 1971. Appellant served in County Police Department's Patrol Division in the Bethesda District from 1971 to 1980. The Appellant testified that he was diagnosed in 1980 with diabetes, and started taking insulin. At that time he was put on light duty in the Police Records Department and his police powers were suspended for approximately two years.

In 1982 the Appellant returned to his physician, Dr. Blank, and asked to be taken off of insulin so he "could return to work on the road." The doctor advised the Appellant to try and control his illness and disease by diet. After a successful test of approximately one month the Appellant was advised by the doctor to return to work. He was assigned to the Traffic Division in the Bethesda District with full police powers. The Appellant was assigned a day work schedule.

Approximately eighteen months later the Appellant again began to feel ill and the doctor advised him to resume taking insulin. Appellant's police powers were again suspended when he resumed taking insulin. He was assigned to the police Check and Fraud Office. After eight months, his police powers were restored but he was restricted to day work and drove an unmarked car. He did not wear a uniform and was not permitted to use emergency equipment on his car. The Appellant remained in his current position for approximately eight years. During that period of time he expanded his responsibilities, his caseload increased, the department's manpower and overtime budget was reduced and he served warrants and made arrests.

On March 12, 1992, the Appellant, after experiencing chest pains for several days went to the hospital where he apparently had a heart attack in the emergency room.

The Appellant underwent angioplasty and returned to work on June 2, 1992, again with police powers. His doctor advised him to avoid physical confrontations, stress, exertion and extremes of weather. The Appellant continued in his regular job assignment until April 1993 when he was awarded a Total Permanent Non-Service Connected Disability Retirement Benefit. During this period of time the Appellant continued to experience chest pain and tightness in his chest even though he attended a cardiac rehabilitation clinic for about four months. His doctor advised him that his artery had once again closed back up and after a thallium stress test, recommended that coronary bypass surgery was an alternative but could be delayed because of his young age.

The Hearing Examiner's opinion concluded that the Appellant is not entitled to a Total Permanent Service Connected Disability Retirement Benefit since both the diabetes or coronary artery disease were not caused by his employment nor were worsened by his job, and his job did not contribute to or cause his heart attack.

FINDING OF FACT AND CONCLUSIONS

The issue before the Board was whether the Appellant suffered from an illness incurred or condition aggravated while in the performance of his official duties.

Both the Hearing Examiner's Opinion and the transcript indicate that the Appellant, a six foot male weighing approximately 200 pounds could no longer participate in "things he used to do, such as ball playing, basketball, skiing." The Appellant's family has a history of diabetes, heart disease and high cholesterol.

Doctors Blank and Blank in their 1992 reports indicated the Appellant had high risk factors for coronary disease, hypertension, diabetes, lipidemia, high cholesterol and a positive family history for coronary artery disease. In addition, after Dr. Blank performed a thallium stress test at a hospital his report states "significant risk factors of insulin dependent diabetes, hypertension, a cholesterol count of over 300 despite medical therapy and a positive family history."

Dr. Blank noted in both his July and September 1992 reports that the Appellant had coronary artery disease, diabetes, hypertension and high cholesterol as well as a positive family history. This combination of major risk factors has enormously increased his probability of developing coronary atherosclerosis. Dr. Blank further states "there is no scientific evidence to implicate police work, or indeed any other occupation in the etiology of coronary atherosclerosis. Thus, I cannot relate his disease to his employment in any way." In fact, in his September 1992 report he states "additional review did not change his opinion."

The Appellant in his September 12, 1994 Final Appeal Petition to the Board requesting that we review Dr. Blank's October 5, 1992 medical report and opinion. The Board's review of Dr. Blank's report and his conclusion indicates "I would assign equal weight of the stress of his employment and his diabetic condition as contributing factors of his disability. I recommend that he be retired from the Police Department at this time."

Based on the above described evidence, the Board concurred with the decision of the Hearing Examiner. It was the opinion of the Board, based on a preponderance of the credible evidence, and for the reasons stated above, that the Appellant was permanently disabled from performing his assigned duties. In addition, the Appellant did not meet the burden of proof under section 2A-8(b) and 2A-10(b) of the Montgomery County Code to warrant a service connected disability.

The Board denied the Appellant's request for a Total Permanent Service Connected Disability Retirement Benefit under Section 33-43(e) of the Montgomery County Code and granted him a Total Permanent Non-Service Connected Disability Retirement Benefit under Section 33-43(d) of the Montgomery County Code.

