Merit System Protection Board Annual Report FY 1998

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

Executive Secretary:
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MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

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

The Board members in 1998 were:

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

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 pre-hearing is given, with thirty work day's 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. 94-12
REMAND

Final decision of the Merit System Protection Board (Board) on remand of this case from the Court of Special Appeals (Court) and the Circuit Court for Montgomery County.

LITIGATION BACKGROUND

Appellant appealed his discharge from the Department of Fire and Rescue Service (Department). During the Board's hearing, the Appellant's Counsel moved to bar evidence as to any reasons for the dismissal other than the report of a confirmed positive urine test. The Board declined to bar such evidence but held the motion in abeyance, agreeing to make a ruling on it after the hearing. The Board subsequently granted the motion and, in making its decision, did not consider evidence presented by the Department regarding other reasons for Appellant's dismissal. The Board found that Appellant's dismissal was entirely due to a positive drug screen and, because the drug test was not conducted in accordance with County procedures for drug testing, as to which there was no dispute, it directed that Appellant be reinstated to his previous employment status, with partial back pay.

Upon appeal, the Circuit Court found that the Board should have considered all of the evidence presented, and that the Appellant's discharge from a drug treatment program and dismissal from employment were the result of poor attendance and poor attitude as well as the positive drug screen. The Circuit Court, therefore, reversed the Board's decision and sustained the termination.

The Circuit Court's decision was appealed to the Court of Special Appeals, which also concluded that the Board's refusal to consider evidence regarding other reasons for Appellant's dismissal from a treatment program and, ultimately, from employment, was erroneous. However, the Appeals Court held that it was not appropriate for the Circuit Court to make findings of fact based on evidence that the Board improperly refused to consider. Rather, the Circuit Court should have reversed and remanded the Board's decision with instructions to make new findings of fact in light of all of the evidence. Accordingly, the Court of Special Appeals vacated the judgment of the Circuit Court, with instructions to reverse and remand the Board's decision for further proceedings in accordance with its decision.

The Circuit Court subsequently remanded the case to the Board. Upon receipt of the remand, the Board requested and received briefs from the parties, on the remanded proceedings.

FINDINGS OF FACT

1. As noted by the Court of Special Appeals, in its March 17, 1997 Opinion (slip Op. at 1-6) the events leading up to Appellant's dismissal are summarized in a "Memorandum of Understanding" (Memorandum) signed by Appellant, his union representative, and a representative of the Department on July 12, 1993, prior to the dismissal, which provides in relevant part as follows:

Appellant [was] a full-time merit system employee of Montgomery County, Maryland, employed as a Firefighter/Rescuer III in the Bureau of Operations of the Montgomery County Department of Fire and Rescue Services.

On September 16, 1992, the employee was counseled by a Captain for excessive use or sick leave. At that time, the employee was instructed that further use of sick leave without a Doctor's certificate would not be authorized.

On November 18, 1992, the employee advised a Lieutenant that he was too sleepy to work. Given that he had slept through a call the previous shift, taken unauthorized sick leave and annual leave, and had an unapproved work substitution, the Captain determined that a drug screening was appropriate.

> On November 18, 1992, the employee was taken by the Captain for drug screening. At the lab he was given instructions not to use any water in the bathroom. On the first test the sample temperature was 85 [degrees]. The employee was told another sample was necessary. On this test water was heard running. This sample was also below body temperature.
>
> On November 21, 1992, the employee was again confronted concerning a drug screening test on November 18, 1992 because the possibility existed that the samples had been altered. At first, he refused direct orders by the Captain and a Deputy Chief. However, after a Union Representative was present and potential repercussions discussed, he agreed to another test. The sample taken on this date was 94 [degrees].
>
> On November 30, 1992, the County Employee Medical Examiner, Occupational Medical Section, by memorandum to the Director, Department of Fire and Rescue Services indicated that the employee had a confirmed positive drug screen from the specimen collected on November 21, 1992. Following the testing process the employee was placed on sick leave.
>
> .....The employee sought assistance from the Employee Assistance Program. The employee obtained a referral through EAP and entered a drug treatment program in late January or early February.

The employee was permitted to report to duty after his April 5, 1993, fit for duty physical examination without having met his responsibilities. On May 20, 1993, the Department, after meeting with the employee and the Union representative which occurred on May 18, 1993, required the employee to provide the following:

- Written confirmation of participation in or having completed a rehabilitation program approved by the Montgomery County Employee Medical Examiner.

-Weekly contact with the Director or designee through the treatment facility if the employee is currently participating in an approved program.

-Apprise the Director or designee upon successful completion of treatment, as determined by the Employee Medical Examiner.

On June 16, 1993, the employee was directed to take another drug screening test and the results indicated that he had a confirmed positive drug screen from the specimen collected. On June 22, 1993, the Captain called a Deputy Chief and indicated that the employee had been dropped from a hospital's drug rehabilitation program due to lack of participation.

2. As a result of a June 16, 1993 positive drug screen, the Department conditioned Appellant's return to work on his execution and fulfillment of the above referenced Memorandum, the relevant terms of which are as follows:

(3) Appellant further agrees to successfully complete the KOLMAC Clinic Outpatient Program and any such recommended programs within its prescribed time frame... Additionally, Appellant agrees to provide written documentation concerning his continued participation in EAP counseling, attendance at a minimum of fifty-two (52) NA/AA meetings within the twelve (12) month period following the execution of this Agreement.... If Appellant violates any of the terms of this paragraph of the Agreement, he agrees and understands that he will be subject to immediate dismissal for breach of this Agreement.

(4) Appellant agrees that if he is terminated by the KOLMAC Clinic Outpatient Program for poor performance within the program, or if he is terminated from any rehabilitation program recommended by EAP for poor performance within that program, he will be subject to immediate dismissal for breach of this agreement.

(17) Appellant understands that he will be dismissed if any one of his random urine test results (or the result of the test conducted during his fitness physical) indicates the presence of any measurable quantity of alcohol or drugs (or metabolites).

.....

(22) If a confirmed positive urine test result is reported to the County, or if Appellant breaches any of the terms of this Agreement concerning participation in and completion of counseling, substance abuse treatment, or a return to work physical examination, then the County will initiate dismissal proceedings based on his violation of this Agreement. Appellant understands that he waives his right to receive a Statement of Charges - Dismissal for violation of any of the provisions of this Agreement and that such violation will result in the immediate issuance of a Notice of Disciplinary Action - Dismissal to Appellant.
(emphasis supplied)

3. On March 25, 1994, the Chief of the Department issued the Notice to Appellant stating that Appellant was being terminated in accordance with the terms of the Memorandum. The Notice explained that:

> On February 23, 1994, Ms. Blank of the Employee Assistance Program (EAP) telephoned the Deputy Chief and apprised him that FFR III Appellant had been terminated from his treatment program (KOLMAC), that he had received a positive drug screen and that he would not be permitted to return to KOLMAC.

After quoting paragraph 22 of the Memorandum summarizing the conduct that would result in Appellant's dismissal, the Notice concluded:

> Based on the fact that a confirmed positive urine test was reported to the County and FFR III Appellant being terminated from his treatment program, he has breached the terms of the July 12, 1993 Memorandum . . . . which initiates dismissal proceedings and requires issuance of a Notice of Disciplinary Action - Dismissal.
> (emphasis supplied)

4. At the hearing, two KOLMAC employees testified to the effect that Appellant missed eleven out of 31 meetings and, when he did attend meetings, he did not participate. They further testified that, prior to his dismissal from the program, Appellant was warned that his poor attendance and negative attitude could result in his dismissal. Both employees stated that, as a matter of policy, KOLMAC did not discharge clients based on positive drug tests alone. When admitted to KOLMAC, Appellant signed a document which stated that "he understood the types of behavior that can result in discharge." One employee explained that the positive drug screen was merely the "final blow", and another characterized it as the "straw" that broke the camel's

back. Finally, the Deputy Chief stated that he told Appellant that his poor attendance and attitude were factors in his dismissal from KOLMAC. The Deputy Chief also testified that, during his conversation with Appellant, it was understood that Appellant was not being terminated from his employment merely because of the positive drug test conducted by KOLMAC.

5. On the issue of procedural due process, the Court held that, although the Notice appears to be somewhat ambiguous, it was not ambiguous to Appellant, and reasonably apprised him of the issues before the hearing. In support of this determination, the Court cited the following facts:

The Notice stated that Appellant's counselor had informed the Deputy Chief of the Department that Appellant "had been terminated from his treatment program (KOLMAC), that he received a positive drug screen and that he would not be permitted to return to KOLMAC." After quoting from paragraph 22 of the Memorandum concerning the Conditions under which Appellant would be terminated from the program, the notice concluded: "Based on the fact that a confirmed positive urine test was reported to the County and FFR III Appellant being terminated from his treatment program, he has breached the terms of the July 12, 1993 Memorandum of Understanding . . . and requires the immediate issuance of a Notice of Disciplinary Action - Dismissal."
(emphasis supplied)

6. Section 27-4 of Appendix F - Personnel Regulation of the Montgomery County Code provides that, in cases of dismissal, "The Chief Administrative Officer must develop a standard charging document which must contain the reasons for the action with specific charges." However, in this case, by paragraph 22 of the Memorandum, Appellant expressly "waived his right to receive a Statement of Charges - Dismissal" as contemplated by Section 27-4.

7. Accordingly, as determined by the Court, Appellant had ample notice, before the hearing, of the issues in this case. Therefore, the Court ruled that Appellant's due process rights were not violated by the Notice.

ISSUES

1. As determined by the Court, was the positive drug test the sole reason for Appellant's dismissal from the KOLMAC Clinic Outpatient program (KOLMAC) and from his employment, or did Appellant's poor attendance and negative attitude play a part in his dismissal from KOLMAC and from his employment?

2. Was Appellant's dismissal consistent with the Memorandum of Understanding?

3. What, if any, is the remedy with respect to backpay and attorney fees?

ANALYSIS AND CONCLUSIONS

1. Although the Board declined to consider evidence regarding reasons other than the failed drug test for Appellant's dismissal from KOLMAC, and his subsequent dismissal from employment, it nevertheless allowed evidence of other reasons to be admitted into the record. Further, the Board has received submissions from the parties with respect to the issues presented by the remand. Therefore, the Board believes that the record is sufficient to resolve the issues on remand.

As discussed by the Court, the record reflects evidence that Appellant's dismissal from the KOLMAC program was based on other reasons in addition to his failed drug test. With respect to that evidence, the Court noted the testimony of two KOLMAC employees that the Appellant had been warned that his poor attendance and negative attitude could result in his dismissal; that KOLMAC did not discharge clients based on positive drug tests alone; and that the failed drug test was merely the "final blow." The Court also noted the testimony of the Deputy Chief that he recalled telling the Appellant that his poor attendance and attitude were factors in his dismissal from KOLMAC. On the basis of such uncontroverted evidence, the Board now finds that the positive drug test was not the sole reason for the Appellant's termination from the KOLMAC treatment program but that his poor attendance and attitude played a part as well.

In its remand, the Court of Special Appeal instructed in pertinent part:

> If, however, the Board concludes that (the Appellant's) poor attitude and attendance played a part in his dismissal from KOLMAC, we do not believe that KOLMAC's testing procedures would be called into question.

Consistent with the Court's decision, the Board no longer finds relevant the fact that KOLMAC's testing procedures are inconsistent with those used by the County.

2. As described above, the Appellant entered into a Memorandum of Understanding agreeing to successfully complete the KOLMAC Clinic Outpatient Program. In the Memorandum "Appellant agrees that if he is terminated by the KOLMAC Clinic Outpatient Program for poor performance with the program, or if he is terminated from any rehabilitation program recommended by EAP for poor performance within that program, he will be subject to immediate dismissal for breach of this agreement."

Having been terminated by KOLMAC in part for poor performance, Appellant's dismissal from the Department was essentially for reasons consistent with his executed Memorandum of Understanding. Since Appellant did not raise any other reason as to why the dismissal might have been improper, the Board finds that Appellant's appeal should be denied.

3. Because Appellant did not prevail on the merits, he has no entitlement to back pay. In its submission to the Board, the County requests that the Appellant be ordered to repay all back

pay he received pursuant to the Board's original decision. As the Board now finds that Appellant's appeal of his dismissal should be denied and the original decision vacated, the County may take such action, as it deems appropriate to recoup any monies paid pursuant to the original order.

Counsel for the Appellant requests that the Board order the County to pay the reasonable costs and attorney fees of the Appellant. Section 33-14(c) of the Montgomery County Code empowers the Board to order the payment of attorney fees only in the circumstance of a decision in favor of Appellant. Having concluded that the appeal is to be denied, an order for the payment of such costs and fees is not authorized by the Code.

CONCLUSION

Accordingly, based on the Court's March 14, 1997 opinion, and the findings stated above, the Board hereby vacates its May 16, 1995 decision in this case and issues a new decision denying the Appellant's appeal. Consequently, the remedies sought by Appellant of back pay and attorney fees are likewise denied. However, if Appellant was paid any back pay in the interim, the County is authorized to recoup any and all back pay paid pursuant to the Board's vacated decision of May 16, 1995.

Case No. 97-13

Appellant appealed the decision of the Director of Fire/Rescue Service (Service), dismissing him from the position of Firefighter/Rescue II.

