Merit System Protection Board Annual Report FY 2001

Members:

Harold D. Kessler, *Chairman*
Robert C. Hamilton, *Vice Chairman*
Brenson E. Long, *Associate Member*

***Executive Secretary*:**
Merit System Protection Board
Waddell Longus

Prepared by:
Susan W. Goldsmith
Executive Administrative Aide

Montgomery County, Maryland
Merit System Protection Board
100 Maryland Avenue, Room 113
Rockville, Maryland 20850
240-777-6620
FAX: 240-777-6624

June 30, 2001

TABLE OF CONTENTS

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD..... 1

DUTIES AND RESPONSIBILITIES OF THE BOARD..... 1

APPEALS PROCESS……..4

SUMMARY OF DECISIONS ON APPEALS

COMPENSATION……..5

COMPLAINT……12

DISMISSAL……...14

GRIEVABILITY……26

MEDICAL……..31

PROMOTIONAL PROCESS……..….35

TIMELINESS……..... 51

TRANSFER……56

* * * *

OVERSIGHT RESPONSIBILITIES……...63

2001
ANNUAL REPORT OF THE MONTGOMERY COUNTY MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

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

The Board members in 2001 were:

Harold D. Kessler	-	Chairman (Appointed 2/97)
Robert C. Hamilton	-	Vice Chairman (Appointed 1/97)
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 35.3 Appeal Period of the Personnel Regulations (October, 2001). 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.

COMPENSATION

Case No. 00-14

SUPPLEMENTAL DECISION AND ORDER OF THE BOARD

This is a supplemental final decision of the Merit System Protection Board (Board) on the Appellant's appeal concerning resolution compensation received while deployed with a Florida Task Force.

BACKGROUND

In its original decision, the Board concluded that it was not unreasonable or inconsistent with rules or regulations to compensate the Appellant based on what Appellant would have been paid as a County employee for the period of time Appellant was voluntarily deployed to Florida to assist in fighting forest fires, such method of compensation being provided for by the provisions of the Emergency Management Assistance Compact (EMAC). The Board rejected the Appellant's contention that compensation should have been on an "hour-for-hour" basis, (frequently referred to as "portal-to-portal pay") as is done when County fire fighting personnel have been deployed based on the Federal Emergency Management Agency's (FEMA) agreement with the State of Maryland and Montgomery County.

The Appellant appealed the Board's decision to the Circuit Court for Montgomery County Maryland (Court), which concluded, in pertinent part, that it was "not satisfied that the record of what the understanding was, what the disclosures were, and how the selection of firefighters took place," facts that the Court deemed material. The Court stated, "So then I think to that limited extent, this matter needs to be remanded . . . for a hearing and further consideration by the Board before a final decision is reached." The Court also viewed as instrumental "if there was down time in Florida, what did it constitute? How does it compare to down time called stand by time here in Montgomery County when it is paid at a rate of 15 percent . . ." The Board convened a hearing to take testimony on the matters cited by the Court. The Board rejected Appellant's request that the hearing not be limited to the matters cited by the Count, concluding that there was no showing that there were other issues of fact necessitating an expanded hearing.

FINDINGS OF FACT

How the Selection of Firefighters Took Place

The genesis for the Florida deployment was a request by the Governor of Florida, that came to the Maryland Emergency Management Agency (MEMA), which, in turn, made a request to Maryland local jurisdictions, including Montgomery County. The County Chief of Fire and

Rescue authorize the deployment of ten volunteers. A computer-aided dispatch message was sent to all stations soliciting volunteers. The message stated, in pertinent part,

> Florida has requested through the Maryland Emergency Management assistance in fighting wildland fires there.
>
> . . . Those wanting to go need some degree of training and experience in wildland/forest fire fighting.
>
> . . . It is a two week commitment, 12 hours on, 12 off.
>
> Personnel would be used from station fill-ins to line operations. Housing could be field tents to motels. All other expenses will be paid.
>
> If you are interested fax to the scheduling office your name, contact number for today and previous training/experience.

Approximately 90 requests were received. An Assistant Chief selected the ten firefighters who would be dispatched to Florida on the basis of experience and the needs of the deployment.

Those selected were provided with a July 2, 1998 "Deployment Information" memo, which provided, in pertinent part, "Individuals who are deploying to the State of Florida to assist in the control of the wildfires will be deployed under the Emergency Management Assistance Compact (EMAC)." The memo makes no reference to how the volunteers were to be compensated. On the same date, the Office of Maryland Governor issued a press release on the deployment, which also specifically references that assistance was being rendered to Florida through the EMAC.

Understandings and Disclosures on Rate of Compensation

As described above, the written announcement seeking volunteers for a Florida deployment made no reference to the method of compensation. Further, based on the testimony put forward by both the Appellant and the County, during the days leading up to their departure for Florida, no County manager addressed the method of compensation.

A Captain, who was designated to be in charge of the firefighters deployed to Florida, testified that on the morning of the group's departure, the Captain asked an Assistant Chief, who was there to see them off, how the task force was to be compensated. The Captain testified that the Assistant Chief responded that it was his understanding that they would be paid "port-to-port for the entire time we were there." The Captain also testified that on several occasions while they were deployed, when the Captain was having daily telephone conversations with another Assistant Chief, the Captain asked how the task force was to be compensated, and that the Assistant Chief answered that it was his understanding that they were to be paid "the entire time they were gone, similar to a FEMA deployment."