Case No. 95-05

BACKGROUND

Appellant was hired as a bus operator by the Montgomery County Department of Transportation on July 22, 1991 and successfully completed her training program and probationary period on April 20, 1992. On November 17, 1991, Appellant was involved in an on-the-job accident while driving a bus for the County. Due to sudden breaking to avoid a car

which cut in front of her bus, a passenger fell forward onto Appellant's right shoulder. Appellant did not lose any time from work due to the accident although she may have been pregnant at the time it occurred.

On April 13, 1992, Appellant's physician recommended that she be placed in a light duty assignment due to a pregnancy- related complication. The County's Occupational Medical Examiner concurred and Appellant was placed in on light duty status by the Department of Transportation until she was medically cleared to return to her Bus Operator duties on August 31, 1992.

In August, Appellant sought treatment for back pain at Blank Hospital's emergency room. The hospital referred Appellant to an orthopedic surgeon, who in turn referred her to Dr. Blank, a neurologist. Dr. Blank examined the Appellant on October 19, 1992 at which time he recommended in writing that she be placed on light duty work. Appellant was again placed on light duty on November 5, 1992 and commenced a physical therapy program which was discontinued on March 16, 1993.

On February 13, 1993, The Department of Transportation requested a Fitness for Duty Physical to determine Appellant's medical suitability for the Bus Operator duties. This request was approved and an appointment was scheduled for March 3, 1993.

On February 17, 1993, Appellant was involved in an automobile accident unrelated to her work. The Appellant's car was struck from the rear by another car which allegedly pushed Appellant's car two or three car lengths ahead and resulted in injuries to Appellant's neck and lower back. Taken by ambulance from the accident scene, Appellant was treated at Blank Hospital and released. Appellant alleges that her symptoms of pain were magnified after the accident but gradually lessened to the level of pain experienced following her bus accident on November 17, 1992.

On March 22, 1993, following consultation with a medical specialist, the County's Occupational Medical Examiner, reported that the Appellant remained medically unfit to perform Bus Operator duties and that the prognosis for her recovery was poor. Dr. Blank directed that if the Appellant was unable to return to her regular duties by the end of April 1993, she should be considered for alternate placement.

On April 30, 1993, Appellant's light duty assignment ended and because she alleged medical inability to return to her Bus Operator duties and had a minimal leave balance, she was advised to request a Leave Without Pay. Appellant's request was approved on May 4, 1993 for a 90 day period which would end on August 1, 1993 or upon alternative placement, whichever event occurred first.

On June 30, 1993, the Appellant was given a Notice of Proposed Termination based upon her excessive absenteeism as defined in Montgomery County Personnel Regulations, Section 24 (c), Termination.

On September 17, 1993 Appellant was terminated from her position due to her continued inability to physically perform her duties as a Bus Operator and failure to secure other alternative job opportunities. She applied for a Service Connected Disability Retirement and was denied for both a service-connected and non- service-connected disability retirement by the Plan Administrator on November 12, 1993. She appealed this denial and on May 5, 1994 a hearing before the Hearing Examiner resulted in the Examiner's upholding the Plan Administrator's denial of benefits. Upon his review of all of the evidence presented, the Examiner concluded that the Appellant had little or no physical impairment resulting from the incident on November 17, 1991 and there was no evidence of total disability.

Appellant was notified by the County of the decision to deny her disability retirement benefits on August 4, 1994 and she appealed this decision to the Merit System Protection Board on August 29, 1994.

ISSUES CONSIDERED

1. Whether the Appellant meets Montgomery County Government's requirements for a Disability Retirement?

FINDINGS OF FACT AND CONCLUSIONS

Section 33-43 of the Montgomery County Code sets forth the criteria upon which a member may obtain a Disability Retirement. That Section provides in pertinent part as follows:

"(b) Non-Service Connected Disability Retirement...

(1) The member has ten years of credited service and is not eligible for normal retirement...

(c) Service Connected Disability Retirement...

"(1) The member is totally incapacitated for duty or partially and permanently incapacitated for duty as the natural and proximate result of an accident occurring, or an occupational disease incurred or condition aggravated while in the actual performance of duty; that the incapacity is not due to willful negligence, and the incapacity is likely to be permanent....

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

The Appellant has the burden of proof to show that she is disabled and totally incapacitated for duty or partially and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty.

