Merit System Protection Board Annual Report FY 1997

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Beatrice G. Chester, Chairwoman
Robert C. Hamilton, Vice Chairman
Harold D. Kessler, Associate Member

Angelo M. Caputo, Associate Member — July, 1996 - December, 1996
Walter T. Vincent, Vice Chairman — July, 1996 - November, 1996

Executive Secretary:
Merit System Protection Board
Waddell Longus

Prepared by:
Susan W. Goldsmith
Principal Administrative Aide

Montgomery County, Maryland
Merit System Protection Board
100 Maryland Avenue, Room 113
Rockville, Maryland 20850
(301) 217-3470
FAX: (301) 217-3472

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1997
ANNUAL REPORT OF THE
MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

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

The Board members in 1997 were:

Beatrice G. Chester	-	Chairperson (Reappointed 1/96)
Robert C. Hamilton	-	Vice Chairman (Appointed 1/97)
Harold D. Kessler	-	Associate Member (Appointed 2/97)

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. A written decision is issued.

DISMISSAL

Case No. 96-12

Appellant appealed the decision of the Director, Department of Fire and Rescue Services (DFRS) dismissing Appellant from his position of Firefighter/Rescuer II.

BACKGROUND

On April 1, 1996, Appellant received a Statement of Charges which may serve as the basis for his dismissal from his employment with the DFRS. By Memorandum of April 11, 1996, Appellant responded to the charges. By Memorandum of May 22, 1996, the Director, Department of Fire/Rescue Services notified Appellant that action was being taken to dismiss him from his employment, effective June 1, 1996. The dismissal action was based on the following charges:

1. Violation of Section 28-2(h) of the Montgomery County Personnel Regulations for failure to comply with the DFRS Policy Number 502, Section 3.1 and 4.0, Code of Conduct.

2. Violation of Section 28-2(h) of the Montgomery County Personnel Regulations for failure to comply with the DFRS Policy Number 521, Section 5.0(a), Detailing Overtime and Recall.

The May 22, 1996 Memorandum also cited the following prior Notice of Disciplinary Action received on November 9, 1995, resulting in a 5% Reduction in Pay for 15 pay periods, for violation of Section 28-2(g) of the Montgomery County Personnel Regulations and failure to comply with the DFRS Policy Number 502, Code of Conduct, Sections 4.0, 5.0, and 5.3, insubordination, File No. 95/07/5-D29.

A hearing was held on September 24, 1996 before three Members of the Board. At the hearing, after the close of the County's case, Appellant's attorney moved to rescind and overturn the dismissal of the Appellant on the grounds that the County failed to meet its burden of proof to establish that it properly terminated Appellant for the reasons that:

1. There is no evidence that the Chief Administrative Officer ever delegated to the Department Head of the DFRS the authority to take disciplinary action, including the dismissal under review. The Appellant's motion to overturn the dismissal was renewed at the close of the hearing on this ground.

2. The County has not utilized the required progressive discipline imposed by Section 28-1 of the Personnel Regulations; nor has it shown that progressive discipline is not appropriate under the facts of this case.

3. Assuming that the County's argument is that Appellant's actions constituted a serious violation of policy or procedure, there is no testimony that the Director, Department of Fire/Rescue Services reviewed Appellant's work record and other relevant factors before rendering his decision.

At the hearing, the Board reserved decision on the Motion made by Appellant's attorney to dismiss the County's case for any of the reasons cited above.

ISSUES

1. As a preliminary matter, was there a proper delegation of authority from the Chief Administrative Officer to Department or Agency heads to take a dismissal action under Section 28 (formerly codified in Section 27) of the Montgomery County Personnel Regulations.

2. Did Appellant violate Section 28-2(h) of the Montgomery County Personnel Regulations for failure to comply with the DFRS Policy Number 502, Sections 3.1 and 4.0 Code of Conduct;

3. Did Appellant violate Section 28-2(h) of the Montgomery County Personnel Regulations for failure to comply with the DFRS Policy Number 521, Section 5.0(a), Detail, Overtime and Recall;

4. If yes, for either or both of the charges in paragraphs 2 and 3 above, was the remedy of dismissal appropriate and in conformity with the Personnel Regulations?

FINDINGS OF FACT

1. Appellant had been working as a Firefighter/Rescuer II in the DFRS for

approximately seven years. He had been working under the direct supervision of a Sergeant (Sgt.) (now a Lieutenant) at the Silver Spring Station One for several years.

2. On March 14, 1996, Appellant was detailed to the Occupational Medical Section (OMS) for his yearly pulmonary function test. "Scheduling" called the Sergeant advising him that someone was being held on overtime, and that when Appellant returns to the station, he was to be detailed to Station 16.

3. When Appellant returned to the station, somewhere between 9:45 and 10:15 a.m., the Sergeant advised him that he was detailed to Station 16 because they were holding a person over on overtime. When Appellant questioned the Sergeant as to why he was being detailed, the Sergeant advised Appellant that the policy was "Once you're out, you're out", so it doesn't disrupt the shift. The Sergeant advised that this policy had also been applied to him. Appellant protested that there were three people at the station who were junior to him and that the policy on detailing was according to "inverse seniority".

4. When the Sergeant, shortly thereafter, saw that Appellant was not leaving, he gave Appellant a direct order to go to Station 16. When Appellant refused to obey the direct order, the Sergeant called Scheduling, which is the personnel that deals with shift changes, and advised them that Appellant refused to take the detail to Station 16. Scheduling advised the Sergeant that they would get back to him.

5. A few minutes later, the Sergeant received a phone call from the duty chief at that time, who told the Sergeant to give Appellant a direct order to leave the station. When the Sergeant gave this direct order to Appellant, he again refused to obey it, and the Sergeant so advised the Duty Chief. The Chief told the Sergeant to tell Appellant to leave the station right away and go to Station 16. The Sergeant again gave this order to Appellant but Appellant walked out of the room.

6. In the meantime, Appellant called the Union and spoke to the Vice-President. The Vice-President of the Union (IF, Local 1664) testified that he received a phone call from Appellant on March 14, 1996 informing him that when Appellant returned to the station from his annual physical, he was told he was detailed to Station 16. Appellant thought that there were several people in the station junior to him who should be detailed before him and, therefore, he had a grievance. The Vice-President testified that he advised Appellant to take the detail because he did not think there was a grievance until Appellant had taken the detail.

7. Appellant testified that he refused to go on the detail because he thought that the order was a violation of policy. Since he was getting very upset, Appellant asked to be placed on sick leave, which was approved. He then asked for ambulance transportation to the hospital.

8. Appellant testified that he thought the order given to him by the Sergeant to go on the detail was both "illegal" and "improper" under DFRS Policies and Procedure, No. 502, Section 4.2, which states that "Employees will not obey any order which they know would require them to commit illegal, improper or unethical acts." Appellant also testified that he thought that the term "original order" in Section 4.0 meant the first order given to him.

9. Appellant testified that he thought that the order directing him to go on the detail violated DFRS Policies and Procedures, No. 521, Section 5.1(b) which states "Consistent with workload requirements as DFRS deems appropriate, the assignment of a bargaining unit employee must be done by inverse seniority."

10. Appellant acknowledged that the phrase, "Consistent with workload requirements" is a way out for the County not to detail according to "inverse seniority". Appellant also testified that he did not know whether a more senior firefighter who had come in late had ever been detailed before a more junior firefighter. Appellant testified that he could have filed a grievance but did not do so because he was upset. He also acknowledged that, in the fire service, it is not his decision to determine who is assigned where, but that he should go wherever he is assigned.

11. An Assistant Chief testified that he was aware of four other disciplinary actions taken against Appellant.

(1) In June 1995, Appellant refused to accept an assignment of providing PMIC responsibilities which involves supervising patient care as part of a 3-person crew on an advanced life support unit. The discipline was a 5% pay reduction for 15 pay periods. (2) In March 1995, he was told to upgrade the status of ambulance 28 to medic 18 because there was an extra level of skill available. Because he failed to do that, an extra unit had to be sent out from the Wheaton station. He was given an oral admonishment. (3) In August 1991, while Appellant was in Communications, he failed to dispatch a call for an ambulance resulting in the individual being transported to the hospital by other means. For that, he received a 5% reduction in pay for 6 pay periods. (4) In July 1991, Appellant had agreed to fill an overtime position at Station 23 as a medic or person who provides advanced life support service but then left the station prior to the relief without authorization. For that, Appellant was given a written reprimand.

12. The Assistant testified that he was a party to the discussions between another Chief and the Director, DFRS reviewing the information presented to him in this case. The Director determined that there had been a consistent pattern here of not providing services as directed and he was unwilling to take further corrective action in this area and, therefore, chose termination.

13. The Assistant testified that the policy of "once you're out, you're out" predates

Policy and Procedures 521 of August 1993. The Sergeant may not have been as familiar with this policy which is routinely applied in all 33 work sites on a daily basis because he is only dealing with one work location. Since 1988, the policy of DFRS has been that assignment of work is management's choice although the Union had tried to push the concept of seniority. Management agreed to put that in the policy (521) with the proviso that it be consistent with workload requirements as DFRS deems appropriate.

ANALYSIS AND DISCUSSION

As a preliminary matter, the evidence shows that the Director as the head of the agency, DFRS, has been delegated the authority to take dismissal/termination actions against employees. (See Delegation of Authority, approved by the Chief Administrative Officer on October 28, 1992, item 16, Dismissal/Termination). Appellant has not presented any evidence to show that this delegation is not valid. In addition, the Director's Statement of Charges refers to the delegation of authority noted in Section 28-5(b) of the Montgomery County Personnel Regulations as the basis for taking the disciplinary action against Appellant.

While Section 28-2(h) refers to the "violation of an established policy or procedure", there is a further reference to the specific policies violated in DFRS Policy Number 502, Section 3.1 and 4.0, Code of Conduct and DFRS Policy Number 521, Section 5.0(a), Detailing Overtime and Recall. Policy Number 502, Section 3.1 provides, inter alia, that "All employees are to adhere to Departmental policies and procedures..." and Section 4.0 provides that "All uniformed employees are responsible for obeying a supervisor's lawful order" and if not rescinded, "the original order will stand."

Policy Number 521, Section 5.0(a) provides in relevant part: "Consistent with workload requirements, as DFRS deems appropriate, the assignment of a bargaining unit employee must be done by inverse seniority." This proviso clearly allows for exceptions to the "inverse seniority" concept when DFRS deems it appropriate as in the situation presented in this case.

