Merit System Protection Board Annual Report FY 1999

Members:
Robert C. Hamilton, Chairman
Harold D. Kessler, Vice Chairman
Brenson E. Long, Associate Member
Beatrice G. Chester, Associate Member
July 1998 - December 1998

Executive Secretary:
Merit System Protection Board
Waddell Longus

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COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

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

The Board members in 1999 were:

Robert C. Hamilton	-	Chairman (Appointed 1/97)
Harold D. Kessler	-	Vice Chairman (Appointed 2/97)
Brenson E. Long	-	Associate Member (Appointed 1/99)

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.

CLASSIFICATION/COMPENSATION

MSPB CASE NO. 99-03

Appellant appealed the decision of the Chief Administrative Officer (CAO), concerning the amount of retroactive compensation to be paid the Appellant under the terms of a Settlement Agreement resolving a previous grievance.

FACTS

On October 30, 1997, the County and Appellant entered into a Settlement Agreement (Settlement) to resolve grievances the Appellant filed over his non-selection for promotion from the rank of Sergeant to Lieutenant. The Settlement provided, in pertinent part:

1. The date of the GRIEVANT'S promotion to Lieutenant shall be revised from January 5, 1997 to April 28, 1996. The GRIEVANT'S pay during that period (April 28, 1996 through January 4, 1997) shall be commensurate, with the promotional pay increase of ten percent (10%) and he shall be reimbursed that amount by the COUNTY. Such payment shall be made within six weeks from the date this Agreement has been signed by both parties.

2. The date of the GRIEVANT'S promotion to Lieutenant shall be revised to reflect an April 28, 1996 promotion date.

3. The GRIEVANT will withdraw his grievances...

4. This constitutes the full and complete agreement between the parties for any and all claims arising out of these grievances.

The Settlement was executed by the parties between October 30 and November 17, 1997.

On February 2, 1998, the Appellant filed a grievance over the fact that he had not yet received the back pay provided for by the Settlement. In responding to this grievance, the County informed the Appellant that the calculation of his retroactive pay results in $5,066.47 in additional wages, but with specified reductions.

-Using the overtime standard for Lieutenants (paid after 45 hours), Appellant would have earned $941.50 in overtime compensation. As a Sergeant, he had previously earned $1,258.16 in overtime compensation (paid after 40 hours). The overpayment for overtime was $316.66.

-Using the overtime standard for a Lieutenant, Appellant would not have earned "roll call pay" (paid to Sergeants). The previously paid $2,551.07 in roll call pay is an overpayment.

-Twenty-nine hours of compensatory/sick leave earned as a sergeant will be reduced from Appellant's accrued sick leave balance.

The alleged "overpayments" of a total of $2,867.73 reduced the retroactive pay to $2,198.74, which was included in Appellant's pay check dated March 13, 1998. On March 13, Appellant filed a separate grievance over the reductions in retroactive pay and leave balance. The case papers reflect that the February 2 and March 13 grievances were consolidated for the purposes of processing. In his decision of July 14, the CAO concluded that Appellant had been correctly compensated. While contending that the County had the authority to retrieve the 29 hours of sick leave, "given the particular facts of this case and in the interest of equity," the 29 hours of sick leave was restored. The CAO also rejected Appellant's requested remedy of interest on the delayed payment of the pay provided for by the Settlement.

POSITIONS OF THE PARTIES

The County contends that the adjustments of the retroactive pay reflect appropriate pay provisions for the rank of Lieutenant, "as agreed to by the parties."

> It is the County's position that Appellant had received compensation as a Sergeant for which he was no longer eligible as a lieutenant, such as, certain overtime, roll-call pay and compensatory time. These areas of pay, for which the Grievant would have been ineligible, were the considered overpayment and Appellant's retroactive pay was reduced accordingly.

The County contends that the objective of the Settlement was to place the Appellant in the situation, or an equivalent situation, as if he had been actually promoted to Lieutenant on April 28, 1996. The County argues that to provide the Appellant a retroactive increase commensurate with the promotional pay increase of a Lieutenant did not mean placing him in a better position than he would have been if he had been initially promoted on April 28. In the County's view, Appellant should be compensated pursuant to the rules of compensation for a Lieutenant.

The Appellant contends that the County has violated the Settlement by making the reductions and by failing to make the retroactive payment within the time specified. In the Appellant's view, the Settlement unambiguously provides for a ten percent reimbursement, and makes no provision for reductions for certain extra pay made by Appellant as a Sergeant. It is contended by Appellant that, while in his capacity as a sergeant during the period of retroactivity, the performance of his duties necessitated the overtime and roll call pay, duties for which the County now refuses to pay. Additionally, Appellant contends that because he was deprived of part of the money provided for by the Settlement, the payment of interest is appropriate. Finally, Appellant seeks the

payment of incurred attorney fees.

ISSUES

1. Was it appropriate to reduce the amount of the retroactive pay by the adjustments made by the County?

2. What is the appropriate remedy?

3. Is there any entitlement to interest?

4. Is there any entitlement to attorney fees?

ANALYSIS AND CONCLUSIONS

1. In the Board's view, the resolution of the issue of the appropriateness of making reductions in the amount of retroactive pay turns on the meaning and application of the terms of the Settlement. The parties settled a grievance and now are asking the Board to decide between differing interpretations of that Settlement. In this regard, the County focuses on the word "commensurate," and interprets it to mean treating the Appellant as if he were a Lieutenant during a period when he was a Sergeant, and paying him accordingly. Conversely, the Appellant argues that the language of the Settlement is clear and unambiguous, and that "commensurate" relates to the 10 percent pay raise that goes with being a Lieutenant, without any reductions.

The Board finds that the Appellant's interpretation is far more compelling. The parties entered into a Settlement which quite literally details its terms. Appellant was to have his promotion date revised back to a date certain, and his pay during the period was to be commensurate with a 10 percent promotional increase. That is, he was to get an amount equal to 10 percent more than his Sergeant's pay. This Settlement was to "constitute full and complete agreement between the parties for any and all claims...." There is no mention of reductions, nor any hint of the theory proffered by the County. It would seem that if the County had intended otherwise, it would have been reasonable to reference it in the Settlement.

Beyond the literal interpretation of the Settlement, the Board also views the facts as persuasive that no reductions are appropriate. The overtime, roll call pay, and compensatory/sick leave pay was extra compensation earned by the Appellant as a Sergeant during the period of retroactivity. It is undisputed that Appellant performed assigned duties for which compensation in excess of basic pay was required. We see no logic to the notion that his retroactive pay should result in the reduction of compensation for the performance of those assigned duties, which are required of a Sergeant.

On the basis of the above, the Board concludes that it was not appropriate for the County to reduce the retroactive pay due the Appellant in an amount equal to his extra earnings.

2. As the Board has concluded that it was not appropriate for the County to reduce the Appellant's retroactivity pay, the $2,867.73 withheld is to be paid to him. As the file reflects that the adjusted sick leave was restored, no remedy for the leave adjustment is necessary.

3. While the Board's remedial authority provided by Montgomery County Code, Sec. 33-14(c) may permit the ordering of interest on pay reimbursement, a point not disputed by the County, the Board has not made such payments a part of its remedial orders. Moreover, in the Board's view, the facts of this case do not justify the payment of interest. Under the terms of the Settlement, the retroactivity pay was due within six weeks of the date the Settlement was signed by both parties, which was November 17, 1997, making the payment due by on or about December 29. While delaying the payment to March 13, 1998, clearly violated the terms of the Settlement, a practice that the Board does not condone in settlement situations, it was not so egregious a delay so as to justify an extraordinary remedy. In the period after March 13, no penalty is justified when the County was awaiting a Board resolution on the disputed amount to be paid the Appellant. Accordingly, the Board rejects the requested payment of interest.

4. The Board is of the view that the payment of the Appellant's reasonable attorney fees is appropriate in the facts of the case, noting particularly the protracted time needed to obtain the monies provided for by the Settlement. To request such payment, Appellant must submit a detailed application for attorney fees to the Board, with a copy to the County Attorney, in accordance with the requirements of Section 33-14(c)(9) of the Montgomery County Code.

MSPB CASE NO. 99-11

DECISION AND OPINION OF THE BOARD

The Appellants (4) appealed the decision of the Chief Administrative Officer in response to Appellants' allegation that as a result of a classification and compensation maintenance review of the Fire/Rescue Officer Rank Occupational Classes, their positions had been reclassified and, pursuant to Section 7-4 (c) of the Montgomery County Personnel Regulations, they were entitled to be placed in the new class of Captain.

FINDINGS OF FACT

A study of Fire/Rescue occupational classes was conducted in 1995 by consultants, Human Resources Systems Group. In their report "Report on the Review of Officer Classes in the Montgomery County Department of Fire and Rescue Services," dated November 1995, the consultants recommended the following concerning the creation of Fire/Rescue Captain positions:

> Most station commanders are now Fire/Rescue Lieutenants, who will convert to Fire/Rescue Captain upon change of title. But classification of station shift supervisors and station commander duties at the Fire/Rescue (new title) will also involve creating 22 Fire/Rescue Lieutenant (old title) positions at 11 stations. The positions are currently identified as Fire/Rescue Sergeants at stations 5,7,11, 15, 16, 21, 24, 26, 28, 33, and 40. Appointments to these positions will be made by competitive promotion. (Emphasis Supplied)

On March 12, 1996, Director, Office of Human Resources, sent a memorandum to the Director, Department of Fire and Rescue Services. The memorandum was entitled "Final Decisions Regarding the Classification and Compensation Maintenance Review of Fire/Rescue Officer Rank Occupational Classes." The memorandum, which reflected the consultant's recommendations, stated the following regarding position creations and abolishments:

> The consultants identified 22 Fire/Rescue Lieutenant (new title) positions where the incumbents serve as a station supervisor. My decision is to create 22 new positions at the rank of Captain (new title), with the subsequent abolishment of 22 Lieutenant positions. These 22 newly created Captain positions will be filled through competitive examination.
>
> In accordance with Section 11-2 of the Montgomery County Personnel Regulation (MCPR) incumbents of the 22 station supervisor positions are to receive a temporary 5% pay increase in recognition of their being required to work out of their occupational class. This pay increase is to be provided to each employee who occupied any one or more of the 22 station supervisor positions beginning on or after July 12, 1992 and termination up to the present. (July 12, 1992 is the effective date since that is the beginning of the first pay period following the date this classification maintenance study should have been completed). Further, current incumbents of the 22 station supervisor positions are to continue to receive the 5% pay adjustment until such time as they are no longer assigned station duties and responsibilities.

The Director, Department of Fire and Rescue Services (DFRS), distributed Directive Number 96-09 dated March 22, 1996, to all DFRS employees. The directive explained the situation, including the fact that the 22 Fire/Rescue Captain positions will be filled via a competitive promotional process. Personnel Bulletin #431 announcing this process accompanied the directive.

As provided for by the Director's directive, effective July 1, 1996, 22 Lieutenant positions were "retitled" as Captain. A promotional examination for the filling of these positions was held and, effective September 1, 1996, 16 Lieutenants, including three of the Appellants made the promotional eligible list and were certified and promoted to Captain, effective September 1, 1996. The remaining six positions were not filled because there were only 16 candidates who made the promotion eligible list. For reasons not clear in the record, one Appellant was not considered for promotion in 1996, but was promoted to Captain effective February 1, 1998.

The Appellants grieved the use of competitive procedures for the filling of the Captain positions and the failure to promote them as incumbents in reclassified positions, effective July 1, 1996. The grievance was denied by the Chief Administrative Officer (CAO), which was appealed to the Board. The Board dismissed the Appellants' appeal, concluding that the initial grievance had been untimely filed. Upon review, the Circuit Court for Montgomery County reversed the Board's untimely filing conclusion and remanded the case for further proceeding. The Board, in turn, remanded the case to the County for processing of the grievances on the merits. When the CAO denied the Appellants the relief sought, they appealed to the Board.

POSITION OF THE PARTIES

The Appellants contend, in essence, that what in fact took place was the reclassification of existing jobs and, accordingly, as incumbents in those jobs, pursuant to Section 7-4 (c) of the Personnel Regulations, they were entitled to automatic promotion to the rank of Captain, rather than having to compete. In this regard, the Appellants contend that they were performing the duties which were deemed to be appropriately classified as Captains, which, according to the regulations, entitled them to be promoted to Captain. Further, the Appellants argue that there is no provision in the regulations for the County to "create/abolish" as they did and, in fact, "abolishing" their old position entitled them to discontinued retirement benefits.

The County contends that it had discretion to fill the positions competitively and doing so was: consistent with the consultant recommendation; appropriate considering the fact that there were 33 employees who had rotated through the 22 station commander positions; did not arbitrarily reward current incumbents, and was consistent with past practice, merit system principles, fairness, and County regulations.

APPLICABLE REGULATIONS

Section 7-3, "Classification Plan," of the Personnel Regulations provides, as relevant:

> (c) Class Creation. When it is determined that the duties and responsibilities of one or more positions are not appropriately described in any authorized class in the classification plan, the (CAO) will create a new occupational class. Such new class must be assigned to an appropriate grade in accordance with guidelines contained herein....
>
> (d) Class Abolishment. The (CAO) may abolish an occupational class when it is determined that the class is no longer needed.

Section 7-4, "Position Classification", of the Personnel Regulations provides, as relevant:

(b) The Personnel Director may reclassify a position when a review of the position description or a desk audit indicates a significant change in:

(1) The type of work performed;
(2) Difficulty and complexity of duties;
(3) Level of responsibility or
(4) Knowledge, skills, and abilities required.