Appellant alleges that she has been having back and related pains since the incident on her bus in November 1991. However her actions following this incident of not seeing a physician until February 1992 indicate that any pain she did experience was not significant. Her visit in February was to an obstetrician for reasons of pregnancy, not back pain. When Appellant complained to her obstetrician of back pain, the doctor recommended seeing her family doctor. She did not follow-up on this recommendation.

Appellant's placement on light duty in April 1992 was due to her pregnancy and not due to other physical problems. It was not until August 1992 that Appellant finally sought medical attention for back pain. She was referred to Dr. Blank, an orthopedic surgeon, who found no evidence of any residual injury from her November 1991 bus accident. Dr. Blank referred Appellant to a neurologist, Dr. Blank. Appellant did not follow-up with Dr. Blank until October 1992 and, as a result of his examination, Dr. Blank recommended that she be returned to light duty status and started her on a physical therapy program.

In a February 17, 1993 automobile accident which was not related to her work, Appellant sustained injuries to her neck and lower back. A report from the County Medical Examiner dated March 22, 1993, one month following Appellant's car accident, stated that her prognosis was poor.

An independent medical evaluation report by Dr. Blank resulted in his finding that mild temporary restrictions were in order and that the Appellant should be able to return to work as a Bus Driver following a work hardening program to facilitate her recovery. He stated, "there is little in the way of objective evidence to indicate any significant organic cause of the patient's symptoms... As far as the patient's current disabling condition being attributed to an accident occurring while [in] the actual performance of her work, to a reasonable medical certainty, I think this is very questionable... The patient was not examined by a physician for 9 months after her work-related injury and the initial treating orthopedic surgeon's report shows minimal findings which are mainly subjective, and in his note, he states that there is no anatomic correlation between the complaints and the objective findings."

The Board noted that, based upon the Appellant's testimony during her Hearing on her request for disability retirement and the medical records, the Hearing Examiner came to the conclusion that the Appellant's testimony was not credible and that she was exaggerating her physical symptoms.

Based upon a preponderance of the evidence, the Board found that the Appellant did not sustain her burden of proof that she met the requirements of Section 33-34 for either a Non-Service Connected Disability Retirement due to her less than 10 years of service or for a Service-Connected Disability Retirement due to not having established that a permanent

incapacitating disability exists and that there is a causal connection between that disability and her work duties.

DECISION

The Board upheld the Plan Administrator's denial of her request for a Disability Retirement Benefit.

Case No. 95-14

BACKGROUND

Appellant, age 44, had been employed by the Department of Fire and Rescue, Services, Montgomery County for 23 years, (17 years of which were with the Rockville Fire Department), having achieved the rank of Master Firefighter prior to his retirement. On September 21, 1993, Appellant testified that he had been dispatched to a house fire and had driven the fire truck to the scene of the incident. He could smell smoke and saw a little smoke coming from the house. He pulled the apparatus up in front of the house and determined to lay a supply line to the hydrant. Instead of pulling the hose straight off from the back of the truck, Appellant stated that he had to pull it, make a U-turn with it, and go up the other end of the street.

At that time, Appellant felt a tightness in his chest, which lasted about one or two minutes and went away. Appellant did not work on September 22 or September 23, 1993 and, since the incident on September 21, 1993, he never returned to full duty as a firefighter. After a hearing held on November 3, 1994, the Hearing Examiner upheld Prudential's decision to grant Appellant a Non-Service Connected Disability Retirement.

ANALYSIS AND DISCUSSION

On November 24, 1993, Appellant obtained medical assistance from Dr. Blank, a cardiovascular disease specialist. Prior to September 21, 1993, Appellant had not had problems with his heart and had never been seen by Dr. Blank for any heart or coronary problem.

The Hearing Examiner found, in the absence of any contradictory evidence, that the pulling of the hose from the truck and laying it out at a fire scene were ordinary and usual functions for Appellant and, at that time, there were no extraordinary or unusual occurrences in the Appellant's performance of his job. Various diagnostic tests were performed including EKG and treadmill tests with thallium. Dr. Blank's conclusion was that Appellant had a blocked left anterior descending coronary artery. Appellant returned to light duty on about October 25, 1993 and on December 1, 1993, he was sent to another station for light duty. On March 22, 1994, his department filed for his disability retirement.

The Hearing Examiner believed that Appellant understated his smoking, his weight and his drinking problems. The Hearing Examiner also believed that Appellant had been obese most of the time as a firefighter and had been counseled about it by County doctors. For example, on October 29, 1976, Dr. Blank found Appellant to be grossly overweight. On March 3, 1977, Appellant's weight was found not acceptable, but he was given latitude to enable him to continue to work. In his December 16, 1991 County physical, Appellant weighed 281 pounds.