The first Assistant Chief denies having had the above-described conversation with the Captain, or having made any representations to any of the deployed firefighters as to their compensation while they were deployed. The second Assistant Chief testified that extensive notes were kept, usually twice a day telephone conversations with the Captain, and has no recollection of ever discussing the issue of how the task force would be compensated. The second Assistant Chief testified that the first conversation on the subject with a deployed firefighter was when the second Assistant Chief went to the airport to pick them up upon their return, at which time the Assistant Chief brought along information on how they were to fill out their time sheets and the Appellant expressed unhappiness over the method of compensation. The Appellant testified that the initial information on the method of compensation was on the way to the airport to leave for the deployment when Appellant asked the Captain to find out how they were to be compensated. The Appellant stated that while at the airport, the Captain told Appellant that it was the Captain's understanding from first Assistant Chief that they would be compensated "portal-to-portal, similar to a Collapse Rescue Team deployment." Appellant also testified that during the deployment, Appellant asked the Captain to inquire of the second Assistant Chief about how they were to be compensated and that the Chief subsequently told the Appellant that the second Assistant Chief thought they would be compensated portal-to-portal, the same as the Collapse Rescue Team.

Mr. Blank, who is employed by MEMA, and who was the official who coordinated the response to the Florida request, testified that on two occasions while in Florida, the Captain asked Mr. Blank if the deployed firefighters were going to be paid "portal-to-portal" from when they left Montgomery County until they returned. Mr. Blank states that Mr. Blank told the Captain, "no, that's not the way you're reimbursed under this (MEMA) agreement." Mr. Blank states that Mr. Blank told the Captain that the firefighters would be paid for the actual hours worked, according to the rules of their respective jurisdictions.

Downtime While on Deployment

While the task force spent some brief time fighting brush fires, the majority of their work time was "filling in" at local fire stations while the local firefighters fought the forest fires. The task force worked 12 hours on-12 hours off schedules. Initially they were instructed to stay around the area where they were housed, but after a few days they were told by the Captain that they could leave the compound, but to let him know where they were going. The Appellant testified that it was their understanding that they had to let the Captain know where they would be because they might be called out, but this never occurred. While off duty, the firefighters were free to go wherever they wanted, as long as they advised the Captain that they would be gone. All meals were provided at a field mess in the area where they were housed.

Administrative Procedure 4-15 provides as to "Stand-by Status" that an employee must, "(1) remain at the principle place of residence; or (2) provide an alternative telephone number where the employee may be reached; or (3) be available and able to be contacted by pager." Employees in such status are entitled to "stand-by pay," which is 15 percent of their regular hourly salary rate.

Deployment Reimbursement Alternatives

Title 19-101 of the Maryland Code provides for the EMAC. Article IX, Reimbursement, provides that any state rendering aid to another state shall be reimbursed by the state receiving the aid for any loss or damages to or expenses incurred in the operation. As the Florida deployment was pursuant to the EMAC, MEMA billed the State of Florida for expenses incurred by all of the participating jurisdictions. Florida sent a check to Montgomery County covering the wages and benefits of the deployed firefighters.

The Memorandum of Agreement between FEMA and the Fire and Rescue Department Urban Search and Rescue Team also provides for Task Force members to be compensated in accordance with the sponsoring jurisdictions pay schedules and policies, ". . . as agreed to by the Federal government, the State, and the local jurisdiction." It is undisputed that when the Search and Rescue Team was deployed pursuant to the FEMA Memorandum of Understanding, they were paid "portal-to-portal."

POSITION OF THE PARTIES

County

The County contends that the deployment was in all respects pursuant to the EMAC, and, accordingly, the County had no discretion to provide compensation other than consistent with how the County would be reimbursed. That is, for the actual hours worked, as the firefighters would have been paid if not deployed. As to the issue of "stand- by" status raised by the remand, the County contends that since MEMA officials required the firefighters to remain in contact with them and available for work during off duty hours, Appellant's off duty hours qualified as standby status. The County states in this regard that Appellant, in fact, received 71 hours of standby pay, compensable at the required 15 percent of regular rate.

Appellant

The Appellant contends that, in fact, the County does not have a written procedure for the type of out-of-state deployment at issue in this case, which, Appellant suggests, is the source of the varying testimony on how deployed firefighters were to be compensated. The Appellant notes that this was the first deployment under the EMAC, while there were more recent FEMA sponsored deployments, which provide a basis for both firefighters and Department managers to speculate that portal-to-portal compensation would be paid. Further, in the absence of any policy, to compensate EMAC deployed firefighters differently than FEMA deployed firefighters, is unfair. As for the County's contention that compensation must be based on the EMAC, Appellant contends that this is a misfocus. The EMAC, according to Appellant's theory, dictates how the County is to be reimbursed by the State of Florida, but does not govern how the County chooses to compensate the firefighters.