In order to resolve the instant appeal, the full Board conducted a de novo review, including a formal hearing where the Appellant and the Service (Parties) were permitted to call, examine and cross-examine witnesses, introduce evidentiary materials and, thereafter, file briefs and make oral closing statements. On the basis of that record, the Board made an independent assessment of the proffered evidence and applicable law and regulations, and found as follows:

EVIDENCE PRESENTED

I. Background

The Appellant, an eight year career firefighter employee of the Service, was assigned, during the period of time at issue in this case, to Service Station 33. The Appellant was a "shift worker," meaning he worked a schedule which consists of a 24 hour shift from 7:00 a.m. one day to 7:00 p.m. the next day, followed by 48 hours off. Ms. Blank (herein Ms. Blank), Firefighter/ Rescue II, is a nine year career firefighter employee of the Service, assigned for two years prior to the events in this case to Station 33, working the day shift, consisting of four 10 hour days, followed by three days off. Appellant and Ms. Blank were also members of the Service's "collapse rescue squad," which operates out of Station 33. Ms. Blank is and was during the incidents at issue married to Mr. Blank, who is a Service career firefighter assigned to Station 23.

The Appellant was dismissed from the Service effective March 15, 1997. He was charged with specified conduct toward Ms. Blank during the approximate six month period from March through August 1996. Appellant denied that any of the conduct he is charged with had occurred.

II. Testimony Provided by the Service

A. Alleged Conduct Relied Upon for the Discharge

1. Requests for a "Date"

Ms. Blank testified that starting in mid-March, 1996, the Appellant began asking her to "go out" with him, suggesting lunch, dinner, taking leave to go out for lunch or dinner, or going

for a motorcycle ride. Ms. Blank estimated that there were approximately ten to twelve such date requests at the fire station and about ten to twelve such requests by telephone at night from the fire station to her home. Frequently, the proposed dates would be on occasions when the Appellant would know that Mr. Blank, who worked the same shift as the Appellant, would be at work, and the telephone calls to her home would always be made when her husband would be on shift duty. All requests were refused, some with intended sarcastic references by Ms. Blank suggesting that he meant to include her husband, and his wife, and some with statements of total disinterest in going out with the Appellant. Ms. Blank also described the content of sexually suggestive telephone and pager messages from the Appellant, including one she received while at a Service-sponsored golf tournament.

2. Physical Conduct of a Sexual Nature

Ms. Blank described an early May, 1996 incident in the fire station kitchen when the Appellant came up behind her, putting his arms around her upper body, and his hands on, and stroking and caressing, her breasts. Ms. Blank told Appellant to stop, pushed him away, and told him never to do that again.

Ms. Blank described an early June 1996 incident in the fire station engine room when the Appellant came up behind her, putting his arms around her, pinning her arms to her side, and then turning and kissing her. Ms. Blank told Appellant that he had to stop bothering her and that his actions were causing her to have marital problems. Appellant offered to call Ms. Blank's husband, but she told him that her husband was very upset and calling him was a very bad idea.

Ms. Blank described a late July 1996 incident in the fire station weight room. According to her, when she entered the room she was unaware that Appellant was sitting on a bench by the door. As she walked in, Appellant grabbed her by the arm and pulled her down on his lap and kissed her. She freed herself and told Appellant to stop. This incident occurred shortly before the Collapse Rescue Squad was to be detailed to Atlanta, Georgia during the Summer Olympics. According to Ms. Blank's testimony, at this time Appellant said to her that when they will be in Atlanta they would have to find a way to sneak off because he could not go a whole week without having sex.

3. Additional Conduct

Ms. Blank described Appellant's repeated conduct of coming up to her, pulling away the neck of her t-shirt asking such things as "what color bra are you wearing today." She also described Appellant sitting beside her and stroking her leg.

B. Corroboration

1. Witness A

Ms. Blank testified that, in June 1996, on two occasions, she told fellow firefighter of the Appellant's conduct toward her. A offered to talk to the Appellant about the problem, which she accepted. A's testimony confirms Ms. Blank's. According to A, after Ms. Blank had talked to him he spoke to the Appellant, advising him that he should "leave the girl alone before you end up losing your job over it." A testified that Appellant in no way denied any conduct toward Ms. Blank.

A testified that he recalled an occasion when he was approaching the kitchen area of the station and heard Ms. Blank telling someone to leave her alone and back off. When he entered the kitchen, the Appellant and Ms. Blank were the only two persons present. He also recalled an occasion, during the period of the alleged misconduct, when Ms. Blank requested that he accompany her to the weight room because Appellant had "backed her up against the wall" there.

2. Witness B

A fellow firefighter testified that, on three occasions in the June-July period, Ms. Blank had told him about the Appellant calling her and asking for dates, sending her a beeper message while she was at a firefighter sponsored golf tournament, and grabbing her in the basement exercise room and whispering something in her ear. B testified that he told the Appellant that he should "cool it" because Mr. Blank was upset over his conduct toward his wife, Ms. Blank.

B testified about a Service environment of employees who file complaints being "labeled," particularly female firefighters. He gave as an example employees warning one another of a female employee that "she'll put a paper on you or something like that."

3. Witness C

A fellow firefighter testified that in August 1996, while the collapse rescue squad was in Atlanta for the Olympics she overheard a conversation between Ms. Blank and another person wherein Ms. Blank was describing being sexually harassed by the Appellant. C states that upon hearing this, she asked Ms. Blank about this conversation and she described the Appellant's actions toward her, her concern for her physical safety, and the effect it was having on her marriage. C testified that, after her conversation with Ms. Blank, she informed the Station 33 Commander Captain that he needed to talk to Ms. Blank because he had a problem in the station.

C testified that Ms. Blank expressed to her a concern about coming forward with a complaint and that females who complain about such conduct in the Service are labeled an "'EEO paper writing bitch."

4. Witness D

A career firefighter and husband of Ms. Blank, testified that Ms. Blank informed him over the months of the Appellant's actions toward her, which included sexual remarks about her appearance, other remarks of a sexual nature, requests for dates, unwanted telephonic and pager message, and physical contact. Included in his description of the information provided to him by Ms. Blank were the above described incidents where the Appellant came up behind her in the kitchen and put his hands on her breasts, came up behind Ms. Blank in the engine room and grabbed her, and pulled her down on to his lap in the weight room. D also testified that he was aware that Appellant was calling Ms. Blank at home at night, based on seeing the Station number on their answering machine.

D described frequent discussions with his wife over what they should do about what was going on. Ms. Blank told him she was afraid of what might happen to her if she reported the Appellant. Instead, she wanted to try to take care of it herself by letting the Appellant know that she was not interested in his advances and his conduct would not be tolerated. Their discussed concern was what might happen to Ms. Blank if she filed a formal complaint in light of the climate that "you're labeled and the labeling is the EEO bitch."

5. Witness E

E, a career fighter with the rank of Lieutenant, was working in Station 33 during the period of time when the events at issue were to have taken place. E testified that, in late June, or early July, Ms. Blank spoke to him approximately four times about a problem she was having and, while her description was vague, he took her comments to mean that she was having "some type of abuse problem." While E recalled specific references by Ms. Blank to some physical contact, he recalled little specificity as to Ms. Blank's descriptions. E states that Ms. Blank was seeking his advice about how to handle the problem. E testified that Ms. Blank did not identify the person who was bothering her and, that at all times, indicated that she wanted to try to work the problem out within the station.

6. Witness F

Station Commander F testified that, on or about August 15, 1996, when he was advised by C, he became aware of the allegation that the Appellant was engaging in "ongoing sexual harassment" toward Ms. Blank. According to F, C told him that Ms. Blank had described Appellant's conduct during a conversation with her in Atlanta. F did not talk to Ms. Blank about this information, but reported what he had been told to a Deputy Chief.

C. Reasons For Not Utilizing Complaint Procedures

Ms. Blank testified that she did not utilize Service procedures for complaining about Appellant's conduct for fear of negative colleague reactions, such as being "ostracized from my coworkers and colleagues," and being labeled an "EEO bitch."

II. Testimony Provided by the Appellant

A. Appellant

In his testimony, Appellant denied that he had ever asked Ms. Blank for dates; that he had ever telephoned her or sent her pager messages about anything other than official Station business. Appellant testified that, on the occasion of the golf tournament, he paged her only to ask who was in the lead. Appellant further denied that he ever touched Ms. Blank's leg or pulled at her blouse; that he ever cupped and stroked her breasts in the station kitchen; or that he ever restrained and kissed Ms. Blank on the mouth in the engine room or in the weight room. Appellant also denied any recollection of A talking to him about his conduct toward Ms. Blank. While recalling B talking to him about D being upset and breaking a pager, Appellant stated that nothing was said about harassment and that he did not know what B was talking about.

Appellant described an incident, which he claimed occurred when he was clearing out his locker after being informed that he was being detailed out of Station 33 because of the investigation concerning Ms. Blank. During that time, he testified that Ms. Blank approached him, appearing very upset, and said that she had nothing to do with his detail and she hopes nothing comes of it.

B. Appellant's Corroborating Evidence

1. Witness AA

AA, wife of the Appellant, testified that on or about August 14, 1996, shortly after the collapse rescue team returned from Atlanta, she visited the station along with members of her family. According to AA, on this occasion Ms. Blank approached their group, which included the Appellant, and asked if the family wanted her to get them a copy of a video tape that had been made while the group was in Atlanta. AA also described a visit to the station about one week later, after she and her husband became aware of the charges, when Ms. Blank and her husband were in the same room and Ms. Blank made no attempt to avoid the Appellant.

2. Witness BB

BB, a career firefighter, who has worked in Station 33 for some 18 years, testified that he never heard or observed requests for dates or "improprieties" by the Appellant toward Ms. Blank.

C. Knowledge of Procedures for Processing Complaints of Sexual Harassment

On cross examination by the Appellant, witnesses were questioned about their knowledge of Service procedures available to employees to bring to management's attention complaints of

sexual harassment. They testified as follows:

1. Ms. Blank - Testified as to her awareness that sexual harassment was violative of Service policy. She testified generally as to her knowledge of the specifics of Service directives on harassment complaint procedures.

2. C - Testified as to her knowledge of Service procedures concerning sexual harassment and the obligation to report such conduct to supervision.

3. D - Testified as to his knowledge of actions available within the Service to employees who are subject to sexual harassment and that neither he nor Ms. Blank pursued available procedures to address the alleged conduct by the Appellant.

4. F - Testified that Service procedure required that policies on sexual harassment would have been distributed at all stations and posted for employees to read.

5. E - Testified as to his knowledge of Service procedures on complaints of sexual harassment.

D. Appellant's Ownership of a Motorcycle

In response to Ms. Blank's testimony that there were suggestions by Appellant that they go for a ride on his motorcycle, the Appellant testified that he did not own a motorcycle until May 17, 1996, and he entered into evidence a copy of the title to his motorcycle showing that date.

E. Alleged Inconsistent Testimony

In his brief, Appellant points to alleged inconsistencies in the description of events as found in statements taken during the Service's investigation and in testimony adduced in the hearing. Such alleged inconsistencies are:

- Ms. Blank and C's testimony concerning their Atlanta conversation differ as to whether C already knew of the alleged conduct and approached Ms. Blank or that Ms. Blank approached C.

- Variances in the dates and times of the alleged incidents of physical contact between Ms. Blank's description given during the investigation and her testimony at the hearing.

- Ms. Blank did not mention the pulling of her t-shirt and rubbing of her leg in her investigatory statements.

- Time sheets of the Appellant and Ms. Blank's work schedule during the period in question demonstrate that, during the approximately four month period at issue, they worked the

same schedule on only eleven days. If Ms. Blank's testimony is credited, it would mean that the Appellant was harassing her almost every day they worked on the same shift.

With respect to this contention, the County countered with payroll data that, if accurate, would show that Ms. Blank and the Appellant were working at the same time 9 days in March, 5 days in April, 6 days in May, 6 days in June, and 9 days in July.

- While Ms. Blank testified that she told E the name of the person who was harassing her, E testified that Ms. Blank never gave him a name.

- Ms. Blank testified to telling fellow firefighters A and B the specific conduct by the Appellant, but they denied that Ms. Blank had described these incidents in detail. Similarly, C testified to being told about only one incident of touching.

SERVICE INVESTIGATION AND DISCIPLINARY ACTION

Station Commander testified that C advised him of Ms. Blank's complaints of sexual advances by the Appellant, and of Ms. Blank's reluctance to come forward with the complaint. He advised a Deputy Chief, who instructed him to document his conversation with C, but to do nothing further. Thereafter, in August 1996, an investigation was conducted by a Service employee who interviewed Ms. Blank, B, D, C, A, and the Appellant. He testified that he reported to the Service Chief that, on the basis of their investigation, he thought that something had happened, "but I didn't think that we had enough to go forward at that time because I didn't think everyone was being completely truthful or divulging everything they knew about the situation."