The Hearing Examiner also believed that Appellant had been a heavy smoker since his mid or early teens. One County doctor wrote that Appellant smoked three packs a day. The medical records show that County physicians were aware of Appellant's smoking and discussed the problem with him. Appellant stated that he now smokes a pack a day but that for 20-25 years he smoked 2 and 1/2 packs per day.

There is also evidence that Appellant has been an alcoholic. He spent 20 days in alcohol treatment at Seneca in January 1982. On December 28, 1982, Appellant told the County that he has been drinking from 0-12 beers per day and stated that he was drinking 35 beers a week. The Appellant had high blood pressure for more than 20 years and has had high cholesterol.

The evidence also shows that Appellant does very little exercise. Other people cut his grass. In his spare time, he mostly watches TV but does do some housework, including cleaning, washing and shopping. While Appellant has gotten some twinges in his chest at meals and while sitting on the couch watching TV, they were very short in duration. His medical records show a history of complaints of heartburn which could explain episodes of discomfort at meals or after them.

The Hearing Examiner found Appellant to be substantially lacking in credibility. The Hearing Examiner concluded that the chest pain experienced by Appellant on September 21, 1993, which lasted for only a minute or two, may have been a minor muscle strain, heartburn from acid reflux, or some other condition. The record is not clear whether Appellant was free of any symptoms. Although Appellant's history shows complaints of heartburn, the record does not show whether a medical diagnosis was made of a gastrointestinal problem, or whether Appellant may have had anginal discomfort earlier, or whether those episodes may have been signs of a cardiovascular problem.

The Hearing Examiner concluded that there are objective findings that show a cardiovascular problem. However, even after knowing that he had a problem, Appellant continued to smoke and had an episode of chest pains only two days after his angioplasty on October 1, 1993. Dr. Blank noted that Appellant came for admission to the hospital on October 3, 1993 complaining of chest pains following smoking a cigarette. Although the Examiner found Appellant to be careless about his health, he did not find that this amounted to willful negligence.

In addition to being examined by Dr. Blank, since the incident on September 21, 1993, Appellant was also examined by Dr. Blank in Virginia and Drs. Blank and Blank. Dr. Blank's report of February 1, 1994 stated that Appellant had been a patient of hers for several months, and that he has a significant LAD lesion that totally occluded. She notes that, although he was a smoker at the time, Appellant is in a tremendously stressful job which could cause coronary disease and lead to heart attacks. She further noted that Appellant is in a job where he is exposed to very high doses of smoke which can also lead to the development of coronary artery disease.

In both his January 14, 1994 and July 18, 1994 letters, Dr. Blank of the Heart Center of Northern Virginia concluded that Appellant is totally incapacitated for duty as a firefighter. Based on information available to him, Dr. Blank noted that Appellant's disability developed in the course of his employment. In his September 19, 1994 letter, Dr. Blank explained that his conclusion is based on the lack of evidence at the time of Appellant's hiring, or in any of his evaluations prior to the development of his symptoms, that he had coronary artery disease. Dr. Blank concluded that, since the first manifestation of his coronary artery disease was while he was "pulling hose", this indicates without doubt that Appellant's employment aggravated his underlying disease process. Dr. Blank thought it was impossible to apportion the development of the disease to any particular risk factor; nor was he aware of any evidence indicating that Appellant's condition was caused by smoke inhalation. However, he thought that smoke inhalation could precipitate either an infarction or aggravation of anginal symptoms.

Appellant was examined by Dr. Blank on or about November 15, 1993. Dr. Blank noted that Appellant has experienced no recurrence of his chest pressure despite regular treadmill exercise and walking daily, with occasional jogging. He also noted certain coronary risk factors and, although there is no significant family history of coronary disease, i.e., Appellant had been smoking two packs of cigarettes per day but has stopped smoking since his diagnosis; he has been treated for high blood pressure since 1976 when he was 26 years old; his cholesterol has been high in the past; and, for his entire adult life, Appellant has weighed more than 200 pounds. Dr. Blank concluded that Appellant has single vessel coronary disease with occlusion of one coronary artery, the left anterior descending. Dr. Blank determined that Appellant "has multiple major coronary risk factors, of hypertension, smoking, obesity, and high cholesterol, and thus I would apportion all of his permanent partial disability to these factors, inasmuch as no disability was precipitated by his work activity, and inasmuch as there

is no scientific evidence to implicate fire fighter, or indeed any other occupation, in the causation of coronary atherosclerosis."
(emphasis supplied)