It is clear and simple that Appellant refused to obey the direct order of his Sergeant supervisor, and the duty officer to go on a detail to Station 16. There was no legitimate justification for this refusal since obeying the order would not have required Appellant to commit "illegal, improper or unethical acts" which would violate Section 4.2 of DFRS Policy 502.

The following testimony of the Assistant is instructive:

Q. Why is insubordination such a serious offense in the Fire Service?

A. The Department of Fire and Rescue Services is charged with providing essentially

emergency services on an immediate basis in either a life-threatening or a property-endangering scenario, much as the military allusion earlier.

We expect to be able to respond immediately. We expect to be able to provide instruction and direction to our employees to carry out the activity that's required at that time. Failure to do that can and will have consequences both in terms of property life -- property loss or life loss.

We operate under a quasi military structure where we provide direction, and we expect employees to comply with that instruction.

Considering also Appellant's previous infractions involving his failure to follow supervisory directions, DFRS was not required to follow progressive discipline. Rather, because of the seriousness of the offense, which goes to the heart of the quasi-military DFRS operations, the Director's choice of the penalty of dismissal is not an abuse of discretion. Therefore, although Appellant may have had favorable documents in his file, Chief Grover had a reasonable basis to consider that, on balance, Appellant has shown a propensity for non-compliance with supervisory direction warranting his dismissal.

CONCLUSION

The preponderance of the credible evidence shows that: there was a lawful delegation of authority to the Director to take dismissal action against Appellant; both charges listed in the May 22, 1996 memorandum of dismissal have been proven; the dismissal of Appellant did not violate any substantive or procedural provisions of the Montgomery County Personnel Regulation; and the Director considered all of the evidence in the file, including prior disciplinary actions against Appellant for insubordination as well as other items in his personnel file.

The Director did not abuse his discretion by deciding to dismiss Appellant because of several prior instances of insubordination.

Considering the seriousness of the infractions, the principle of progressive penalties was not required to be followed in this case.

Based upon a preponderance of the evidence presented, the Board sustains the County's action in dismissing the Appellant. Therefore, this appeal is denied.

GRIEVABILITY

Case No. 97-02 & Case No. 97-04

Appellants appealed the decision of the Labor/Employee Relations Manager denying the Appellants' grievances as not being appropriate for review through the grievance process. Appellants (2) requested consolidation of their appeals.

BACKGROUND

Both Appellants are Fire/Rescue Lieutenants employed by Montgomery County Government in its Department of Fire and Rescue Services (DFRS). On June 6, 1996, Lieutenant A, who was then a Sergeant filed a grievance requesting back pay in the amount of five percent (5%) for the period from November 1, 1992, until March 5, 1994, together with other additional remedies that might be appropriate under the circumstances of his case.

On June 10, 1996, Lieutenant B, who was also then a Sergeant, filed a similar grievance requesting back pay in the amount of five percent (5%) for the period from July 12, 1992, until October 31, 1992, together with all other appropriate relief.

By separate memorandums dated July 18, 1996 to Lt. B and July 23, 1996 to Lt. A, the Labor/Employee Relations Manager advised that the complaints set forth in their grievances involved a classification dispute and, therefore, were not appropriate for review through the grievance process under the County Grievance Procedure, Administrative Procedure 4-4, and Section 7-6 of the Personnel Regulations.

Each Appellant noted an appeal to the Merit System Protection Board on the grounds that the refusal to review their grievances on the merits denies them equal protection under the law and discriminatorily refuses to compensate them for back pay.

FINDINGS OF FACT

1. In November, 1995, a consultant provided the County's Director of the Office of Human Resources with a Classification Study of officer ranks in the DFRS. This Report made recommendations with respect to numerous areas of personnel, two of which form the basis for Appellants' respective grievances and subsequent appeals to the Merit System Protection Board.

2. The first relevant recommendation involved changing the titles used for Fire/Rescue officers. For example, the Final Report recommended that the then current title "Fire/Rescue Sergeant" be changed to "Fire/Rescue Lieutenant" and that the then current title "Fire/Rescue Lieutenant" be changed to "Fire/Rescue Captain."

3. The second relevant recommendation involved specific stations where members may be eligible to receive back pay due to performing work outside of their job classification, specifically Sergeants performing station Commander responsibilities. The consultant recommended that Station Commander responsibilities be assigned the rank of Lieutenant (old title). Implementation of this recommendation would involve the creation of 22 new Lieutenant positions which, through retitling, would result in 22 new positions assigned the rank of Captain.

4. By memorandum dated March 12, 1996, the Director of the Office of Human Resources advised the Director of the DFRS of her final decisions regarding the classification and compensation review of the Fire/Rescue officer rank occupational classes. She accepted the consultant's recommendations that the occupational class titles be changed so that Fire/Rescue Sergeants would become Fire/Rescue Lieutenants and Fire/Rescue Lieutenants would become Fire/Rescue Captains. The retitling of positions was to take effect on July 1, 1996. She also addressed the consultant's recommendations concerning position creations and abolishments as follows:

> "The consultant identified 22 Fire/Rescue Lieutenant (new title) positions where the incumbents serve as the station supervisor. My decision is to create 22 new positions at the rank of Captain (new title), with the subsequent abolishment of 22 Lieutenant positions. These 22 newly created Captain positions will be filled through competitive examination."

5. Section 7 of the County's Personnel Regulations deals with classification and provides, through pertinent subsections, that each occupational class must be reviewed at least once every five years. When the review of an occupational class is not completed in five years, employees' salary adjustments under Section 9-19 (salary following reclassification/ reallocation) must be made retroactive to the expiration of the five year period.

6. Following the above Personnel Regulations, in a March 12, 1996 memorandum, the Director of the Office of Human Resources instructed that incumbents of the 22 Station Commander positions receive a temporary five (5%) pay increase in recognition of their being required to work out of their occupational class. The pay increase was to commence July 12, 1992, the beginning of the first pay period following the date that the classification maintenance study should have been completed until the time that an incumbent was no longer assigned station supervisor duties and responsibilities.

7. By Directives #96-09 and 96-11 to DFRS Personnel issued on March 22, 1996, the Director of the DFRS stated that the retitlement of ranks would become effective July 1, 1996 and that 22 then Lieutenant positions would be created at eleven work sites and retitled to the rank of Captain. The new Captain positions would be filled through a competitive promotional process. He also noted that some then Sergeants (new Lieutenants) assigned to Stations 5, 7, 11, 16, 21, 24, 26, 28, 33 and 40 who worked out of their occupational class in performing services as a station supervisor may be due temporary back pay increases for such work performed between July 12, 1992 and March 30, 1996. A form to be completed by Sergeants requesting back pay for work performed out of class as station supervisor during this period was included with directive #96-11.

8. Both Appellants completed requests to receive back pay and both requests were denied because Station 10 was not one of the Stations specified in Directive 96-11. Each Appellant filed a grievance.

9. Lt. A filed his grievance on or about June 6, 1996. According to the grievance, he was transferred to Station 10 on November 1, 1992 and performed the duties and responsibilities of a Shift Commander on the "A" shift until March 5, 1994. On March 6, Station 10 added a piece of equipment to the engine and ambulance assigned to this single-service station, and a Lieutenant (old rank) was assigned to take over responsibilities as a shift commander on the "A" shift. Lt. A requested back pay in the amount of 5% for the period November 1, 1992 through March 5, 1994. Appellant contends that Directive 96-11 erroneously did not include Station 10 and, due to changes made during the time frame mentioned in the Directives, Station 10 was not a single service station at the time the consultant's study was performed.

10. Lt. B alleges that then Sergeant B was transferred to Station 10 on September 9, 1990 and performed the duties and shift responsibilities of a Shift Commander on the "A" shift until October 31, 1992 at which time he was transferred and replaced by Sergeant A. Lt. B requested back pay in the amount of 5% for the period July 12, 1992 through October 31 1992. He contends that Directive 96-11 erroneously did not include Station 10 for the above referenced period.

11. By memorandums dated July 18 and July 23, 1996, the County's Labor/Employee Relations Manager determined that both Appellant's complaints involved a classification issue and, as such, were not appropriate for review through the grievance procedure. "[T]he decision as to specific stations where incumbents are eligible to receive back pay was made as a result of the decision on a classification assignment and, as such, is not subject to review through the County Grievance Procedure, Administrative Procedure 4-1."

12. The County's final response to the Board, dated August 28, 1996, which was prepared by the Director of Human Resources and the Assistant County Attorney, concluded, that the subject of this appeal involves a classification issue and, absent a violation of procedures contained in Section 7-5, it is not appropriate for review through the grievance procedure. The County further requested that this appeal be denied.

ISSUES

1. Whether the failure to review the Appellants' grievances on the merits violated any merit system principles or laws, as interpreted by relevant court or Board decisions; and

2. If so, as a remedy, whether Appellants are entitled to a review of their grievances and attorney fees.

ANALYSIS AND DECISION

1. The Appellants claim that they are entitled to due process of law and are entitled to a review of their grievances. The November 1995 consultant's report stated that "individuals at certain stations receive extra compensation for working out of class from the period between July 12, 1992, and March 30, 1996."

2. A review of the consultant's report as well as March 12, 1996 memorandum from the Director, Office of Human Resources to the Department of Fire Rescue Services list the fire stations where employees were assigned duties as Station Commanders and, according to Section 11-2 of the Personnel Regulations, are to receive both back pay and a temporary pay increase in recognition of their being required to work out of occupational class.

3. The Appellants asserted that through an error, Station 10, where they were assigned between 1992 and 1994, was omitted as a single service station where they were assigned Shift Commanders duties. The Appellants claim that Station 10 was omitted because, when the joint classification and compensation review was performed by the Office of Human Resources and the outside contractor, the station was not a single service station. However during the retroactive pay period it was.

4. The Appellants make a very convincing argument that, under Section 7 of the Personnel Regulations, the classification decision made by the County was that, based upon the study, the individuals who served in a position of Shift Commanders in a single service station should receive back compensation. Therefore, this matter is grievable since the Appellants are not grieving a classification issue but rather, the issue of whether the County erred in omitting Station 10 from the listing of single service stations.

5. The Board cites three recent Court remands to the Board ordering the Board to return the cases to the County. The Board, in all cases, ordered the County to "entertain, process and determine the merits of the grievances."