ISSUES

1. What were the task force members told about compensation prior to the deployment?

2. Did the task force members "downtime" in Florida constitute the equivalent of "standby status?"

3. Was Appellant's "actual hours worked" method of compensation appropriate?

4. Is Appellant entitled to attorney fees?

ANALYSIS AND CONCLUSIONS

1. None of the written communication provided to the task force makes reference to their method of compensation. As to verbal communications, we have a stark credibility issue, with the Captain testifying that the first Assistant Chief and the second Assistant Chief specifically told Appellant that the task force would be compensated portal-to-portal, as is done with FEMA sponsored deployments, and both Chiefs denying saying any such thing. There is little in the way of objective criteria for resolving this credibility issue. However, because the Court directed that the Board determine what the task force was told about rate of compensation, and because it is the role of Board to make factual determination, including the resolution of credibility disputes, we will do so in the instant case. In the Board's view, the totality of the circumstances does not support the contention that the Captain and the second Assistant Chief stated as a fact that the task force would be paid on a portal-to-portal basis. While it is quite possible, because of the FEMA supported deployment of the search and rescue team, that such compensation was mentioned. However, the Board doubts that the two Assistant Chiefs would have stated a result with any certainty when there was no basis for saying it, particularly when everyone knew that the Florida deployment was under the auspices of the EMAC.

2. While not technically meeting the requirements of standby status in that the task force members could leave the area without being able to be reached by telephone or beeper, the County takes the position that the firefighters were in the equivalent of a standby status because of the limitations on their movement, that is, having to tell a supervisor when and where they were going. Further, it is undisputed that they were compensation an additional 15 percent of regular pay, as provided for by the regulations.

3. In its original decision, the Board noted that the deployment of the Florida task force was through the EMAC agreement, which provides for compensation based on what the employees would have been paid as a County employee. Based on the EMAC agreement, the County would not be eligible for reimbursement at a level that would provide the "portal-to-portal" method of compensation urged by the Appellant. The Board concluded:

> The evidence does not support the contention that the parameters of one agreement must be superimposed on another to maintain parity in pay rates. In the Board's view, the determination to pay firefighters on the Florida Task Force consistent with the parameters of the EMAC agreement versus the FEMA agreement is not unreasonable or inconsistent with the rules and regulations.

The Court viewed as relevant what the disclosures were to the employees prior to their deployment. As discussed above, the written disclosures which generated the volunteers from which ten were selected, made no reference to method of compensation. The Board's resolution of the credibility issue is that possibly on the morning of the departure there were references to the type portal-to-portal compensation during a FEMA deployment, but clearly there was no formal statement of policy of this result. The Board does not view the possible references to a FEMA deployment as a basis for a different outcome.

As to the status of downtime while in Florida, and its comparison to standby status while in Montgomery County, the record reflects that their Florida status is similar to standby at home, and the County paid them accordingly. The Board does not view this as a basis for a different outcome.

Finally, with respect to the Appellant's contention that in the absence of specific policy on method of compensation on a EMAC deployment, the County had the discretion to compensate the task force by the portal-to-portal method, as is done in a FEMA deployment, and to do differently is unreasonable and discriminatory. While it might be advisable for the County to formalize their policy on the issues of compensation when employees are deployed either through the EMAC or FEMA agreements, it is, in the view of the Board, not unreasonable to compensate consistent with how the County would be reimbursed. While this may result in comparably situated employees being compensated differently, the Board does not view this as creating an obligation on the County to compensate employees in an amount which exceeds the reimbursement.

Accordingly, the Board concludes that the Appellant's actual hours of work compensation was appropriate.

4. The Board's authority to direct the payment of attorney fees is part of our remedial authority provided for in Section 33-14 of the Montgomery County Code. The Board therefore ordinarily grants requests for the reimbursement of attorney fees and costs where an Appellant has prevailed, at least in part, on the merits, and is receiving some remedy. In the instant case, as discussed above, the Board has found that Appellant's actual hours worked method of compensation was appropriate. Hence, Appellant has not prevailed and an award of attorney fees and costs is not appropriate.

The Board views the instant case as distinguishable from the Decision of the Circuit Count for Montgomery County, Maryland in the matter of Civil No. 211084. In that case, the Court had originally remanded the case to the Board on the basis of a finding that the Board had made an

erroneous conclusion. On remand, the Board denied the appeal and the request for attorney fees because the Appellant had not prevailed. On review, the Court sustained the Board on the denial of the appeal but overruled the Board on the attorney fee issue, concluding that the Appellant was successful in Appellant's appeal insofar as Appellant's efforts resulted in the vacating and remanding of the case due to the Board's mistake. In the instant case, there is no finding that the Board made a mistake, with the remand being based solely on the desire of the Court for specified factual information.

ORDER

In consideration of the reasons stated above, and based on the evidence in the record, the Board hereby denies the appeal of the method of compensation paid the Appellant during Appellant's deployment to Florida, and denies Appellant's request for attorney fees.

COMPLAINT

This is a determination of the Montgomery County Maryland Merit System Protection Board (Board) on the request filed by (Complainant) that, in accordance with Section 33-10 of the Montgomery County Code, an investigation be conducted with respect to allegations of illegal or improper actions by Montgomery County Government.

Background

On March 8, 2001, the Complainant filed a grievance under the Montgomery County Administrative Grievance Procedure, 4-4 asserting that Complainant's transfer from Complainant's position as Controller of the Department of Liquor Control to the Department of Finance was arbitrary, capricious, and discriminatory, and taken in retaliation for Complainant's exercise of free speech and for discharging the responsibilities of Complainant's position, which included providing unfavorable information regarding the Director of the Department of Liquor Control. Also on March 8, the Complainant filed with the Board a request that under Montgomery County Code Section 33-10, the Board conduct an investigation of illegal and improper actions, the alleged actions being the same as those described in the grievance.