Appellant and his medical records were examined by Dr. Blank on May 24, 1994. Dr. Blank noted that Appellant was approximately 67 pounds overweight. After reviewing his records, Dr. Blank believed that Appellant's diagnosis is arteriosclerotic heart disease which incapacitates him from taking part in actual fighting fires, exposing himself to toxic fumes or rolling heavy equipment around. However, Dr. Blank concluded "I do not feel that his coronary artery disease can be attributed to an accident occurring in the actual performance of duty with reasonable medical certainty. It is also difficult to say whether his job at the fire department can be reasonably assumed to have aggravated his condition. I do not see any evidence of that at this stage."

None of the physicians who examined Appellant and reviewed his medical records was able to state, with any reasonable degree of medical certainty, that Appellant's coronary artery disease was either caused or aggravated by his work at the fire department on September 21, 1993 or prior thereto. The reports of Dr. Blank and Dr. Blank rely mainly on presumptions and inductive reasoning based on the possibility that either "pulling a hose" or smoke inhalation from Appellant's exposure to a fire on September 21, 1993 caused or aggravated his condition, absent evidence that he was treated for a coronary condition before that date. However, in addition to presumptions, these two medical reports ignore or discount Appellant's known coronary risk factors, specifically, his obesity, high blood pressure and high cholesterol, and his heavy smoking habit. On the other hand, Drs. Blank and Blank concluded that there is no evidence that Appellant's condition was caused or aggravated by his job as a firefighter. The Board agrees with this conclusion.

CONCLUSION

To be granted a Service Connected Disability Retirement, Appellant must prove, by a preponderance of the evidence, that he meets the criteria in Section 33-43 (e) of the Personnel Regulations. Considering the objective evidence summarized above, it is clear that the Appellant has not sustained his burden of proof for entitlement to a Service Connected Disability Retirement. In reaching this decision, the Board considered only the objective medical and other evidence in the record. Therefore, the Board finds no merit in Appellant's arguments that he has not had a "due process" hearing before the Prudential Hearing Examiner, or that Mr. Blank's decision included matters beyond the scope of the issues, or that he had a disclosed potential conflict of interest. In addition, the Board finds that the objective evidence submitted at the hearing is adequate for the Board to reach a decision without the necessity of holding another hearing. The appeal was denied.

TRANSFER

Case No. 94-16

This is the final decision on the record of your appeal which was timely filed with the Board on May 24, 1994. The Appellant's appeal is based on a decision of the Personnel Director concerning his complaint of retaliation for having filed a grievance.

BACKGROUND

After having worked for twenty years with the Police Department, at the Rockville District Station, the Appellant transferred to the Youth Division in May, 1992, and was assigned a new supervisor in November, 1992.

In February, 1993, the supervisor provided an endorsement for assignment to an alternative position. The Appellant alleged that his supervisor began harassing him in November, 1993 after he had been informed that his grievance concerning a transfer from the Youth Division had been resolved in his favor.

In the addendum to Appellant's grievance dated November 8, 1993, he indicated that there was no valid reason for his transfer from the Youth Services Investigative Division and he referred to the relief which he had requested.

A. Rescind Sgt. Blank's transfer and transfer Lt. Blank.

B. Offer Sgt. Blank a comparable position in another investigative unit, or any other assignment that he is willing to accept, at such time that either becomes available.

In your written complaint, you refer to the instances below of harassment and retaliation by your supervisor:

> In his written complaint, Sergeant Blank specifically references the following instances of harassment and retaliation by his supervisor, Lieutenant Blank: his 1993 performance appraisal; comments made to him on November 29, 1993 by Lieutenant Blank; being ignored by Lieutenant Blank on November 29, 1993, threats to rescind approval to work the compressed work week; issuance of a remedial action form; conflict over the conduct of an investigation concerning a rape allegation; and denial of a new take-home vehicle. In the interest of organization each area will be addressed separately.