> In MSPB Case No. 95-03, Civil No. 131678, on October 2, 1995, a Circuit Court Judge reversed the Board's decision that the case is not grievable and remanded this grievance with instructions that the responsible Montgomery County Government officials process, entertain, and determine the merits of the grievance.
>
> In MSPB Case No. 95-11, Civil No. 139428, on January 18, 1996, a Circuit Court Judge reversed the Board's decision that the case is not grievable, and directed the MSPB to return the case to the County with directions to consider the merits of the grievance.
>
> In MSPB Case No. 95-17, Civil No. 138554, on December 8, 1995, a Circuit Court Judge reversed the Board's decision that the case is not grievable, and remanded this grievance back to the Board with instructions to return this case to Montgomery County to have the Appellants' grievance reviewed on the merits. The Judge further held that the Appellants are merit employees and the idea of a merit system is that people will get treated on a merit basis and are entitle to an inquiry into their grievance.

6. Therefore, the Board concludes that the County's refusal to determine the merits of the Appellants' grievances is a violation of the merit law. Based upon the foregoing cases, it is the opinion of the Board that Section 7 is not being properly applied by the County.

7. The Board is not in a position to judge the merits of the case at this time and, thus, has no authority to award attorneys fees.

CONCLUSION

In consideration of the above findings of fact and conclusions of law, and considering the recent Court remands to the Board, the Board determined there has been a violation of merit principles or laws in the County's decision not to accept the grievances filed by the Appellants. The County is hereby ordered to accept the Appellants grievances for review on its merits. Therefore, this case is remanded to the County for further processing of the grievances.

The Board has no authority to grant legal fees in this appeal and, therefore, the Appellants' request for attorneys fees is denied.

Appellant appealed the decision of the Labor/Employee Relations Manager, that his complaint was not appropriate for review under the County Grievance Procedure. Appellant had filed a grievance concerning a denial by the Director of the Office of Human Resources, of his request for a discontinued service retirement.

ISSUE

Whether the June 21, 1996 grievance filed by Appellant, complaining about a decision by the Director of the Office of Human Resources to deny his request for a discontinued service retirement, is grievable and should be considered by the County on its merits.

FINDINGS OF FACT

1. On June 5, 1996, Appellant, employed as an Automated Systems Manager II in the Department of Fire and Rescue Services, requested a discontinued service retirement from the Director of Human Services. The Director denied his request on the grounds that he was not eligible for a discontinued service retirement.

2. On June 21, 1996, Appellant filed a grievance complaining about the denial of his request for a discontinued service retirement. By memorandum dated July 29, 1996, the Labor/Employee Relations Manager advised the Appellant that his complaint is not appropriate for review under the County Grievance Procedure.

CONCLUSIONS OF LAW

Section 29-2 of the County's Personnel Regulations sets forth various grounds upon which a County employee may file a grievance. That section provides, inter alia, that a grievance may be filed by an employee who is adversely affected by an alleged:

. . . .

> (d) Improper, inequitable or unfair application of compensation policy, and employee benefits, which may include salary, pay differentials, awards, overtime pay, leave, insurance, retirement and holidays.
> (emphasis supplied)

Since Appellant's grievance concerns the denial of a discontinued service retirement, it is grievable under the language of Section 29-2 quoted above. This section authorizes the

filing of a grievance by an employee who is adversely affected by an alleged improper, inequitable or unfair application of the retirement laws.

Reliance by the Labor/Employee Relations Manager, as stated in his July 29, 1996 memorandum, on Section 33-56 of the County Code concerning Interpretations of the Employees' Retirement System of Montgomery County is misplaced. The language of Section 33-56 addresses a request by a member of the County Retirement System for a decision from the Chief Administrative Officer on a question arising under Article III, Employees' Retirement System. However, Section 33-56 does not apply to this case because here Appellant's application for a discontinued service retirement was denied by the County. Since the County has denied Appellant's application, Appellant is entitled to file a grievance under Section 29-2 of the Personnel Regulations complaining about the County's alleged misapplication of the retirement laws to his application for a discontinued service retirement.

This is not a final decision by the Board on the merits of the grievance. Therefore, the Board has no authority under Section 33-14(c) to award attorney fees as requested by Appellant's attorney. Should the Appellant ultimately prevail in an appeal of the merits, the Board may then consider an award of attorney fees in its final decision on the merits of the grievance.

CONCLUSION

In consideration of the above, the Board reverses the July 29, 1996 determination of the Labor/Employee Relations Manager, that Appellant's complaint is not appropriate for review under the County Grievance Procedure. Accordingly, Appellant's grievance is remanded to the County for further processing and for a decision on the merits.

Case No. 97-10

Appellants appealed the decision of the Labor/Employee Relations Manager, finding that grievances filed by the Appellants were non-grievable "classification matters" under the administrative grievance procedure, and alternatively, were dismissable as untimely filed.

BACKGROUND

In November 1995, the County's Director of the Office of Human Resources (Director) was provided a consultant's "Report on the Review of Officer Classes in the Montgomery County Department of Fire and Rescue Services." As relevant herein, the Report recommended that the existing officer rank structure be retained, and the position then titled

"Fire/Rescue Lieutenant" be strengthened by assigning station commander responsibilities to the class, "thereby creating 22 new positions at this rank." It was further recommended, that the then titled position of "Fire/Rescue Sergeant" be changed to "Fire/Rescue Lieutenant" and that the position then titled "Fire/Rescue Lieutenant" be changed to "Fire/Rescue Captain." By memo dated March 12, 1996, the Director notified the Director of the Department of Fire and Rescue Services (Department), of her decisions regarding the above-referenced study. The described title changes were to be made and 22 newly created Captain positions were to be filled through competitive examination.

By Directive dated March 22, 1996, all Department employees were notified that the changes in titles would be effective July 1, 1996, and that the newly created Captain positions would be filled via a competitive promotion process. On July 16, 1996, the Appellants filed grievances contending that as current Lieutenants, a position to be designated Captain, they should be reclassified to Captains pursuant to Section 7-4 of the Personnel Regulations, rather than the positions being filled by competitive procedures. In their view, there was an entitlement to reassignment to the rank of Captain. As remedy, Appellants requested that they be placed in the Class of Captain effective July 1, 1996, and be awarded attorney fees. Alternatively, they reserve the right to obtain a Discontinued Service Pension at their election.

In his response to the grievances, the Labor/Employee Relations Manager noted that Section 7-6 of the Personnel Regulations provides that "the Chief Administrative Officer's decision on classification matters is final and may be appealed to the (Board) only if there is a claim of a violation of Section 7-5 of the Personnel Regulations," concluding that "as there was no claim of violations of Section 7-5, there is no further right of appeal." The Labor/ Employee Relations Manager then looked to the scope of the grievance procedure and stated:

> ...for an action to be considered grievable it must arise out of a disagreement between an employee and supervisor concerning a term or condition of employment. The classification of a position does not involve a term or condition of employment, therefore, it is not subject to review through AP 4-4. In addition, Section 4.10 of AP 4-4 specifically excludes filing grievances on position classification decisions.

The Labor/Employee Relations Manager alternatively stated that in his view the grievances were untimely filed, contending that they were filed more than 20 calendar days from either the March 12 decision to create the new position or the March 22 dissemination of the decision to affected Department employees.

ISSUES

1. Were the grievances timely filed?

2. If so, are the grievances non-grievable classification matters?

3. If no, is there an entitlement to attorney fees?

ANALYSIS AND DECISION

1. Administrative Procedure 4-4, Grievance Procedure, provides the following time limit for filing a grievance:

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

As stated above, the Labor/Employee Relations Manager contends that the time limit for filing a grievance should begin to run from the March 12 decision to create and fill by competition the new positions, a decision that was communicated to the firefighter associations, or no later than the March 22 notice of this disseminated throughout the system. The submission filed in behalf of the Appellants does not dispute their awareness of "the problem" from either the March 12 or 22 communication, but contends that the time for filing a grievance began to run from the July 1, 1996, effective date of the classification. Appellants argued:

> Had the Appellants filed grievances prior to the July 1, 1996 effective date, their efforts would have been premature. Rather, the Appellants properly waited until July 1, 1996 when the classifications took effect. It was at that time when the dispute became a concrete one.

The Appellants' concept of the appropriate event to start the 20 day clock running is not in compliance with the clear language of the applicable grievance procedure. The procedure provides that the 20 day period for filing a grievance begins with the date the employee knows, or should have known "that the problem existed." The evidence is clear, and it is undisputed, that the Appellants knew that the new Captain positions were going to be competitively filled, which was the crux of their complaint, no later than March 22, 1996. Twenty calendar days from March 22 was April 11, 1996. The grievances were not filed until July 16 and 17, making them untimely under the grievance procedure. Therefore, the dismissal of the grievance is sustained.

Having concluded that the grievances were not grievable, because they were untimely filed, the Labor/Employee Relations Manager did not respond to the merits of the grievance.

Accordingly, having agreed with the decision that the grievances were untimely filed, the Board sustains the dismissal of the grievances. Accordingly, since the grievances were not timely, there is no reason for deciding the merits of the grievances and there is no entitlement to attorney fees.

Case No. 97-11

Five Appellants appealed the decision of the Labor/Employee Relations Manager, that their grievances were not timely filed.

BACKGROUND

The Appellants filed grievances regarding the awarding of a 5% pay increase retroactive to January 1992 which were denied as untimely filed. As relief, the Appellants request that the grievances be remanded to the Office of Human Resources and considered on their merit. At issue is whether the grievances were filed in a timely manner.

FINDINGS OF FACT

1. A special classification study of selected positions was completed on June 21, 1996. The final classification decisions of the Director, Office of Human Resources were transmitted to the affected employees in a memorandum dated June 21, 1996, and in a memorandum dated June 24, 1996 by the Council Staff Director.

2. On August 12, 1996 Appellants filed a grievance with the Office of Human Resources under Administrative Procedure 4-4 because the classification decision in the special study was not made retroactive to 1992.

3. On August 22, 1996 the Labor/Employee Relations Manager, in a written response to the Appellants, determined that the grievances were not timely filed. Section 6.0 of Administrative Procedure 4-4, Grievance Procedure, provides the following time limit for filing a grievance:

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

4. On September 4, 1996, in a written response to the Labor/Employee Relations Manager and the Chief Administrative Officer, Appellants cite Personnel Regulations, Section 1-13, Limitations on Actions and Relief, paragraph(a) as being in conflict with Section 6.0 of Administrative Procedure 4-4:

> Personnel Regulations, Section 1-13(a) ....Any actions instituted or filed by an employee under these Regulations must be filed within 45 days from the date the employee knew or should have known of the occurrence upon which the action is based, subject to the provisions of (b) in Section 1-13.

5. On September 12, 1996, in a written response to Appellants, the Labor/Employee Relations Manager stated that paragraphs (a) and (b) must be read together in order to get a clear understanding of the time limitations for filing a grievance. Personnel Regulations, Section 1-13, Limitations on Actions and Relief, paragraph(b) provides the following:

> Personnel Regulations, Section 1-13(b)....If another provision of the Personnel Regulations provides a shorter period of time within which an action must be commenced, the shorter period of time is controlling.