Applicable Law and Regulation

Section 33-10 of the Montgomery County Code provides for the right of an employee to file with the Board a disclosure and/or complaint alleging illegal or improper action, and the authority of the Board to initiate an inquiry of any person suspected of taking retaliatory or coercive action. Section 33-10(e) of the Code provides, in pertinent part:

> Should the Board's staff determine that the subject matter of the complaint involved allegations more properly the subject of an employee grievance or complaint to be filed under the provisions of the personnel regulations or other laws or regulations, the complainant shall be so advised and the complaint dismissed; and the period of limitations for the bringing of such other action shall be deemed to run from the date of the dismissal.

Section 33, "Disclosure of Illegal or Improper Acts," of the Montgomery County Personnel Regulations provides with respect to the Board's processing of Complaints such as that filed by the Complainant:

> 31-5. Investigation of Complaint. The staff of the Board may conduct an investigation to determine if there is probable cause to believe a retaliatory or coercive action has been taken or attempted. The investigation must be completed within 30 days of receipt of the complaint, and the staff must take one of the following actions:

(a) If it is determined that the subject matter of the complaint involved allegations properly covered by the grievance process or other laws or regulations, the complainant must be so advised in writing, and the complaint dismissed;

Administrative Procedure 4-4, Section 2.10, defines "Grievance" as:

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

Analysis and Conclusions

The above-described provisions of the Code and Personnel Regulations mandate that the Board dismiss a Section 33-10 complaint/request for investigation where it is found that the complaint involves allegations properly covered by the grievance procedure. In the Board's view, the instant complaint very clearly involves allegations covered by the Administrative Grievance Procedure. In the complaint, the Complainant alleges that Complainant has been adversely affected (e.g., reassignment to lesser job) by supervisory actions which are violations of policies, procedures, regulations, and laws. These are allegations clearly covered by the grievance procedure, where grievance is defined, in pertinent part, as a ". . . violation of any policy, procedure, regulation, law or practice which is sufficiently established to have precedential value." It should be noted in this regard that the Complainant not only does not dispute coverage by the grievance procedure, but has filed a grievance over the identical allegations set forth in the request for an investigation. Accordingly, the Board concludes that, pursuant to the provisions of Section 33-10 or the Montgomery County Code and Section 33-5 of the County Personnel Regulations, that the instant complaint and request for an investigation must be dismissed, and it is so ordered.

DISMISSAL

Case No. 00-22

DECISION AND OPINION

This is a decision on an appeal from a disciplinary dismissal from Montgomery County service on the basis of specified conduct in the performance of duties. A hearing was held before the Board on September 18, 19, and 20, 2000, during which the County and Appellant, respectively, presented testimony, documentary evidence, and closing statements. Following the close of the hearing, the Board requested the parties to provide comments on whether the discipline received by the Appellant does or does not meet the regulatory requirement that disciplinary actions must be progressive in severity.

FINDINGS OF FACT

Background

Fleet is one of seven divisions making up the Department of Public Works and Transportation (DPWT). Fleet's essential mission is to acquire, maintain, repair, and dispose of the County's vehicles. Maintenance functions are primarily performed at a motor pool operation. Appellant was hired into the position of Chief of Fleet on December 4, 1994. In June 1999, the Appellant's supervisor was hired from outside County employment into the position of Director of DPWT.

According to Appellant's supervisor, the supervisor assumed the position as Director of DPWT at the same time that new budgets were being prepared, and, very early in the Director's involvement in reviewing the budget requests, the supervisor became concerned about the administration of the "Motor Pool Fund," which is an accounting fund that results from Fleet "charging" County agency users for its service for acquisition and maintenance of vehicles. Included among the funds in the Motor Pool Fund are funds for the future acquisition of vehicles, which is referred to as the "replacement fund." The Appellant, as the Chief of Fleet, had the responsibility of "managing" the Fund and, because the type "revolving funds" used by Fleet are complicated, the supervisor states that in the first few months in supervisor's position, the supervisor spent a great deal of time becoming acquainted with it. The supervisor contends that supervisor was not satisfied with the type of information being provided by the Appellant, particularly with respect to how much Fleet customers were being charged, and how funds were being accounted for.

In July, 1999, the supervisor was advised by the Internal Audit Section of the County's Department of Finance (Finance) that audit services were available, primarily through a contract with the outside audit firm, and that Finance intended to conduct audits in the DPWT. The

supervisor was asked to designate priorities, and the supervisor requested that they start with the replacement fund. The audit was conducted through the latter months of 1999. The audit firm and Finance representatives began to provide oral reports to the supervisor in December 1999, the content of which were the same findings as were later included in the audit firm's draft written report and, ultimately, in what became the final report given to the County after Appellant's dismissal. According to the County's testimony, on January 6, 2000, the supervisor was given a briefing by the Director of Finance, and Director of the Office of Management and Budget, on the preliminary findings of the firm's audit, which are discussed below. On January 7, 2000, the supervisor removed Appellant from Appellant's position as Chief of Fleet, reassigning Appellant to the Executive Office of DPWT. Temporarily assigned to act as Fleet Director was the supervisor.