The Service made the decision to seek the assistance of the County Attorney's Office, which conducted a second investigation in early October, essentially interviewing the same persons who were interviewed during the first interview, except for the Appellant. The results of these investigations were provided to the Service Chief, who testified that, after reviewing the results of the two investigations, he determined that dismissal was appropriate. He testified, "In this particular instance, while in the response to the statement of charges he unequivocally denied all the allegations, he presented no opposing arguments or reasons or anything in defense of his denial." With respect to the appropriateness of dismissal, as opposed to other possible penalties, the Chief testified he believed that, within the context of the County government's policy on sexual harassment, the training given personnel, and the rules and regulations of the Service "with regard to the pervasiveness of (the Appellant's) actions over some period of time that it was a termination offense." He stated further, "Because I believed this case to be of such a serious nature that the impact on the rest of the employees as a part of an example set...."

BASIS FOR DISCIPLINARY ACTION

Set forth below are the bases for the disciplinary action which the Service relied upon in the Notice of Disciplinary Action provided to the Appellant, along with the Appellant's position on each:

1. Section 28-2(h) of the Montgomery County Personnel Regulations for violation of an established policy or procedure. Appellant's Position: The Charge is vague, insufficient and inadequate because it does not reference specifically the established policy or procedure upon which it is alleged to be based.

2. Section 28-2(o) of the Montgomery County Personnel Regulations for violation of any provision of the County Charter, County laws, ordinances, regulations, State or Federal laws, or conviction for a criminal offense, if such violation is related to County employment. Appellant's Position: This charge is vague, imprecise and cannot serve as a basis for taking disciplinary action.

3. Department of Fire and Rescue Policy and Procedure (DFRS) #502, Code of Conduct, Sections 3.2, 5.0 and 5.14. Appellant's Position: Portions of this policy have application to the Service, and to all employees of the Service. However, to the extent that it requires employees to be responsible for a non-discriminatory work environment, there was selective enforcement in that Ms. Blank's failure to report the alleged conduct makes her as much in violation as the Appellant is alleged to be, and there was a lack of due process and of a factual basis.

4. DFRS Policy and Procedure #507, Discrimination, Section 4.0, 4.4 arid 5.0. Appellant's Position: Included with comments under item 3 above.

5. Montgomery County Policy on Sexual Harassment, Policy item 2, effective May 10, 1996. Appellant's Position: The Service has not presented persuasive evidence that this policy was in fact issued to Service employees, including the Appellant. Moreover, the Appellant is charged with conduct that pre-dates May 10, 1996.

6. Article 49B of the Annotated Code of the State of Maryland. Appellant's Position: Appellant contends that the referenced section of the Code contains 41 separate sections, comprises 957 pages, and that the Service has failed to provide the Appellant with sufficient specificity so as to allow adequate due process on this charge.

7. Section 27-19(a)(1) of the Montgomery County Code. Appellant's Position: Appellant contends that this section sets forth prohibitions on the conduct of an "employer" but is not applicable to the Appellant.

Appellant additionally contends that the discipline is procedurally defective. Appellant notes that the original statement of charges provides, "You are hereby notified that the following may serve as the basis for a discipline action up to and including dismissal." (emphasis supplied) He argued that Administrative Procedure 4-10 provides that such statements should be avoided.

THE DISCIPLINE

Appellant contends that his dismissal does not comply with the regulatory requirements for progressive discipline. Appellant relies on Section 28 of the County Personnel Regulations which set forth eight types of disciplinary action ranging from oral admonishment through and including dismissal as the most severe. The County responded that, given the severity of the conduct at issue, that there was no alternative to dismissal. In his testimony, the Chief described the Service as seldom using suspension as a discipline since that ends up penalizing the Service because of the need to provide coverage for a person under suspension.

ISSUES

1. Is there a credible factual basis for disciplinary action?

2. Is there a legal basis for disciplinary action?

3. On the basis of the facts as credited and the applicable rules and regulations, is the discipline taken - dismissal - appropriate?

ANALYSIS AND CONCLUSIONS

1. The first issue, which was the focus of the evidentiary hearing, requires the resolution of the credibility dispute between the account provided by the County's witnesses, and that of the Appellant, which was essentially a denial that any of the conduct attributed to him occurred. In support of its position, the County relied on a cogent account of the conduct at issue from the alleged victim, Ms. Blank, and the supporting testimony from persons who were told about the conduct by Ms. Blank. In support of Ms. Blank's veracity, the County argued that, if Ms. Blank's account were not true, it is unimaginable that she would make up this story, seek the advice and assistance of others, and do so over a period of months. What would motivate her to do that? What would she have to gain? Why would she subject herself to the potential ostracism of fellow firefighters?

In addition to simply denying having engaged in the conduct attributed to him, the Appellant's response is primarily to try to discredit Ms. Blank by her failure to file a formal complaint. Appellant's position is that, if Ms. Blank was being subjected to such egregious behavior, why would she not utilize a variety of avenues available to her to seek to have the

conduct stopped, some of which could have arguably been used anonymously? Would not a believable victim "go public" about what was going on?

Ms. Blank's answer to Appellant's contention is that, in her workplace, if a female were to file a formal complaint against other firefighters, she would be subjected to forms of hostility possibly as bad as the conduct she was complaining about. Rather, notwithstanding the negative impact it was having on her life, Ms. Blank testified that she was trying to work it out on the job. To that end, she sought advice and assistance from fellow firefighters who might prevail on the Appellant to cease the objectionable conduct.

Counsel for the Appellant asserts, with some accuracy, that it is difficult to prove a negative. But here there is more than just an accuser and accused without supporting evidence. There is the support provided by the County's corroborating witnesses describing how Ms. Blank told them about Appellant's conduct and how they sought to convince Appellant to cease his conduct. Like Ms. Blank while they were clearly reluctant to be an accuser of a fellow firefighter, their testimony is quite believable. For example, A's testimony as to approaching the kitchen and hearing someone say to leave her alone and back off; and finding only Ms. Blank and the Appellant in the room, amounts to almost an "eyewitness" account. Indeed, the Board believes that this is objective support for crediting the account provided by County witnesses.

Appellant seeks to discredit Ms. Blank on two additional bases that warrant discussion. The first is alleged inconsistencies in accounts given by her at various times and under varying circumstances. In the Board's view, to the extent that there are such inconsistencies, they are minor and appear to be more a function of the passage of time than a reflection of someone not telling the truth. The second is the Appellant's use of time sheets to support an unanswered contention that the Appellant and Ms. Blank were only working at the same time during a limited number of days. Assuming that this contention is correct, in the Board's view this does not provide a basis for affecting the crediting of Ms. Blank's testimony. The Appellant needed only a few days to engage in the conduct attributed to him and actions like the phone calls are described as having taken place when he was at work and Ms. Blank was not.

In conclusion, as to issue 1, the Board determines that there is a credible factual basis for taking disciplinary action against the Appellant.

2. The Appellant raises three arguments with respect to the legal basis for taking disciplinary action. The first goes to the quality and quantity of the pre-disciplinary investigations and the decisional process utilized by the Chief, who made the Service's decision to dismiss the Appellant. The Board concludes that due process was in all respect accorded to Appellant in the investigatory process. The results of two extensive and independent investigations were provided to the Chief. The Appellant was provided a copy of the investigation and an opportunity to respond to the charges, which he denied, and this denial was available to the Chief. The fact that the Chief testified that he did not read every word of the investigative files, or that he sought input

from other management sources, does not, in the Board's view, affect the due process that was accorded to Appellant.

The second argument raised by the Appellant with respect to the "legal basis" for the dismissal is that the notice of dismissal was defective in that it provided that the conduct alleged may serve as the basis for a discipline action "up to and including dismissal." While Administrative Procedure 4-10 specifically urges the avoidance of this language, in the Board's view, use of this to be avoided phrase does not render the notice fatally defective. In this regard, the record shows that the Appellant was given ample opportunity to be apprised of the specific charges against him and the possible resulting penalties. With respect to any due process considerations, it is noted that the Appellant was provided a de novo review before the Board on the charges against him.

The third of Appellant's arguments goes to a legal framework for the action taken. Administrative Procedure 4-10, Adverse Actions, requires that statements of proposed discipline set forth specific charges, with sufficient specificity to permit the recipient to be able to understand and respond to the charge. This carries with it the requirement that there be a legal basis for the action. In the March 10, 1997, Notice of Disciplinary Action, the Appellant was advised of the regulatory and statutory bases for the dismissal. In the Board's view, it is necessary that we identify the appropriateness of one of such bases.

It is essentially conceded by the Appellant that the May 10, 1996 Service Code of Conduct and the Montgomery County Policy on Sexual Harassment provide a legal basis for disciplinary action but Appellant argued that the alleged conduct, in significant part, predates the issuance of these documents. However, two of the credited accounts of physical harassment occurred after May 10, i.e., the engine room and the weight room incidents took place in June and July, 1996 respectively. Such conduct clearly is within the scope of the following prohibition:

> County employees must not subject other employees...to sexual harassment. An employee who is found to have engaged in sexual harassment will be subject to appropriate disciplinary action, which may include discharge.

"Sexual harassment" is defined in Montgomery County's Sexual Harassment Policy as 1) unwelcome advances; 2) requests for physical conduct of a sexual nature; and 3) any written, verbal or physical conduct of a sexual nature, with the one applicable condition, "when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." (Emphasis supplied) (County Exhibit 25) Ms. Blank's testimony amply described how the Appellant's conduct interfered with her work performance and created an intimidating, hostile or offensive work environment. One need look no further than her described concern about going to Atlanta for fear that the Appellant would use the opportunity to fulfill a promise to make sexual advances, i.e., they would have to find a way to get together because he didn't know if he could go a week without sex.

While concluding that there was sexual harassment conduct by Appellant after the May 10, 1996 Policy had been issued, the Board is of the view that there is a sufficient basis for discipline in the also relied upon October 4, 1995, Policy and Procedure 507. That Policy, which was applicable to "All DFRS personnel" proscribes, in Sections 3.5 through 3.8, precisely the type of conduct at issue in this case. While the dismissal letter makes reference to other Sections of that Policy, the sections mentioned required compliance with County regulations, which include sections 3.5 through 3.8 of the same Policy.

Therefore, the Board concludes that there is sufficient legal basis to support disciplinary action against the Appellant.

3. A determination as to the appropriate discipline in the instant case necessitates evaluating a number of competing considerations, some factual and some concerning the application of rules and regulations. Consideration for a mitigation of the County imposed dismissal is primarily found in the fact that the progressive discipline provided for in Administrative Procedure 4-10, Adverse Actions, was not followed. In this regard, the Appellant has eight years of service and there is no proffered evidence of other disciplinary actions having been taken against him. Moreover, the Service's testimony was that such conduct had never been the basis for discipline within the Service.

While considerations for mitigation may exist, in the Board's view, on balance, far more compelling considerations support dismissal as a reasonable and appropriate penalty. The Appellant's conduct progressed from unacceptable verbal harassment to outrageous physical attacks, all in the face of consistent rejection by Ms. Blank of any interest in his advances. This conduct continued over a long period of time and the ultimate physical conduct was blatant and extreme. The content, quantity, and continuity of the Appellant's conduct far exceed any weight to be given to Appellant's otherwise clean record in mitigation of the dismissal action.

There are also the unique aspects of the work environment that exacerbate the Appellant's conduct. The Service is a place where men and women are required to not only work together as trusting team members, but, to a degree, to live together during their duty hours. The Appellant's conduct rips asunder that required fabric of teamwork and trust. An excellent example is the impact of the Appellant's not particularly veiled threat in his statement to Ms. Blank concerning his need to have sex while the collapse rescue unit was on detail in Atlanta. Ms. Blank, therefore, had a legitimate basis for fearing for her safety while engaged in the performance of her duties in Atlanta.

Finally, there is the consideration of the mission of the Appellant as a firefighter. These people are engaged in the protection of the public safety. As discussed above, the Board has concluded that there is sufficient believable evidence to credit the testimony provided by Ms. Blank and supporting witnesses. The Appellant's essentially unsupported denial is, therefore, not to be believed, meaning that a public safety employee is not being truthful. Public safety employees must meet a very high standard of conduct. Dismissal for blatant misconduct that does

not meet that standard, such as in this case, may be affirmed by the Board, even in the absence of progressive discipline.

On the basis of the above, the Board concludes that, in the circumstances of this case, dismissal is appropriate and reasonable and is not an abuse of discretion. Therefore, the Board sustains the County's action dismissing the Appellant from his position as firefighter. Accordingly, having concluded that there is a credible factual and legal basis for taking disciplinary action against the Appellant, and that dismissal is appropriate and reasonable under the circumstances of this case, the Board dismisses Appellant's motion to rescind the termination action and reinstate the Appellant. (While not controlling precedent, we note consistent and persuasive decisions by the U.S. Merit System Protection Board and state courts in similar cases, e.g., Payne v. U.S. Postal Service, 74 M.S.P.R. 419 (1997); Walker v. Dept. of the Navy, 59 M.S.P.R. 309 (1993); OARE v. Coughlin, 520 N.Y.S. 2d 658, 133 A.D. 2d 943 (1987.))

GRIEVABILITY

Case No. 97-15

Appellant appealed the decision of the Chief Administrative Officer (CAO) denying his grievance to reinstate State health benefits which he had previously dropped.

FINDINGS OF FACT

1. The dispositive facts are undisputed. Appellant is an employee in the Montgomery County Department of Health and Human Services (DHHS). His position was formerly a State County (dual merit system) position with the former (State) Department of Social Services which, as a result of a reorganization and HB 669, is now part of DHHS.