The Personnel Director concluded as follows:

> A review of the facts and conclusions in this matter demonstrate that Sergeant Blank and Lieutenant Blank feel that their respective positions are equally correct. Sergeant Blank maintains that his supervisor's conduct towards him was predicated upon an unsuccessful attempt to transfer him which came about as a result of his exercise of grievance rights. Lieutenant Blank, on the other hand, took a closer interest in monitoring Blank's supervision of staff and cases, after the "Blank" case was not supervised to his satisfaction.
>
> Taken as a whole the complainant's assertion of harassment cannot be substantiated. Some of the examples were clearly not relevant, and in other cases, the Appellant was not the lone subject of his supervisor's behavior. In those instances where admonishments, correction or direction were given by Blank, these behaviors are viewed as an effort on the part of Blank to correct supervisory practices which were incompatible with how he felt certain cases should be handled. Albeit, good judgment and common sense are not readily apparent in all the behaviors exhibited by the factual scenarios presented, the burden yet remains with the complainant to show a pattern of harassment attributable to his grievance activity. As stated the burden has not been met. Therefore, relief requested is denied.

You were involuntarily transferred from the Youth Services Investigation Division to the Bethesda District Field Services Division and on March 30, 1994 filed a grievance in regard to that transfer.

In your appeal petition filed on May 24, 1994, you addressed each of the Personnel Director's findings separately. You stated that:

> In summary, I disagree with the action of the Personnel Director because his decision was influenced by statements of employees who themselves have reason to fear retaliation. In addition, some statements made by Lt. Blank are untrue and inaccurate. Applying the standard of the Preponderance of the Evidence, I believe that the Personnel Director has erred in his decision.

As relief, you requested:

> - Immediate reassignment to my former position as a Sergeant in the Youth Services Investigations Division accompanied by appropriate protection from further retaliation.
>
> - In lieu of assignment to Youth Services Investigations Division I request assignment to a comparable position in a different investigative unit or any other assignment that I am willing to accept.

- That I be made whole in this matter.

- Such other and further relief that may be deemed appropriate.

In response to your appeal, the County responded to the Board on June 20, 1994. In this response the County first takes exception with the relief you have requested and notes as follows:

> The County takes exception with the relief requested by the Appellant in his appeal, that he be returned to the Youth Services Division, because it is not the relief requested in the original complaint but identical relief to that requested in his subsequent grievance filed on March 30, 1994. The March 30, 1994 grievance is currently the subject of review by the Chief Administrative Officer and that subject relief will be addressed through that grievance. Secondly, the Appellant was still assigned to the Youth Services Division during the time frame considered in this harassment/retaliation complaint.

The County in that response takes exception to each of the allegations you have made. Your final comments are dated July 20, 1994. Concerning the relief, you state that:

> Section 4.8 of the grievance procedures does not address the issue of relief and therefore no specific relief was requested. It was not until I received this appeal petition that I was asked to specify any relief requested. Instruction (3) stipulates that the relief requested is subject to modification by the Appellant.

In conclusion, you state:

> That I be returned to my former position in Youth Services Investigations Division, on the first day of the next pay period following the effective date of Lt. Blank's retirement which will be August 31, 1994.

FINDINGS OF FACT AND CONCLUSIONS

The relief requested by you as a grievant differs from the relief you requested during the pendency of the appeal. We defer to the relief you requested to deal with the original matter for which the grievance was filed, that is, you did not want to be transferred from the Youth Division. Clearly you did not wish to work with the supervisor who is the target of your complaint. Presently, you are willing to be reassigned to the Youth Division because you believed that your former supervisor would have retired on August 31, 1994.

We find in this file indications of differences of opinion on how cases are handled,

concerns over who had final authority to make a decision on an available vehicle, and pressures exerted by a supervisor on an employee in the conduct of day to day work which is stressful and subject to interpretation as retaliatory and harassing on account of the exercise of filing a grievance. We are impressed by the thoroughness of the reviews of your complaints and the clarity of the analysis.

We are not persuaded by a preponderance of the evidence before us that the actions of your supervisor which are under review here are motivated more by a desire to retaliate against you or harass you for having filed a grievance.

If it is true that the supervisor in question has in fact retired from the Youth Division and it is your desire to work in that Division, we would ask that the Police Department give serious consideration to your desire. We do not believe that the interests of justice concerning your complaint as well as the circumstances concerning the timing of this appeal can be served by acting otherwise.

The Board did not find a basis for sustaining Appellant's appeal.

Case No. 95-09

BACKGROUND

Appellant was a shift supervisor in the Bethesda Police District. On October 3, 1993, after a female subordinate filed a sexual harassment complaint against him, he was temporarily reassigned to the Tactical Support Unit of the Special Operations Division, where he was assigned non-supervisory duties reporting to a Police Officer III in the SWAT bus garage. Appellant remained at the SWAT garage for approximately 6 months and one week while the Office of Internal Affairs investigated the charges against him.