On March 22, 2000, Appellant was issued a Statement of Charges for Dismissal. A "Notice of Disciplinary Action - Dismissal" dated May 26, was received by the Appellant on May 31. The dismissal notice relies exclusively on alleged conduct by the Appellant as Director of Fleet. Although some of the allegations are based on matters discovered between January 7 and March 22, 2000, there are no allegations raised concerning Appellant's performance during that period.

Dismissal Notice

Appellant's dismissal notice bases the action on the allegation that Appellant had ". . . failed generally in performing their duties." The dismissal notice from the supervisor states, in pertinent part:

> Your managerial failures and actions have adversely impacted the fiscal, operational, and administrative integrity of Fleet. Your actions and inactions have undermined the County's ability to provide a safe, orderly and productive work environment at Fleet. Your actions and inactions and general insubordination . . . are unacceptable for any County employee, and especially in your case, as a senior manager in Montgomery County Government. In particular, you have: (1) ignored or selectively observed County laws, regulations, policies and procedures; (2) disregarded and ignored the directives of your superiors; and (3) failed to properly manage your subordinate employees, consistent with the requirements of the County's merit system. I no longer have confidence in your ability to effectively lead and manage the Division of Fleet Management Services.

Citing provisions of the County Code, Administrative Procedures, and, specifically, "causes for disciplinary action" listed in Section 28-2 of the Montgomery County Personnel Regulations (MCPR), the Notice discusses seven alleged conduct matters. Set forth below is a discussion of the allegations in the Notice, and Appellant's counter:

I. Failure to Properly Manage the Motor Pool Fund

The audit report contained the following major findings with respect to the replacement fund (summarized):

- Fleet had no written policies or procedures for the procurement and replacement functions of the operation of the replacement fund;

- No distinguishable replacement fund had been created;

- Sufficient funds were not available to replace vehicles;

- There was a lack of properly prepared reports to allow for the administration of the replacement fund;

- Agencies are billed a replacement fee for vehicles exceeding their life cycle;

- Agencies are not paying equitable charge backs under Fleet's bill rate calculation; and

- "Deadlined" vehicles continue to be billed to agencies.

On the basis of the Auditor's report, and, observations, the supervisor concluded in the notice of disciplinary action that Appellant had: failed to maintain adequate records and documentation for the replacement funds collected; and appeared to have no concept of the replacement funds operation, nor system for the setting of rates charged to customers. It was contended that in some instances County departments were being charged for vehicles that had been retired, while in other instances County departments were not being charged for vehicles in operation. These allegations had come from the Auditor's report.

Appellant describes the development of a Fleet maintained record of funds designated as the replacement fund in the monthly billing record, which were totaled each year and reflected in Fleet budget documents. Appellant also contends that throughout Appellant's tenure as head of Fleet, there was no evidence of any dissatisfaction with respect to the replacement fund, including from the County Office of Management and Budget, prior to the arrival of the supervisor and the outside audit. Appellant also contends that there was always money available to purchase replacement vehicles, and that so called replacement funds and operating funds were all commingled, until 1999 when they separated operating and replacement funds in internal accounts. With respect to the audit, Appellant contends that the audit is riddled with assumptions based on faulty data such as the application of current operating procedures to previous administrations and the use of replacement rates developed by the auditors to determine how many dollars should have been collected since the inception of the fund.

II. Failure to maintain accurate vehicle/equipment inventory

Relying on findings from the audit report, and the observations of people working in Fleet after the Appellant was removed from Appellant's position, it is alleged that the Montgomery County Code mandated annual audit of vehicles and equipment was inaccurate. It is further alleged that Fleet had failed to process into service over 150 new police cars, in some instances for more than one year, causing "far-reaching and significant adverse impact on the County and its ability to serve its citizens."

With regard to the accuracy of the inventory, the audit found that there was not an official inventory of unassigned vehicles stored at Fleet facilities, and that the manual log maintained did not distinguish between assigned and unassigned vehicles. The Appellant agrees that new vehicles were accounted for in a ledger system, but that Appellant's staff was transferring such data into the "FASTER" system that the audit contended was not being properly used. In Appellant's testimony, Appellant described how the data allegedly not maintained could be ascertained from the FASTER system.

The allegation concerning the failure to process new police cars concerns the Fleet practices with respect to preparing purchased vehicles to become police cars, which involves painting and the installation of radios and other police car equipment. The audit disclosed that in a Fleet administered lot, there were some 150 vehicles destined to be police cars, some since April 1999, and some vehicles received in 1997 were still being assigned in the December 1998 through March 1999 period. It was also disclosed that as vehicles were received, they were being parked in the lot where they were stored in a manner which made it difficult to access older vehicles, and, as a result, the older vehicles were experiencing such problems as dead batteries, and paint and tire damage.

According to the Appellant, a significant inventory of vehicles destined to be police cars was standard procedure, resulting from the way that newly purchased vehicles arrive. The practice was to prepare vehicles for the Police Department as they were needed to comply with replacement schedules. Appellant contends that there had never been any dissatisfaction with this delivery schedule and, to Appellant knowledge, the Police Department was not in need of any more vehicles than were supplied. A witness from the Police Department who is presently assigned to Fleet testified that to their knowledge there was no problem with the rate at which police vehicles were being processed into service. However, on cross examination, this witness acknowledged that in the last two negotiations between the County and the Fraternal Order of Police there had been an issue on getting police cars on the street, and that the Department had a list of officers waiting to be issued vehicles.