(c) Effect of Reclassification on Incumbent. The incumbent of a reclassified position will be placed in the new class unless the incumbent does not meet the minimum qualifications of the new class.

(e) Position Abolishment. The (CAO) may authorize abolishment of one or more positions because of:

(2) A change in the approved work program/plan/design for a department/office/agency;

(3) Administrative reorganization of a department/office/agency.

Administrative Procedure section 3.1, Individual Positions, provides, in pertinent part:

> ...Employees should be assigned duties and responsibilities which are appropriate to their authorized position classification and should not be intentionally assigned higher level duties or responsibilities for the purpose of circumventing the competitive promotional process.

ISSUES

1. Did the County have the regulatory discretion to fill Captain positions through competitive processes?

2. Was the decision to fill the Captain positions competitively arbitrary and capricious?

3. Are the Appellants entitled to consideration for discontinued service retirement in the event that their positions were not reclassified, but rather, abolished?

ANALYSIS AND DISCUSSION

1. The County contends that the applicable regulations give it the discretion to fill the "newly created" Captain positions competitively. In the Board's view, the Personnel Regulations do in fact clearly convey to the County the discretion to do what they did, create new positions and fill them competitively. In this regard, Section 7-3 (c) instructs the CAO to "create" a new class when a position is deemed not to be appropriately

described, and (d) provides the discretionary "may" with respect to the abolishment of classes no longer needed. Similarly, section 7-4 (b) says that the Personnel Director "may" reclassify a position. That is, the County is directed to "create" a new position under described circumstances and the option, "may" as to reclassifying positions under described circumstances. If the County does the former, the resulting new position is filled competitively. Accordingly, the Board concludes that the County had the discretion to fill the Captain positions at issue in this case through competitive processes.

2. It should first be noted that the Captain positions were arguably "different" positions than those performed by the Lieutenants under consideration, in that they are even described by the Appellants as "strengthened". More significantly, the consultant study had recognized the circumstance that they were recommending the creation of 22 Captain positions and that there were more potential incumbents than that. They had therefore recommended that the positions be filled competitively. The County agreed and acted accordingly. There was not an available option of promoting every Lieutenant who had spent time performing some of the duties deemed warranting the title of Captain, as there were not enough positions. Doing what was done, exercising discretion to fill the positions competitively is neither violative of regulations, nor arbitrary and capricious.

3. As to the issue concerning discontinued service retirement, persons promoted to Captain had their old Lieutenant positions abolished when they were promoted. There was no point where their position was abolished and they were left with no position they could encumber. We see no support for a contention that they were at some point in time entitled to be offered discontinued service retirement, or that the fact that they were not has any relevance to whether the County had the discretion to fill the Captain positions competitively.

CONCLUSIONS AND ORDER

On the basis of the above, the Board concludes that the County's creation of the positions of Captain and filling those positions competitively was not inconsistent with law or regulation, and was not arbitrary and capricious.

In consideration of the reasons stated above, and based on the evidence in the record, the Board hereby denies the appeal.

DEMOTION

MSPB CASE NO. 98-05

The Appellant appealed the April 15, 1998 decision of the Director, Department of Fire and Rescue Service (DFRS), demoting her from Fire/Rescue Captain, Grade 24, to Master Fire Fighter/Rescuer, Grade F4, Step K in the DFRS. The decision further prohibited Appellant from participating in future promotional processes prior to completion of experience requirements commencing with the date of the order, effective May 10, 1998. A hearing was held before the Board on August 17, 18, and 19, 1998 during which time the County and Appellant, respectively, presented testimony, documentary evidence, and closing statements.

BACKGROUND

Appellant worked for the DFRS since February 1988. Prior to that time, she had been a volunteer firefighter for about 6 years. In early September 1997, she was promoted to Captain. By memorandum of February 10, 1998, Appellant was notified that she may be subject to dismissal based on charges consisting of seven violations of the same County and DFRS regulations and policies for her failure to cooperate in an Internal Affairs investigation on specific occasions, her failure to obey a supervisor's lawful orders and her failure to obey a lawful written order from the Director.

By letter of February 26, 1998 from her attorney, Appellant responded to the charges by claiming that, although she failed to obey orders on two occasions, there were extenuating circumstances and justification for her actions described in the letter. By memorandum of April 15, 1998 from the Director, DFRS', Appellant was notified that she was being demoted from Fire/Rescue Captain, Grade 24 to Master Fire Fighter, Grade F4, Step K and prohibited from participating in future promotional processes prior to completion of experience requirements commencing with the date of the order, effective May 10, 1998.

ISSUES

1. Are the violations set forth in the February 10, 1998 Statement of Charges against Appellant supported by a preponderance of the credible evidence?

2. If the answer to item 1 is yes, was the penalty to demote Appellant justified under the facts and circumstances of this case?

3. If the answer to item 2 is no, what should the penalty be?

FINDINGS OF FACT

1. Prior to the 1997 Promotional Examination for the rank of Fire/Rescue Captain, each candidate was required to sign a security order agreeing to keep all aspects of the promotional examination confidential, and was prohibited from communicating in any form with any other person concerning the exercise content, format, difficulty or administration procedure until notified that the security order was lifted. The Order indicated that, since one candidate for medical reasons was unable to participate in the examination process during the designated period, the security of the examination must be maintained until this candidate had been tested. The security order was not lifted until February 9, 1998.

2. However, the eligibility list for the rank of Fire/Rescue Captain was issued on November 24, 1997, effective November 21, 1997. It listed those candidates certified by the Office of Human Resources (OHR) as "Well Qualified" and others as "Qualified".

3. After overhearing several conversations among three individuals concerning the Captain's promotional examination administered in November, on December 3, 1997, Appellant telephoned a Personnel Specialist in the OHR and told her what she had overheard. The Specialist advised Appellant that the Security Order had not been lifted. Although Appellant did not believe that the integrity of the examination had been compromised, she was concerned that the current practice of permitting makeup examinations and releasing examination scores before all candidates had taken the examination would not continue in the future. The prior practice had been to permit examinations to be taken on one day only, which Appellant was told when she was ready to take the Captain's examination.

4. Appellant believed the Specialist had promised her anonymity, but the Specialist testified that Appellant told her she could use her name if she felt she needed to. Appellant refused to reveal to the Specialist the names of the three individuals she overheard talking about the examination.

5. On December 3, 1997, the Specialist informed a Deputy Chief about the telephone conversation with Appellant and that the Security Order had been violated.

6. In the evening of December 3, 1997, a Lieutenant from the Office of Internal Affairs, met with Appellant. Appellant advised the Lieutenant that, at the time she heard the test being discussed, the County had already notified applicants of the test results. When the Lieutenant asked Appellant if she knew who the individuals were who were discussing the promotional process, Appellant replied that she did but would not provide the names. The Lieutenant advised Appellant that she could be ordered to provide the information.

7. The Lieutenant interviewed Appellant again on December 18, 1997. Appellant was asked again whether she knew the individuals who were discussing the examination. She again replied that she did but would not provide the names. However, Appellant

advised the Lieutenant that she was reasonably sure that the information she heard at Station 30 was not of any value to any other person and that she heard nothing that would compromise the examination. The Lieutenant advised Appellant that he was acting on behalf of the Director, that she would be given a direct order to provide the names and that she would be subject to Department charges, up to and including dismissal, if she failed to obey. Appellant was given a direct order to provide the names but refused to obey the order.

8. The Lieutenant told Appellant that the information he requested was important and that the promotional process could be held up or thrown out. Appellant stated again that she was not going to provide any further information and that the investigation already had enough information to act on.

9. Appellant was given a second direct order to provide the names but refused to comply with the second order. Appellant advised the Lieutenant that she had not spoken to her husband, also a Montgomery County firefighter, about this matter because this was a confidential investigation. The Lieutenant told her, as a friend, that it was "okay" to speak to her husband. He gave her until Monday, December 22, 1997 to reconsider her decision.

10. On December 22, 1997, Appellant left a voice mail message with the Lieutenant that she had not changed her mind.

11. On December 30, 1997, Appellant was detailed to DFRS Headquarters where she was handed a written order from the Director. The order stated that, as a Captain and supervisor, Appellant is expected to set an example and support policies and procedures preserving a standard of cooperation in present and future examinations. The Director ordered Appellant to provide the Lieutenant with the names of those persons she observed and heard discussing the 1997 promotional process for the rank of Fire/Rescue Captain before it had been finally concluded. The Order stated that Appellant's failure to obey may be grounds for disciplinary action, including dismissal. Appellant refused to sign that she had received the Order and refused to cooperate.

12. Appellant also testified that her husband's partner, Mr. Blank, who did not take the examination, talked to her on the telephone about the examination while her husband was present in his office and able to hear Mr. Blank talk about the examination. Because her husband did not report Mr. Blank's telephone conversation with her about the examination, she believed that, if she revealed the names of persons she heard talking about the examination, including Mr. Blank, her husband may be subject to discipline.

13. Appellant further testified that she repeatedly asked the Lieutenant if she could speak to a command officer about her concerns with the investigation but the Lieutenant responded that she could not discuss the investigation with anyone, not even her husband. On the other hand, the Lieutenant testified that Appellant never requested permission to speak to anyone about the investigation. Appellant testified that she believed that a wife may not be required to testify against her husband. She stated that

she was willing to take the penalty for not providing the names since she thought it would be a minor disciplinary action, like a reprimand.

14. On December 30, 1997, Appellant was placed on administrative leave by a District Chief because of her refusal to cooperate with the Lieutenant's investigation. She was escorted to station 30 to retrieve her personal belongings. Appellant left Station 30 but called the Lieutenant shortly thereafter asking if it was too late to reconsider. She stated that she had spoken to her husband, who advised her to cooperate and provide the information requested.

15. Appellant met with the Lieutenant at DFRS Headquarters and wanted his guarantee that no disciplinary action would be taken against her if she cooperated. The Lieutenant replied that he could not give such guarantee since that decision rests solely with the Director. Appellant cooperated with the Lieutenant. The Lieutenant met with the Director and informed him that Appellant had provided all the information that was needed.

16. After December 30, 1997, when Appellant provided the names of the three Lieutenants she overheard discussing the examination, the Lieutenant interviewed those Lieutenants, and three others who took the examination at a later time. In his January 15, 1998 report of investigation File 97-0051, the Lieutenant concluded that, "It is with a high degree of certainty, the 1997 Fire/Rescue Captain Promotional process was not compromised, nor did those who too the exam receive any benefit from the discussions." He found that the three Lieutenants committed only minor infractions.

17. Another District Chief, testified that, since 1974 when he became a firefighter for Montgomery County, he has never heard of anyone in the DFRS being demoted two ranks for insubordination. He himself had received a written reprimand for insubordination in a particular incident.

18. There are no prior disciplinary actions on record against Appellant. She received several letters of commendation for her work in DFRS, including some from the Director. Appellant's second level supervisor when she was stationed at Cabin John Volunteer Fire Department Station No. 30, testified that Appellant's performance in the DFRS was outstanding, and that she was dedicated, fair and well respected by supervisors and subordinates. He further testified that, given her outstanding record, Appellant's discipline is the severest he has heard of in the DFRS.

19. Several other witnesses testified to other incidents of violations of rules in the DFRS where either no or a minor disciplinary action was taken for similar or more egregious violations. No other case of a demotion for refusal to cooperate in an investigation or for insubordination was presented by the County.

DISCUSSION AND CONCLUSIONS

Issue 1.

Appellant was charged with violations of Section 28-2(h) and (o) of the Personnel Regulations; sections 3.1 and 5.14 of DFRS Policy and Procedure No. 502 Code of Conduct; sections 4.6, 4.10 and 5.0 of DFRS Policy and Procedure No. 529 Internal Affairs; and sections 4(b) and (d) of FRC Executive Regulation 30-89AMII Code of Ethics and Personal Conduct. Although the Chief's February 10, 1998 memorandum lists seven charges, all seven charges are the same, each alleging a failure to cooperate on six separate occasions in the Internal Affairs investigation with respect to the promotional examination for Captain. Because the seven alleged violations are identical, except that six are alleged to have occurred at different times, the Board will treat all seven alleged violations as the same violation of the following regulations repeated by Appellant at six different times:

Section 28-2 of the Personnel Regulations provides that, interalia, the following may be cause for disciplinary action:

> (h) Violation of an established policy or procedure;
>
> (o) Violation of any provision of the County Charter, County laws, ordinances, regulations State or Federal laws.... if such violation is related to County employment.

DFRS Policy and Procedure No. 502 provides in relevant part:

> 3.1 All employees are to adhere to Departmental policies and procedures, County Administrative Procedures, Executive Orders, Montgomery County Personnel Regulations and Charter and to conform to all laws applicable to the Fire-Rescue-EMS Services and the general public.
>
> 5.14 No employee will commit any act which constitutes conduct unbecoming a merit system employee. "Unbecoming" conduct includes, but is not limited to, any criminal, dishonest or improper conduct.

DFRS Policy and Procedure No. 529 provides in relevant part:

> 4.6 All employees must cooperate fully with the Internal Affairs Section during an investigation. An employee who fails or refuses to answer valid employment-related questions of an Internal Affairs investigator is considered insubordinate.
>
> 4.10 Employees are required to truthfully and promptly answer questions concerning performance of duty, adherence to Department procedures, or suspected misconduct.

5.0 Employee. Employees must cooperate fully with Personnel assigned to the Internal Affairs Section, or other authorized Personnel conducting internal investigations.