6. On October 8, 1996 Appellants appealed to the Merit System Protection Board to accept the grievances based on their merit, citing the cumbersome and confusing language of the Regulations as the reason for the delayed filing.

CONCLUSION

Based upon a review of the record, the Board finds no ambiguity in Section 6.0, Administrative Procedure 4-4, stating the time limit within which an employee must file a grievance. Nor is the Board persuaded that Personnel Regulation, Section 1-13, Limitations on Actions and Relief, is in conflict with Section 6.0, Administrative Procedures 4-4, since Section 1-13(a) read together with Section 1-13(b) clearly states that, if another Regulation provides a shorter period of time, the shorter period is controlling.

For the reasons stated above, the Merit System Protection Board affirms the decision of the Labor/Employee Relations Manager, dated September 12, 1996. The appeal is therefore denied.

PROMOTIONAL PROCESS

Case No. 96-08

Appellant appealed the decision of the Chief Administrative Officer (CAO), dated April 10, 1996, denying the Appellant's July 18, 1995 grievance. The grievance contested the failure of the Montgomery County Police Department to select Appellant for promotion to Police Lieutenant.

BACKGROUND

Appellant, a Sergeant in the Montgomery County Police Department (MCPD), applied for a promotion to the rank of Police Lieutenant pursuant to a promotional announcement made on July 13, 1993. After taking the examination, Appellant was rated as "Well Qualified" and certified to the promotional eligible list for the rank of Police Lieutenant effective October 1, 1993.

Appellant was placed 8th out of 21 police sergeants on the list with a score of 96. There were 7 candidates with scores higher than Appellant. The Well Qualified list was in effect for two years, from September 30, 1993 until September 10, 1995. Nine candidates with lower test scores than Appellant were promoted prior to the expiration of the list. Appellant was skipped over for promotion to the rank of Police Lieutenant. He claims that, in doing so, the MCPD violated applicable merit system principals.

FINDINGS OF FACT

1. The July 13, 1993 promotional announcement for Police Lieutenant, taken verbatim from Departmental Memorandum 89-14, which was issued on March 30, 1989, states in relevant part:

> In making promotional decisions the Chief of Police may consider examination results, length of County service, time in rank and other information pertinent to the candidate's suitability and potential for successful performance in the higher rank. The Chief may also consider for up to a maximum of five years: personnel evaluations, commendations, reprimands, and disciplinary actions. Information may be obtained by a review of personnel files, examination results, personal interviews or recommendations from the supervisors of those on the eligible list. The selection

process must be consistently conducted at each stage of consideration.
The Chief of Police may formally delegate to others authority to review and consider the above listed information and, based on that information, to recommend officers for promotion.....

2. The process utilized by the Department for selecting applicants from the eligible list for promotion to Police Lieutenant was "rank order with exception."

3. The Chief of Police stated that an act of dishonesty, which occurred on May 24, 1994, was the reason the Appellant was not promoted. A decision was made to bar the Appellant from promotion until further notice.

4. The incident of dishonesty, upon which the Chief based the decision not to promote the Appellant, involved the submission of a request for reimbursement for money he was not owed. When Appellant's supervisor inquired regarding the request for reimbursement for a car wash, Appellant lied to him on two occasions.

5. In a handwritten letter to a Police Captain, dated May 26, 1994, Appellant stated, in relevant part, as follows:

> Since I probably won't see you until I get back to work on Tuesday at 4:00 p.m., I again wanted to apologize to you and Blank for submitting the expense sheet and, more importantly, for lying to both you and Blank....
>
> To the best of my knowledge, I have never given anyone reason to question my integrity before. As it now stands, I have <u>destroyed</u> it as far as you and Blank are concerned...

6. The written record of the incident upon which Appellant's promotion was denied consists of: a May 25 and 26, 1994 explanation of the incident from Appellant; a June 2, 1994 investigation of the incident from a Police Lieutenant; a July 21, 1994 memorandum from a Police Captain regarding Appellant's promotional potential; and a July 5, 1994 memorandum from a Police Major the Police regarding Appellant's promotional potential.

7. The documents referenced in item 6 above were not maintained in any personnel files provided for in Administrative Procedure 4-8, Records, but were kept in the Office of the Chief of Police. Appellant stated that he had never seen the documents referred to in item 6, except for his own explanation of the incident, until the day prior to the November 21, 1995 hearing.

8. Effective May 29, 1994, Appellant was transferred from the Special Investigations Division to the Wheaton Glenmont District because of the May 26, 1994 incident. However,

no formal disciplinary action was taken against Appellant by the MCPD as a result of the lying incident.

9. A former Lieutenant Colonel told Appellant that, if he and a former Chief were still there, Appellant would be considered for the next round of promotions. However, when the Lieutenant later informed the current Chief (appointed in February 1995) of this statement, she responded that she had made a decision not to promote Appellant and that she was not bound by what the former Chief had said.

10. Appellant maintains that irrelevant, inappropriate and prejudicial materials belonging to other employees were contained in his personnel file when it was reviewed as part of the selection process, i.e., a request for secondary employment and an accident report of an employee's police vehicle being struck while parked in a parking lot. However, the Chief of Police stated that these documents were placed in Appellant's personnel file by error and, in any event, were not a consideration in the promotion selection process.

11. The position held by a Police Sergeant (#002228), who scored 81, the lowest score on the Police Lieutenant examination, was transferred, effective March 5, 1995, from the Police Training Academy to Field Training Officer Coordinator to replace a Lieutenant who was transferred on the same date to the Management Service Bureau as Director, Records Division/Technology. The MCPD March 1995 Personnel Action Report lists the Sergeant's transfer among the permanent transfers.

12. The Chief of Police stated that the Sergeant's position was initially transferred to the Coordinator position because the Sergeant shared the same work site as the Coordinator and, therefore, he could split his time performing the duties of his incumbent position as well as those of the Coordinator. She stated that another consideration was the fact that the Sergeant already knew the rookies who were the subject of the Coordinator's activity and, further, that the Sergeant's assignment was the least disruptive option to fill a position that could not be left vacant.

13. The Sergeant was promoted to the rank of Police Lieutenant on April 2, 1995. Although the Chief of Police and retired Lieutenant stated that the transfer of the Sergeant's position did not influence the Chief's decision to promote him, the Chief stated that the Sergeant's assignment as acting Field Training Officer Coordinator was a consideration in his promotion.

14. The Chief of Police testified that she was familiar with all candidates selected and that, in making promotional decisions, the Chief and the MCPD followed its established procedures outlined in the 1993 Police Promotional Examination announcement for the rank of Lieutenant.

15. It is undisputed that a major reason that Appellant was not selected from the 1993

eligibility list for Police Lieutenant by the former Chief or the current Chief was the incident occurring in May 1994 of which the Chief of Police had direct knowledge. The Chief stated that her decision not to select Appellant for promotion to the rank of Lieutenant was based solely on her concerns regarding character, integrity and dependability reflected by Appellant in the May 1994 incident. These are deemed by her to be essential leadership qualities required of key management staff upon whom she must depend to carry out the mission of the MCPD in a professional and exemplary manner.

ISSUES

1. Whether the failure to promote Appellant to the rank of Police Lieutenant violated any merit system principles or laws, as interpreted by relevant court and Board decisions; and

2. If so, as a remedy, whether Appellant is entitled to a retroactive promotion, back pay and attorney fees.

ANALYSIS AND DECISION

1. Appellant claims that Memorandum 89-14, issued on March 30, 1989, as utilized in the 1993 promotional process for the rank of Police Lieutenant, on its face is violative of the merit laws and regulations. To support this contention, Appellant cites the CAO's decision in the Grievance of David Aaron, et al. issued on September 27, 1995 wherein the CAO determined that the MCPD amended the promotional announcement and procedure in Memorandum 89-14 for promotions to Sergeant to by changing "may" to "will" as follows: "[i]n making promotional decisions, selections, the Chief of Police will consider examination results...and other information pertinent to the candidate's suitability and potential for successful performance in the higher rank." In essence, the changed language makes it mandatory for the Chief of Police to consider the listed items for promotional decisions for sergeants.

2. However, whether Memorandum 89-14 with respect to promotional decisions for lieutenant is in conformity with merit system procedures is really not an issue in this case. Here, it is undisputed that the Chief of Police did not select Appellant for promotion because of "other information pertinent to the candidate's suitability and potential for successful performance in the higher rank" as authorized by Memorandum 89-14. This other information concerns the May 24, 1994 incident wherein Appellant submitted a request for reimbursement for money he was not owed and then lied to his supervisors regarding this request on two occasions. This incident was certainly one which the Chief had the authority and discretion to take into account in determining whether Appellant was suitable to assume the responsibilities of the higher rank of Lieutenant.

3. Although the case of Alban v. Montgomery County Police Department, (Alban), Circuit Court, Civil No. 71818, November 10, 1992, was overturned by Lee v. Montgomery County Department of Police, (Lee), Court of Special Appeals, No. 49, October 25, 1993, portions of such case which were not reversed are instructive and applicable to the circumstances of this case. There, Judge Blank distinguished that case from Montgomery County v. Anastasi, (Anastasi), 77 Md. App 126, 549 A.2d 753 (1988). In Anastasi, the Court of Special Appeals cited two major concerns in arriving at its decision i.e., Chief Blank did not provide guidelines to his advisors before seeking recommendations from them. Secondly, the process by which to decide who to promote from the eligibility lists was "casual" and "ad hoc" in that advisors submitted recommendations only as to those candidates whom they personally observed, which were the only recommendations considered by Chief Blank.

4. In Lee, the Court of Special Appeals reversed Alban, because all the appellants in that case had not been considered for promotion under the same guidelines issued on March 30, 1989. While the Circuit Court in Alban found the guidelines to be sufficient under merit system laws, the Board, in its remand decision from the Court of Special Appeals in James D. Lee, et al. , MSPB Case No.91-09, June 29, 1994, found it unnecessary to determine whether the Chief's March 30, 1989 memorandum sufficiently complies with merit principles for application in future cases. However, the Board did not determine that the 1989 guidelines do not comply with such principles and in this case, Appellant has not shown that the March 30, 1989 Memorandum violates merit system principles or laws.