2. As a State/County employee, Appellant could enroll in State and/or County health benefits plans. In 1995, Appellant discontinued State health benefits. Appellant contends it was his understanding he could reinstate those benefits at a later date. House Bill 669 (HB 699) was effective October 1, 1996. HB 699 provides, in pertinent part:

> An employee transferred under this Act shall have the option to receive the health and other employee benefits available to new Montgomery County employees at the time the option is elected or the employee may elect to continue to receive the employee benefits the employee is receiving at the effective date of this Act, including County health benefits that duplicate those offered through the State.
>
> * * * * * * * *
>
> State employee benefits may not be reinstated once the employee discontinues the benefit unless the employee again becomes employed by an entity that provides its employees with State employee benefits....

3. A State health plan open enrollment period was scheduled by the State during the period October 12-25, 1996. The CAO determined that, by operation of HB 699, effective October 1, 1996, Appellant could not reinstate State benefits which he did not have on that date.

4. Appellant contends that it was the intent of HB 669 to preserve conditions in effect prior to its effective date; that scheduling the open enrollment after the effective date of HB 669 deprived him of the opportunity to reinstate previously existing State health benefits; and that

there was not full and timely information on the details of the open enrollment period. The relief sought by Appellant is the right to reinstate State health benefits.

5. The CAO denied Appellant's grievance, concluding that, pursuant to the provisions of HB 669, since he was not receiving State health plan benefits on October 1, 1996, the effective date of HB 669, he could not reinstate those benefits during the open period. The decision noted:

> While it is unfortunate that the State open enrollment season did not occur before October 1, 1996, the timing of the open enrollment season is not under the control of the County or the Department. The open enrollment season is the same for all State employees and is set by the State.

The CAO stated in his conclusion, "The County cannot make an administrative decision to offer State health plans."

ISSUE

Does Appellant have a right to reinstate previously dropped State health benefits after October 1, 1996, the effective date of HB 669?

ANALYSIS AND CONCLUSIONS

The language of HB 669 on the issue in this case is clear and plain on its face. Therefore, the Board need not inquire as to its legislative history. The intent is to preserve the current level of State health benefits. After October 1, 1996, a transferred employee has no right to reinstate State health benefits not held on that date. There is no evidence to support Appellant's contention that the intent of HB 669 is to preserve the right of an affected employee to reinstate State health insurance previously dropped.

The record is also undisputed that the period of October 12-25, 1996 was a State open enrollment period concerning State health benefits not under the control of the County. As the CAO advised Appellant, the County could not make an administrative decision for the State. Therefore, the County cannot grant the relief sought. The appeal was denied.

Case No. 97-16

Appellants (2) appealed the decision of the Chief Administrative Officer (CAO) denying their relief requested in the consolidated grievances. The grievances requested of the Labor/ Relations Manager's November 1, 1996, announcement that "effective immediately, Step 3

grievances will be conducted without the use of a court reporter or verbatim recording." (herein referred to as "Hearings").

BACKGROUND

In June 1991, Administrative Procedure 4-4 was revised on an interim basis and published in its present form in May 1992. One of the primary changes to the procedure was the elimination of the use of outside fact-finders who conducted hearings, which had been expressly provided for in the 1984 and 1989 versions (at Section 7.4E). The then CAO advised all department heads on June 13, 1991, that:

> The grievance review process under the administrative procedure will now be structurally similar to the grievance procedures provided under various labor agreements.

Since the changes were made to the grievance procedure in 1991, hearings have been permitted in only a few cases, i.e., certain police officer cases in which the County Attorney had provided representation. However, in a November 1, 1996 letter, the Labor/Employee Relations Manager advised the County Attorney that, in the future, step 3 reviews would "be conducted without the use of a court reporter or verbatim recording." In his explanation, he stated that the purpose of the step 3 review is to "ascertain the relevant facts and to facilitate settlement of the dispute at hand." He stated that the creation of a verbatim record shifts the focus from resolving the dispute to creating a record for later use and, in addition, the assigned Specialists are not trained to assume the role of a hearing examiner. The Appellants grieved the announced elimination of hearings.

ANALYSIS AND DISCUSSION

Appellants contend that a hearing with a verbatim record at the step 3 level of the Grievance Procedure is required by Section 33-12(b) of the Montgomery County Code and that the language of AP 4-4, Section 4.9B permitting the use of legal counsel infers that a verbatim record may be established. Appellants also contend that the elimination of the long-standing practice of providing such hearings is arbitrary and capricious and violates the "due process" rights of grievants.

Referring to the establishment of personnel regulations to resolve grievances, Section 33-12(b) provides in relevant part:

> In providing these procedures, the County Executive shall ensure that any grievance based upon an alleged improper application of a merit system law or regulation concerning a disputed issue of fact is entitled to resolution after a fact-finding inquiry authorized by the Board. Grievances based upon an alleged improper interpretation of merit system laws or regulations do not require a hearing during the grievance process.

Appellants' reliance on Section 33-12(b) is misplaced. This provision of the Code provides that procedures used in the resolution of grievances will include a "fact-finding inquiry" authorized by the Board where there are disputed issues of fact. The Board rejects the Appellants' contention that Board procedures provided for by Section 33-12(b) require hearings to resolve "disputed issues of fact" at step 3 of the grievance procedure. In the Board's view, the requirement for a "fact finding inquiry" does not apply to the third step of the grievance procedure. This interpretation is totally consistent with the next sentence which explicitly provides that grievances under this section alleging an improper interpretation of the merit laws or regulations "...do not require a hearing during the grievance process."

In addition, Appellants have misconstrued AP 4-4, Section 6.4 pertaining to step 3 of the grievance procedure, which provides in relevant part:

> Upon receipt of the employee's written grievance, the Chief Administrative Officer's designee will meet with the employee and the department within 15 calendar days in an attempt to resolve the matter. The employee and the department will have an opportunity to present and respond to the grievance and provide all supporting documentation, and may call witnesses as appropriate.

While Section 6.4 provides that there will be an opportunity for the grievant to submit supporting documentation and call witnesses to ensure that the facts are presented at the CAO level, the language of Section 6.4 does not imply that a formal hearing is required. Rather the emphasis is on the right of a grievant to place the facts before the CAO, not to have a formal hearing.

Further, the language of AP 4-4, Section 4.9B provides that the use of counsel is optional and the costs are the responsibility of the employee. This clearly does not imply or require that a verbatim record be made at the step 3 grievance proceedings.

Moreover, the case of Lofland v. Montgomery County, 319 Md. 265, 272-3 (1990) relied upon by Appellants is not applicable to step 3 grievance proceedings because it holds that a merit system employee is entitled to an evidentiary hearing in a Merit Board appeal from a grievance decision whenever there is a need for factual findings upon which the Board bases a legal determination. Therefore, contrary to Appellants' contention, the merit employee is certainly not deprived of "due process" rights since the Board is required to hold an evidentiary hearing in an appeal of a grievance decision when there are disputed issues of fact.

Finally, the Board sees no merit to the final contention that the elimination of the long-standing practice of granting hearings is "arbitrary and capricious," and therefore somehow improper. The County rescinded a past practice which was discretionary - not required by law or regulation. Moreover, there is no showing that making this change was without a rational basis. In this regard, the November 1, 1996, announcement explains the basis for the action, i.e., the focus is resolving the dispute rather than creating a record for later adjudication; the specialists

assigned to investigate grievances are not trained to act as hearing officers; and, in order to make the administrative grievance procedure consistent with those in collective bargaining agreements.

CONCLUSION

For the reasons discussed above, the appeal was denied.

Case No. 98-01

Appellants (2) appealed from the Labor/Employee Relations Manager's determination, that the Appellants' grievances were not subject to review under Administrative Procedure 4-4.

BACKGROUND

Both Appellants hold the position of Fire/Rescuer III, employed by Montgomery County, Maryland in its Department of Fire and Rescue Services. On July 8, 1997 and July 9, 1997 respectively, Mr. A and Mr. B filed grievances requesting that their supervisor be instructed to refrain, cease and desist from ordering them and other firefighters to cut grass and perform other lawn maintenance activities, including but not limited to mulching, planting, hedging, utilizing weed eaters, or blowers, (herein referred to as "lawn maintenance") or from performing any other type of activities which are not expressly or impliedly related to their duties and responsibilities as stated in their job description.

By Memorandum dated July 24, 1997, the Labor/Employee Relations Manager advised Appellants that, pursuant to Section 33-12(b) of the Montgomery County Code and Administrative Procedure 4-4, Grievance Procedure, grievances are defined as disagreements concerning a "term or condition of employment". He asserted that the assignment of work is the responsibility and prerogative of the employer and not a term or condition of employment. Further, he contended that the employer retains authority to determine the tasks to be performed by each employee and to classify the nature of the work. He concluded that, since work assignments are not terms and conditions of employment, the complaints set forth in their grievances were not grievable through Administrative Procedure 4-4.

An additional contention made by the County is that as the Appellants are in designated bargaining unit positions, they are covered by the terms and conditions of the County's agreement with the International Association of Firefighters, Local 1664, and that agreement provides that the employer has the right to assign work and determine the operations to be performed. "This is further evidence of the fact that work assignments are not terms and conditions of employment and are, therefore, not grievable." Therefore, the County did not decide the grievances on their merits.

ISSUES

1. Are the Appellants' grievances over the assignment of assorted lawn maintenance duties grievable under the administrative grievance procedure?

2. Is an award of attorney fees appropriate in the appeal of a grievability determination?

ANALYSIS AND CONCLUSIONS

1. Personnel Regulation Section 29-2, Grievance Procedure, in defining its scope, provides, in pertinent part:

> Definition. A grievance is a formal written complaint by an employee arising out of a misunderstanding or disagreement between a merit system employee and a supervisor, which expresses the employee's dissatisfaction concerning a term or condition of employment or treatment by management, supervisors, or other employees. A grievance may be filed if an employee is adversely affected by an alleged:
>
> **********
>
> (c) Improper, inequitable or unfair act in the administration of the merit system, which may include promotional opportunities, selection for training, duty assignments, work schedules, involuntary transfers and reductions-in-force. (Emphasis supplied)

The grievances at issue concern the assignment of lawn maintenance duties under Section 29-2(c), "duty assignments". On their face, therefore, the grievances at issue are clearly within the scope of the administrative grievance procedure.

The County argues that, under the "Employer Rights" provisions expressed in the Fire and Rescue Collective Bargaining Law and in the collective bargaining agreement covering the Appellants, i.e., (to determine the tasks to be performed by employees and to classify the nature of that work), duty assignments are not considered a "term and condition of employment," and, therefore, grievances over duty assignments are excluded from the scope of the administrative grievance procedure. The Board does not agree with that contention.

First, the grievances at issue are filed under the administrative grievance procedure, not a procedure governed by either the Fire and Rescue Collective Bargaining Law or by the Fire Service collective bargaining agreement. The scope of the grievance procedure is defined by Section 29-2(c) of the Personnel Regulation. The County presents no argument that the grievances at issue are excluded from the defined scope of the administrative grievance procedure

either by the terms of that procedure or cited applicable law or regulation. Accordingly, in the view of the Board, the grievances at issue are grievable under the administrative grievance procedure as defined in Section 29-2(c) of the Personnel Regulations.

The Board additionally notes that the issue before it is one of grievability and not the merits of the grievances. Accordingly, this case is remanded to the County for a decision on the merits.

2. Section 33-14(c) of the Montgomery County Code provides that the Board has the authority to order the County to reimburse or pay all or part of employee's reasonable attorney's fees in "final decisions". The Board has consistently interpreted Section 33-14(c) as meaning that a determination of grievability is not a "final decision by the Board on the merits of a grievance." (Appeal, MSPB Case No. 96-14, February 24, 1997.) Therefore, in this case concerning the grievability of a grievance, the Board has no authority under Section 33-14(c) to award attorney fees as requested by the Appellants. Should the Appellants ultimately prevail in an appeal on the merits of their grievances, the Board may consider an award of attorney fees in a final decision on the merits of the grievances.

Case No. 98-01
REQUEST FOR RECONSIDERATION

The County requested reconsidering of a Board's decision finding that the above-referenced Appellants' grievances over the assignment of assorted lawn maintenance duties were grievable under the administrative grievance procedure.

REQUEST FOR RECONSIDERATION

In the County's original submission to the Board, it contended that the grievances were not grievable under the administrative grievance procedure in that the issue, the assignment of duties, did not concern a "term or condition of employment," but rather is a reserved management right within the meaning of the Collective Bargaining Agreement (CBA). The County's position was that the Appellants were in a bargaining unit covered by a collective bargaining agreement which reserved to the employer the right to assign work. On this point, the County contended, "This is further evidence of the fact that work assignments are not terms and conditions of employment and, are, therefore, not grievable."

In reaching its decision, the Board viewed the County's reference to the collective bargaining agreement as supportive of its primary contention that since the grievances did not concern a term or condition of employment, they were not grievable under the County's

administrative procedures. Noting that the scope of the administrative grievance procedure is defined by the Personnel Regulations, not the referenced bargaining agreement, and that the administrative grievance procedure specifically covered "duty assignments," the Board held that the grievances were grievable under the County's procedures.