FRC Executive Regulation No. 30-89AMII, Code of Ethics and Personnel Conduct provides in relevant part:

4(b) Adherence to Other Applicable Standards. All on-duty personnel must adhere to all applicable State, Federal and local laws and regulations including Fire and Rescue Commission or County Policies and procedures, policies laws Executive Orders, Personnel Regulations and the Charter, and conform to all laws applicable to the fire, rescue, and emergency medical services and the general public....The Corporations and the Department are responsible for taking disciplinary actions for any violations of this code by their respective Personnel.

The essence of the claimed violation is that Appellant is considered "insubordinated" for failing to cooperate with an Internal Affairs investigation by refusing to answer valid employment related questions in violation of sections 4.6, 4.10 and 5.0 of DFRS Policy and Procedure No. 529. All of the other regulations alleged to have been violated by Appellant are merely "catch-all" general provisions which refer to the more specific No. 529 regulations.

The Board concludes that the preponderance of the credible evidence demonstrates that Appellant violated the above cited regulations by refusing to answer valid employment-related questions asked by a Lieutenant in his Internal Affairs investigation as to whether the Captain's promotional examination had been compromised. Appellant had overheard conversations among several candidates about the examination while there was a security order in effect prohibiting such conversations. While the Appellant may have sincerely believed that she had valid reasons for refusing to provide the information sought, such a refusal cannot be countenanced. The order was in all respects a legal one and she was required to obey it, or suffer the consequences.

Issue 2.

In the Director's Notice of Disciplinary Action, he states:

Your actions have conveyed a contempt for the Department and that it is acceptable to be insubordinate and disrespectful. Your gross insubordination, lack of respect for the integrity of the policies and procedures, and flippant attitude towards the possible ramifications that you faced does not meet the standard expected of a Montgomery County Fire/Rescue Officer, especially that of a Fire/Rescue Captain.

However, the Board does not believe that the County sustained the burden of proving that the Director's description is in fact accurate. Rather, the Board believes that

in the circumstances of the case, the penalty of demotion assessed against Appellant is much too severe and is arbitrary, capricious and unreasonable.

In arriving at this determination, the Board took into account that Appellant believed she had a justifiable reason for not providing the information, although she was misguided in her belief. Although she conscientiously brought the matter to the attention of Human Resources, Appellant believed that the examination was not compromised by the conversations she overheard, or her failure to report the names of the individuals involved. In fact, the Lieutenant came to the same conclusion in his final report after Appellant had provided the information on December 30, 1997 and he interviewed the Lieutenants involved and the two persons who later took the examination. The Board also found creditable Appellant's testimony that she repeatedly asked the Lieutenant if she could speak to a Command Officer to explain her problem about responding to his question, which the Lieutenant would not let her do.

The Board also took into account that no prior disciplinary action was cited against Appellant, that she had been given several letters of commendation, and that the unrebutted testimony of witnesses showed that she was an outstanding employee of DFRS who was well respected by both supervisors and subordinates. In addition, from the testimony, it seems clear that Appellant was treated disparately in comparison to other DFRS employees who received minor penalties for similar or even more egregious offenses.

Issue 3.

In consideration of the above, the Board determines that a penalty which is consistent with the totality of the facts and circumstances is a written reprimand to remain in effect for a period of two years from the effective date of Appellant's demotion and the loss of the equivalent of one pay period's pay. Such a penalty, in the Board's view, appropriately responds to the nature of the offense without unduly punishing Appellant who has been an exemplary employee. Accordingly, Appellant should be restored to her former Captain's position with back pay, if due, plus interest, from the date of her demotion. The County is directed to determine the amount of back pay and interest that may be due to Appellant. To request payment of reasonable attorney fees, Appellant's attorney must submit a detailed application to the Board, with a copy to the County Attorney, in accordance with the requirements of section 33-14(c) (9) of the Montgomery County Code.

GRIEVABILITY

MSPB CASE NO. 86-130

BACKGROUND

This matter originally came before the Board when 350 Fire and Rescue Corporation personnel (Appellants) appealed to the Board from a May 2, 1986 determination by the then Director of the Office of Personnel that they were not covered by the Fair Labor Standards Act (FLSA) and, consequently, not subject to the 40 hour workweek which it provides for. Subsequent to the filing of the Board appeal, 314 of the Appellants filed FLSA claims in the United States District Court for the District of Maryland. On July 8, 1986, the Board notified all parties to the appeal before it that the Board was staying any further administrative review and/or action pending resolution of the appeals to the U.S. District Court.

On March 20, 1996, the Parties to the case before the District Court entered into a settlement agreement. On March 29, 1996, United States District Judge issued a "Final Order and Judgement As to Plaintiffs and Defendants" approving the settlement agreement and dismissing the matters before the Court. The settlement agreement provides, in pertinent part, that in consideration of the agreement, the Plaintiffs release the Corporations and Montgomery County from all claims alleged in the court action brought under FLSA and any administrative proceeding "including but not necessarily limited to such claims that were stayed before the County Merit System Protection Board (cases 86-35 through 86-360)."

On January 20, 1998, the County filed with the Board a Motion to Dismiss 36 referenced appeals which were stayed by the Board's July 8, 1986 order. These were the appeals of the Appellants who had not filed FLSA appeals in the case that was filed in the United States District Court. The Motion to Dismiss contends that 29 U.S.C. 201 grants exclusive jurisdiction to consider FLSA claims to State and Federal courts, and that the Board lacks jurisdiction to consider these claims. Copies of the Motion were served on the Appellants before the MSPB who were not parties to the Court case.

In support of its Motion, the County contends that Federal law limits jurisdiction to hear claims arising under FLSA to courts and not administrative tribunals such as the Board, and that Federal law preempts Fire Commission regulations providing the MSPB as a forum to hear claims arising under FLSA. A response to the County's Motion was filed by one of the Appellants, wherein it is contended, in summary, that the FLSA authorization to Federal and State courts does not constitute a bar to consideration of such cases by administrative tribunals such as the Board; nor does FLSA preempt state regulations, nor imposition of state remedies for violations arising out of similar

circumstances. "The parties agreed to submit this matter to the Merit System Protection Board and the Merit System Protection Board should hear the matter."

ISSUE

Does the Board have jurisdiction over the grievances/appeals claiming application of the provisions of FLSA?

DISCUSSION

The resolution of the issue of the Board's jurisdiction in the instant case can be considered either from the point of view argued by the County, i.e., FLSA vests exclusive jurisdiction to State and Federal courts, or, the converse that applicable County law and regulation do not vest the Board with authority to apply the terms of FLSA and grant relief provided in that law. In the Board's view, either approach leads to a conclusion that the Board does not have jurisdiction over the claim presented by the Appellants in this case.

It must be noted at the outset that what the Appellants sought by their grievance was relief under the provisions of FLSA. As described in the Director of Personnel's response to the grievance:

> "You have requested as relief payment of overtime for each hour worked in excess of 40 hours per week at a rate of time and one-half retroactive to the date of the Supreme Court's Garcia decision, February 19, 1985. You have also requested a reduction in your workweek to no more than 40 hours."

That is, the grievants sought overtime pay under the provisions of FLSA. Neither the grievances nor the Director of Personnel's response speak to the interpretation or application of County laws or regulations. Accordingly, at issue is jurisdiction over a claim exclusively under the provisions of FLSA.

With respect to the contention that exclusive jurisdiction lies with State and Federal courts, FLSA (29 U.S.C. sec. 216(b)) provides, in pertinent part:

> "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similar situated." (Emphasis supplied)

Court cases seem to establish that notwithstanding the "may" in this section, Federal and State courts are the exclusive forum for these questions. For example, in Lerwill v. Inflight Motion Pictures. Inc., 343 F. Supp. 1027 (N.D. CAL. 1972) the court said about a suit against an employer for unpaid overtime wages, "The only conclusion

possible, then, is that the statutory remedy is the sole remedy available to the employee for enforcement of whatever rights he may have under FLSA." (See also Tombrello v. U.S.X Corporation, 763 F. Supp. 541, 545, (N. D. ALA. 1991) "Courts have consistently held the (FLSA) as the exclusive remedy for enforcing rights created under the FLSA," and Dunham v. Brevard County School Board, 401S.2d 888, 889 (FLA. D. CT. App. 1981), "The jurisdiction to consider causes arising under the Fair Labor Standards Act is in the Circuit Courts, not administrative tribunals.")

The Supreme Court has also suggested that statutory FLSA claims may only be enforced in State or Federal court. In Barrentine v. Arkansas Best Freight System. Inc., 450 U.S. 728, 101 S.Ct. 1437 (1981), the Court held that employees could bring a Federal FLSA action after having unsuccessfully submitting a wage claim based on the same underlying facts to arbitration pursuant to the collective bargaining agreement. The Court noted that an employee submitting a grievance to arbitration seeks to vindicate contractual rights, while filing a lawsuit under FLSA asserts independent statutory rights. Examining FLSA, the Court wrote, "no exhaustion requirement or other procedural barriers are set up, and no other form for enforcement of statutory rights is referred to or created by this statute."

Consistent with these Federal court cases is a recent decision of the Maryland Court of Special Appeals on the issue of whether the proper avenue of State employees to enforce rights created by FLSA is the State administrative grievance procedure when some remedies available under FLSA are not available under the State grievance procedure. In Edward Bunch. III, et al. v. Bishop L. Robinson, No. 1754, Sept. Term, 1997, 4 wage & hour, Cas.2d (BNA) 1300, it was concluded that the State's administrative grievance process is preempted so far as it is inconsistent with properly enacted Federal law. The court noted in this regard that available remedies and time limits provided under FLSA were different than those provided for by the State's administrative grievance procedure.

With respect to whether applicable County law and regulation grants the Board authority to grant the relief sought by the grievances, Sections 404 & 405 of the County Charter establishes and provides for the Board for the resolution of appeals of removals, demotions, and suspensions, and the investigation and resolution of formal grievances. Section 33-7 of the County Code charges the Board with protecting the merit system and employees and applicants rights guaranteed by the merit system, and empowers it to adjudicate appeals and grievances. Section 33-12(b) defines grievance as a formal complaint arising between a merit system employee and supervisor with reference to a term or condition of employment. "The determination of the Board as to what constitutes a term or condition of employment shall be final." Section 33-14 of the Code provides the Board with its hearing and remedial authority.

The Personnel Regulations address the powers and the procedures of the Board in the resolution of appeals and grievances, which are broadly defined as ".....arising out of a misunderstanding or disagreement between a merit system employee and supervisor, which expresses the employee's dissatisfaction concerning a term or condition of

employment or treatment by management, supervisors, or other employees." The enumeration of employee adverse effects which may be alleged includes "improper, inequitable or unfair application of the compensation policy and employee benefits, which may include salary, pay differentials, overtime pay, leave, insurance, retirement and holidays."

It is clear that the Charter, Code and applicable regulations grant the Board wide jurisdiction and authority with respect to the resolution of grievances arising among County employees, including those having to do with pay matters. However, these particular grievances seek relief that has nothing to do with County law or regulation, or the merit system. They seek the application of the FLSA, and nothing in applicable law and regulation establish the grievance procedure and Board as the forum for that task. Rather, as suggested by the above-described cases, that forum is State and Federal courts. This is a result strongly suggested by the Court of Special Appeals decision in Edward Bunch, who would not permit the use of Maryland's administrative grievance procedure, which had different time limits and remedies than those available under FLSA. The exact same can be said about the County's grievance procedure.

On the basis of the above, the Board concludes that it does not have jurisdiction over the grievances and appeals in the instant case and grants the Motion to Dismiss the appeals of the Appellants.

Concurring Opinion of Associate Board Member

I concur in the result, to grant the Motion to Dismiss the appeal, but for a different reason. The appeal should be dismissed because the Appellant's FLSA claim is barred by the 2-year statute of limitations. 29 U.S.C. § 255. Although Appellant filed an appeal to the Board in 1986, an administrative appeal does not toll the running of the statute of limitations. Appellant's failure to commence court action within two years after the FLSA claim accrued bars the enforcement of his claim. 29 U.S.C. §§ 216 (b), 255.

However, I believe that the Board would otherwise have jurisdiction to resolve an FLSA claim of a County employee if it were not barred by the statute of limitations. Section 216 (b) provides that an action to enforce an FLSA claim "may" be brought in any Federal or State court of competent jurisdiction but it does not provide for the exclusivity of a Federal or State court or preclude the bringing of an FLSA claim before an administrative body. Moreover, Section 9-9 (g) of the Montgomery County Personnel Regulations provides for an exception to the payment of compensatory time "when the Fair Labor Standards Act requires overtime pay." The Board has broad powers to resolve an employee appeal involving "overtime pay", particularly since it is included in the County Regulations. However, because Appellant's FLSA claim in this case is barred by the Statute of Limitations, the claim should be dismissed.

MSPB CASE NO. 98-06

BACKGROUND

On March 17, 1998, Appellant filed a grievance, which was described as an "interrelated" "Grievance I" and "Grievance II." Grievance I contested the settlement of a Prohibited Labor Practice (PLP) filed by the Municipal and County Government Employees Organization (MCGEO) against the County Executive, others in the chain of command, her immediate supervisor, and the Appellant. The Appellant contended that the settlement, entered into without her being represented, defamed her and bargained away her career. She requested that she be given a hearing to refute the charges and clear her name, that her file be expunged of any references to the matter, that approximately 57 hours of sick leave be reinstated, and that her attorney fees be paid. Grievance II went to a February 11, 1998 notification of an alleged "illegal transfer" to the Office of Policy and Planning, pending completion of an investigation of charges of improper conduct.