As a result of the investigation, on April 6, 1994, the sexual harassment charges were not sustained. On April 10, 1994, Appellant was transferred to a vacant Sergeant position in the Wheaton district. Appellant claims that, during the 6-month period while he was assigned to the SWAT garage, he estimates that he lost $3,841.49 in shift differential pay, roll call pay and holiday premium pay which he would have received if he had not been assigned to a non-supervisory position. Appellant believes that this loss of income also resulted in a reduction in his retirement pension. Information in the file indicates that Appellant retired, effective September 30, 1994.

Appellant also contends that the transfer to the SWAT garage was arbitrary and capricious, as well as demeaning, and that the length of time taken for the Internal Affairs investigation violated the 30-day requirement of its standard operating procedures.

DISCUSSION AND ANALYSIS

As stated in the Chief of Police's response to Appellant's grievance, the investigation did not take an inordinate length of time because of a delay in arranging for an interview of Appellant and, further, the 30-day requirement was dropped because it was deemed to be unreasonable. Since Appellant retained his pay level during the temporary assignment, his transfer was appropriate under Personnel Regulation 21-1 because it was made to a position at the same grade and salary level as his previous position.

The transfer to the SWAT garage was not arbitrary and capricious under the regulations since Personnel Regulation 212(g) provides that an employee may be transferred on the basis of: "The resolution of a grievance or other problems affecting the operational efficiency of a unit or organization." Thus, the temporary transfer of Appellant was proper pending the outcome of the allegations of sexual harassment and other charges against him.

The Chief Administrative Officer concluded that Appellant is not entitled to additional pay during the 6-month period he was assigned to the SWAT bus garage because he was not required to work on holidays, report early or stay late to handle roll call, or work shifts that would have entitled him to additional pay. However, the Board disagrees with this conclusion based on equity and fairness because the transfer was made pending investigation of the charges and the charges against Appellant were not sustained.

> Pursuant to Section 33-14(c)(8) of the Montgomery County Code, the Board has the authority to order appropriate relief to accomplish the remedial objectives of the merit system, including "corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale."

The only reason for Appellant's temporary transfer was because he had been charged with sexual harassment which, after investigation, was found to be not sustained. Therefore, since the sexual harassment charge against Appellant was not sustained, he should not be penalized by the temporary transfer but, rather, should be made whole for the loss of income he would have earned had he not been transferred from his position in the Bethesda district as a shift supervisor.

CONCLUSION

Because the charges of sexual harassment against Appellant were not sustained, the Board granted Appellant's request for relief for loss of pay as a result of the temporary transfer from October 3, 1993 through April 6, 1994 covering shift pay differential, holiday pay, or roll

call pay which he would have received during that period had he not been transferred. If this loss of pay affected his retirement pay, appropriate adjustments should be made in such pay as well. Appellant's appeal was sustained.

Case No. 95-12

BACKGROUND

After having worked for twenty years with the Police Department at the Rockville District Station, Appellant transferred to the Youth Services Investigation Division in May, 1992 and Lt. Blank became his supervisor in November, 1992. In February, 1993, Lt. Blank provided an endorsement for his assignment to an alternative position.

On December 16, 1993, Appellant filed a grievance with the Personnel Director requesting an investigation and that appropriate action be taken in response to alleged harassment and retaliation by this supervisor, Lt. Blank. Appellant identified this harassment as beginning in November, 1993 when an earlier grievance concerning his transfer from the Youth Services Investigation Division had been resolved in his favor.

On March 30, 1994 Appellant filed a grievance concerning his involuntary transfer on April 3, 1994 from the Youth Services Investigation Division to the Bethesda District Field Services Division. Appellant alleged Lt. Blank's endorsement of his assignment to an alternative position was the end result of his continuing retaliatory harassment.

On May 24, 1994, Appellant filed an appeal to The Merit System Protection Board from a decision of the Personnel Director on his December 16th grievance. In his Appeal Petition, he addressed each of the Personnel Director's findings separately and requested reassignment either to his former position in the Youth Services Investigation Division or to another assignment in a comparable position that he was willing to accept along with assurance of appropriate protection from further retaliation. Appellant also requested that he be made whole in this matter and sought such other relief as the Board deemed appropriate.

On October 6, 1994, the Board issued its decision on Appellant's Appeal, Case No. 94-16. The Board was not persuaded by a preponderance of the evidence that the actions of Appellant's supervisor in recommending his transfer were motivated by retaliation and, therefore, could neither sustain his appeal nor grant the requested relief.