In its request for reconsideration, the County states that it should have given greater emphasis in its initial presentation to the contention that cited applicable law, regulation, and the collective bargaining agreement provide that the negotiated grievance procedure is the exclusive procedure available for the disposition of the Appellants' grievances. Accordingly, the grievances are non-grievable under the administrative grievance procedure. Accompanying its request for reconsideration, the County relied upon past Board decisions relevant to the issues presented by the instant case.

Section 30-19 of the Personnel Regulations provides that "the Board may not reconsider its decision, except in the case of fraud, mistake or irregularity." In most circumstances in a request for reconsideration, the Board will not consider new evidence or issues not presented in the prior proceeding. However, in this case, the Board will consider the arguments raised in the County's reconsideration request for two reasons:

> First, while in the context of arguing a different theory, the initial filing did reference that the Appellants were covered by a collective bargaining agreement and that the subject of the grievance was not a term and condition of employment covered by that agreement. Second, and more importantly, the issues raised by the reconsideration request directly affect the issue of Board jurisdiction, which can be raised at any time. Thus, on the basis of the County's claim of a "mistake" in its original decision, the Board will reconsider its decision by addressing the issues and authorities raised in the request for reconsideration.

POSITION OF THE PARTIES

As noted above, the County presently argues that the grievances are not grievable under the administrative grievance procedure because, under cited law and regulation, when a matter is covered by the negotiated grievance procedure, that procedure is the exclusive procedure for the resolution of grievances involving bargaining unit employees. In support of this "exclusive forum" argument, the County relies on various laws and regulations among which are the following:

> Section 33-147 of the Montgomery County Code (Code) provides that once employees have selected a bargaining representative "collective bargaining must be used in place of, and not in addition to, existing means to initiate government action on subjects that are appropriate for collective bargaining under this Article."

Section 401 of the Charter of Montgomery County states that:

> "Officers and employees who are members of a unit for which a collective bargaining contract exists may be excluded from provision of the merit system only to the extent that such provisions are subject to collective bargaining..."
>
> Section 4.5(B) of the County Administrative Procedure 4-4, "Grievance Procedure," states, "a bargaining unit employee may not file a grievance under this procedure if the subject matter of the grievance is covered by a collective bargaining agreement."
>
> Section 33-12(b) of the Code includes a statement that "(g)rievances do not include the following: ...or other matters for which another forum is available to provide relief or the Board determines are not suitable matters for the grievance resolution process."

The County then cites provisions of the collective bargaining agreement (CBA) covering the Appellants to support the proposition that the matter grieved is covered by that agreement. Specifically:

> The Preamble to the CBA states as its purpose the peaceful resolution of differences; and includes the agreement of the parties on rates of pay, hours of work and other conditions of employment...:
>
> Article 38 of the CBA establishes a contractual grievance procedure under which the concept of a grievance is broadly defined as a dispute concerning the applications or interpretation of the terms of the CBA. Article 38.17 also provides that if a unit employee files a grievance with the Personnel Office under the merit system law which is on a subject covered by the CBA, the "employee's filing of such a grievance under the merit law is a violation of the procedures in this Article."
>
> Article 5 of the CBA, "Management Rights," says that the CBA shall not impair the right of the employer to "Determine the services to be rendered and the operations to be performed;" and to "Direct and supervise employees;" and to "transfer, assign and schedule employees."

The Appellants' response to the County's request for reconsideration does not contest the theory of exclusivity of the contractual grievance procedure for matters covered by the CBA, but contends that the matter at issue in the disputed grievances is not covered by the agreement. In support of this contention, the Appellants point to the County's own oft-stated view that the contractual management rights clause reserves to management the right to assign work, thereby foreclosing the Appellants' search for a remedy under the negotiated grievance procedure to the

assignment of lawn maintenance duties. The Appellants state:

> The County's argument in this regard is circular and would afford the Grievants no opportunity for a review of their complaints. It argues that the Grievants may not utilize Administrative Procedure 4-4 because of the Collective Bargaining Agreement. However, its own references to the Collective Bargaining Agreement indicates that such would not be a matter to be raised by a contract grievance. The County cannot have its cake and eat it too.

However, in the County Attorney's January 7, 1998 letter to the Board, the County now concedes that "...the subject matter of assigning work is a subject covered by the CBA. If the Appellants wish to challenge the County's authority to assign them certain types of work (a subject covered by the CBA), or if the Appellants wish to challenge certain work assignments as an arbitrary and capricious exercise of the County's authority under Article 5 of the CBA, they must present their grievances within the framework of the Contract Grievance Procedure, rather than through the County's Grievance Procedure."

Finally, the County provides decisions of past Boards and contends that they stand for the proposition of the exclusivity of the contractual grievance procedure for matters covered by the agreement. The Appellants argue that the decisions are distinguishable.

ISSUES

1. Can the administrative grievance procedure be used by employees in a unit of exclusive recognition for matters covered by the collective bargaining agreement?

2. Is the "matter" of the grievances at issue covered by the collective bargaining agreement?

ANALYSIS AND CONCLUSIONS

1. The laws and regulations cited by the County in its request for reconsideration reflect an intended scheme that makes the contractual grievance procedure the exclusive procedure for grievances over matters covered by the agreement. Particularly relevant are the Section 4.5(b) provision of Administrative Procedure 4-4 "a bargaining unit employee may not file a grievance under this procedure if the subject matter of the grievance is covered by a collective bargaining agreement," and the Section 33-12(b) provision of the Code which excludes from the definition of grievances under the administrative grievance procedure "matters for which another forum is available to provide relief."

Accordingly, the Board concludes as to Issue 1 that the administrative grievance procedure cannot be used by an employee in a unit of exclusive recognition to grieve over matters covered by the collective bargaining agreement.

2. The issue of whether the instant grievances are covered by the collective bargaining agreement turns on the application of the word "matter," as used in the above-discussed provision of law and regulations. Obviously, the contract contains no reference to the performance of the disputed lawn maintenance tasks, but the Board does not view such specificity as required to satisfy the coverage test. The contract provisions relied upon by the County quite clearly cover the "matter" of assignment of work, whether it is assignment of fire and safety or lawn maintenance duties. Appellants contend that the issue raised by their grievance deals with assignment of work, which is a reserved management right under the CBA and, therefore, not a term and condition of employment covered by the CBA. However, a determination on whether a matter is covered by an agreement turns on whether the parties covered the matter in the agreement. In the Board's view, and as conceded by the County, inclusion of the right to assign work in the agreement constitutes coverage of the matter in dispute in the grievance. An arbitrator, thus, may determine whether the assignment of lawn maintenance duties to Appellants was an appropriate exercise of management's right to assign work or whether it was arbitrary and capricious. Accordingly, as to issue 2, the Board concludes that the grievances at issue are covered by the collective bargaining agreement.

DECISION

As discussed above, in its original decision, the Board's consideration was based on the issues and arguments presented by the parties. On the basis of the reconsideration, the Board now determines that the negotiated grievance procedure is the exclusive procedure for the grievances at issue and, hence, they are not grievable under the administrative grievance procedure. The Board determines that its original decision was therefore a "mistake." Accordingly, the Board vacates its decision of December 31, 1997 on the above-referenced matter for the reasons discussed above and denies the Appellants' appeal of the Labor/ Employee Relations Manager's determination that their grievances are not subject to review under Administrative Procedure 4-4.

Case No. 98-04

Appellant appealed the decision of the Labor/Employee Relations Manager, that grievances dated December 12, 1997, and January 8, 1998, were not over a grievable issue and were not timely filed.

BACKGROUND

On November 28, 1997, Appellant filed a grievance over "the findings/judgement . . . which state that I am not qualified for promotion to the rank of Fire/Rescue Captain." By memo dated December 12, 1997, the Labor/Employee Relations Manager advised the Appellant of the

"preliminary finding" that his complaint did not involve a grievable issue and that it was not timely filed, giving him until December 31 to respond further. On December 15, Appellant filed a second grievance, which contains the request that it be consolidated with his earlier grievance. In the second grievance, Appellant contended that on November 29, 1997, he learned of the pendency of a court decision involving a grievance brought by a Mr. Blank, who claimed entitlement to having his position reclassified, effective July 1, 1996, to the rank of Fire/Rescue Captain "As noted, only recently, have I learned about this grievance and the pending court case and I have filed this grievance as promptly as reasonably possible." Relying on the Court case, Appellant requested that he be placed in the Class of Captain, effective July 1, 1996.

By memo dated January 8, 1998, the Labor/Employee Relations Manger responded to the second grievance with a "preliminary decision" that the complaint was outside the grievance process, and not timely filed. On the timeliness issue, the County rejected the contention that knowledge of the court case could serve as the "triggering event" for the filing of a grievance. By memo dated January 16, 1998, Appellant responded to this preliminary determination and by memo dated January 27, 1998, the Labor/Employee Relations Manger rendered a final decision rejecting the grievance.

On January 9, 1998, Appellant noted an appeal to the County's determination of December 12, 1997, but requested that Board action be deferred and stayed pending disposition of the second grievance. On February 3, Appellant noted an appeal to the January 8 County determination on the second grievance. As both appeals deal essentially with the same dispositive issues, they will be treated by the Board as one appeal. The Board has previously denied (February 18, 1998) Appellant's request that the instant appeal be consolidated with the above mentioned court case.

FINDINGS OF FACT

The Appellant is a Fire/Rescue Lieutenant. Appellant held the rank of Fire/Rescue Sergeant which was re-classified to the rank of Lieutenant.

By Memorandum dated March 12, 1996 the Director of the Office of Human Resources, notified the Department of Fire/Rescue Services of her decision regarding a recent classification and compensation maintenance review of the Fire/Rescue Officer rank occupational classes that was completed in November 1995. Pertinent to the instant appeal was the decision that title changes recommended by the study were to be made and that 22 newly created Captain positions were to be filled through competitive examination.

On March 22, 1996, the Department of Fire/Rescue Services issued Directive 96-09 to all Fire/Rescue personnel notifying them that the change in titles would take effect on July 1, 1996, and that the positions would be filled via competitive process. Employees were also informed that incumbents of certain positions were entitled to a temporary 5% pay increase as a result of the study and referred employees to Directive 96-11.

On March 23, 1996, the Appellant applied for the 5% pay increase as referenced in Directive 96-09 by filling out the Class and Compensation Implementation, Working Out of Class Application. On July 1, 1996, the re-titling of the 22 positions as referenced in the March 12, 1996 Memorandum became effective.

On July 16, 1996, a grievance was filed by Lt. Blank, protesting the fact that the positions would be filled through competitive examination, and not given to the incumbents of those positions, of which he was one.

Lt. Blank's grievance was denied by the County as untimely filed. In its decision, the County stated that the Lt. should have filed within 20 days of the March 12, 1996 Memorandum when he knew that a problem existed.

The Lt. appealed the County's decision to the Board which sustained the dismissal of the grievances, concluding that the grievances had not been filed within 20 days of the March 22, 1996 date when it was clear, and undisputed, that the Lt. was aware "that the problem existed." (MSPB Case No. 97-01)

The Lt. appealed the Board's decision to the Circuit Court. On November 26, 1997, the Court remanded the case to the Board to be considered on its merits, concluding, "it is my view that the issue was timely filed and within 20 days of July 1, 1996..."

Appellant filed his two grievances on November 28 and December 15, respectively, contending in the latter that they were filed when he learned about the Court decision.

Positions of the Parties

The Appellant contends that his two grievances are separate, raising separate complaints, and should be addressed separately. As to the first grievance over "the finding/judgement...which state that I am not qualified for promotion to...Captain," the Appellant acknowledges that the grievance was unclear with respect to the "factual predicate upon which the Appellant was basing his grievance that he was 'not qualified' for promotion." The Appellant asserts however that he should have been afforded either an opportunity to revise the grievance with any needed information, or, alternatively, be provided with a meeting or hearing to go over his grievance in detail.

As to the second grievance, Appellant contends that it does concern grievable matters, promotion opportunities, compensation policy and employee benefits, and that it was timely filed. Appellant based his contention on the knowledge he received of the Court decision, contending that it can serve as a triggering event for the filing of a grievance.

The County contends that the subject of both grievances involve a classification issue which is excluded from the scope of the grievance procedure. As to timeliness, the County contends that both grievances go to the 1996 personnel actions, and argues that the Appellant had knowledge, or should have had knowledge, of these events as far back as March 12, 1996, and certainly by July 1, 1996, making the two subject grievances clearly untimely.

ISSUES

1. Were Appellant's grievances timely filed?

2. If so, are the grievances over grievable matters?

3. Is there any entitlement to attorney fees?

ANALYSIS

Preliminary to a discussion of the timeliness of the grievances is the issue of whether the two grievances involve separate complaints. We reject the Appellant's contention that the grievances are separate complaints. In the first grievance, Appellant recounts his employment history. In the concluding paragraph, he states, "In July of 1996, the position of Lieutenant was retitled Captain," and thereafter describes his September 1996 placement as an acting Station Supervisor as the basis for his request for reclassification to Captain. After being advised of the determination that the first grievance had not stated a cause of action, Appellant filed the second grievance, more specifically describing the July 1, 1996 reclassification, and asking that it be consolidated with the first. In the Board's view, the two grievances constitute one complaint, that the Appellant believes that he should have been promoted to Captain as a result of the July 1, 1996 reclassification of some Lieutenant positions to the rank of Captain.