5. Montgomery County Personnel Regulation, Section 6.3 states that the appointing authority, including the Police Chief, subject to affirmative action objectives, is free to choose any individual from the highest rating category based on that person's overall rating, character, knowledge, skill ability and physical fitness for the job as well as possible future advancement. Thus, the Chief of Police is authorized to exercise his/her full discretion to consider a multitude of indicators of suitability for promotion and examination performance is merely one of them. Therefore, in this case, it is within the discretion of the Chief of Police to consider the May 29, 1994 incident and give it whatever weight she deems appropriate in considering Appellant for promotion to the rank of Lieutenant.

6. Appellant complains that there was improper document maintenance and review concerning his promotability in that a separate file of the May 29, 1994 incident and other supervisory comments were kept in the Chief's Office without his knowledge. However, the files in question were not personnel files provided for in Administrative Procedure 4-8, Records or regular performance appraisals but, rather, were furnished to the Chief for her consideration only for her determination on the promotability of Appellant. Thus, there was no requirement that Appellant be given a copy of the documents in the file or an opportunity to submit a rebuttal. Appellant has not demonstrated that such a file kept in connection with promotion considerations violates any merit system laws.

7. Appellant further complains that not only were the discussions on the review of candidates casual, unmethodical and unrecorded but their format changed after the replacement of the former Chief of Police by the current Chief of Police, and became a direct participant in the command staff review of candidates. Again, Appellant has not shown how the change in Police Chief or the direct involvement of the current Chief in the review of candidates violated merit system laws. Besides, the Chief testified that she personally knew all the candidates on the eligible list and that the procedures derived from Memorandum 89-14 were applied consistently to each candidate each time a promotion was made from the list.

8. Appellant claims that the November 1994 evaluation of him by a Police Lieutenant and a Police Captain comment, that he strongly believed that Appellant was ready to assume the position of Lieutenant, required the destruction of the Blank evaluation and any negative inferences resulting from the earlier car wash incident concerning his promotability. However, notwithstanding the foregoing, the decision of the current Chief of Police, which differed from the opinion of former Chief of Police, to maintain the ban on Appellant's promotion was not shown to have violated any merit system laws. The current Chief had direct knowledge of the car wash incident and could not ignore standards of performance involving character, integrity and dependability which she deems to be essential leadership qualities required of key management staff.

9. The transfer of the Sergeant's position to the vacant position of Field Training Officer Coordinator did not violate Section 23-4 of the Personnel Regulations, Temporary Promotion, because the Sergeant was not given a temporary promotion. The testimony shows that the Sergeant was familiar with the duties of such position and that his position was transferred because it was the least disruptive option for filling a need. subsequent promotion was in accordance with selection procedures and had no impact on the decision not to promote Appellant.

CONCLUSION

In consideration of the above findings of fact and conclusions of law, the Board determines that there has been no violation of merit principles or laws in the Chief of Police's decision not to promote the Appellant. Therefore, the Board affirms the April 10, 1996 decision of the CAO denying Appellant's grievance and the relief requested.

Appellant appealed the decision of the Labor/Employee Relations Manager denying the Appellant's grievance regarding his non-selection for promotion to the rank of Police Major. The County determined that the Appellant's grievance was not timely filed. The Appellant modified his request for relief in his Final Comments to the Board to request that the grievance was timely filed and must be reviewed by the County on its merits.

BACKGROUND

In March 1995, the Appellant, a Captain in the Montgomery County Police Department, was one of five officers certified by the Chief Administrative Officer as "Well Qualified" (the highest rated category) on the Eligible List for Police Major.

On March 21, 1996, when this list expired, three individuals other than the Appellant had been promoted. On March 21, 1996, the Appellant filed a grievance with the County. The Appellant contends that the promotion process was tainted by allowing an unqualified candidate to be promoted to a temporary promotion and then made eligible, giving him an unfair advantage over others, in addition to other irregularities and that the merit system principles were violated.

The County, in its April 2[illegible], 1996 response to the Appellant, indicated that its preliminary finding was that his grievance was not timely filed since the Appellant knew a problem existed prior to or in November 1995, when the last of three individuals were promoted, thereby filling the three positions of Police Major contained in the existing personnel complement. The filing of his grievance to be timely must be filed within twenty calendar days from the date the employee knew, or should have known the problem existed. On April 23, 1996, the County issued its decision and informed the Appellant that the County's decision may be appealed to the Merit System Protection Board.

FINDINGS OF FACT

1. Appellant filed his grievance with the County's Labor/Employee Relations Manager within twenty days from the expiration of the Personnel Bulletin No. 427 "Promotional Examination for the rank of Major" on March 21, 1966.

2. Section 6.0 of Administrative Procedure 4-4, Grievance Procedure, states the following in pertinent part in reference to the period to file a grievance:

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

3. The three individuals selected for the position to Major were promoted April 2, 1995, August 6, 1995, and November 26, 1995, respectively.

4. The County's preliminary response dated April 2, 1996 as well as its final complaint designation, dated April 23, 1996, determined that the Appellants's grievance was not timely filed since the last candidate was promoted on November 26, 1996 and the filing of the grievance/complaint was outside the twenty day time frame appropriate to filing a grievance. The County's response continues. " Therefore, it is my final conclusion that your complaint may not be processed further."

5. The Appellant's May 17, 1996 Appeal to the Board as well as the Appellant's final comments dated July 8, 1996 disagree with the County's conclusion that the Appellant's grievance was not timely filed.

6. The County's final response to the Board dated June 14, 1996, which was prepared by the Director of Human Resources and the Associate County Attorney, concluded that since there are three positions of Police Major contained in the personnel complement for the Police Department, the Appellant's grievance should have been filed if and when the Appellant felt any one of the three promotions was improper and not when the promotion list expired. In addition, the County restated its conclusion that the grievance may not be processed further.

7. The County appointed a new Chief of Police in February, 1995. The Chief put in place her plan to best serve the Police Department. This plan included the reassignment of certain police officials.

8. The Appellant maintains that some of these transfers and appointments were temporary or "acting" until the Personnel Bulletins were posted and promotional examinations taken.

9. The Appellant also maintains that the promotion process was tainted by the Chief allowing an unqualified candidate to be promoted to a temporary promotion and then made eligible, giving the candidate an unfair advantage over others.

10. The Appellant maintains that until the list expired in March, 1996, he did not know a problem existed and, therefore, his grievance was timely filed. The Appellant cites several Board and Court decisions which in part state,"the Appellant had a reasonable expectation of promotion as long as the initial eligible list was valid and in effect."

11. The Appellant maintains that for the County not to review his grievance is a violation of merit principles and request the Board order the County to accept the grievance and to review the grievance on its merits.

ISSUES

1. Whether the failure to review the Appellant's grievance violated any merit system principles or laws, as interpreted by relevant Court and Board decisions; and

2. If so, as a remedy, whether Appellant is entitled to a review of his grievance and attorneys fees.

ANALYSIS AND DECISION

1. Appellant claims that his grievance was filed in a timely manner. When Personnel Bulletin No. 427 expired on March 21, 1996, the Appellant became aware that he was not selected and that problems existed in the "handling" of temporary and acting promotions that eventually led to those individuals being promoted to the rank of Major. The Appellant also cited that in February, 1995, the new Police Chief was appointed and as is usual with a new appointee changes and reassignments are normal.

2. The Appellant also claims that several command level officials as well as the new Chief had one on one meetings with him regarding the police major positions. This lead the Appellant to not file a grievance at the time the three individuals were promoted. The Appellant felt that, with all the reassignments made in the Department, as long as the list did not expire there was a chance that the complement would be expanded.

3. The Appellant also states that the Board in the past had ruled that it is common for grievances to be filed at the lapse of an eligibility list.

4. The Appellant cites several cases where the Board has ruled that the timely filing of a grievance is after the Appellant knew that a problem existed.

5. An analysis of the applicable Board cases cited by the Appellant follows:

MSPB NO. 89-03 & 89-10. In both of these cases the Board ruled that as long as the eligibility list was in effect, the Appellants had a reasonable cause to believe they could be promoted.

The County has stated that, since the existing personnel complement list three positions for Police Major, as soon the last position was awarded on November 26, 1995 the

Appellant should have known about this. If a problem existed. the grievance should have been filed within 20 days on the appropriate form.

6. The County's argument normally would be correct except for the appointment of the new Police Chief on February 21, 1995 and the customary changes made by a new Department Head in the top Staff positions. In addition, a few days earlier a Promotional Examination for the rank of Police Major was posted.

7. The Board cites three recent Court Remands to the Board ordering the Board to return the cases to the County. In all cases the Board ordered the County to "entertain, process and determine the merits of the grievances."

Merit System Protection Board, Case No. 95-03, Civil No. 131678 - A Circuit Court Judge reversed the Board's decision on October 2, 1995, that the case is not grievable and remands this grievance with instructions that the responsible Montgomery County Government officials process, entertain and determine the merits of the grievance.

** In Merit System Protection Board Case No. 95-11, Civil No. 139428, A Circuit Court Judge reversed the Board's decision that the case is not grievable, and directed the Merit System Protection Board to return the case to the County with directions to consider the merits of the grievance.

Merit System Protection Board, Case No. 95-11, Civil No. 138554 - A Circuit Court Judge reversed the Board's decision on December 8, 1995, that the case is not grievable and remands this grievance back to the Board with instructions to return this case to Montgomery County to have the Appellant's grievance reviewed on the merits. The Judge further held that the Appellants are merit employees and that the idea of a merit system is that people will get rated on a merit basis and are entitled to an inquiry into their grievance.

8. The County's refusal to determine the merits of the Appellant's grievance is a violation of the merit law in that the time limits for filing a grievance were met by the Appellant.

9. The Merit System Protection Board is not in a position to judge the merits of the case at this time and has no authority to award attorneys fees.

CONCLUSION

In consideration of the above findings of fact and conclusions of law, the Board determined that there has been a violation of merit principles or laws in the County's decision not to accept the grievance filed by the Appellant. The County is hereby ordered to accept the Appellant's grievance for review on its merits. Therefore, the County's request that this appeal be denied is rejected and the case is remanded to the County.

Case No. 97-03

This is the final decision of the Montgomery County Merit System Protection Board in the above referenced appeal of the Director of Human Resources decision, dated July 15, 1996, that your name be removed from the eligible list for the position of Montgomery County Police Officer Candidate.

BACKGROUND

An Applicant for employment for the position of Montgomery County Police Officer was disqualified as a result of the examination and a review of his medical records.