By memorandum dated March 19, 1998, the Labor/Employee Relations Manager (LERM) responded to the March 17 grievance, contending that it was not timely filed within the required 20 calendar days from the February 11, 1998 effective date of the transfer. The LERM's memorandum notes that the February 11, 1998 notification of the transfer states that it would be reviewed upon completion of an investigation that had been referenced in that notification. The LERM concluded that his decision that the grievance was untimely was preliminary, granting the Appellant until March 30, 1998 to provide other arguments and information that she wished considered.

On March 30, 1998, the Appellant filed another grievance, which references a March 19, 1998, memo, which the grievant claims she did not receive until March 27, from Chief of the Department of Police Management Services Bureau. This memo, subjected "Temporary Transfer," reiterates the "verbal transfer" effective February 23, and the placement of the Appellant under the command of the Director of the Volunteer and Community Resources Division. In the grievance, Appellant contends, "This is further notice of transfer from the Records Division," and states:

> I believe I have in effect been permanently detailed out of Records as a result of the County settlement of the MCGEO charges of unfair management practices. I wish reinstatement to my position with the Records Division, as well as the other relief requested in the attached grievance of March 17, 1998.

Attached to this grievance was the same elaboration that had been attached to the March 17 grievance.

By memorandum dated April 6, 1998, the LERM responded to the March 30 grievance, calling it "the second complaint in which you contest your involuntary transfer from the Records Division of the Police Department." Characterizing the March 30 and March 17 grievances as concerning "essentially the same subject," The LERM contends it

was not timely filed within the required 20 calendar days from February 11, the date of the notification of transfer. The LERM concluded that his decision that the grievance was untimely was preliminary, granting the Appellant until April 16, 1998 to provide other arguments and information that she wished considered.

By letter dated April 3, 1998, Appellant's attorney contended to the LERM that a timely grievance had been filed, noting, in pertinent part, ".....The Appellant cannot be charged with knowing that the County was not going to return her to her position until it became clear, long after the passage of twenty days, that the County intended to never return the Appellant to the Records Division." Reference is made to the March 19, 1998 reassignment memorandum.

By letter dated April 20, the LERM reiterated his earlier actions on the March 17 and 30 grievances, and declined to reverse his initial preliminary determination that the grievance (presumably the one of March 30) was untimely filed.

ISSUES

Were either the March 17, 1998 and/or the March 30, 1998, grievances timely filed?

If so, is an award of attorney fees appropriate?

ANALYSIS AND CONCLUSIONS

In the March 17 grievance, Appellant complained about the settlement of a PLP and the February 11, 1998 notification of her transfer from the Records Division pending completion of the investigation of charges of improper conduct. It is uncontested that Appellant knew of these events by the receipt of the February 11 communication. AP 4-4, Section 6.0 provides that a grievance must be filed within 20 calendar days of when the employee knew or should have known that a problem existed. In agreement with the County's determination, a grievance over such a problem should have been filed by March 3, 1998, 20 days after February 11. Accordingly, the Board concurs that the March 17, 1998 grievance over the settlement of the PLP and the February 11, 1998, notification of temporary transfer was untimely, and the appeal of that determination is denied.

The Board however does not concur with the County's determination that the March 30 grievance was "essentially the same" as the March 17 grievance, and should therefore similarly be viewed as untimely. In the Board's view, the March 30 grievance goes to a different matter, the alleged "permanent" nature of the transfer. That is, on the basis of the March 19 memo, Appellant was contending that she had, "in effect been permanently detailed out of Records...." While the Appellant references the earlier grievance and attached materials from it in her March 30, 1998 grievance, she was alleging something that was not part of the earlier grievance, i.e., permanent transfer, and was alleging as the "triggering event" the March 19 memo. Without addressing the intent of the March 19 memo, the Board concurs that the passage of time and the content of this

memo present circumstances adequate to give rise to a grievable alleged event, that the Appellant had reason to believe that her transfer had become permanent. This alleged event in and of itself, the Board concludes, could be timely grieved within 20 days from the March 27 receipt of the March 19 memo. Accordingly, the March 30 grievance was timely filed.

Before the Board was the County's determination that the subject grievances were untimely. Having found that the March 30, 1998 grievance was timely, the matter is remanded to the County for further processing.

With respect to the Appellant's request for attorney fees, the Board has consistently interpreted Section 33-14(e) of the Montgomery County Code as meaning that a determination on procedural grievability, including timeliness, is not a "final decision" by the Board on the merits of the grievance, which would give rise to an award of attorney fees. Accordingly, no award of attorney fees is appropriate in the instant case.

MSPB CASE NO. 99-01

FACTS

On June 5, 1998, the Director, Department of Fire and Rescue Service (DFRS) issued the Appellants a "Statement of Charges - Written Reprimand" (Charges) . The Charges went to alleged misuse of sick leave on April 3, 1998, and subsequent disobeying of an order to bring in a doctor's note covering the April 3 sick leave. The Charges provided a ten day period to respond.

Also on June 5, 1998, the Director issued to the Appellant a notification that based on the information in the Charges, his absence on April 3 was not being approved and he was being placed in an "Absent Without Official Leave" (AWOL) status for that date. This notification contained no provision for response.

On June 15, the Appellant filed a grievance in the Administrative Grievance Procedure. The grievance describes receipt of the AWOL notification, including the statement, "His (Director's) memorandum also referred to a Statement of Charges for a written reprimand which was also dated June 5, 1998." The grievance contends:

> I contest the determination to place me in an "Absent Without Official Leave" category. I do not believe that it is justified by the facts of this case. I have prepared a response to the Statement of Charges, and I incorporate by reference that response into this grievance.

The relief sought was rescinding of the AWOL and any loss of pay as a result of it.

Also on June 15, the Appellant responded to the Charges, denying misuse of sick leave, reciting his version of the events at issue, and requesting that no disciplinary action

be taken against him and that the matter be expunged from his personnel file. Alternatively, Appellant requested that, if disciplinary action is taken, he should receive an oral admonishment.

By memorandum dated June 26, 1998, Labor/Employee Relations Manager, (LERM) responded to the Administrative Grievance over the AWOL determination by advising the Appellant that the exclusive procedure for his grievance was the negotiated grievance procedure established by the collective bargaining agreement between the Service and the Montgomery County Career Fire Fighters Association (Association) . Therefore, the grievance was not grievable under the Administrative Grievance Procedure. However, by memorandum dated July 20, the LERM advised the Appellant that at the time of his June 26 correspondence, he was unaware that the Appellant was still a probationary employee, which denied him coverage by the collective bargaining agreement. The LERM further stated that pursuant to County Personnel Regulations and the provisions of the Administrative Grievance Procedure, probationary employees could only grieve a disciplinary action. Since AWOL is not such an action, Appellant did not have standing to file an Administrative Grievance. Appellant was advised of his right to respond to that determination and to appeal a final decision to the Board.

On July 20 and 21, Appellant filed with the Board appeal documents going to the LERM's June 26 determination that the issues raised in his grievance were not subject to the Administrative Grievance Procedure, assuredly unaware of the LERM's July 20 memorandum revising his Position. The County and Appellant's subsequent filings with the Board are based on the LERM's July 20 position.

While not contained in the file, both parties statements of position state that on July 17, 1998, the Appellant was issued a written reprimand, as provided for by the above-described Charges. There is no appeal of that July 17 determination pending before the Board.

POSITIONS OF THE PARTIES

The County cites Section 29-2 Special Note of the Personnel Regulations, for the proposition that probationary employees may grieve only disciplinary actions through procedures established by the Section, and contends, without cited law or regulatory support, that AWOL is not a disciplinary action, but only a "non pay status."

In response, the Appellant contends that, even assuming that the County's position that probationary employees may only grieve disciplinary actions is correct, the Appellant's grievance "is part and parcel of his objections to the actions undertaken .... to place him in an Absent Without Leave position and to issue a Statement of Charges." Noting that the AWOL notification refers to the Charges and a finding that the Appellant was absent without leave is a fundamental basis upon which any disciplinary action could be taken, Appellant contends that his grievance refers not only to being placed on AWOL, but specifically to the Charges. Appellant concludes:

Thus, (Appellant's) grievance stems from and involve a disciplinary action. A determination that the Director had improperly placed him in an Absent Without Official Leave category would nullify the basis for any disciplinary action.

ISSUE

Is Appellant's grievance grievable under the Administrative Grievance Procedure?

ANALYSIS AND CONCLUSIONS

It is undisputed that the Appellant is, at least at the time of these events, a probationary employee. Further, it is clear, and not actually contested by the Appellant, that the Administrative Grievance Procedure limits access of probationary employees to "disciplinary actions." This limitation is stated both in Section 29-2 of the County Personnel Regulations and Section 4.5, E. of the Grievance Procedure itself. Hence, it is clear that the Appellant could only grieve a disciplinary action.

We concur with the County's uncontested contention that AWOL status is not a disciplinary action. Section 28-3 of the Personnel Regulations, "Types of disciplinary actions," does not include AWOL, and section 28-2, "Causes for disciplinary action," includes "abuse of sick leave." "Disciplinary actions" are referenced in Section 29-2 (e) of the Personnel Regulations, as including "written reprimands, forfeiture of annual leave or compensatory time and within-grade reductions." The "Special Note" to Section 29-2 of the Regulations states, "Demotions, suspensions, terminations and dismissals affecting merit system employees may be appealed directly to the Merit System Protection Board under Section 30 of these Regulations."

Appellant does not dispute any of the above, but seeks to turn the AWOL grievance into an appeal of a disciplinary action by virtue of the interrelationship of the two matters. We reject this theory. The grievance itself was clearly directed solely to the AWOL status determination. Moreover, at the time that it was filed, there was no disciplinary action, but only a proposed action that was responded to at the same time as the grievance was filed. The disciplinary action was not issued until July 17 when Appellant was informed that he was receiving a written reprimand. Finally, even if the Appellant was right, under the terms of the Personnel Regulations and the Grievance Procedure, a probationary employee is limited to appeal a disciplinary action to the Chief Administrative Officer. The Board has no jurisdiction over a probationary employee's appeal.

On the basis of the above, the Board concludes that Appellant's grievance is not grievable under the Administrative Grievance Procedure and accordingly, his appeal is denied. Having denied the appeal, there is no entitlement to the requested attorney fees.

MSPB CASE NO. 99-06

Appellants appealed the decisions of the Chief Administrative Office that they were not eligible for call-back pay beyond a guaranteed three hour minimum.

BACKGROUND

On April 16, 1998, one Appellant filed a grievance in the Administrative Grievance Procedure over a determination by the Payroll Office that he was entitled to three hours of "Call-Back Pay" (time and one-half) and two hours regular pay for a five hour period when he was "called back" to respond to an emergency situation. On June 23 and July 7, 1998, another Appellant filed grievances in the Administrative Grievance Procedure over a determination by the Payroll Office that he was entitled to three hours of Call-Back Pay and 1/2 hour regular pay for a 3 1/2 period when he was called back to respond to an emergency situation. These grievances were consolidated for processing, resulting in a disposition by Chief Administrative Officer that, pursuant to the County Personnel Regulations and procedures, the Appellants were not eligible for overtime or call-back hours worked beyond the guaranteed three hours minimum. A timely appeal was filed by the Appellants.

APPLICABLE REGULATION

Personnel Regulation Section 9-6, Call-Back Pay, provides:

> Whenever an employee is required to return to work to perform unanticipated and unscheduled work assignments, usually of an emergency nature, the employee is entitled to receive call-back pay in a guaranteed minimum amount of 3 hours of overtime pay. The Chief Administrative Officer must establish reporting procedures for call back pay, if adopted.

Administrative Procedure 4-27, "Overtime Compensation for Employees, Grade 25 and Above," Definitions, 2.0, defines and explains as to "Call-Back Pay":

> Compensation premium which is received when an employee is required to return to work to perform unscheduled, unanticipated and/or emergency work. The Personnel Regulations require the payment of a minimum of three hours overtime compensation (1 - 1 and 1/2 rate) as the call-back premium.

and in 2.9, defines "Overtime Compensation," as " Payment for overtime worked."

Personnel Regulation Section 9-10, Limitations on Overtime, Sub-Section (a), Employees Grade 25 and Above and Police Officers at the Rank of Police Lieutenant and Above, provides:

> Employees at grade 25 and above and police officers at the rank of Police Lieutenant and above are not usually eligible to receive overtime pay but may be declared eligible to receive pay pursuant to administrative procedures established by the Chief Administrative Officer when it is determined to be equitable and in the best interest of the County.

Personnel Regulations Section 9-11, Compensatory Time, Sub-Section (a), Limitations on Crediting of Compensatory Time for Overtime Work, provides:

> Any employee at grade 25 and above and any police officer at the rank of Police Lieutenant and above is eligible to be credited with compensatory time on an hour-for-hour basis for overtime work. Such employees are not eligible for compensatory time for the first 5 hours of overtime work in an employee's regularly scheduled work week....

County Office of Human Resources publication "Procedures for Special Compensation in Montgomery County," provides:

> Call-back - Whenever an employee is required by his authorized supervisor to return to work from an on-call or an off-duty status to perform unanticipated and unscheduled work assignments (usually of an emergency nature), the employee shall be entitled to receive call-back pay in a guaranteed minimum amount of three hours of overtime pay. This applies to all ranks.