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.)** (Emphasis supplied)

As discussed above, the "problem" complained of by the Appellant was not being included in the July 1, 1996 reclassification. It is clear from the record that the Appellant was aware of the reclassification process when it was going on in 1996. Part of the sequence of events was the March 22, 1996, Department of Fire/Rescue Service Directive 96-09 informing Personnel of the change in titles, effective July 1, 1996, and that certain personnel were entitled to a 5% pay increase for working out of class. On March 23, 1996, the Appellant filed an application for the

5% increase. Accordingly, since Appellant knew about the reclassification, a timely grievance should have been filed within 20 calendar days after the July 1, 1996 effective date of the reclassification.

In the Circuit Court decision, the court's concern that a grievance filed prior to the July 1, 1996 effective date of the reclassifications would have been premature led to its decision that Lt. Blank had 20 days from July 1, 1996 to file a timely grievance. It is undisputed that the Appellant's grievances were filed in December 1997 and January 1998, well after that period.

Apart from knowledge of the July 1, 1996 reclassification action, the Appellant argues that mere knowledge of the Circuit Court decision could serve as a "trigger" to the timely filing of a grievance. That is, according to Appellant, a timely grievance could be filed within 20 days of the November 24, 1997 Circuit Court decision, which would make both of the Appellant's grievances timely. Appellant cites Lofland v. Montgomery County, (Lofland), 319 Md. 265, 572 A.2d 163 (1990), to support his contention that knowledge of a Board or court decision could trigger a right to file a timely grievance, notwithstanding that a grievant could otherwise have had long-standing knowledge of the existence of a problem. In the Board's view, the instant facts are quite distinguishable from Lofland, in that the Court decision did not create any substantive change of conditions of employment which could give rise to a grievance. Rather, the Court decision held that the event triggering Lt. Blank's right to file a grievance was the effective date of the reclassification, and not the earlier dates when the new classification program was announced. All that the Court decision means to the Appellant is that he could have filed, but failed to do so, a timely grievance 20 days after July 1, 1996. However, it does not trigger the right to file grievances in November and December 1997, merely based on knowledge of the Court decision.

Appellant contends that he is entitled to a fact-finding hearing to present "his side of the case that he did not know, nor should have known, that a problem existed prior to becoming familiar with the court decision." However Lofland is distinguishable in that the Court held that a fact-finding hearing was required because it was unclear when Lofland should reasonably have had knowledge of the compensation matter that he wished to grieve. In the Board's view, in this case, there is no lack of clarity as to when the Appellant knew or should have known that a problem existed. In fact, Appellant does not dispute that he had knowledge of the announcements in March, 1996 of the impending reclassification, as evidenced by his filing for the 5% differential. The reclassification, posting, and filling of the Captain positions were widely known and Appellant, as someone who was then reclassified to the rank of Lieutenant, was well aware of these events. In the Board's views, it as abundantly clear that, under the terms of the grievance procedure, Appellant's time period for filing a grievance over the reclassification expired 20 calendar days after July 1, 1996, making his instant grievances untimely filed.

For the reasons stated above, the Board sustains the dismissal of the grievances and denies the appeals. Having concluded that the grievances were untimely filed, it is unnecessary for the Board to consider whether the subject of the grievances was grievable. There is no entitlement to attorney fees.

MEDICAL

Case No. 97-14

Appellant appealed the decision of the County Medical Examiner that he was medically unacceptable to be considered for employment as a Bus Operator.

SUMMARY OF FACTS

On March 25, 1997, in connection with his application for a position as a Montgomery County "Bus Operator," Appellant provided medical history concerning arthroscopic surgery on your right knee for a torn medial meniscus. As a result of this disclosure, the County Employee Medical Examiner requested a letter from his primary physician concerning the surgery, including diagnosis, treatment, and prognosis as it related to fitness for duty for Bus Operator. By letter dated April 10, 1997 his health plan physician provided the requested letter, describing a June 4, 1996 arthroscopic surgery, a current diagnosis of a "torn posterior horn medial mensicus right knee," and a good prognosis. The letter concludes, "Mr. Blank should be able to work as a bus operator as long as this does not require prolonged walking."

Following receipt of this information, the Medical Examiner advised the Office of Human Resources (OHR) of his determination that you were medically disqualified for the position of Bus Operator. He stated:

> The Class Specification for Bus Operator indicates that he had to continuously operate a transit vehicle for extended periods of time as well as assuring passengers onto and off the transit vehicle. This includes pushing a person in a wheelchair up a ramp, push them onto a lift and lift the wheelchair-bound person out of the wheelchair. Mr. Blank's knee condition would make it difficult to handle this amount of "wear and tear". This could pose a significant threat to himself. Accommodation could not be made.

On the basis of this evaluation, by letter dated April 30, 1997 you were informed by the OHR of the determination that you did not meet the applicable medical requirements for the position at that time. In a May 1, 1997 letter, not a part of the County's consideration, your health plan physician stated that your condition "is minor and I do not see it becoming worse due to operating any vehicle or the duties involved in operating a bus."

In the appeal, relying on his doctor's assessment and his current experience as a "Ride-on" Bus Operator, he contends that his "minor knee condition" would not hinder his physical ability to perform the Bus Operator position. He also stated in a document filed with the Board, that the County physician who originally examined him found no problem with his knee, but only noted his description of some discomfort when it is cold.

In its response to his appeal filed with the Board, the OHR states that he was rated medically unacceptable "largely based on the (April 10) letter received" from his physician, and, additionally, on your described discomfort from cold. It states, "The combination of pain and already existing degeneration of the knee along with the amount of wear and tear placed on a Bus Operator based on the class specifications caused the medically unacceptable rating of April 14, 1997." It is also noted that his physician's April 10 letter did not indicate his knee condition was "minor," as did his May 1 letter, which the Medical Examiner had not received.

ISSUE

Were the procedures followed and decision reached with respect to the determination of Appellant's medical unacceptability for a Bus Operator position consistent with regulations and otherwise proper?

ANALYSIS AND CONCLUSIONS

The establishment of "medical standards," the requiring of a medical examination of applicants for employment, and the disqualification of applicants based on a physical condition are all specifically provided for by Sections 5-12 of the County Personnel Regulations and Administrative Procedure 4-13, Medical Standards. The essence of his contention is that the resulting County determination that his particular knee condition disqualified him for the Bus Operator position is incorrect. In this regard, he argued both that the condition is less serious than described by the County and, moreover, that his performance of the duties of the position would not be adversely affected by the condition at issue.

In the Board's view, County management should be accorded substantial latitude to assess the impact of a particular medical condition on the duties of a specific position. Accordingly, the County's determination on qualifications should be given significant deference, absent a showing that it is arbitrary, capricious, or clearly unsupported by the evidence.

The procedure followed in response to your application for employment was consistent with the regulations, and he was given an opportunity to have his physician provide input. Thereafter, the medical information available was considered, along with job content, and a determination was made that his knee condition would make it difficult for him to handle the amount of "wear and tear," which would result from some of the more arduous aspects of the Bus Operator position. While he disagreed with the conclusion reached, there is no showing that the County's procedures were improper or that the disqualification determination is not supported by a preponderance of the evidence. Accordingly, the appeal was denied.

Case No. 97-17

Appellant appealed the decision of the Medical Examiner that he was medically unacceptable for the position of Warehouse Worker.

SUMMARY OF FACTS

On April 30, 1997 in connection with his application for the position of Warehouse Worker with the Department of Liquor Control Appellant was given a medical examination.

On May 22, 1997, the County Employee Medical Examiner notified the Office of Human Resources of his determination that Appellant was medically disqualified for the position of Warehouse Worker due to cellulitis/vasculitis and chronic eczema of the left lower leg. The doctor stated in pertinent part:

> The Class Specifications for the position indicates that the work is performed in a warehouse environment where the employee is exposed to dust, grease, wet floors...Heavy physical effort is used in recurring lifting, pushing, bending and pulling cases of beer, liquor, wine and kegs of beer weighing up to 160 pounds. His leg condition would make meeting this requirement and accommodation difficult.

On the basis of this evaluation, by letter dated June 11, 1997, Appellant was informed by the Office of Human Resources that he did not meet the applicable medical requirements for the position at that time. He relied on the written evaluation of his personal physician who acknowledged his condition but concluded, "Mr. Blank can adequately fulfill the duties of a Warehouse Worker described in the job description." The Office of Human Resources argued this before Appellant could provide this to the Medical Examiner; he rendered his medical disqualification decision.

ISSUE

Were the procedures followed and decisions reached regarding Appellant's medical unacceptability for the position of Warehouse Worker consistent with regulations and otherwise proper?

ANALYSIS AND CONCLUSIONS

The establishment of "medical standards", the requiring of a medical examination for applicants for employment and the disqualification of applicants based on physical condition is specifically provided for by Section 5-12 of the County Personnel Regulations and Administrative

Procedure 4-13. With respect to this requirement, the Board has held that County management should be accorded substantial latitude to assess the impact of a particular medical condition on performance of the duties of a specific position. Accordingly, the County's determination on qualifications should be given significant deference, absent a showing that it is arbitrary, capricious, or clearly unsupported by the evidence.

The procedure followed in response to the application for employment was consistent with the regulations. It was the determination of the medical examiner that the condition of Appellant's left lower leg would make it difficult to meet the requirements of the position. While your personal physician may disagree with the conclusion reached, there is no showing that the County's procedures were improper or that the disqualification is not supported by a preponderance of the evidence. The appeal was denied.

Case No. 98-02

Appellant appealed the decision by the Director of Human Resources, that the Appellant did not meet the medical guidelines for a Department of Fire/Rescue Service (Service) Firefighter/Rescue I position.

BACKGROUND

After this appeal was filed, the Medical Examiner reversed his decision and found Appellant to be medically qualified. Appellant was then placed in the position of Firefighter Rescuer I as of January 20, 1998. Subsequent to the Appellant being placed in the position sought, the parties requested a Board determination on the merits of the appeal and whether the appointment should be retroactive, including back pay, and the appropriateness of the payment of attorney fees.

FACTS

The Appellant was a volunteer firefighter for Montgomery County at its Burtonsville Station (#15) since November 18, 1990. It is undisputed that over a seven year period the Appellant satisfactorily performed a full range of firefighter duties, had extensive firefighter training, including being certified for having completed numerous Service provided courses, and was a volunteer at the Firefighter III level. On March 23, 1997, Appellant applied for a paid firefighter position. He thereafter passed the written exam and was placed on the "Eligibility list." On September 2, 1997, the Service offered him employment as a Firefighter/Rescuer I, contingent upon his passing the medical and physical exam.

On September 26, 1997, Appellant obtained the results of his own eye exam, which describes a longstanding "lazy" (amblyopic) right eye "which has remained stable since birth/early

childhood, and will continue to remain stable throughout life." The examination results concluded:

> The lazy right eye has not interfered with his functional vision, including his ability to drive a fire truck, or with the performance of any of his duties as a firefighter during his tenure as a volunteer; and it does not interfere with his excellent vision in the left eye.

By memorandum dated October 3, 1997, the Montgomery County Employee Medical Examiner, relying on the Appellant supplied eye evaluation, advised the County Office of Human Resources that the Appellant was medically unacceptable as a firefighter applicant because he fails to meet the vision standard. The Medical Examiner described aspects of a firefighter position to justify his conclusion. By letter dated October 7, 1997, the Director, Office of Human Resources transmitted a copy of the Medical Examiner's evaluation and stated, "It is the opinion of the physician that your condition is not correctable in the immediate future, and since it is not possible for the County to accommodate your condition by altering the work requirements for the Firefighter/Rescuer I job, it is necessary that your name be removed from the eligible list for that position."

The Appellant timely appealed this determination of medical unacceptability. In the statement in support of the appeal, it was contended, in summary, that the Appellant was being unlawfully discriminated against on the basis of a disability, that he was qualified for the position, and that the Service did not consider a reasonable accommodation. The remedy sought was immediate appointment to the Firefighter/Rescuer I position, and that he be awarded attorney fees, compensatory damages, back pay, and "front pay." The County's response to the appeal concluded that the Medical Examiner felt, based on his medical judgement. that the Appellant's monocular vision did not meet the standards that would assure both his safety and the safety of others.

On January 5, 1998, Appellant filed a reply to the County's statement in opposition to the appeal, contesting contentions made therein. On January 12, the Medical Examiner advised the Office of Human Resources that he had reconsidered the Appellant's case, and, on the basis of additional analysis, has revised his decision finding the Appellant to be medically acceptable, with the qualification that any vehicle he drives have mirrors on either side. By letter dated January 20, the County notified the Board that, on the basis of the Medical Examiner's revised decision, it had offered the Appellant the position sought, that he had accepted it, and that he would report to work on January 20, 1998.

By letter dated January 22, the County advised the Board that while Appellant had been placed in the firefighter position, unresolved were the issues of back pay liability, effective date of hire, retroactive membership in the County retirement plan and attorney fees. The County requested that the Board proceed to consider the merits of the case. The County stipulated to certain facts, which included, as relevant:

- Had the Medical Examiner not rated the Appellant as medically unacceptable ... he would have been appointed effective November 17, 1997.

- It is very unlikely that the Medical Examiner would have reviewed his determination of October 3, 1997 and revised it if the Appellant had not appealed his unacceptable rating to the Board.