FINDINGS OF FACTS

1. Personnel Regulations, Section 5, Application and Examination Procedures, including Section 5-12, Medical Requirements for Employee/Applicants, state in part:

> Whenever an employee/applicant is found to have a defect or condition that would impair satisfactory performance of duties, or may jeopardize the health or safety of the employee/applicant or others, the Chief Administrative Officer may declare the applicant ineligible for appointment. In the case of an employee, the Chief Administrative Officer may remove that individual from the position and temporarily place the employee on limited duty or transfer the employee to a position where the individual may be productively employed, or take another personnel action deemed appropriate and reasonable.
>
> Prior to making a decision or taking an action based on the medical findings, the Chief Administrative Officer must determine if the problem is correctable and whether or not reasonable accommodation could be made in accordance with the County's policy on employment of the handicapped or disabled.

The County's Employee Medical Examiner's letters dated July 8 and August 26, 1996, medically disqualified the Applicant in accordance with the Personnel Regulations.

2. Both the hearing test performed by the County as well as the test performed by the Applicant's doctor, indicated a hearing loss in his left ear. The hearing loss does not meet the medical guidelines and hearing standards for public safety positions, including police officers.

3. The hearing standards were established in 1988, after a job analysis of more than twenty law agencies, including the Montgomery County Police Department. The job analysis and

study were performed by an Occupational Health Services Corporation. The studies conducted in 1988 have shown that there are several core hearing tasks that law enforcement officers need to be able to perform.

4. The Applicant maintains that his minimal hearing loss has never affected his ability to perform well in everything that he has accomplished thus far in his life. The Applicant believes that he deserves a chance to prove himself.

5. It is undisputed, in the opinion of the Merit System Protection Board that the decision of the County to disqualify the Candidate is in accordance with the Montgomery County Personnel procedures.

ISSUES

1. Whether the failure to accept the Applicant as a Candidate violated any merit system principles or laws, as interpreted by relevant court and Board decisions; and

2. If so, as a remedy, whether Applicant is entitled to be reinstated to the eligibility list for the position of Montgomery County Police Officer Candidate.

CONCLUSION

In consideration of the above findings of fact and conclusions of law, the Board determined that there has been no violation of merit principles or laws in the County's decision to remove the Applicant's name from the eligibility list. Therefore, the Board affirms the County's decision to deny Applicant's appeal and relief requested.

Case No. 97-08

BACKGROUND

An Applicant for employment for the position of Correctional Officer I. Appellant was removed from the eligible list for Corrections Officer Candidate after failing the pre-employment medical test on three separate occasions. The Appellant disagrees with the results of the test and, as relief, asks that a subsequent test administered by Kaiser Permanente be considered in lieu of the standard test performed by Occupational Medical Services.

FINDINGS OF FACT

1. The Appellant, under Section 5-12, Personnel Regulations, is required to take and pass a physical examination administered by Occupational Medical Services. Occupational Medical Services performs the test according to set protocols and guidelines outlined in a study by Med-Tox Associates, specifically designed for Montgomery County. This validation study provides the job specific requirements for job performance by correction officers. Every officer therefore must have a minimum strength, stamina, endurance, and exercise capacity in order to be able to perform the demands of that job.

2. Appellant initially took the physical examination on June 3, 1996 and failed to meet the minimum requirements of the stress test. Subsequently, the Appellant took the stress portion of the test again on June 10, 1996 and July 1, 1996. Appellant failed to meet the minimum requirements on both of these tests as well.

3. On July 29, 1996 the Employee Medical Examiner, Occupational Medical Services, in a memorandum to the Leader, Public Safety Team advised that the Appellant was disqualified for the position of Corrections Officer Candidate because he did not meet the stress test requirements at his physical examination.

4. On August 12, 1996 Appellant was notified in writing by the Director, Office of Human Resources, that he did not meet the applicable medical requirements for the position of Correctional Officer Candidate. Personnel Regulations, Application and Examination Procedures, Section 5-12, state:

> ...Whenever an employee/applicant is found to have a defect or condition that would impair satisfactory performance of duties, or may jeopardize the health or safety of the employee/applicant or others, the Chief Administrative Officer may declare the applicant ineligible for appointment. In the case of an employee, the Chief Administrative Officer may remove that individual from the position and temporarily place the employee on limited duty or transfer the employee to a position where the individual may be productively employed, or take another personnel action deemed appropriate and reasonable.

5. Prior to making a decision or taking an action based on the medical findings, the Chief Administrative Officer must determine whether the problem is correctable and whether or not reasonable accommodation could be made in accordance with the County's policy on employment of the handicapped or disabled. In the opinion of the medical examiner, Appellant's condition is not correctable in the immediate future and, since no reasonable accommodation can be made to the work requirements of the Correctional Officer Candidate position, it is necessary to remove Appellant's name from the eligible list for that position.

CONCLUSION

Based upon a review of the record and in consideration of the above findings of fact and conclusions of law, the Board determined that there has been no violation of merit principles or laws in the County's decision to remove the Appellant's name from the eligibility list. The Board affirms the decision of the Director, Office of Human Resources, dated August 12, 1996. The appeal is therefore denied.

Case No. 97-09

Appellant appealed the decision of the Chief Administrative Officer, denying his grievance, which alleged that had a classification and compensation study of fire and rescue management classes been timely conducted in 1992, as required by the then existing Montgomery County Personnel Regulations, he would have been promoted to Lieutenant at that time. The remedy sought was retroactive promotion effective July 1, 1992.

BACKGROUND

Prior to November 1994, the County Personnel Regulations, as relevant, provided that each occupational class in the classification plan must be reviewed at least once every five years to ensure proper grade assignment. In November, 1994, that regulation was amended to provide for review of covered classification "as necessary to ensure proper grade assignments." The Appellant argues, in essence, that pursuant to the regulation in effect prior to November 1994, a classification study of the fire and rescue positions should have been performed in 1992, but no such study was conducted until 1995. In November, 1995, the Director, Office of Human Resources was provided a consultant's "Report on the Review of Officer Classes in the Montgomery County Fire and Rescue Services" (Study). As relevant herein, the Study recommended that the then titled positions of "F/R Sergeant" be changed to "F/R Lieutenant" and that the then titled position "F/R Lieutenant" be changed to "F/R Captain". These changes in title/classification were made effective July 1, 1996. It appears from the record that, as a result of this action, the Appellant's titled position was changed from Sergeant to Lieutenant.

The Appellant's contention is that had the study been performed in 1992, as required by the then effective regulations, the same conclusion would have been arrived at, and he would have been reclassified to Lieutenant in 1992, rather than having to wait until 1996. It

is undisputed that an October 25, 1991 eligibility list for the rank of Lieutenant indicates that the Appellant was found to be well qualified for that rank. The Appellant further argues that his position on the appropriateness of retroactive promotion is supported by the decision growing out of the 1995 study to grant to 22 station supervisor positions (Sergeants) a temporary 5% pay increase in recognition of their being required to work out of occupational class. In this regard, the March 12, 1996 memorandum from the Director on "Final Decisions" regarding the Study provides, in pertinent part:

> This pay increase is to be provided to each employee who occupied any one or more of the 22 station supervisor positions beginning on or after July 12, 1992 and terminated that assignment anytime up to the present (July 12, 1992 is the effective date since that is the beginning of the first pay period following the date this classification maintenance study should have been completed.) (Emphasis supplied)

In the decision on the grievance, the Chief Administrative Officer (CAO) concluded that: while the classification review was planned under the regulation which required a five year maintenance review, that requirement had been deleted at the time the Study commenced; employees determined to have been working out of class were compensated for the period July 12, 1992 to March 12, 1996; since no positions, including the Grievant's were reclassified as a result of the Director's decision, "there is no entitlement to a noncompetitive promotion, and Section 7-4(c) is not applicable"; and, the creation and filling of vacancies are decisions which remain within the Employer's control and "There is no law or regulation which mandates the retroactive filling of vacancies." The CAO concludes, in denying the grievance, "The facts and conclusions.... pertaining to the promotional opportunity created by the classification maintenance review study," do not support the claim for a retroactive promotional opportunity. In its memorandum to the Board in support of the denial of the grievance, the County argues that, since no position including the Grievant's was reclassified as a result of the Director's final decision, there is no entitlement to a non-competitive promotion: that the vacancies created by the Study did not exist in 1992; and, assuming that a study had been done in 1992, it is speculative whether any positions would have been created at that time, or how many such positions would have been announced.

ISSUES

1. Does the failure of the County to conduct a classification study in 1992 entitle Appellant to a retroactive promotion remedy?

2. Should the request for a hearing be granted?

3. Is there an entitlement to attorney fees?

ANALYSIS AND CONCLUSIONS

1. County Regulations existing prior to 1994 provided for a classification review of the positions at issue every five years. However, since the regulations in effect from 1994 to the present eliminated the five year requirement, replacing it with the current "as necessary" language, there is no violation of the subject regulations within the scope of the instant grievance. The gravamen of the Appellant's contention is that, because there was a regulatory violation in 1992, he is entitled to retroactive promotion to a position that he would have been awarded had the violation not occurred. The defect in the logic of this contention is the lack of a nexus between what arguably occurred in 1992, and what is sought as a remedy now. Moreover, it is purely speculative that a study in 1992 would have resulted in a promotion of the Appellant. A remedy for the failure to conduct a classification review might have been simply the conducting of such a review, rather than, as argued by the Appellant, his promotion. Accordingly, we find that the failure of the County to conduct a classification study in 1992, provides no entitlement to the Appellant to a retroactive promotion.

2. In the view of the Board there are no issues of fact which would require the holding of a hearing. Accordingly, the appeal is denied.

Case No. 97-12

Nine (9) Appellants appealed the decision of the Chief Administrative Officer (CAO), denying their grievances against the Department of Fire and Rescue Services (Department) over the failure to promote them to vacant positions.

BACKGROUND

In November 1994, the Department issued vacancy announcements for a number of positions at the rank of Master Firefighter/Rescuer and Fire/Rescue Sergeant (positions), which required CRT or EMT-P (paramedic) certification. A number of the vacant positions were filled from among eligible employees who had been rated "Well Qualified," the highest rating category, on a previously published promotion eligibility list. The Department did not fill all of the vacancies, having determined to fill vacancies only from employees rated Well Qualified, as there were no additional Well Qualified rated employees with the requisite CRT or EMT-P certification. The Appellants, who had promotion eligibility ratings of "Qualified," a lower rated category than "Well Qualified," but who had the required CRT of EMT-P certification, were not selected for the subject vacant positions. The Appellants timely grieved the failure to select them for the vacant positions, citing specified County Personnel

regulations, including the regulatory goal that all existing vacancies be filled within 30 days from the date the position becomes available.