III. Refusal to properly implement directive to coordinate direct on-site mechanic support for highway services

In July 1999, the supervisor instructed the Appellant to work with the Division Chief of Highway Services to come up with a plan for putting some mechanics into Highway Services

depots, rather than requiring that all Highway Services vehicles be brought to Fleet for repair and maintenance. Over the next several months the supervisor repeatedly inquired as to whether instruction had been implemented, and found that it had not. When the first snowfall occurred on December 22, 1999, the supervisor found out that when Highway Services called in its crews at 4:00 a.m., the Fleet mechanics failed to report until 6: 00 a.m.

The Appellant states that Appellant was complying with the supervisor's instruction, contending that initially Appellant wanted to make sure that actually putting mechanics in the depots was what was wanted. The Appellant stated in Appellant's testimony, " I didn't want to make (the change) if I didn't have to." The Appellant also states that Appellant wanted to make sure that all of the issues associated with the change were identified, and that Appellant had the opportunity to discuss those issues with the supervisor. It is undisputed that the instruction was not accomplished until November 1, but that the problem on December 22 was that the Appellant did not understand the supervisor's instruction as requiring that the Fleet employees work the same hours as the Highway Services employees.

IV. Hiring Contract Employee

Appellant "hired" a contract employee to do clerical work for Fleet, undisputedly in violation of County personnel and procurement regulations. According to the Appellant, this person had first come to them as a temporary, and had been a very good employee. There was a desire to retain this person and a member of Appellant's staff advised Appellant that it could be done by contract. Appellant assumed that Appellant's employee was correct in the recommendation and a contract was let, without any attempt to seek advice and approval from appropriate County sources.

V. Continued use of unauthorized performance appraisal form

In August 1999, the Director of the County's Office of Human Resources (OHR), advised Appellant that OHR had received inquiries from four Fleet employees concerning the performance evaluation form being used by Fleet, and their investigation had disclosed that Fleet was not in compliance with Administrative Procedure 4-12, Performance Planning and Appraisal (AP). Appellant was requested to comply with the AP. Notwithstanding this instruction, in October 1999, two Fleet employees complained about the continued use of a performance appraisal process that was not in conformity with the AP. This led the supervisor to send a memo to all Division Chiefs concerning the form to use, but after Appellant's transfer from the Division Chief position, it was discovered that the improper appraisal process was still being used.

The Fleet Service Coordinator, an Appellant subordinate, testified that OHR's instruction on what appraisal form to use was "complied with," but acknowledges the likelihood that there were Fleet supervisors who were still using the old forms, contrary to OHR instructions.

VI. Failure to reconcile FASTER accounting system with FAMIS accounting system

One of the audit findings was that "FASTER," which is a vehicle management database and is used to bill Fleet's customers, contained inaccurate and incomplete data, and there was considerable testimony on the number of such errors found by County employees who came into Fleet after the Appellant was removed. "FAMIS" is an accounting system used, as relevant here, to collect the charges Fleet users pay for the services provided. The dismissal notice alleges that the supervisor ordered the Appellant to reconcile the two systems, but that after the Appellant was removed, the Appellant's replacement advised the supervisor that no such reconciliation had been accomplished in either November or December 1999.

Appellant contends that the errors in FASTER were a result of a conversion in the computer operating system and that Appellant was working with the vendor to correct the problem. As for the reconciliation of FASTER and FAMIS, Appellant contends that there would always be differences between the two systems. "If you looked at the FASTER system, you had what you immediately did or spent." "When you looked at the FAMIS system, it was always delay, because it was done by bills and reconciliation, how you paid." Appellant contends that Appellant told the supervisor that they had been trying to reconcile FASTER and FAMIS for three years, and it was virtually impossible to do unless someone from outside the division assisted, which was not provided.

VII. Bus Acquisition Contract

The supervisor contends that in July 1999, the supervisor learned that the Appellant might have accepted lap top computers in lieu of late payment penalties, for ordered buses that were not delivered on time. Subsequent to Appellant's January 7, 2000 removal from Appellant's position, it was determined that Fleet had accepted approximately 20 lap top computers in lieu of monetary penalties prescribed by the terms of a contract for the late delivery of buses, all in violation of County procurement laws and regulations.

It is undisputed that the lap top computers were accepted in lieu of penalty payments, and that such a transaction is inconsistent with the bus purchase contract and procurement processes. According to Fleet Service Coordinator, with Appellant's knowledge, negotiated the acceptance of the lap tops in lieu of penalty payments. This resulted from a situation where the firm from whom the buses had been purchased was contending that they would go bankrupt if they had to pay the late fees. The Fleet Service Coordinator provides a highly complex account of the circumstances, and in their view, the justification for the transaction, basically contending that the County got the best deal it could. In response to the question of why County legal and/or procurement resources were not involved, the Fleet Service Coordinator contends that Fleet had always handled such negotiations itself. The lap tops themselves became Fleet inventory and were used for vehicle diagnostic purposes. In this regard, the Fleet Service Coordinator testified that had the penalty provision of the bus acquisition been handled in accordance with the terms of the contract, the funds would have gone back to the County general fund, and "It was not

going to go back into ours so it didn't make any sense to take the money back because we did all the work but weren't getting benefits."