On December 2, 1994, Appellant appealed to the Merit System Protection Board the Chief Administrative Officer's November 29, 1994 Disposition of his March 30, 1994 grievance concerning his transfer on April 3, 1994. This complaint and administrative responses thereto

form the basis for this Appeal identified as Case No. 95-12. The Board's consideration of Appellant s Appeal is based upon the record as follows:

Appellant's grievance dated March 30, 1994;

* The Chief Administrative Officer's decision dated November 29, 1994;

* Appellant's Appeal to the Merit System Board dated December 19, 1994;

* The County's response thereto dated January 13, 1995 with nine (9) exhibits;

* Appellant's two (2) page response dated January 22, 1995 in which he amended the relief sought to reimbursement for $1,000 in legal expenses paid to the Alliance of Police Supervisors, and personal reimbursement for 105.5 hours of annual and/or compensatory leave.

ISSUES CONSIDERED

1. Whether the Department of Police properly followed procedures in Section 21, Transfer, of the Personnel Regulations Montgomery County Government, March 1994, in Appellant's April 3, 1994 transfer from the Youth Services Investigation Division to the Bethesda District Field Division?

2. Whether Appellant's transfer on April 3, 1994 was arbitrarily and capriciously undertaken in retaliation for other actions?

FINDINGS OF FACT AND CONCLUSIONS

The Merit System Protection Board has previously considered much of the evidence given in support of this grievance in its October 6, 1994 decision on Appellant's Appeal in Case No. 94-16. Its consideration of this Appeal will be limited to new information or relevant information not considered in its decision on Case No. 94-16.

Issue #1. Was Appellant's transfer made in compliance with Section 21, Transfer, of the Personnel Regulations? In pertinent part, this Section provides:

21-1. Definition

Transfer of employees is a prerogative of management and is the movement of an employee from one position or task assignment to another position or task assignment at the same grade and salary level either within a department/office/ agency or between departments/offices/agencies.

1. Reason for Transfer

An employee may be transferred on the basis of:

(g) The resolution of a grievance or other problems affecting the operational efficiency of a unit or organization.

Findings: As a Sergeant, Appellant is a supervisor and admits to having discussed his December 16, 1993 grievance with the President of Fraternal Order of Police's bargaining unit. Section 29-1 of the Personnel Regulations prohibits the representation of a supervisor by an official of a labor organization when the organization is certified to represent the employees subject to the supervision and control of the supervisor. Contents in Appellant's grievance and supporting documentation contain references to confidential management conferences and alleged statements which, if made, appear irrelevant to his grievance. The subsequent communication of these statements unnecessarily discredited and damaged the reputation of Lt. Blank. The President of the FOP apparently also used confidential information in Appellant's grievance to file a contract grievance on behalf of another police officer. This breach of confidentiality could have a divisive impact upon operations, could create divided loyalties and discussion counterproductive to the goals and objectives of the operation. This breach of confidentiality and its logical repercussions is sufficient cause for Appellant's transfer to foster operational efficiency in accordance with Section 21-1 (g).

Conclusions: Appellant presented no convincing evidence in support of his allegation that the Department of Police failed to follow the procedures required when transferring an employee.

Issue # 2. Was Appellant's transfer arbitrarily and capriciously undertaken in retaliation for other actions?

Findings: Appellant bears the burden of proof to show by a preponderance of the evidence that his transfer was arbitrary and capricious or discriminatory. Unless this burden is met, Management retains the right and prerogative to involuntarily transfer an employee in accordance with Personnel Regulations governing transfers.

Conclusions: Appellant did not meet this burden. Appellant's stated belief that "blind patronage, under the former administration, made it virtually impossible to achieve justice in personnel matters at any level below that of the Merit System Protection Board" (from his December 19, 1994 Appeal Petition to the Board) presents no additional factual support for his claim that his transfer was motivated by retaliation. Appellant's emphasis on the alleged consequences of his communication with the president of the Fraternal Order of Police as evidence to support his allegation of retaliatory action has been addressed under Issue # 1.

DECISION

Based on a preponderance of the evidence, the Board was not persuaded that Appellant's transfer was arbitrary, capricious, discriminatory or due to retaliation. The Police Department followed applicable Personnel Regulations in effecting and processing Appellant's transfer. Therefore, the Board did not find a basis for sustaining Appellant's Appeal or granting the relief he sought.