The record account of the grievance meeting describes at great length the Department explanation for its refusal to fill vacancies from the Qualified list. As summarized in its brief to the Board, the Department: 1) considered promotional candidates to be first and foremost candidates for the rank of Master Firefighter or Sergeant, regardless of their status as paramedics; 2) desired to promote the best overall candidates first and believed that the best candidates for promotion were those in the highest rating category; and 3) knew that the vacant paramedic positions could be filled through temporary promotions. It is significant to note that it is the position of the Department that "bypassing" the Well Qualified list to select from the Qualified category would have required prior approval from the Promotion Board and such approval had not been sought.

The CAO denied the grievances, concluding that it had not been shown that the decision not to promote from the lower rating category was arbitrary, capricious, or violative of applicable regulations. In so concluding, the CAO concurred with the Department's contention that to have selected from the Qualified category, regulatory bypass procedures would have been required. While such a request might have been reasonable under the circumstances, the Department's rationale that individuals on the "Well Qualified" list were better qualified for promotion into leadership positions was neither arbitrary nor capricious.

The Appellants contend at the outset that the view that the use of "bypass procedures" was required to select from the "Qualified" category is erroneous, essentially because in the circumstances present, there were no "Well Qualified" candidates with the required certification. Appellants then argued that: they all possessed the requisite qualifications for the vacancies; it is not fair and equitable to deprive them of positions when candidates rated higher are not qualified for the position; and, the operational concerns expressed by the Department cannot serve as a basis for denying promotion opportunities. The relief sought by the Appellants in the initial grievance and in the submission to the Board is retroactive promotion.

Appellants request that the Board conduct a hearing on their appeal and that attorney fees be awarded.

ISSUES

1. Is the Department's failure to promote "Qualified" rated Appellants to vacant positions violative of applicable regulations?

2. Should the Appellants' request for a hearing be granted?

3. Is there an entitlement to attorney fees?

ANALYSIS AND CONCLUSIONS

1. Both the County and the Appellants devote considerable attention to the controversy over whether the regulatory "bypass" procedure would have to have been used for employees in the "Qualified" category to have been promoted to the vacant positions. The Board, however, views this question to be of little importance to the resolution of the merits of the case. The Department concluded that it was not going to fill the vacant positions from the "Qualified" category and, accordingly, it did not pursue bypass approval. It is the decision not to fill from the Qualified category that is alleged to be violative. Whether the Department would have had to follow bypass procedures had it come to a different decision is, in our view, irrelevant.

The Appellants' theory of regulatory violation in the facts of this case is based on cited procedures from the "Merit System" regulations, including the "Promotion Procedure" stating a goal of filling existing vacancies within a period of 30 days. These are however regulatory procedures, rather than a prescribed mandate to fill vacancies. As the Board stated about the 30 day language in its earlier decision on the grievability issue,

> 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.

We see nothing in applicable regulations which require that an announced vacancy be filled. Accordingly, no showing has been made that the decision to not fill the vacancies was violative of personnel regulations.

The Appellants additionally argue that the actions of the Department should be reversed because County regulations mandate "fair treatment" to employees, and because the Board is charged with the responsibility to protect employees against arbitrary and capricious action. As noted above, the arbitrary and capricious argument is based on the view that inasmuch as there were "Qualified" applicants with the required certification, it is unfair and irrational to refuse to promote them because there are no higher rated candidates with the required certification. The CAO's decision on the grievance also speaks to the alleged arbitrary and capricious nature of the Department's action, stating that the burden on a grievant is to demonstrate that a decision "was irrational or whimsical, or served no legitimate management need," and urging that this was not the case in the instant situation.

While not adopting a specific operational test of "arbitrary and capricious," it is correct that what must be looked at is rationality in a given set of circumstances, rather than the mere

substitution of the Board's judgment over that of a manager. In the circumstances presented here, the Department wanted to assure that positions were filled by the highest ranked potential firefighters and was prepared to deal with paramedic requirements in other ways rather than fill positions with lower rated candidates. In the Board's view, there is no showing that the Department's decision to the contrary was other than rational.

On the basis of the above, we find that the refusal to fill the vacant positions from the "Qualified" category was not violative of regulations and consequently, the CAO's denial of the grievance is sustained.

2. In the view of the Board, there are no issues of fact which would require a hearing. Accordingly, the request for a hearing is denied.

RETIREMENT DISABILITY

Case No. 96-09

Appellant appealed the decision of the Prudential Insurance Company that he was not entitled to a Service Connected Disability Retirement Benefit, but was entitled to a Non-Service Connected Disability Retirement Benefit.

BACKGROUND

This case began when the Department of Recreation initiated a disability retirement application on behalf of the Appellant a 44 year old employee in that Department. After a review of the records submitted, the Administrator concluded that the Appellant was entitled to a Non-Service-Connected Disability Retirement. Appellant appealed the finding that his disability was not service-connected and a hearing on this issue was held before the Administrator's Hearing Examiner on November 14, 1995. The Examiner subsequently issued an opinion recommending a Non-Service-Connected Disability Retirement. This recommendation was adopted and the Appellant was sent notice of this decision on March 8, 1996. Upon receipt of this notice, Appellant filed a timely appeal with the Merit System Protection Board contending that he should have been found eligible for a service connected disability.

FINDINGS OF FACT

1. Prior to his retirement, the Appellant was employed by the Montgomery County Department of Recreation as a Community Activities Coordinator at a community center. In this position, he was responsible for scheduling and monitoring the use of the Center and ensuring proper supervision and appropriate use of the facility and equipment. Appellant's job requires interaction with members of the public who have open and unrestricted access to the Center. (Class specification provided in the County's Exhibits.)

2. Appellant had been employed on a permanent part-time basis for the Recreation Department for the past six or seven years. Previously, he had worked for the Department on a part-time basis for approximately 13 to 15 years.

3. Appellant had been diagnosed as having intractable epilepsy. According to records provided by the National Institutes of Health (NIH), the Appellant first started having

seizures at the age of 14 months. (History and physical examination record dated January 5, 1993 from the NIH Clinical Center.) He has continued to have seizures through his childhood and as an adult and, despite use of various prescribed seizure medications, has had poor seizure control.

4. Over time, Appellant's seizures worsened to the point that he experienced an average of two petite mal seizures a day and two grand mal seizures a month. This led the Department of Recreation to refer him to the County's Employee Medical Examiner for a medical assessment.

5. In a memorandum dated June 27, 1994 from the Chief of the Community Recreation Division, to the Medical Examiner, details were provided concerning Appellant's current condition and the impact of his condition on his ability to perform his job duties. Mr. Blank noted that the Department had provided Appellant with a number of accommodations in the past but the frequency of his seizures and recent changes in his behavior were affecting the Department's continuing ability to accommodate his disability. Mr. Blank described Appellant's symptomatic related behavior as including memory loss, disorientation, serious events of 15 to 30 minutes duration occurring once or twice per week characterized by convulsions, spasms and uncontrollable running out of the building and occasionally running into Center patrons. Recovery from more serious episodes necessitated the Appellant's going home to rest during his regularly schedule work hours. Appellant's memory loss has resulted in Appellant's routine work functions not being adequately managed as evidenced by double booking the facility, forgetting or not providing telephone information and providing inaccurate rental information to the public. Mr. Blank and Ms. Blank, Director of the community center and Appellant's direct supervisor, felt that the disruptions within and to the work environment had become significant and that the Appellant's physical reactions presented a danger to the Appellant, to the Center's staff and to the public in their use of the Center.

6. In July, 1994, the Medical Examiner referred the Appellant to neurologist Dr. A, who was treating him. In Dr. A's July 15, 1994 letter to the Medical Examiner, he noted that the Appellant had recently been placed on new medication that, although causing a reduction in the number of his seizures, may have other impacts. He advised that Appellant be given office-type work that did not exceed 30 hours a week in duration and did not require him to leave the office on a regular basis.

7. Appellant was also evaluated in July by Dr. B who prepared a psychological report for the County. In an August 1, 1994 report to the Medical Examiner, Dr. B expressed that, in his medical opinion, Appellant was under considerable stress due to worry and apprehension about his seizures. He concluded that Appellant was not fit for a return to his regular duties due to problems with stress tolerance, ability to think clearly when solving problems, and judgment when emotionally distressed.

8. Based on Dr. A's and Dr. B's recommendations, the Medical Examiner notified the Department that the Appellant was not fit for full duty as a Community Activities Coordinator and recommended that he be put on restricted duty and closely monitored for 90 days to determine whether safety and productivity could be achieved. In addition to the restrictions suggested by Dr. A, the Medical Examiner also stated that Appellant was not to be required to go up or down stairs regularly, that he not be given mentally demanding assignments, that he not work alone, and that he avoid tasks requiring recall of verbal details. The Medical Examiner felt that the Appellant would be able to perform part-time office work in a calm, low-stress and safe environment.

9. Due to the limitations imposed, the County was apparently unable to provide Appellant with the type of light-duty assignment recommended. (September 6, 1994 memorandum from the Director of the Department of Recreation to the Director of the Office of Human Resources and the September 8, 1994 memorandum from the Director of the Office of Human Resources to the Occupational Medical Section.) As a result, the Appellant was placed on Administrative Leave by the Department. (July 8, 1994 memorandum from the Director of the Department of Recreation to Appellant.)

10. In a November 9, 1994 memorandum, the Medical Examiner indicated that Appellant's condition had not improved and that his new medication had to be discontinued due to potential side-effects. The Medical Examiner concluded that "Appellant's ability to be productively employed with reasonable accommodation is greatly decreased due to this current medical condition. It is therefore, my recommendation that he be processed for disability retirement application pending any treatment break-through for his condition..."

11. Acting upon the guidance provided by the Medical Examiner, the Department submitted an Application for Disability Retirement on behalf of the Appellant. (January 20, 1995 memorandum from the Acting Director of the Department of Recreation.)

12. After the disability retirement process had begun, Dr. A provided a June 6, 1995 letter to the Disability Retirement Administrator which advised that although the Appellant was currently back on medication and was participating in a study at NIH, Dr. A did not feel that the Appellant would be able to return to his regular duties and believed that his condition was permanent. Based upon Dr. A's report and the other medical information on record, the Administrator found that the Appellant has a permanent Non-Service-Connected Disability.

13. The Appellant appealed to the Administrator's Hearing Examiner. The Hearing Examiner held a hearing on November 14, 1995 and, after consideration of the testimony presented and the information placed into the record, issued a recommendation that the Appellant be found eligible for a Non-Service-Connected Disability Retirement. The Hearing Examiner's recommendation was accepted and prompted the Appellant's appeal from that decision to the Merit System Protection Board.

ISSUE

Whether the Appellant's disability meets the requirements for a Service-Connected Disability Retirement as set forth in Section 33-43(e) of the Montgomery County Code which provides, in pertinent part:

"(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."