By letter to the Board dated January 27, 1998, Appellant states agreement that the issues of back pay and attorney fees still need to be adjudicated, and that the Board should render a decision in connection with the appeal.

ISSUES

1. Was the original determination of medical disqualification inconsistent with law, regulation, or otherwise improper?

2. In light of the Medical Examiner's revised determination qualifying Appellant for the position, should placement in the position be retroactive, including back pay, and, if so, to what date?

3. Is the Appellant entitled to attorney fees?

ANALYSIS AND CONCLUSIONS

1. While the County has revised its determination of medical unacceptability and placed the Appellant in the position sought, a resolution of the unresolved issues requires a decision by the Board as to whether the original determination was improper. That is, retroactivity, back pay, and attorney fees may only be ordered where the Appellant prevails on the merits of the allegation that the County's action was improper.

In Case No. 97-14 (August 19, 1997), the Board stated with respect to review of medical disqualification for a position:

> In the Board's view, County management should be accorded substantial latitude to assess the impact of a particular medical condition on the duties of the specific position. Accordingly, the County's determination on qualification should be given significant deference, absent a showing that it is arbitrary, capricious, or clearly unsupported by the evidence.

In the Board's view, and obviously recognized by the County when it reversed its original decision, the determination of medical unacceptability was unsupported by the evidence. The

Appellant had satisfactorily functioned as a firefighter for some seven years and his medical evaluation was that his eye situation had existed since birth, would remain stable, and would not interfere with the performance of his duties. In the face of such medical evaluation, to rule him medically disqualified because of his eyes was unsupported by the evidence.

2. Section 33-14(c) of the Personnel Regulations provides the Board with remedial authority to make correction actions retroactive, and to do so with or without back pay. In the Board's view, retroactivity, including back pay, is appropriate in a circumstance where the evidence clearly demonstrates that, but for the improper determination, the proper action would have occurred. In the circumstances of this case, but for the improper determination of medical disqualification, the Appellant would have been placed in the position sought. The County stipulates that this is so, "Had the Medical Examiner not rated the Appellant as medically unacceptable . . . he would have been appointed effected November 17, 1997." Accordingly, the Board concludes that an appropriate remedy is to make Appellant's appointment as a Firefighter/Rescuer I effective November 17, 1997, and that he be made whole, including back pay, from that date to the January 20, 1998 date of his appointment.

3. Section 33-14(c)(9) of the Personnel Regulations grants the Board the authority to order the County to reimburse or pay all or part of the employee's reasonable attorney's fees. While the ordering of the payment of attorney fees is discretionary, the Board views such a remedy as appropriate in the circumstances present here. The Appellant has prevailed on the merits, that is, it has been determined that the original determination of medical unacceptability was clearly unsupported by the evidence. The County concedes that "It is very unlikely that the Medical Examiner would have reviewed (his determination) if the Appellant had not appealed to the Board." That is, the Appellant's appeal, including the use of a private attorney, is the reason that corrective action was initiated. Accordingly, the Board concludes that the Appellant is entitled to the reimbursement of his reasonable attorney's fees.

Section 33-14(c)(9) a-i, of the Personnel Regulations are the factors to be used in determining the reasonableness of attorney's fees. (Appendix) The Appellant may present to the County a claim for attorney's fees. Should the parties be unable to arrive at an agreed upon amount of reasonable fees, they may submit the matter to the Board for resolution, along with their positions with respect to the application of the factors to the facts of the case.

Case No. 98-02
ATTORNEY FEES

This is a final decision of the Merit System Protection Board (Board) determining the amount of the reimbursement for attorney fees to be paid by the County to Appellant's attorney, as provided for in the Board's decision, Case No. 98-02.

BACKGROUND

On March 25, 1998, the Board issued a final decision in the above-referenced case, concluding, in pertinent part, that the Appellant was entitled to the reimbursement of his reasonable attorney's fees. The Board instructed:

> Section 33-14(c)(9) a-i, of the Montgomery County Code are the factors to be used in determining the reasonableness of attorney fees. The Appellant may present to the County a claim for attorney's fees. Should the parties be unable to arrive at an agreed upon amount of reasonable fees, they may submit the matter to the Board for resolution, along with their positions with respect to the application of the factors to the facts of the case.

Appellant and County have advised the Board that they were unable to reach an accord on the amount of the fees, and seek a Board resolution. Appellant's Counsel has filed a request for attorney fees showing 27.3 hours of work ($5,107.00) on the original appeal, and 6.85 hours of work ($1,301.50) in preparing her application for attorney fees, all at an hourly rate of $190, plus charges of $172.34 for the cost of postage, photocopying, courier service, and a Freedom of Information Request, for a total of $6,580.84. Appellant's Counsel submits itemized statements reflecting the time charged, and contends that she billed at her usual and customary hourly rate.

The County contends that the amount that should be paid is $2,814.00, reflecting the disallowance of all but 20.1 hours of the time billed for, and a reduction in the allowable hourly rate from $190 to $140.

ANALYSIS AND CONCLUSIONS

Discussed below are the County's contention and the Board's analysis and conclusions with respect to those contentions.

1. Included in the bill are 2.2 hours related to a concurrent Appellant case before the Montgomery County Human Relations Commission. - Concurrent with the appeal to the Board, the Appellant also sought redress through a filing with the County Human Relations Commission (HRC), alleging discrimination on the basis of handicapping condition. The County contends that 2.2 hours billed in the instant case was related to the HRC case, while Counsel for the Appellant states that billed time excludes matters exclusive to that case.

The Board recognizes that certain legal work relevant to the claim that the Appellant was physically capable of performing firefighter duties may also have been relevant to the case before the HRC, where the allegation was discrimination on the basis of handicapping condition. However, a review of the bill reflects that included in some billed time were activities, which

appear to have occurred in the HRC case. In this regard, we note references in the description of billed time such as discussions of disability discrimination claim with EEOC personnel. We conclude that the 2.2 hour reduction sought by the County is a reasonable estimate and, accordingly, conclude that the payable fees should be reduced by that amount.

2. Too much time was spent on certain aspects of the case for someone of the experience of Appellant's counsel. - In support of this contention, the County cites the following examples recommended for reduction:

- 8.6 hours to prepare the brief filed with the Board.

- 28 minutes for a telephone conversation with the County's attorney, three minutes to read a letter from the County's attorney, 13 minutes to read a letter from the County's attorney, and an unknown amount of time to discuss the fee situation with a Board staff member.

- 5.4 hours to prepare the brief on the issue of fees, particularly in comparison with the 8.6 hours taken to prepare the brief on the merits of the case.

The Board has carefully reviewed Appellant's attorney's itemized bill and concludes that, in most circumstances, there is no basis to objectively conclude that any particular time charged is unreasonable. Looking to the applicable factors for determining appropriate reasonable fees, this case was successfully argued by Appellant's Counsel. The County does not contend that the hours billed were not worked. Rather, it observed that a particular task should have been done in a somewhat shorter period of time for an experienced attorney as Appellant's attorney claims to be. Such contentions do not provide a basis for reducing what may be legitimate claimed hours.

However, the Board has basis for reviewing claims where Appellant's attorney was in contact with the staff of the Board. In the Board's view, the County should not have to compensate Appellant's attorney for excessive time claimed for status inquiries. Although many of the claimed time show multiple activities, it is possible to isolate the times limited to the contact with the Merit System Protection Board office. The Board is of the view that a reduction of one-half hour for status inquiries with the Merit System Protection Board is reasonable.

3. Section 33-14 (c)(9) of the County Code does not specifically authorize the payment of attorney's fees for time spent recovering reasonable attorney fees, and, under the circumstances of the number of hours billed and the billing rate in this case, the County should not have to pay for time spent petitioning for fees. - Section 33-14(c) of the County Code authorizes the Board to provide, as part of a remedy, an order for the County "to reimburse or pay all or part of the employee's reasonable attorney fees". It provides specific factors to be considered in determining the reasonableness of the fees. In the Board's view, the Board has the discretion to order reimbursement for the time reasonably required in preparing the application for attorney fees. However, consistent with the specific factors listed in section 33-14(c) of the Code, such an

award would only be appropriate "to accomplish the remedial objectives of this article." That is, the Board will direct payment for the time spent in preparing the request for attorney fees only in unusual circumstances, such as, where there is a showing that a more extensive explanation is reasonably required to be documented in the fee application. The Board believes that the factors listed in section 33-14(c) normally require a short and simple application for attorney fees as to which extra attorney fees are usually not warranted. Extensive applications for attorney fees are normally not required, nor encouraged. In the instant case, it is evident that there are no unusual circumstances requiring an extensive explanation of the specific Code factors in the attorney fee application. Accordingly, the claim for 6.85 hours for preparing the application for attorney fees is not reasonable and is disallowed.

4. The hourly rate billed is excessive. - As noted above, Appellant's counsel billed at what she describes as her customary fee for similar work, $190. In support of this claim, she submits a "matrix" annually provided by the United States Attorney's office in the District of Columbia, which matches hourly rates with an attorney's years of experience. The application of that rate would permit Counsel to receive up to $195 per hour. However, the County argues that Montgomery County rather than Washington, D.C. rates are applicable, and that the customary hourly rate in the County for services such as those provided by the Appellant's counsel is between $125 and $150. This contention is amply supported by Merit System Protection Board precedent.

Section 33-14(c)(9), a-e, provides the factors for determining the reasonableness of attorney fees, several of which are applicable to the determination of the appropriate hourly rate in this case. The Board is of the opinion that factor i, "Awards in similar cases," warrants a reduction in the allowed rate. In this regard, Montgomery County rates are more in the range of $125 to $150. We, therefore, conclude that the County's suggested rate of $140 is appropriate.

5. Since County law does not address costs separately from attorney fees, routine costs should be considered an integral part of the hourly rate that is charged. Under this theory, the County urges the disallowance of the billed $172.34 for postage, photocopying, courier service, and FOIA request. The Board rejects this contention. The County Code provides for the reimbursement of "attorney fees," which in no way excludes costs such as those present in the instant case. Accordingly, a disallowance of costs is not appropriate.

On the basis of the above, the Board concludes that the reasonable amount of Appellant's attorney fees to be reimbursed by the County is $3,430.00, for 24.50 hours at an hourly rate of $140.00, plus costs of $172.34, for a total of $3,602.34.

SUSPENSION

Case No. 98-03

Appellant appealed the decision of the Director, Department of Health and Human Services (DHHS), of a five-day suspension, effective from February 2, 1998 through February 6, 1998.

BACKGROUND

Disciplinary charges were filed by Appellant's immediate supervisor, (A), which were received by Appellant on November 26, 1997. A response to the charges was filed on behalf of Appellant by Legal Assistant for the Municipal and County Government Employees Organization (MCGEO), dated December 12, 1997. After an investigation, in a January 23, 1998 Notice, the DHHS Director, determined that the charges were justified and supported the five-day suspension. The charges, as specified in the Notice and the MCGEO responses, are divided into three parts, as follows:

1. **Charge - MCPR § 28-2(e) - Failure to perform duties in a competent or acceptable manner**: After a meeting on Friday, October 17, 1997 attended by (B) (Administrator, Medical Assistance Programs, Aging and Disability Services, DHHS, and direct supervisor), Appellant and (C) (Aide in the Outreach Unit), to discuss the reception of customers on the 4th floor of 401 Hungerford Drive, the discussion was put in a memorandum on Monday, October 27, 1997, and became effective on October 28, 1997. Upon receipt of the written procedures, Appellant immediately stopped work to type three memos stating why the procedures were unacceptable to her. The time taken to type these memos delayed the processing of applications, completion of the appointment list and the list for the reception area for that day.

Response - Appellant contends that she did not stop working when she received the written procedures, with which she did not disagree, and even told a co-worker she would have to address a question about the lunch hour later because customers had to be attended to first.

2. **Charge - MCPR § 28-2(g) - Insubordinate behavior by failure to obey lawful directions given by a supervisor**: On Wednesday, October 29, 1997, (B) met with Appellant and four staff members to discuss the issues in Appellant's memos. Although Appellant initially refused to participate in the discussion and denied the need for a meeting, the group revised the reception area procedure. After the meeting, everyone except Appellant returned to their work areas. When asked to leave the office, Appellant made inappropriate remarks to her supervisor. Several times Appellant refused to comply with instructions to return to her work area, and to Ms. (B's) request for her to leave the office, and demanded that Security be called.

Response - Appellant attended the meeting under the guise that procedures were going to be discussed. Instead, Appellant contends that the meeting was used as a forum to discuss her work performance, and she was humiliated in front of other co-workers since work performance is supposed to be confidential. When the meeting ended and Appellant was trying to express her concerns that she did not like the way she was being treated, Ms. (A) and Ms. (B) continually "yelled" at her to leave the office.

3. **Charge - MCPR § 28-2(p) - Knowingly making false statement or reports in the course of employment:** During the Wednesday, October 29, 1997 encounter, Ms. (B) felt threatened by Appellant's behavior and went to the office of Ms. (A), Human Resources Team Leader, for assistance. During Ms. (B's) absence, Appellant called the County Security Office claiming to be "a woman in distress". When Security responded to Appellant's "distress call", there were no physical or verbal threats to Appellant, who felt that she needed someone to "witness" for her.