An example in this publication on how to compensate Fair Labor Standards Act exempt employees (Lieutenants and above) in a situation when five hours of call-back pay is worked provides, "Call-back compensation is recorded as three hours of overtime... The fourth and fifth hours are not compensated since the employee must work in excess of 45 hours in the regular workweek to receive overtime compensation."

POSITION OF THE PARTIES

The Appellants contend that Section 9-6 states that an employee who is required to return to work is entitled to call-back pay at the rate of time and one-half for all time spent. That is, while Section 9-6 specifies a minimum period of such compensation, three hours, no maximum is provided by applicable regulations. In the latter regard, Appellants contend that other regulations relied upon by the Department concern overtime pay and compensatory time for when an employee is required to work in excess of the normal scheduled work day or week, and are not applicable to the particularly inconvenient circumstance of when an employee is called back from an off-duty status. Further, it is contended that an Office of Human Resources internal instructions to the contrary exceeds the County Council's legislative intent.

The County contends that Section 9-6 must be read in conjunction with the Section 9-10 limit of payment for overtime in the case of higher graded officers, and that for 28 years these provisions have resulted in the existence of a distinction in the amount of call-back pay earned by such officers. That is, "the effect of Section 9 when read in its

entirety is that police officers at the rank of Lieutenant and above will receive one-for-one compensation for overtime worked in excess of five hours, but except for the first three hours of call-back work."

ISSUES

1. Do applicable regulations provide a limit of three hours on the amount of call-back pay of Department Lieutenants and above?

2. What is the appropriate remedy?

3. Is there an entitlement to attorney fees?

ANALYSIS AND CONCLUSIONS

1. It appears clear, and from the parties position papers essentially undisputed, that Section 9-6, standing alone, provides a compensation level of time and one-half for all time worked in a call-back situation, the referenced three hours being a minimum amount of such paid time. That is, employees in a call-back status will receive "at least" three hours of pay at a time and one-half rate, but will be compensated at that rate for the full period of the call-back. While not explicitly stated in the case papers, it seems clear from the parties arguments that this is the way rank-and-file police officers are compensated. The dispute is whether Section 9-6 read in conjunction with other regulations, provide a three hour maximum to such compensation for Lieutenants and above. In the Board's view, they do not.

Section 9-6 itself makes no distinction between the rank of employees and, importantly, nor does Administrative Procedure 4-27, which deals specifically with compensation for employees Grade 25 and above, and references the Personnel Regulation requirement for the payment of a minimum of three hours overtime compensation as the call back premium. That is, these regulations specifically provide for an unlimited amount of call-back pay, regardless of rank, with Administrative Procedure 4-27 rather explicitly applying this benefit to employees Grade 25 and above.

The County contends that notwithstanding these specific instructions, reading them in conjunction with the Section 9-10 and 9-11 limitation on overtime compensation for Grades 25 and above leads to an "intent" that supports their interpretation that limits officer call back-pay to three hours. We do not disagree with the principle that interpretations should be based on an overall reading of possibly applicable regulations, but we do not agree with the result sought by the County in these circumstances. There is no nexus between Sections 9-10 and 9-11 and the call-back provisions. Rather, these sections deal with the separate category of overtime for FLSA exempt employees, that is, time in excess of the regularly scheduled work day or week. It is noteworthy in this regard that the call-back provision seems applicable even if an employee was not otherwise in an overtime status.

Besides Personnel Regulations Sections 9-10 and 9-11, the County also relies on the Human Resources publication and the existence of considerable past practice. With regard to the former, we do not believe that this internal management tool can stand in the stead of what we believe is a rather clear County Council approved Personnel Regulations. This is particularly true in this circumstance where the publication contains an unequivocal statement providing for call-back pay without limit for all ranks, and that the alleged limit only is found in an example located in a far removed portion of the publication.

As to the alleged past practice that is consistent with the interpretation urged by the County, again, while we do not dispute the relevance of historical interpretation generally, in the circumstances of this case where the interpretation of controlling regulations is clear, past practice, which is hardly documented, does not provide support for the County's position.

2. The Appellants are entitled to receive compensation at the rate of time and one-half for the full period of the call-back situations that were the subject of their grievances, and the County is so ordered. Moreover, in order to eliminate any ambiguity and confusion, the County is ordered to make such changes as are necessary for consistency with this decision in the publication "Procedures for Special Compensation in Montgomery County".

3. Section 33-14(c) the County Code grants to the Board authority to order appropriate relief to accomplish the remedial objectives of the Code, including the discretionary authority to order the reimbursement or pay of all or part of an employee's reasonable attorney's fees. The granting of attorney fees is not required in all cases where an Appellant has prevailed if the regulatory criteria. In the instant case, the Board does not believe that an order for the reimbursement of attorney's fees is appropriate to accomplish remedial objectives, noting Particularly that the County was following a practice of longstanding based on a not unreasonable interpretation of applicable regulations and that a full remedy with respect to the Appellant's can be accomplished by the actions we have ordered. Accordingly, the Appellants' request for attorney fees is denied.

MSPB CASE NO. 99-13

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

In the Fall of 1995, Appellant applied for the position of Grade 17 Mechanic, with the Department. During the interview process, Appellant advised then the Station Chief that he could not accept a position unless he was allowed to work a four, ten-hour day, work schedule. The Station Chief and the then President, Department selecting officials,

agreed to provide the four day schedule as a condition of employment. It is undisputed by all parties that this condition of employment was verbal and that there is no written contract.

Appellant was promoted to the position of Grade 21 Senior Mechanic on January 5, 1997, and continued to work the four, ten hour day, work schedule. By letter dated August 3, 1998, the current President advised Appellant that effective on August 30, 1998, his work schedule would be changed from four10-hour days to five 8-hour days per week. By letter dated August 23, 1998, Appellant requested reconsideration of the proposed change in work schedule, relating the financial impact from the loss of a part-time job, increased travel time, and additional automobile expenses incurred by an extra travel day. By letter dated August 27, 1998, the current President informed Appellant that he had met with the current Fire Chief and the Board of Directors, and that "in the interest of the Corporation," it was decided that the change in Appellant's work schedule would stand. On August 9, 1998, Appellant filed a grievance under Administrative Procedure 4-4 indicating that the change in schedule was instituted for no reasonable or valid reason and that it was a violation of his contract of employment with the Rockville Volunteer Fire Department. Appellant also asserted an improper, unfair act by a supervisor, as well as improper, inequitable and unfair application of employee benefits, to include leave schedule.

ISSUES

Was the change in Appellant's work schedule violative of applicable regulations, or arbitrary and capricious?

ANALYSIS

It is undisputed that Appellant was offered a four ten-hour day work schedule as a condition of employment when he was appointed to the position of Grade 17 Mechanic in 1995. Of dispute is whether this verbal commitment is binding "forever", regardless of current departmental needs or what position the Appellant holds in that Department. Section 12, sub-section 12-1, Work Schedules, of the Montgomery County Fire and Rescue Corporation Personnel Regulations states:

> "The work schedules for all employees must be determined by the department head. Department heads, under the supervision of the Chief Administrative Officer, must maintain on a current basis in the Personnel Office work schedules of employee groups under their supervision and provide a copy of schedules to the Chief Administrative Officer."

In the Board's view, Management is responsible for the efficiency and effectiveness of their department, and, as such, must be afforded substantial latitude in assigning work and determining work schedules of the employees. Absent a showing that such a change to work schedules, is violative of regulations, or arbitrary, capricious, it is

within "management's right" to assign work and set work schedules to meet Department needs.

The decision to change Appellant's work schedule was related to legitimate concerns about the timely repair of equipment essential to maintaining the ability of the Department to provide fire and rescue services. The change in work schedule was made after consultation between the President, the Chief, and the Board of Directors, and was made to "meet the needs of the Department" which was critically short of equipment. The Appellant's day off posed an impediment to getting the equipment repaired quickly.

Appellant has presented no evidence in the record to support his assertion of an improper, inequitable and unfair application of employee benefits, to include leave schedule, no further analysis will be done on this contention.

With respect to the allegation that the Department violated a "contract" with the Appellant in that he accepted a job on the condition that he be able to work a four day week, in the Board's view that commitment cannot be binding on all future managers and for the rest of his time as an employee. The Personnel Regulations clearly provide department heads with the authority to determine work schedules of the employees under their supervision, and, as discussed above, there is no showing that the Department's determination in this circumstance was arbitrary or capricious. It should also be noted in this regard, that the change in Appellant's hours was after his promotion to a different job.

For all of the reasons stated above, and based on a preponderance of the evidence, the Board concludes that the Department's action in changing Appellant's hours was not violative of regulations, nor arbitrary or capricious and the Board hereby denies the appeal.

INVOLUNTARY TRANSFER

MSPB CASE NO. 99-04

The Appellant, a Police Sergeant employed by the Montgomery County Department of Police (Department) and assigned to the Rockville Police District, was involuntarily transferred from Shift 7, a permanent midnight shift, to Shift 4, a rotating day and evening shift on February 15, 1998. The Department stated that the transfer action was taken by a Captain Supervisor after he became concerned during the early part of 1998 about Appellant's judgment and his handling of several incidents.

In one incident, which is being investigated by the Office of Internal Affairs (OIA), Appellant used a chemical agent to get the occupants of a house to leave. In another incident, Appellant confronted a Lieutenant who had complained about his handling of a criminal matter and refused to leave the Lieutenant's office even though the Lieutenant repeatedly asked him to leave. In a third incident also being investigated by OIA, Appellant, who had a broken hand and had been told by a Lieutenant not to take any law enforcement action, became involved in a physical altercation with a person who had been arrested and detained at the station. While there was evidence that the Captain Supervisor had discussed each of these incidents with Appellant, there was no evidence of any formal counseling.

Appellant's last performance evaluation for the period August 1996 to July 1997 prepared by a Captain (then Lt.) and reviewed by another Captain, contained ratings of mostly "Exceeds Requirements". Appellant also received very favorable comments from his supervisors on his overall performance and productivity as supervisor of Shift 7.

According to the Department, the Captain Supervisor saw a pattern developing in which Appellant was getting involved in situations in which he was accused of improper conduct. The Captain felt that Appellant was not getting an appropriate level of direct supervision on the midnight shift and transferred him to a shift involving day and evening work so that more of his work time would coincide with the hours of the Rockville District management staff. Also, because of comments being made in the Department that Shift 7 was perceived as overly aggressive, the Captain thought the shift might benefit from a "more moderate" supervision style. The Captain did not view the transfer as punitive; nor did he believe that Appellant did anything wrong but, rather, that Appellant did not use the best judgment.

Appellant was first told about his transfer on January 22, 1998 by the Captain. Appellant claimed that the transfer caused him to lose shift differential pay and an opportunity to earn overtime pay. Because he expected his assignment to Shift 7 to continue, Appellant stated that he made personal, family and community commitments which he will now have difficulty meeting. He requests that his transfer be rescinded, that he be made whole, and that he receive other relief as may be required.

ISSUES

1. Whether Appellant's involuntary transfer violated any Montgomery County Personnel Regulations, or was arbitrary and capricious or discriminatory?

2. If so, what should the remedy be?

ANALYSIS AND DISCUSSION

Although regulations of a more general nature were cited, Appellant's claim that the transfer violated the permissible reasons for transferring employees provided in Montgomery County Personnel Regulations (MCPR), Section 22 is the one directly applicable. Section 22-1 states that "Transfer of employees is a prerogative of management..." Section 22 includes as a permissible basis for a transfer "(g) the resolution of a grievance or other problems affecting the operational efficiency of a unit or organization."

The Department pointed out that an involuntary transfer is not an adverse action under the County's regulations. In this case, Appellant's transfer was made to improve the efficiency of the service of the Rockville District. Montgomery County Code (Code), Section 33-5 (b)(5) provides that both supervisors and employees have a responsibility to facilitate work performance correction and improvement. Appellant had several conversations with the Captain about the incidents which caused his supervisors to question his judgment. The record indicates that the Captain and others in the management structure believed that Appellant should be transferred from the midnight shift because:

(a) the midnight shift allowed Appellant to operate with greater autonomy and less contact with his supervisor and other members of the management staff of the Rockville District;

(b) the midnight shift exposed Appellant to a greater number of criminals than the other shifts and this constant exposure may have caused or contributed to his development of an attitude, demonstrated in a number of incidents, where he responded in an overly aggressive way;

(c) if Appellant was allowed to stay on the midnight shift, there was a greater chance that he would cause serious problems for himself and the Department; and

(d) the officers on Shift 7 would benefit from a different supervisor and a different style of supervision because Appellant sometimes demonstrated questionable judgment.

Overtime pay and shift differentials are not entitlements but only required to be paid to employees to the extent that the employees actually worked during overtime hours or during certain shifts. Thus, Appellant does not possess a property interest in overtime pay or shift differential that he could have earned had he worked such hours on the midnight shift.

Section 22-6, MCPR, gives a merit system employee the right to appeal an involuntary transfer in accordance with Section 29 of the regulations. However, the employee must sustain the burden of showing that the action was "arbitrary and capricious or discriminatory." The Appellant argues, in essence, that his transfer is arbitrary and capricious in a circumstance where he had consistently receives excellent performance reviews and was never provided notice of any performance problems. The Board finds no merit in this argument. It should be noted at the outset that there is no requirement under MCPR, Section 22 that an employee be formally counseled, or that an employee's performance evaluations be considered before a decision is made to transfer the employee. Moreover, the record reflects the Department gave reasoned consideration to the decision to transfer the Appellant, and had identified ample reasons for taking the action.

The Department's decision to involuntarily transfer Appellant from Shift 7 to Shift 4 was based on management's evaluation of Appellant's behavior and judgment as evidenced by several incidents.