The Notice of Disciplinary Action concludes:

> While these charges are brought collectively, each charge in and of itself can support discharge. I cannot rely upon you to bring to my attention any failure in sufficient time to correct the problem, nor can I rely upon you to act when directed when you have a different view of what you think must be done. As you know, I am very willing to listen to your ideas and suggestions, but when I have made a decision on the proper course to follow, I expect that those decisions will be implemented, or that I will be advised regarding the problems encountered in implementation. This you seem unwilling or unable to do.

ISSUES

1. Has the County sustained, by a preponderance of the evidence, that the disciplinary removal of the Appellant from Appellant's position as Chief of Fleet was reasonably justified and consistent with the applicable regulatory provisions?

2. Has the County sustained, by a preponderance of the evidence, that the disciplinary dismissal of the Appellant from County employment was reasonably justified and consistent with applicable regulatory provisions?

3. If it is determined that the disciplinary dismissal is not appropriate, what penalty should be accorded?

ANALYSIS AND CONCLUSIONS

1. In the view of the Board, the County has proved that each of the counts of the dismissal notice are essentially factually accurate. As found by the audit, the administration of the Fund, including the replacement fund, lacked precision and proper documentation. As found by the audit and described in detail by County witnesses, the equipment inventory was replete with inaccuracies, and the manner in which police cars were processed was, at best, inefficient and not responsive to customer needs. The Appellant had reacted slowly to a direct supervisory order to place Fleet mechanics in the highway services facilities. A contract employee had been hired by Fleet in violation of procurement regulations. Despite direct instructions from OHR, supervisors were permitted to continue to use an unauthorized performance appraisal form. The FASTER and FAMIS systems were not reconciled, notwithstanding specific instructions that this be accomplished. The settling of the penalty payment for late delivery of buses was accomplished (acceptance of lap tops in lieu of monetary payments) in a manner inconsistent with applicable regulations and the bus acquisition contract, and without coordination with other County offices.

The Appellant does not contest the accuracy of any of these counts. Rather, the Appellant relies on explanatory circumstances. The Fund, including the replacement fund, was administered in a manner that had historically been deemed satisfactory and there had always been funds to purchase new vehicles. The errors in the inventory, which they were in the process of correcting, were caused by computer software problems, and police cars were put on line in a manner that met Police Department requirements. The delay in putting mechanics in the highway services location was to provide an opportunity to insure that all problems were resolved, and they were so located by November 1. The manner in which the contract employee was hired was consistent with his staff's advice. There were advantages to the unauthorized performance appraisal forms and they were getting around to complying with the instruction to use the authorized form. The FASTER and FAMIS systems just won't reconcile. The manner in which the bus acquisition contract was settled, obtaining the lap tops, was as good a deal as they could get, and served Fleet well.

The Appellant argues that overall Fleet was well managed by Appellant, and that any proven defects were in the process of being corrected, and they did not impair the operation of Fleet. Appellant suggests that as the counts relied upon were either so lacking in substance, or were untrue, that there was some "political" reason for his removal and termination. The suggested, but not supported, reason being discontent on the part of the union which represents Appellant's subordinates.

While we categorically reject the contention in the Notice of Disciplinary Action that each charge in and of itself can support discipline, we do conclude that the County has sustained that, collectively, the proven allegations provided a basis for Appellant's removal from the position of Fleet Chief. It is important to stress that the Appellant held a significant management position with responsibility for a large and important County function. Until the appointment of a new DPWT Director, Appellant's performance was deemed satisfactory, but the evidence shows that the supervisor found reason to have legitimate concerns with Appellant's performance, and that the audit provided ample evidence of mismanagement sufficient to provide a basis for the January 7 removal of the Appellant from Appellant's position. While the conduct relied upon to support the removal are of varying significance, particularly justifying Appellant's removal from the Fleet Chief position are the failure to manage the motor pool and replacement funds; the manner in which new police vehicles were processed; the somewhat purposeful delay in implementing the instruction to provide on-site support for Highway Services; the use of improper procedure for hiring a contract employee; and the manner in which the bus acquisition contract was handled. Accordingly, the Board concludes that the County has sustained, by a preponderance of the evidence, that the disciplinary removal of the Appellant from Appellant's position as Chief of Fleet was reasonably justified and consistent with applicable regulatory provisions.

2. Montgomery County Personnel Regulations Section 28, which was relied upon in the Appellant's Notice of Discipline, provides in Section 28-2:

> . . . . Except in cases of theft or serious violations of policy or procedure that creates a health or safety risk, <u>disciplinary action must be progressive in severity</u>.

> The severity of the action should be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record and other relevant factors. (Emphasis supplied)

Section 28-2, "Causes for disciplinary action," is a list of seventeen offenses, which include, as relevant herein:

> (e) Failure to perform duties in a competent or acceptable manner;
> (g) Insubordinate behavior by failure to obey lawful directions given by a supervisor;
> (h) Violations of established policy or procedure;
> (i) Negligence or carelessness in the performance of duties;

Section 28-3, "Types of disciplinary action," is a list of eight penalties, in order of severity, from oral admonishment to dismissal.