Response: Appellant contended that when she called the Security Office, claiming to be a "woman in distress," she was first threatened with Security when Ms. (A) yelled at her to leave the office.

In addition, the Notice stated that an investigation of the above incidents was conducted by an EEO Specialist, Office of Human Resources, who concluded that allegations of discrimination against Appellant's supervisors are not sustained.

The Notice also indicated that the following other disciplinary actions were documented in Appellant's personnel file:

September 1995 - (5% reduction in pay for 4 pay periods) for insubordination and failure to perform duties in a competent and acceptable manner;

October 1996 - (counseling memo) for failure to perform duties in a competent and acceptable manner;

January 1997 - (counseling memo) for unauthorized absence or chronic tardiness;

January 1997 - (counseling memo) for insubordination;

February 1997 - (counseling memo) for failure to perform duties in a competent and acceptable manner;

March 1997 - (5% pay reduction for 6 pay periods) for insubordination and failure to perform duties in a competent and acceptable manner;

April 1997 - (6 months delay of service increment and reassignment of increment date) for substandard work performance;

October 1997 - (counseling memo) for insubordination and failure to perform duties in a competent and acceptable manner.

A hearing was held on April 20, 1998 before the Board after conducting a March 17, 1998 pre-hearing conference. At the hearing, testimony was taken from witnesses and exhibits received in evidence from both parties relating to the five-day suspension of Appellant. At the end of the hearing, attorneys for both parties presented oral closing arguments in lieu of written briefs.

ISSUES

1. Whether Appellant violated MCPR, § 28-2(e) by failure to perform duties in a competent or acceptable manner.

2. Whether Appellant violated MCPR § 28-2(g) by insubordinate behavior in failing to obey lawful directions given by a supervisor; and/or

3. Whether Appellant violated MCPR § 28-2(p) by knowingly making false statements or reports in the course of employment.

4. If the evidence supports any or all of the above violations, was there just cause for imposing a five-day suspension?

FINDINGS OF FACT

1. Appellant had been transferred to DHHS from the Fire and Rescue Commission in September 1996, and assigned first to the Adult Assessment Center and then reassigned to the Medical Assistance Long Term Care Unit (Long Term Care Unit) in July 1997.

2. At the time of Appellant's reassignment to the Long Term Care Unit, and during the period of the incidents in question, Ms. (B) was the Administrator of both the Long Term Care Unit and the Medical Assistance Outreach Unit (Outreach Unit); and the direct supervisor of the Long Term Care Unit was Ms. (A) and Appellant was the Aide. As relevant to this case, Ms. (C) was the Aide in the Outreach Unit.

3. In July of 1997, after moving to the Hungerford Drive location, Ms. (B) determined that there was a need for a central reception area for clients with appointments in both Units. On October 17, 1997, Ms. (B) had a meeting with the two Aides, Appellant and Ms. (C), to develop a procedure for them to handle clients coming into the reception area. The procedure developed at the meeting was for Ms. (C), whose office was closer to the reception area, to greet clients and

alert Appellant that they were there, and for Appellant, whose office was further back in the work area, to direct the clients to an interviewing room or to begin the application process. Since both Aides had been taking a 12 noon lunch hour, they would alternate their lunch schedules so that, on one day, one Aide would go to lunch at 12 noon and the other at 1 p.m. and on the next day it would be vice-versa, except when they were on leave or in training. The procedures were put in writing on October 27, 1997, to be implemented on the next day, October 28, 1997.

4. By memorandum of October 28, 1997, Appellant notified Ms. (B) that she had no objection to her instructions in the October 27, 1997 memorandum but indicated that she usually took her lunch at 11:30 a.m., "per Ms. (A's) prior approval." Appellant requested Ms. (B) to advise her if there was a need to reschedule her lunch hour. Ms. (A) testified that she had given Appellant permission to change her lunch hour to 11:30 a.m. prior to the time she knew about the October 17, 1997 meeting and Ms. (B's) October 27, 1997 memorandum. After learning of the rotational lunch schedule, Ms. (A) testified that she told Appellant her prior permission to take lunch at 11:30 a.m. was rescinded.

5. By memorandum of October 28, 1997, the lead worker in the Outreach Unit informed Ms. (B) that Appellant was not following the procedures that had been developed, and she wanted to have a meeting to discuss the reception area responsibilities. Ms. (B) testified that, on October 27, 1997, when she gave Appellant a copy of her memorandum outlining the procedures, Appellant also asked to have a meeting about reception area duties, which she now disputes.

6. A meeting was held in Ms. (B's) office on October 29, 1997 attended by Ms. (A), the Long-Term Care Unit and Appellant's supervisor; Appellant, the Aide for the Long-Term Care Unit; Assistant Supervisor for the Outreach Unit; Ms. (C), the Aide for the Outreach Unit; Ms. (D), the lead worker for the Long-Term Care Unit; Ms. (E), Aide to Ms. (B), and Ms. (B). The purpose of the meeting was to clarify the coverage for the reception area.

7. Ms. (B) began the meeting by stating that Appellant felt that they needed to meet to clarify procedures for coverage of the reception area. Appellant initially responded by stating that she had not requested the meeting, but that the procedure needed to be clarified because her lunch was at a different time. According to Ms. (B), Appellant expressed dissatisfaction that Ms. (B) had identified her as needing the meeting. The meeting lasted about 45 minutes and, at the end of the meeting, it was understood that the procedures had been clarified.

8. When the meeting ended, Ms. (B) asked Ms. (A) to remain to discuss some other matter, although Appellant still remained in her office. According to Ms. (B) and Ms. (A), Ms. (A) asked Appellant to return to her work area but Appellant refused, complaining that Ms. (A) "talked to her like a dog"; that Ms. (A) was always telling Appellant to get out of her office; and that Ms. (A) discriminated against Appellant because she is hispanic. Ms. (B) testified that Ms. (A) asked Appellant to return to her work station about four or five times but each time Appellant refused. Ms. (B) also asked Appellant to return to her work station several times but Appellant refused. After again requesting Appellant to return to her work area, Ms. (A) stated that if

Appellant refused, she would have to call Security.

9. According to Appellant, she remained after the meeting ended to ask Ms. (A), in the presence of Ms. (B) that, whenever she is in Ms. (A's) office, to say that she is "dismissed" instead of saying "get out of here." Appellant told Ms. (A) that she treats her "like a dog" because Ms. (A) tells Appellant to "get out of here" as if talking to her pet dog.

10. Ms. (B) testified that, during this time, Appellant kept ranting that she would not go back to her office and demanded that Security be called. Ms. (B) responded that if Appellant did not go back, she would have to ask her to go home. Ms. (B) thereupon left her office to get the Human Resources Team Leader, because, she testified, she felt threatened by Appellant's behavior. After Ms. (B) left her office, Appellant called Security stating, "I need security. I'm a woman in distress." At that point, Ms. (A) left Ms. (B's) office and sat outside the office but within hearing distance of Appellant. Appellant testified that she called Security because, when she was about to leave the office, Ms. (B) became very agitated and said, "get out" and Ms. (A) said that they would call Security if Appellant did not leave. Appellant testified she then called Security to witness the "kind of labor procedures" that existed in that unit.

11. Shortly after Ms. (B) returned to her office with the Human Resource Team Leader, a Security Officer, arrived. Appellant had explained to them that she wanted the Security Officer to "witness for her." After stating her complaints about her supervisor, Appellant left at the request of the Human Resource Team Leader but returned to ask Security to meet with her afterwards, which they did. On October 31, 1997, Ms. (B) prepared a Security Incident Report of the events of October 29, 1997.

12. Ms. (A) testified that her complaint about Appellant's performance was that Appellant did not prioritize her work to write her personal memos during a time when she did not have to clear applications for the workers to interview waiting customers. Although Ms. (A) testified that she orally discussed the matter of prioritizing the work with Appellant several times, she did not document this to Appellant in writing.

13. The penalty of a five-day suspension, according to the Human Resource Team Leader, was arrived at after considering Appellant's other disciplinary infractions documented in her official personnel file according to the principle of progressive discipline.

14. Appellant saw an EEO Specialist, Office of Human Resources, on November 24, 1997, after she had received the statement of charges relating to the October 29, 1997 meeting. According to the Specialist, although disputed by Appellant, Appellant complained of discrimination based on her national origin and age and claimed that she was being "treated like a dog" by her supervisor, Ms. (A). The Specialist testified that this was a routine intake interview after which, in accordance with standard policy, she informed Appellant that she did not think that Appellant had a viable discrimination complaint. However, Appellant testified that she did not file a discrimination complaint against her supervisor. After Appellant contacted the Director of

Human Resources, the Specialist took it upon herself to conduct a preliminary investigation of the October 29, 1997 incident. As a result of her own investigation from personal interviews, she found that there was no basis for Appellant's complaint of discrimination.

15. Appellant testified that she sought help from the Employee Assistance Program (EAP) on her own. Although Appellant went to the EAP four times, she testified that she has not been currently participating in the EAP.

16. Ms. (AA) testified that she worked with Appellant for one month, in May 1996, in the Department of Corrections, Alternative Community Services. During that period, Ms. (AA) testified, she worked closely with Appellant and observed that Appellant got along with everyone, and was very helpful and well-organized. Appellant taught Ms. (AA) computer skills and organized the paperwork for other employees.

17. Ms. (BB) supervised Appellant in the Adult Assessment Center, DHHS, from April 1997 to June 1997. Ms. (BB) testified that, during the period under her supervision, Appellant was a competent employee who followed orders. Ms. (BB) wrote a routine letter of recommendation, dated May 28, 1997, for Appellant. Prior to Ms. (BB's) supervision, Appellant had reported to a supervisor, who had issued at least two disciplinary actions against Appellant.

18. Dr. (CC), Chief of Aging and Disability Services, DHHS, testified that Appellant was transferred to his Division from a temporary position at the Department of Corrections to which she had been detailed from her position at the Fire and Rescue Commission. Dr. (CC) testified that, from an early period, there were some difficulties with Appellant's performance in terms of arrival and lunch times and a progressive discipline process was started. However, as a result of a restructuring in DHHS, Appellant was shortly thereafter reassigned to the Long Term Care Unit under Ms. (B).

ANALYSIS AND CONCLUSIONS

The Board reviewed the charges, the testimony and documentary evidence, and the applicable legal principles and, after due deliberation, has reached the following conclusions:

1. MCPR § 28-2(e) - **Failure to perform duties in a competent or acceptable manner**:

As to the first charge that, when Appellant received the October 28, 1997 memorandum, she immediately stopped working to type three memos stating why the procedures were unacceptable to her, while delaying the processing of applications for workers waiting to interview clients, there is conflicting testimony as to Appellant's actions. Although testifying to conclusions of fact, none of the County's witnesses testified from first-hand knowledge as to Appellant's actions. On the other hand, Appellant denied that she neglected her regular duties when typing personal memos. Therefore, it is apparent that the County has not proven this

charge by a preponderance of the evidence.

2. MCPR § 28-2(g) - **Insubordinate behavior by failure to obey lawful directions given by a supervisor**:

As to the second charge of Appellant's insubordinate behavior by failure to obey lawful directions given by a supervisor at the October 29, 1997 meeting, the basic facts are not in dispute, although there are some differences in minor details. Thus, it is abundantly clear from a preponderance of the evidence that Appellant failed and refused to obey the lawful directions of her supervisors, Ms. (B) and Ms. (A), to leave Ms. (B's) office on October 29, 1997 after the meeting ended. Whether Appellant had a just complaint or grievance that she desired to discuss with Ms. (A) and Ms. (B) is immaterial. Employees are expected to obey the lawful directions of their supervisors unless to do so would clearly jeopardize their health or safety. If employees have any complaint, they could file a grievance after the incident instead of disobeying supervisory directions. Since Appellant failed to follow her supervisors' lawful directions to leave the office and go to her work area after the October 29, 1997 meeting ended, she is clearly guilty of insubordination as charged.

3. MCPR § 28-2(p) - **Knowingly making false statement or reports in the course of employment:**

As to the third charge, there is no evidence that Appellant "knowingly" made a false statement or report in the course of her employment by calling Security and claiming to be "a woman in distress." This statement expresses a subjective feeling on her part because, whether or not justified, she may have believed that she was truly "in distress" by the manner in which her supervisors asked her to leave the office at the end of the meeting when she wanted to discuss a complaint she had against Ms. (A). The term "knowingly" means that Appellant knew or should have known that her statement was false. Since it was a subjective statement, the Board does not believe that a statement such as a "woman in distress" can be evaluated objectively since it depends upon the feelings of the person involved. Therefore, Appellant's knowledge of the statement, being purely subjective, did not meet the criteria of a "knowingly false" statement.

4. **Whether there was just cause for imposing a five day suspension?**

Regarding the assessment of a five-day suspension, even though the Board has not sustained the first and third charges, based on Appellant's prior disciplinary record of several similar offenses of insubordination, and the principle of progressive discipline, the Board believes that management had not abused its discretion or exercised it in an arbitrary and capricious manner. In sum, the Board believes that, under the circumstances of this case and the principle of progressive discipline, there is just cause for the five-day suspension for Appellant's insubordination.

CONCLUSION

For the reasons stated above, Appellant's five-day suspension is sustained, and the appeal is denied.