The Board does not find that the material facts, as set forth in 78 findings of fact in the decision of the Chief Administrative Officer, are unclear or disputed. Therefore, the Board does not believe that a hearing is required.

CONCLUSION

Based upon a preponderance of the evidence, the Board concludes that Appellant has not sustained the burden of proving that the Department's action in involuntarily transferring him from Shift 7 to Shift 4 in the Rockville District was arbitrary and capricious or discriminatory. Rather, as the Board held in MSPB Case No. 95-12 (March 27, 1995), the Department followed applicable Personnel Regulations and had a reasonable basis for effectuating Appellant's transfer. Therefore, the Board denies the appeal and the relief requested.

MEDICAL

MSPB CASE NO. 98-09

SUMMARY OF FACTS

On May 14, 1998, in conjunction with the Applicant's medical examination for the position of Firefighter/Rescuer I, he provided a medical history that indicated 'yes' to the question "have you ever had: wheezing/asthma". Based on this answer, the County Employee Medical Examiner, requested a letter from your private physician regarding Applicant's asthma, to include diagnosis, treatment, prognosis, and fitness for duty as a firefighter. In a letter dated May 19, 1998, the Applicant's private physician, indicated that the Applicant had a long history of asthma which is treated with Atrovent prior to exercise and Albuterol as needed. The Doctor also indicated that Azmacort had been prescribed as a preventative medication. The Doctor indicated a good prognosis and believed that you were fit enough to work as a firefighter, "although this may aggravate the asthma."

Following receipt of this information, the County Medical Examiner advised the Office of Human Resources that Applicant was medically unacceptable for the position of Firefighter/Rescuer I. In his letter date June 4, 1998, the Medical Examiner stated that Applicant's condition could be aggravated by strenuous exercise, smoke, and fumes that would be experienced while fighting fires. The Medical Examiner noted that Applicant currently takes medication before exercising, and stated, "it is not always feasible to take medication during suppression or emergency rescue operations. An exercise induced attack occurring during fire fighting could incapacitate the Applicant and also, pose a threat to the safety of others."

On the basis of this evaluation, in a letter date June 9, 1998, the Office of Human Resources informed Applicant that the Applicant did not meet the medical standards of the position at that time, and that the County could not accommodate the Applicant's condition by altering the work requirements of the Firefighter/Rescuer I job.

In Applicant's appeal, Applicant relied on current experience. Applicant stated that they have not used any medication before exercising in a few months and have not used the prescribed Albuterol inhaler in over a year. Applicant also stated that they recently passed the PG County agility test without the aid of any medication and did not have any problems with asthma after the test.

In its response to Applicant's appeal, the Office of Human Resources included in their response a second letter from the Medical Examiner, which stated in pertinent part, "the fact that the Applicant's treating physician feels that fire fighting may aggravate the asthma is the crux of the matter." Also, in acknowledging that the Applicant passed the PG County agility test without the aid of medication, the Medical Examiner states that

this testing was not done in the presence of smoke and noxious fumes while wearing heavy fire fighting equipment.

ISSUE

Were the procedures followed and a decision made with respect to the determination of Appellant's medical unacceptability for the position of Firefighter/Rescuer I 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 physical condition are all specifically provided for by Sections 5-12 of the County Personnel Regulations and Administrative Procedure 4-13, Medical Standards. Applicant contend that they haven't used any medication in a few months and that they haven't used the inhaler in over a year, and therefore the County's determination is incorrect.

In the Board's view, the County's 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 facts.

The procedure followed in response to Applicant's application for employment was consistent with the regulations, and Applicant was given an opportunity to have a private physician provide input. Based in large part on that input, and the job requirements of the position for which Applicant was applying, it was determined that Applicant's condition could be aggravated in a fire fighting environment. While the Applicant may disagree 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. Applicant's appeal was denied.

MSPB CASE NO. 99-02

SUMMARY OF FACTS

On May 27, 1998, in conjunction with a medical examination for the position of Firefighter/Rescuer I, Applicant provided a medical history that indicated 'yes' to several questions relating to their surgery for aortic valve replacement on April 20, 1998. Based on this information, the County Employee Medical Examiner, Dr. X, requested a letter from Applicant's private physician regarding their cardiac surgery, to include diagnosis, treatment, prognosis, and fitness for duty as a firefighter. In a letter dated June 10, 1998,

Applicant's private physician, Dr. XX, indicated an excellent short and long term outlook and his opinion that Applicant could participate as a firefighter.

Following receipt of this information, Dr. X advised the Office of Human Resources that Applicant was medically unacceptable for the position of Firefighter/ Rescuer I. In his letter dated June 24, 1998, Dr. X stated that Applicant had a recent surgical/medical condition that could adversely affect Applicant's ability to do the essential functions of firefighting.

On the basis of this evaluation, in a letter dated June 26, 1998, the Office of Human Resources informed Applicant that they did not meet the medical standards of the position at that time, and that the County could not accommodate Applicant's condition by altering the work requirements of the Firefighter/Rescuer I job.

In their Appeal Petition to the Merit System Protection Board, relying on their current experience, Applicant states that they are capable of performing all essential functions for the position of Firefighter/Rescuer I, and that they do not need any special accommodations to perform these essential functions.

In its response to that appeal, the Office of Human Resources included in their response a second letter from Dr. X, which stated that following the Applicant's open heart surgery, they were placed on an anticoagulant medication called Coumadin. This anticoagulant treatment will need to be continued essentially for the life of the mechanical valve, or at best, long term. Adverse reactions for patients using Coumadin may include:

1. Fatal and non-fatal hemorrhage from any organ or tissue. This is a consequence of anticoagulant effect.

2. Bleeding which occurs with PT/INR in the therapeutic range warrants diagnostic investigation. (The PT/INR is a laboratory test of the blood to determine how long it takes for the blood to clot).

3. Necrosis of the skin and other tissue.

4. Other adverse reactions such as: dermatitis, hepatitis, diarrhea, vomiting, and puritis.

Another drug reference on Coumadin recommends to teach the family and patient:

1. To avoid hazardous activity (football, hockey, skiing, and dangerous work). Trauma may precipitate bleeding.

2. Avoid over the counter prescriptions which may cause serious drug infections.

Coumadin can react with a vast range of prescription or non-prescription drugs as well as a long list of common foods to precipitate bleeding.

This risk of bleeding poses a problem for the firefighter while he performs the essential tasks of his job. A firefighter faces the constant risk of injuries while engaged in a hostile and difficult working environment. He may sustain burns or trauma from falling debris, a fall from heights, or encounters with combative or panicked persons. He can encounter icy or fuel filled highways. Closely confined spaces combined with poor visibility are other hazards of the job that can lead to trauma. An injury resulting from trauma under these conditions is likely to be more severe with individuals taking Coumadin.

Dr. X also notes that the NFPA 1582, Standard on Medical Requirements for Firefighters, 1997 edition, states that "prosthetic valves are acceptable unless full anticoagulation is in effect." Applicant has a mechanical prosthetic heart valve that requires full anticoagulation (Coumadin).

Based on the above, Dr. X concluded that Applicant posed an increased risk to himself and others, should he be exposed to the dangers of firefighting while performing the essential functions of the job.

The record discloses that Applicant is currently working as a part-time Firefighter in good standing with the Frederick County Department of Fire/Rescue Services, having been hired on January 4, 1997 after meeting the qualifications and successfully completing that County's Firefighter medical examination and Physical Agility Test.

ISSUE

Were the procedures followed and a decision made with respect to the determination of Appellant's medical unacceptability for the position of Firefighter/Rescuer I consistent with the regulations and otherwise proper?

ANALYSIS AND CONCLUSIONS

Applicant contends that they are capable of performing all essential functions of the job, and therefore the County's determination is incorrect. Additionally, the Applicant contends that they clearly meet the Americans with Disabilities Act (ADA) definition of "disabled," and of "qualified employee," and that their disability does not prevent Applicant from performing the essential functions of the position. In this latter regard, Applicant contends that no accommodation is necessary to perform the functions of the position and that there is no evidence that they poses a "direct threat" to Applicant or others in performing the job.

The establishment of "medical standards", the requiring of a medical examination of Applicants for employment, and the disqualification of Applicants based on physical

condition are all specifically provided for by Sections 5-12 of the County Personnel Regulations and Administrative Procedure 4-13, Medical Standards.

In the Board's view, the County's management should be accorded substantial latitude to access 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 facts.

The procedure followed in response to Applicant's application for employment was consistent with the regulations. It was determined that Applicant's condition could be aggravated in a firefighting environment. While there may be disagreement with the conclusion reached, there is no showing that the disqualification determination is not supported by a preponderance of the evidence. Rather, the County's assessment is a reasoned consideration of Applicant's condition and potential impact on the performance of the duties of the position.

To the extent that the Applicant seeks application of ADA legal principles and/or is contending that the County's determination discriminates against them for a handicapping condition that allegedly does not impair their ability to perform the functions of the job, the Board concludes that the Montgomery County Human Relations Commission is the appropriate forum for such matters to be raised.

The appeal was denied.

MSPB CASE NO. 99-10

BACKGROUND

As part of the application process, certain job classifications are given pre-employment physical examinations to determine their medical acceptability for the position. The County has developed a medical program which includes medical guidelines for each job. An Applicant must meet these guidelines in order to be appointed.

FINDING OF FACT

On October 21, 1998, in conjunction with an application for the position of Firefighter/Rescuer II, Applicant was given a medical examination by the Employee Medical Examiner, Dr. X. As part of that medical examination, Applicant was given a hearing test. The results of the hearing test indicated that Applicant had a hearing loss in the left ear, and Applicant was so advised. Applicant was further advised that they would

be given reconsideration if they presented a hearing test conducted by an Otolaryngologist/Audiologist, demonstrating a satisfactory hearing acuity. Applicant subsequently presented a test report conducted by an Audiologist one month prior to the examination by Occupational Medical Services. This report confirmed a hearing loss.

On the basis of this evaluation, in a letter dated December 15, 1998, the Director, Office of Human Resources, informed Applicant they were medically disqualified for the position of Firefighter/Rescuer II, due to a hearing loss. Additionally, Applicant was informed that the County could not accommodate their condition by altering the requirements of the Firefighter/Rescuer II job.

After this notification, Applicant indicated that the poor hearing test results were due to a head cold at the time of the test. On Applicant's request, they were given a second test on December 28, 1998. Although the second test showed slight improvement, the results were essentially the same as the first test, indicating that Applicant didn't meet the hearing requirements of a Firefighter/Rescuer Applicant.

In Applicant's appeal, dated January 11, 1999 they indicated that the results of the second test were a lot better, and that they think their hearing is fine. Applicant also indicated that their ear doctor, Dr. XX says their hearing is fine.

In response to Applicant's appeal, the Office of Human Resources included in their response a second letter from Dr. X dated January 27, 1999, which stated in pertinent part, that Applicant's hearing impairment was evaluated as to duration of impairment, and was "determined to be permanent." In Dr. X's experience, such hearing deficits when exposed to noisy environments, as is common in the Firefighter/Rescuer position, get worse, not better.

Dr. X also notes that the National Fire Protection Agency (NFPA), an international codes and standards organization, stated in "Standard for Firefighter Professional Qualifications" (1987 Edition):

> 2-2.4.2 Hearing. The cause for rejection for appointment shall be:
>
> Hearing accuity loss by audiometric tests of 20 decibels or more for the speech frequencies (500-1000-2000 cycles) in either ear....

Med-Tox Healthcare Services, an independent research organization for environmental and occupational health standards, stated in their study that Firefighters and Rescuers are required to perform their duties in various levels of noisy environments. Hearing ability is critical in performance of duties in Public Safety positions. Med-Tox Associates, Inc. states:

> "Hearing loss attenuated by hearing aid is unacceptable.
> Pure tone loss in the worse ear not worse than 25dB in three of the four

frequencies (500 Hz, 1000Hz, 2000Hz, 3000Hz) or no greater than 30 dB in any of the three frequencies and an average of 30db for the four frequencies is acceptable for safety classifications."

ISSUES

Were the procedures followed and a decision made with respect to the determination of Applicant's medical unacceptability for the position of Firefighter/Rescuer II consistent with the regulations and otherwise proper?

ANALYSIS

The establishment of "medical standards," the requiring of a medical examination of Applicants for employment, and the disqualification of Applicants based on physical condition are all specifically provided for by sections 5-12 of the County Personnel Regulations and Administrative Procedure 4-13, Medical Standards. Applicant contends that his hearing is fine, and therefore the County's determination is incorrect.

In the Board's view, the County's management should be afforded 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 facts.

CONCLUSION

The procedure followed in response to the application for employment was consistent with regulations. Applicant was offered a reconsideration of the evaluation if they presented a hearing test conducted by an Otolaryngologist/Audiologist. Applicant was also afforded the opportunity to take another hearing test, based on their feeling that a head cold that they had at the time of the first test affected their hearing. Based on the results of the three hearing tests, it was determined that Applicant's condition could be aggravated in a firefighting environment. While Applicant 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. Applicant's appeal was denied.

REDUCTION-IN-FORCE

MSPB CASE NO. 99-08

FINDINGS OF FACT

Employment History

The Appellant, a medical doctor, began employment with the County on November 22, 1991. Appellant's medical specialty is obstetrics and gynecology (OB-Gyn), and throughout her employment with the County's Department of Health and Human Services (DHHS) she worked exclusively at functions within her specialty. There is no issue as to the satisfactory nature of Appellant's employment history.