ANALYSIS AND DISCUSSION

There is agreement that the Appellant has a disability as defined in the County's disability retirement law and that the disability is permanent. The sole question before the Board is whether Appellant's disability is service connected or non-service connected and centers on the requirement that the employee be "totally 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...."

The Appellant has the burden to show, by a preponderance of the evidence, that his condition has been aggravated while in the performance of his duties for Montgomery County. To meet this burden, there should be evidence that an existing condition was aggravated to the point where there is additional disability beyond that which already existed. (Bethlehem Steel Co. v. Ruff, 203 Md. 387, 101 A.2d 218 (1953).

The County argues that there must be a causal connection between the aggravated condition or disease and Appellant's work. His work-related activity must be the proximate cause of the condition or must have aggravated the condition to the point where he can not satisfactorily perform those activities. The "possibility" of a causal connection is insufficient. The law requires proof of probable, not merely possible, facts. No award should be made for a condition which cannot be attributed to some service or act in the employee's employment but instead ensues from some hazard to which the employee would have been equally exposed apart from his employment. (Reeves Motor Co. v. Reeves, 204 Md. 576, 105 A.2d 236 (1954) and Yellow Cab Co. v. Bisasky, 11 Md. App. 491, 275 A.2d 193, cert. denied, 262 Md.745 (1971).

In support of his contention that his condition was aggravated by the performance of his duties. Appellant introduced a March 31. 1995 letter from Dr. C. Dr. C states that Appellant's seizure frequency may increase in the presence of factors such as intercurrent medical illnesses. sleep deprivation. or psychosocial stressors including "routine employment stressors." Dr. C did not conclude, however, that job-related stress actually caused Appellant's condition to worsen.

A review of Dr. B's August 1, 1994 report indicates that Appellant was under stress both at home and at work due to the impact that his epilepsy was having on his life. Appellant's contention that he could have performed but was not offered a temporary position. Whether Appellant was or was not able to perform or was offered another temporary position has no bearing on whether his disability was caused or aggravated by his job. The Department Director's statement that excessive public contacts and associated stresses are inappropriate for Appellant addresses the possible result, not the causation or aggravation of Appellant's disability.

CONCLUSION

Throughout his life, Appellant suffered from a condition which, in the natural progression of his disease, has worsened to the point where he can no longer effectively and safely perform his job duties. However, there is insufficient evidence in the record to justify a finding that Appellant's disability is service-connected.

Rather, the preponderance of the evidence presented in support of the Appellant's request for a service-connected disability consist of general statements that job stress "may be" a factor in his disability. "May be", without further supporting facts does not present a sufficient basis for concluding that Appellant's underlying condition was aggravated by his employment so as to invoke the aggravation clause contained in Section 33-44(e) of the Montgomery County Code.

DECISION

Based on a preponderance of the evidence of record, the Merit System Protection Board is not persuaded that the Appellant's job duties performed on behalf of Montgomery County sufficiently aggravated his pre-existing medical condition to the point of constituting a Service Connected Disability Retirement Benefit and concurs with the Aministrator's decision granting Appellant a Non-Service-Connected Disability.

Appellant is a retired police officer who seeks a reversal of the County's Chief Administrative Officer's (CAO) interpretation of the retirement plan in denying him the right to change his retirement by canceling the joint annuitant option or, in the alternative, changing the joint annuitant.

SUMMARY OF FACTS

1. Appellant accepted early retirement from the County Police Department on or about November 1, 1986. In completing his application for retirement benefits under the Group Annuity Contract, Appellant voluntarily elected a "joint and survivor annuity option." Under this option, the retiree receives decreased retirement pay but with the proviso that benefits would continue to be paid to the designated beneficiary for life in the event that the retired member predeceases the beneficiary.

2. At the time of his retirement, Appellant received an option form, explaining the various pension pay out alternatives. The pension form, in bold-faced type, states:

> THE PAYMENT OPTION CHOICE IS IRREVOCABLE AND CANNOT BE CHANGED.

3. Shortly after completing the retirement option form, Appellant and his then current wife, who was his joint annuitant on his retirement option, separated and divorced. Appellant has since remarried and is requesting the County to change his designated joint annuitant to his current wife.

4. Appellant is also seeking to change his retirement option to ten year certain and continuous. Under that option, a retiree receives a payment until death. If the retiree dies within the initial ten years of receiving his retirement, his beneficiary would continue to receive his retirement until the expiration of the ten years. In the alternative, Appellant seeks to change his beneficiary to his current wife.

5. The County CAO denied Appellant's request on the grounds that: unilaterally depriving the Appellant's spouse conferred benefits would expose the County to potential liability; under the retirement law, the individual designated as the joint annuitant must be the employee's spouse at the time that the election option is made; and, the contract between Aetna Life Insurance Company (Aetna), the plan's underwriter, and the County does not permit the requested change.

6. The Group Annuity Contract issued by Aetna provides, in pertinent part, that a

retired Member may not revoke his election of option, change his joint annuitant, or otherwise change the provision of his election in any way, "unless the Aetna agrees thereto on the basis of such additional or modified provisions as the Aetna may require." Before rendering a decision, the Board requested the County to inquire from Aetna as to the meaning of this language, to ascertain whether there are circumstances under which they would agree to change of a joint annuitant and, if so, what, if any, additional or modified provisions Aetna would require with respect to such change.

7. Aetna responded that, once payments under the plan are made to a retiree, no change in joint annuitant may be made except in very unusual circumstances, i.e., fraud on the part of the retiree or where the joint annuitant is responsible for the death of the retiree.

ISSUE

Whether the County's action in interpreting and applying the Group Annuity Contract denying Appellant the requested right to change previously selected options was appropriate and correct.

ANALYSIS AND CONCLUSION

In response to the Board's inquiry, by letter of May 27, 1997, Aetna clarified the Joint Annuity provision in the Group Annuity Contract. Aetna explained that retirees have a right to change their elections of the joint annuitant, provided that any such changes are made prior to the commencement of payments to the retiree, which is not the case here. The only exceptions would be for fraud or for involvement of the joint annuitant in the death of the retiree, neither of which apply.

The option form given to members of the retirement plan is consistent with Aetna's above explanation since it states that the payment option elected by the member is irrevocable. In addition, the County points out that sections 33-44 and 33-35 of the Montgomery County Code permit only a "member", meaning a County employee contributing to the system, to change a retirement option, but does not grant the same right to a "retired member".

In the Board's view, the County's interpretation and application of the Group Annuity Contract to deny Appellant's request to change options is appropriate and correct. The form executed at the time of retirement makes clear that the selection of options is irrevocable. The Contract itself clearly states that changes can only be made with the agreement of Aetna. Since Aetna has advised the Board of the limited circumstances under which it permits changes, and the present situation is clearly not within the scope of those circumstances, the Board must deny the appeal.

Appellant appealed the decision of the Office of Human Resources decision dated July 17, 1996, denying disability retirement benefits.

BACKGROUND

Appellant was an employee of the Division of Parking, Department of Transportation working as an Administrative Aide from 1988 or 1989 to September 24, 1994. As grounds for her appeal, Appellant contends that she is permanently and totally incapacitated for duty as a result of an aggravation of her condition while in the performance of her duties and is, therefore, eligible for Service-Connected Disability Retirement. As relief, the Appellant requests that Service-Connected Disability Benefits be awarded.

FINDINGS OF FACT

As a Principal Administrative Aide with the Division of Parking, Appellant's duties consisted of the processing of parking and car pool permits for County parking lots, handling the corresponding money transactions, responding to walk-in customer requests for renewal of their permits, and responding to telephone customer inquiries regarding permits. Additionally, Appellant compiled monthly reports indicating how many permits had been processed for each of the areas that month. At some point the Residential Parking Office was consolidated with the Division of Parking and those duties were assumed by her as well.

Appellant stopped working for the Division of Parking on September 24, 1994, with over five years of service to her credit. Appellant suffered from narcolepsy, a genetic brain disorder, and was no longer able to perform the duties of her position. On July 5, 1995, Appellant was granted a Non-Service-Connected Disability Retirement by the Prudential Insurance Company.

Appellant appealed to the County that her condition was service-connected and a hearing was held on April 9, 1996. Appellant's treating physician, Dr. A submitted evidence to support Appellant's claim of a work related/aggravated condition, citing the repetitive nature and stress of the job as contributing factors. Dr. A concluded that Appellant's condition, according to Montgomery County Code, Section 33-43(e)(1), qualified her for a Service-Connected Disability Retirement. Section 33-43(e)(1) of the Montgomery County Code provides the following:

> (e) Service-Connected Disability Retirement. A member may be retired on a Service-Connected Disability Retirement if:

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

Additional documentation was submitted by Ms. Blank, a licensed clinician who had treated the Appellant for the last six years, also citing the repetitive nature and stress of the job as factors that would aggravate the Appellant's condition.

The Hearing Examiner reviewed all of the available documentation and concluded that Appellant's condition did not qualify for a Service-Connected Disability Retirement. In his response, the Hearing Examiner said that he found no evidence that the Appellant's job aggravated her condition and that this case "does not rise to the level of a Service-Connected Disability." The Hearing Examiner, therefore, denied the Appellant's request for Service-Connected Disability Retirement. Additionally, the Hearing Examiner decided that the Appellant did not meet the eligibility requirements for a Non-Service-Connected Disability Retirement in that her condition predated her employment with the County. Applicable County regulations provide, in pertinent part, that a member may be retired on a Non-Service-Connected Disability Retirement if "the member is mentally or physically incapacitated for the further performance of duty as the result of an illness or injury incurred after enrollment as a member." The Hearing Examiner found that since Appellant's condition clearly predated her employment with the County, the regulations preclude the granting of a Non-Service-Connected Disability Retirement.

CONCLUSION

Based upon a review of the record, the Board agrees with the Hearing Examiner's finding that there was no causal relationship between Appellant's job environment and an aggravation of her condition. In the Board's view, there is insufficient evidence to support Appellant's claim of a work related aggravation of her admittedly pre-employment condition. The medical testimony on behalf of Appellant describes a progression of her condition while she was employed, but does not demonstrate a relationship between her job environment and that progression, a relationship which is necessary for a finding of a Service-Connected Disability. Therefore, Appellant does not qualify for Service-Connected Disability Retirement Benefits. The Board further agrees with the Hearing Examiner's decision to rescind previously granted Non-Service-Connected Disability Benefits, noting that Appellant's documented and undisputed history of the disease far predates her employment with the

County. Accordingly, Appellant's condition constitutes a pre-existing condition which makes her ineligible for Non-Service-Connected Disability Retirement. The appeal to grant disability benefits is, therefore, denied.