Reduction in Force

For a number of years, DHHS has been "privatizing" the delivery of medical services. That is, reducing those services within the County and contracting for them in the private sector. Such initiatives have lead to RIF's and medical service employees losing their County jobs. The County's Fiscal Year 1999 operating budget provided for the privatization of "women's health services" (OB-Gyn) functions and the abolishing of one physician position. The only County physician performing the duties identified in the budget for elimination was the Appellant.

The Appellant testified that in November 1997, she was advised of the intention to privatize the OB-Gyn functions and of the budgetary intention to eliminate one physician position performing those functions. She further testified that DHHS managers spoke to her about the possibility that she would take another position and assured her that she would not lose her job. However, in February 1998, she was told that there would be no position for her after July 1, at which point she began looking for other employment, both in and out of County government.

Testimony reflects that the budget providing for the elimination of the physician position did not pass until late May 1998. However, in late November 1997, DHHS managers had met with the DHHS' Human Resources team leader, to discuss the development of a request for a "service needs exception" to assure the retention of a position described as a Board certified pulmonologist with expertise in the treatment of tuberculosis.

On April 28, 1998, identical notifications were sent to the Appellant and Dr. X that DHHS would be abolishing one of two filled positions in the Physician job classification on July 1, 1998. The Physician job classification which both the Appellant and Dr. X were in, is not specialty specific, making no reference either to the OB-Gyn duties of the Appellant or the tuberculosis treatment and control duties of Dr. X. The April 28 letter also advises of placement services that will be provided and that, "If

alternative placement cannot be found, the least senior employee(s) will be issued final Reduction-In-Force letters," which are to be received a minimum of thirty (30) days prior to the date of separation.

In a memo dated April 29, 1998, from the Chief of the Public Health Service, to the HR Team Leader, the circumstances and essentiality of Dr. X's employment and work in tuberculosis treatment and control are described. It is also contended that a "board certified" pulmonologist, which Dr. X is, also offers the efficiency of having someone who is able to read x-rays. The memo concludes, "It is therefore my recommendation that the incumbent, Dr. X, a board certified pulmonologist, be maintained in this position and that the position be designated as a specialized need." In a memo dated May 28, 1998, the Director of DHHS requested the Director of the Office of Human Resources, a Service Needs Exception for a physician position in the "Tuberculosis Control Program." The memo notes that the position being abolished is encumbered by the Appellant, "who is the most senior in the class." Requested is for approval to maintain Dr. X's position.

On May 27, 1998, one day before the date of the Director's memo requesting the Service Needs Exception, a Human Resources Specialist provided the Director of OHR an analysis of the DHHS Director's "attached" request. The testimony was that a draft of the DHHS Director's memo had been forwarded to Human Resources prior to the transmittal of the formal request and, because of time constraints, review had been initiated based on the content of the draft. The HRS's memo recites applicable regulations, and the "unique" duties of Dr. X, as differentiated with those of the Appellant. The concluding paragraph states:

> The absence of the education and experience in all aspects of the TB identification, treatment, and prevention would leave the Appellant at a disadvantage in performing the duties required of a Physician in the TB Control Program. Moreover, the wealth of information and experience in the TB specialty field as well as his "on the job" training acquired by Dr. X since his employment with Montgomery County in 1993 would be impossible to impart on another Physician within a six month period. Lastly, it is also highly unlikely that the Appellant would be able to obtain a State Board Certification as a Pulmonologist within a six month period, an essential requirement of the Physician position at issue since she would have to complete a three year medical training requirement in Pulmonology prior to certification.
>
> For all of the reasons noted above, I recommend approval of the DHHS Director's request.

The Director, OHR's approval of the recommendation was documented by her initialing of the OHR's memo. By letter dated May 28, the Director, OHR, advised the Appellant that procedures require that she issue a notice of termination due to reduction-in-force at least 30 days prior to the effective date. And, "This letter will serve as your

formal notification ... that your employment with Montgomery County will be terminated at the close of business ... on July 3, 1998." Appellant was advised of appeal rights and the opportunity to continue to work with OHR staff to find an alternative to termination.

Testimony revealed that the Appellant initiated discussions with DHHS managers about the possibility of postponing her termination date to give her the opportunity to find alternative employment and because of personal financial circumstances. By letter dated June 10, the Director of OHR advised the Appellant that additional funding had been obtained and that Appellant's position had been extended through December 31, 1998. DHHS managers testified that to accommodate the Appellant, the filling of a nurse position was delayed so as to use those funds to keep the Appellant an additional six months. On November 23, 1998, a new termination notice was issued to the Appellant, effective December 31.

On December 14, the Director, OHR, responded to a November 25 letter from the Appellant, wherein she contended that she had not yet received final notice of termination. In her letter, she recounts the communication sent to the Appellant and the hand serving of a termination notice on December 4, concluding that she would be terminated 30 days from December 4. In this letter, the Director of OHR states:

> Although you have more seniority with Montgomery County than the least senior affected employee, Dr. X, (DHS) requested that (OHR) ... grant a service need exemption to Dr. X since he was a Board Certified Pulmonologist. These credentials would be essential to his assigned position in the Tuberculosis Clinic .... After careful consideration, the Director of OHR approved the service need exemption.
>
> The Appellant was terminated effective January 4, 1999.

Respective Medical Qualification

It is undisputed that the duties remaining were those related to the treatment and control of tuberculosis. It is also undisputed that these were the duties that were performed by Dr. X. There was considerable testimony and documentation of Dr. X's accomplishments and reputation in his field. It is not contested that Dr. X was extremely qualified to perform the duties for which he was retained.

APPLICABLE REGULATIONS

Section 26-2(a) of the County Personnel Regulations provide, in pertinent part:

> When a reduction-in-force becomes necessary, the resulting transfers, demotions and terminations must be based on one or more of the following factors:

(1) Service needs;
(2) Seniority; or
(3) Work Performance

With respect to "Service needs," Administrative Procedure section 3.2 provides:

> SERVICE NEEDS - These are the specialized duties or functions which will remain after a reduction- in-force has taken place. These specialized duties or functions are unique and different from other positions and are not performed by all incumbents of the class in the department. Service needs may provide the basis for an exception to the seniority and/or performance based criteria for lay-off. Service needs will require knowledge, skills, and abilities which are imperative to satisfactory performance but will not include capabilities which can be acquired readily within a brief period of time (approximately 6 months or less). A department may request an exception to retain the unique functions of a particular position within a class by providing documentation as to how the position differs from others in the class and department and substantiating the service need for such position. The Office of Human Resources will then conduct a job analysis to evaluate the tasks, their required qualifications, and the qualifications of remaining employees.

ISSUES

1. Was the service needs exception procedurally flawed and thereby violative of applicable regulations?

2. Was the service needs exception substantively flawed and thereby violative of applicable regulations?

ANALYSIS & DISCUSSION

1. The Appellant contends, in essence, that there was no need for a service needs exception in that applicable regulations and past practice provided for the retention of the senior employee in the class, the Appellant, and that the service needs exception relied upon is flawed procedurally in that rather than being the independent analysis required by Administrative Procedure section 3.2, it was a hastily prepared by OHR, and is a superficial rubberstamp of the request from DHHS.

Administrative Procedure section 3.2 defines "service needs" as "specialized duties or functions which will remain after a (RIF)." "These specialized duties or functions are unique and different from other positions and are not performed by all incumbents of the class...." In the Board's view, the record amply demonstrates that the tuberculosis treatment and control duties which were to remain after the RIF were "specialized." There was considerable uncontested testimony on the quantity and complexity of the tuberculosis problem in Montgomery County, including, but not limited

to, its treatment in the HIV population and of treating patients recently arriving from less developed countries where they had varying levels of treatment. Similarly, the Board concludes that the specialized duties are unique and different from those performed by the Appellant, the only other incumbent in the class. During her employment with the County, the Appellant had worked exclusively in OB-Gyn activities, duties and functions having little if any similarity to those remaining after the RIF. In the Board's view, the decision to seek a service needs exception was not violative of regulations.

Administrative Procedure section 3.2 requires that upon receipt of a request for a service needs exception, OHR will then conduct a job analysis to evaluate the tasks, their required qualifications, and the qualifications of the remaining employee. There is no question that DHHS and OHR allowed their intention to request a service needs exception to get sidetracked, because they had reason to believe that the Appellant would either obtain other employment or would not be interested in the position remaining after the RIF. As a result, OHR was put in a position of hastily accomplishing the regulatory requirement and not conducting as elaborate and "independent" a job analysis as might normally be done. However, the Board feels that both the letter and spirit of the regulatory requirement was met. OHR reviewed the duties to be performed and the respective training and experience of the two people in the class. The Director of OHR acted on a product that adequately set forth the information appropriate for a decision to be made.

On the basis of the above, the Board concludes that the procedures of the service needs exception were not violative of applicable regulations.

1. The Appellant contends with respect to the content of the request for a service needs exception that it was substantively flawed in that the inclusion of the requirement for a certified pulmonologist was not necessary to the position and was included just to assure that Dr. X was retained, and, further, it incorrectly concluded that the Appellant could not acquire the capability to perform the function in six months. As to the former, the Appellant points out that the vacancy announcement that led to Dr. X's hiring makes no reference to certification in pulmonology, although the County notes that it does say, underscored, "trained in pulmonary diseases."

It is clear that Dr. X was a board certified pulmonologist, a qualification that the Appellant clearly could not acquire in six months, and that both the request for the service needs exception and the job analysis reference the "must" nature of that requirement. We do not believe however that the inclusion of this requirement in the circumstances of the case makes the service needs exception flawed. Administrative Procedure section 3.2 provides that the process look to "knowledge, skills, and abilities." The function that was to remain included what Dr. X brought to it, board certification in pulmonology. That a different/lesser job could have been done by someone who did not have such certification is not the point. The County wanted to retain a person whose particular knowledge, skills, and abilities permitted them to do the duties that would remain after the RIF.

Similarly, it is clear that the Appellant could not acquire within six months the capabilities to deliver the function of tuburculosis treatment and control. Work in the TB field is clearly complicated and unique. Even assuming her work in Iraq and the United Arab Emirates had included tuburculosis treatment, information that is not reflected on her resume, Appellant had performed no such work during her employment with the County.

Accordingly, on the basis of the above, the Board concludes that the service needs exception was not substantively flawed and therefore not violative of applicable regulations.

CONCLUSION & ORDER

On the basis of the above, the Board concludes that the Appellant's termination from employment with the County as a result of a RIF was consistent with applicable regulation and is not otherwise improper.

In consideration of the reasons stated above, and based on the evidence in the record, the Board hereby denies the appeal.

TERMINATION

MSPB CASE NO. 99-09

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

The Appellant was hired by OMB in December 1994, as a Budget Specialist II (grade 22). According to the testimony, he began employment at a stage of the budgetary preparation cycle where he could not be assigned the type budget preparation which would be his normal duties. He was instead assigned to assist a senior OMB budget employee, a circumstance which continued to the Spring 1995 start of a new budget preparation cycle. There is no contention that his work assisting a senior budget employee was other than satisfactory, and, at the conclusion of six months employment, he successfully completed his probationary period.

In the Summer and Fall of 1995, the Appellant was assigned a full range of budgetary work, which, according to the Director of OMB, was of varying complexity. While the Director testified concerning unsatisfactory work by the Appellant on what was referred to as the "mowing project," it does not appear from the testimony that the quality of the Appellant's work was seriously questioned until after November 1995, when he was placed under the supervision of a Senior Budget Analyst, (SBA) who had previously worked for OMB, and just returned to become a manager there. The SBA testified that she found problems with the Appellant's communication, both verbal and written. While not questioning his thought processes, the SBA felt that the Appellant's words did not convey what would be a correct meaning. The SBA states that she would have to send the Appellant's work back to him repeatedly and, often, finally having to rewrite herself when he was unable to produce an acceptable product.

In response to the Appellant's problems, management began to modify his assignments, both as to complexity and quantity, but found that whatever work he was assigned was unsatisfactory. In May 1996, the Appellant was assigned to participate in a County sponsored writing course consisting of a total of 24 hours. The SBA testified that the instructor of that course told her she was discouraged by the Appellant's progress in that he did not seem to apply a lesson learned one day to another exercise, and that the instructor did not feel that additional instruction would be of benefit.

Appellant does not dispute that the SBA was frequently critical of his work, but disputes the justification of the criticism. Appellant testifies that while he might make

spelling or minor errors in his writing, the implication of his testimony is that the SAB was unreasonably critical of his work. He characterizes the writing class as mostly focusing on grammar, with little one-on-one attention.

Prior to 1997, OMB did not have a system of written performance appraisals, but the Appellant had a performance plan established in August, 1996, and received his first written appraisal in July 1997, wherein he received an overall ranking of "below requirements." The narrative portion of the appraisal discusses the deficiencies identified by supervision. The appraisal package includes Appellant's counter-comments and a reply.

At some point in Appellant's performance discussions with the SBA, he advised her that he had once been told that he had dyslexia (learning disabled). This information, along with observations already made by management, prompted the Director to request a "special medical evaluation" of the Appellant from County Medical Director Dr. X. That is, a "fitness for duty evaluation" made in accordance with Section 5.12 of the County Personnel Regulations. The request relates the Appellant's position and duties, and the fact that his then current performance appraisal had an overall rating of below requirements. It states that during a discussion of his work with his supervisor, Appellant had mentioned that he had dyslexia, which, coupled with supervisory observations, "suggests that he may not be suited for work required of a Management and Budget specialist." The request then recounts management's view of Appellant's performance problems.

Dr. X testified that upon receipt of the request, he met with the Appellant to discuss with him his employment situation and the medical evaluation that he would be doing. Dr. X determined that to make his evaluation, he would need to have the Appellant examined by a specialist in learning disabilities, and contracted for such from a Ph.D psychologist. On September 15, 1997, the psychologist provided to Dr. X a "Fitness for Duty Evaluation," which describes the Appellant's background, test findings, and overall impressions, which has as a conclusion that the Appellant "appears to have a learning disorder that is affecting his ability to function on the job." Particularly noted is a "marked area of deficiency" in writing. The psychologist concludes:

> Given these findings, several recommendations should be considered. (Appellant) should be given a writing coach, with a view to provide 1-1 tutoring for his writing. After three months of tutoring, if his performance is still not satisfactory, the County should consider the use of a speech recognition program, . . . which is relatively low cost computer program that will process dictation into a written report, as an accommodation. At the current time, Appellant appears unfit for full duties.

Dr. X testified that upon receipt of the psychologist evaluation, he concluded that he needed another opinion, particularly to address the concern as to the findings on whether accommodations would improve performance. In Dr. X's ultimate evaluation he

stated with respect to this concern, "This is in light of the fact that tutorial sessions for sharpening skills and a smaller workload were already addressed and found to be insufficient to provide improvement in his performance." Dr. X sought this second opinion from another Ph.D psychologist. This evaluation, dated January 1, 1998, recounts in great detail "behavioral observations," relevant history, and eleven categories of test results. In his "Summary, Impressions, and Recommendations," this psychologist states:

> The prognosis and complete work place accommodations for (Appellant) are currently unknown. Until the results of both his physical and neurological exams are completed, it is unclear whether his problems might be corrected/accommodated and if so how they might be corrected/ accommodated. However, given his past history of work performance and the results of this evaluation, it is clear that without some form of intervention/accommodation, (Appellant) is unable to perform at the level expected for success in his current position.

Referencing the accommodations recommended in the first evaluation, this psychologist states that while they might assist him in providing a better performance on the job,

> ...due to the potential nature of the additional difficulties, suggested by this evaluation it is not clear that providing only those accommodations would be enough to contribute to (Appellant's) success.

By memorandum dated February 2, 1998, from Dr. X to the OMB Director, the results of the psychologist evaluations are summarized. It concludes, that based on those evaluations, "it is my recommendation that (Appellant) be found not fit for duties as a specialist in the Office of Management and Budget." It rejects the accommodations suggested by the second psychologist, because most had been attempted and were unsuccessful.

On February 6, the Appellant and the SBA met with a Human Resources Specialist (HRS) who specializes in the area of disability, particularly vocational rehabilitation. The purpose of this meeting was to advise the Appellant of the medical evaluation and to begin to explore alternative course of action. Apparently, an outgrowth of this meeting was an understanding that the HRS would assist the Appellant in finding another position in the County that he would be able to satisfactorily perform. Over the next few months, the Appellant applied for various County jobs, but was not successful. The testimony reflects that while he had some willingness to accept a job at a somewhat lower grade, he was negative about jobs substantially below the grade he had been working at.

On May 28, 1998, the Director initiated a request that the Appellant be given a disability retirement on the basis of Dr. X's finding that he was not fit for duty. Appellant opposed the request, and declined to participate in the development of the information related to the request. In a decision dated December 16, 1998, the Disability

Review Panel concluded that disability retirement is not recommended, on the basis, "Medical documentation has not been provided to allow the Disability Review Panel the ability to determine whether or not a physical or mental impairment is present." On January 8, 1999, Chief Administrative Officer (CAO), relying on the Disability Review Panel, issued a decision finding that the Appellant was not eligible for disability benefits.

On November 13, 1998, the Appellant received from the Director a Notice of Intent to Terminate, "...based on the finding" by Dr. X that the Appellant was not fit for his duties as an OMB specialist. The Notice recounts the performance problems, the fact that a writing class has been tried and work load reduced. Separate responses were filed by the Appellant and his attorney. In them, issues are raised as to whether the County had met its obligation to seek to accommodate his condition, whether there is a justification for the proposed termination, and the absence of a recent appraisal.

With respect to the appraisal, Appellant was not given his scheduled performance appraisal in the Summer of 1998. Given the fact that steps were already underway to deal with the performance problems by seeking to place him somewhere else in the County, or get him a disability retirement, management contends that it seemed to them that it would be unnecessarily punitive to give Appellant another negative evaluation.

On December 14-15, 1998, the County's Office of Human Resources (OHR) gave its approval to the Appellant's termination. The official form of the approval was a sign off on the County Personnel Action Form by someone not specifically identified on the Record. Submitted into evidence is a document providing delegations from the Chief Administrative Officer. In that document, the authority to determine whether reasonable accommodation could be made in accordance with the County's policy on employment of people with disability is delegated to the Personnel Director, now called the Director of OHR. The document further provides that this authority can be further delegated within the personnel office. The County OHR Director testified that she had been briefed by staff on the Appellant's situation and was aware of the relevant circumstances. She states that while her initials are on the termination Personnel Action Form, they were probably placed there by the County's Labor Relations Manager, who often acts as acting director when she is not there.

On December 16, 1998, Appellant received from the Director a termination notice, which recounts the history of the employment concerns, fitness for duty evaluations, and responds to contentions made in the responses to the notice of intent to terminate. Appellant was terminated effective December 28, 1998.

ISSUES

1. Was the termination of the Appellant consistent with applicable regulations?

2. Has the County amply demonstrated that it had a reasonable basis for terminating the Appellant?

ANALYSIS AND DISCUSSION

1. The Appellant's contentions that his termination was in violation of cited County regulations will be treated in sequence.

A. Personnel Regulation Section 5-12 provides, in pertinent part:

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

Appellant contends that this regulation was violated in two ways. First, there is no evidence in the record that the Chief Administrative Officer made the requisite determinations as to whether the problem is correctable and whether or not a reasonable accommodation could be made. Second, that the record will show that the County did not meet the reasonable accommodation test, specifically with respect to the accommodations suggested by the first psychologist.

With respect to the fact that Section 5-12 requires approval by the Chief Administrative Officer, in the Board's view this requirement is met when the requisite approval is accomplished by a person with appropriate delegated authority. A specific delegation is accorded to the OHR Director, and that delegation can be re-delegated within OHR. There is no dispute that the OHR Director was sufficiently knowledgeable about the facts of Appellant's situation. The fact that the Personnel Action Form was actually signed off on by someone other than the OHR Director does not, in the view of the Board, render the action regulatorily flawed.

The more substantive issue is whether the County met its "two prong" regulatory test prior to taking an action based on the medical findings. That is, a determination "if the problem is correctable," and, "whether or not reasonable accommodation could be made in accordance with the County's policy on employment of the handicapped and disabled." The County clearly made these determinations, which are articulated in the Medical Examiner's fitness for duty determinations and described in the termination documents sent to the Appellant. The Board however has the responsibility to review

those determinations to see if they are supported and were appropriate in the circumstances of the case.

With respect to the first prong of the test, "correctable," the County's testimony amply documents that the Appellant's work was deemed unsatisfactory and that steps taken to correct deficiencies, i.e., training, instruction/guidance, reduced work load, had not been successful. Moreover, the tests done by both psychologists found profound problems in the Appellant's ability to produce written products. The proffered defenses that the County did not introduce unsatisfactory work products, that Appellant was highly educated, that Appellant's work products submitted in relation to this case are lucid and understandable, and that his supervisor's standards might have been part of the problem, do not negate the fact that management had a reasonable basis for concluding that Appellant could not produce work of the caliber required. Considerable time, training, and direction did not bring Appellant's work up to requirements, even when the quantity and complexity were dramatically reduced. The writing instructor expressed doubt as to improvement and the psychologists both concluded that the Appellant had a disability that could not be corrected. In the Board's view, the record demonstrates the validity of the determination that the problem was not correctable.

The second prong of the regulatory test is whether or not reasonable accommodation could be made. The Board has ascertained that while the County once had in place an "interim" Administrative Procedure on "Reasonable Accommodation," that Procedure was not in force when the Appellant was terminated. In the absence of any County policy, it is left to the Board to review the County's determination, without the guidance envisioned by section 5-12. By way of accommodation, the actions taken with respect to the existing position was to reduce the quantity and complexity of assignments. Outside of the existing position, considerable effort was made to assist the Appellant in finding a position within County government that he could do, and would accept. This was not successful. There is no evidence that the Appellant suggested additional accommodations while employed, his defense relying only on the fact that the first psychologist suggested specific items in his evaluation, i.e., writing coach, one-on-one tutoring, and speech recognition software. While these suggestions, may, arguably, be reasonable, the County correctly argues that the first two equate to what had already been tried. As to the latter, there is nothing in the record to show that speech recognition software is an accommodation that would make the Appellant fit for duty. On the basis of the record, the Board concludes that the County's determination that there were not additional reasonable accommodations that could be made is consistent with the spirit and intent of the regulations.

B. Section 8-4 of the Personnel Regulations requires an annual evaluation. The Appellant received an evaluation in 1997, which put in motion the events ultimately leading to his termination, but none was done in 1998. Appellant's contention in this regard is that his termination in 1998 is regulatorily flawed because it was not based on a timely evaluation. In the facts of the case, the Board rejects this contention. The 1997 evaluation was the basis for the Appellant's termination. From that point on, the County was following procedures to respond to the performance problem, seeking a medical

evaluation as to his fitness for duty, exploring disability retirement, and seeking alternative placement. In these rather prolonged circumstances, it is entirely reasonable for the County to bypass an evaluation in the Summer of 1998, at a time when Appellant was much involved in the issues of whether he was fit for duty. Accordingly, the Board does not feel that the failure of the County to give Appellant a performance evaluation in 1998 renders his termination in violation of regulation.

C. Section 25-1 of the Personnel Regulations defines "termination," and reasons for such action. Paragraph (e), cited by the Appellant, provides:

> Similar to Appellant's contention with respect to Section 8, Appellant's contention with respect to Section 25-1 concerns the absence of a 1998 performance evaluation. That is, he could only be terminated on the basis of an evaluation conducted under Section 8, which was not done in 1998.

As discussed above, in the Board's view, the Appellant was terminated on the basis of his 1997 performance evaluation. The fact that the steps taken to effectuate a performance based action continued throughout 1998 does not provide a basis for finding a violation of regulations.

2. Apart from the allegations of specific violations of regulations, the Appellant contends that there are evidentiary considerations that would lead to the conclusion that the County has not met its burden of proof with respect to a justification for termination. Evidentiary considerations noted are:

- The County did not enter into evidence any samples of Appellant's alleged unsatisfactory work, while there are in the exhibits examples of Appellant writing efforts that show a clear, understandable style of writing.

- An implication that the County Medical Examiner, was under orders from the Director to provide a negative fitness for duty conclusion, which is why when the first psychologist's evaluation did not provide the right support, he sought a stronger one from the second psychologist.

- D. X's conclusion was inconsistent with the medical determination by the Disability Review Panel in that no basis was shown for granting a disability retirement.

- Support for the County's action is, at best, inconsistent. The two medical evaluations differ in considerable part, and both differ from that of the Disability Review Panel.

The County offers as their burden of proof justifying a termination by a "preponderance" of the evidence. Assuming that to be an appropriate test, in the circumstances of this case, the Board concludes that the record provides such justification. That is, the evidence demonstrates that the Appellant was unable to

satisfactorily perform his assigned tasks and that time and training was not going to improve the situation. In reaching this conclusion, it is not necessary that the Board conduct a de novo review of pieces of work, substituting its judgement for that of an Appellant's supervisors. Rather, the Board can look at events to decide that management's actions were reasoned and appropriate. In this case, it is uncontroverted that Appellant was producing work deemed by management to be unsatisfactory. This went on for a considerable length of time, and training and instruction did not change the situation. Moreover, medical evaluations indicated that the Appellant's work was not going to get any better.

The Board finds little import in the alleged "inconsistencies." First with respect to those alleged in the evaluations by the two psychologists, they are not inconsistent in the essential findings of the Appellant's ability/fitness to do the work of a budget examiner. The fact that one of the two suggested some additional accommodations does not make a substantive difference when it comes to reasonable justification, as discussed above.

As to the inconsistencies with evaluation by the Disability Review Panel, that group was faced with a somewhat different issue, i.e., whether the Appellant had the capacity to perform his usual work activity, not whether he satisfactorily performed his assigned work. Moreover, the Panel found that there was not provided sufficient medical evidence for them to formulate an opinion regarding the employee's capacity to perform his usual work activity. The fact that the Appellant did not participate in the process probably had a major impact on the outcome.

Finally, the Board does not feel that the record provides a basis for crediting the speculation that Dr. X was somehow "conspiring" with management to get the right medical evaluation. Dr. X did not rely on his own judgement as to the Appellant's fitness for duty, but sought a specialist's evaluation. When the first evaluation seemed to be inconsistent with what he knew about prior attempts of accommodation, he sought a second opinion. Even if he had a predisposition to a certain conclusion, the fact that he sought that second opinion does not provide a basis for concluding that the process was flawed.

Accordingly, the Board concludes that the County has demonstrated, by a preponderance of evidence, that it had a basis to terminate the Appellant.

CONCLUSION & ORDER

On the basis of the above, the Board concludes that the Appellant's termination was consistent with applicable regulations and that the County had a reasonable basis for the termination.

In consideration of the reasons stated above, and based on a preponderance of the evidence in the record, the appeal was denied.