The Board requested the parties provide comments on the question of whether the discipline received by the Appellant does or does not meet the requirements of 28-2, "especially in regard to the requirement that disciplinary actions must be progressive in severity."

In its response, the County did not address the specific language of 28-2, nor contend that it means anything different than its literal language, but relies on decisions of the Federal Merit System Protection Board where dismissal with no prior discipline were upheld, and contends that it is not unreasonable for public employers to hold upper level managers to a high level of conduct and knowledge of work rules. Noting each of the counts against the Appellant, and their relationship to their assigned duties and responsibilities, the County states that, "the supervisor could not in good conscience allow Appellant to continue in Appellant's position." The County contends that it may take into account the damage to its reputation when choosing an appropriate sanction for Appellant, stating, "The County may impose a severe sanction . . . to communicate to the public that it will not countenance gross mismanagement and to maintain its reputation for efficient use of taxpayer funds. Any lesser sanction would permit Appellant to continue to mismanage and subject the County to additional damage."

The Appellant's submission stresses that the County has produced documents supporting mismanagement dating from August 1997, but that Appellant's performance reviews from December 1994 through June 1999, were consistently high, and that Appellant had no prior discipline during his preceding five years on the job. Appellant contends that the County failed to follow its own regulation that discipline be progressive, and it was a clear violation of Appellant's rights to dismiss Appellant from Appellant's position when the alleged violations occurred sequentially over a long period of time. Appellant also cites the Section 28-1 provision that " ... a disciplinary action against an employee must be initiated promptly when it is evident that the action is necessary to maintain an orderly and productive work environment," and contends that the County failed to promptly initiate disciplinary action. The Appellant states in this regard, "The events underlying (the accusations) were known to the County several months before the Statement of Charges for Dismissal was issued on March 22, 2000."

Notwithstanding its imperative wording, in the Board's view, the language of Section 28-2, "disciplinary action must be progressive in severity," does not provide an absolute ban on a penalty without there having been a prior less severe penalty. The language on progressive discipline must be read in conjunction with the sentence which follows that conveys discretion in the selection of penalty after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record, and other relevant factors. To interpret the language at issue as always requiring evidence of a prior less severe discipline would lead to the unreasonable interpretation that management could not select any of the disciplines listed in Section 28-3 without having first imposed a lesser discipline.

While concluding that Section 28-2 does not provide an absolute ban on a discipline without there having been a prior less severe penalty, the Board views the imperative as placing on the County a rather significant burden of proof that the selection of penalty, and the rejection of lesser penalty, is justified by all of the circumstances of the situation. This is particularly true when the discipline at issue is dismissal.

As to the appropriate discipline, the Board has concluded that the County has proved that each of the counts of the dismissal notice are factually accurate. We also conclude that among the bases for discipline is conduct that falls within the Section 28-2 list of causes for disciplinary action. The failure to manage the motor pool fund constitutes a 28-2 (e) failure to perform duties in a competent and acceptable manner. The delay in implementing the instruction to provide Highway Services on-site mechanics and the continued use of an unauthorized performance appraisal form constitute 28-2 (g) insubordinate behavior by a failure to obey lawful directions given by a supervisor. The manner in which the contract employee was hired and the manner in which the bus acquisition was handled constitute 28-2 (h) violations of established policy or procedure. The manner in which new police vehicles were processed constitutes 28-2 (i) negligence or carelessness in the performance of duties.

While these are certainly serious matters and justify disciplinary action, in the Board's view, the totality of considerations envisioned by Section 28-2 provide substantial support for the conclusion that the discipline of dismissal is inappropriate and must be mitigated to a lesser penalty. The considerations leading to this conclusion are:

- All of the counts relied upon by the County are attributable to the Appellant in Appellant's capacity of Chief of Fleet, a position that Appellant had been removed from, an action the Board has concluded was appropriate.

- Many of the defects in management attributed to the Appellant are methods of operation which had been deemed satisfactory prior to the arrival of the supervisor.

- To the extent that the counts against the Appellant are more performance than conduct matters, there is no evidence of any attempt to give the Appellant an opportunity to improve Appellant's performance.

- To the extent that the counts are more conduct matters, there was little if any warning of the consequences of such conduct.

- The County's submission on the discipline focuses on Appellant's removal from the position of Chief of Fleet and offers nothing to indicate that Appellant could not perform satisfactorily in some other capacity.

- There has been no prior discipline of the Appellant in his some five years of County employment. That is, disciplinary action was not progressive, as certainly encouraged by Section 28-2 of the Personnel Regulations.

Accordingly, the Board reverses the Appellant's dismissal.

3. As discussed above, while we concur that the County has demonstrated a justification for Appellant's removal from the Chief of Fleet position, and, for that matter, Appellant's lack of qualification for managerial/supervisory positions because of the nature of the defects found, we see nothing that disqualifies Appellant from a non-managerial/non-supervisory position for which Appellant is otherwise qualified. Accordingly, the Board concludes that an appropriate mitigation of the discipline accorded the Appellant is that Appellant be offered the highest non-managerial/non-supervisory position for which Appellant is qualified. Further, it is concluded that Appellant should receive back pay at the rate of the offered position from June 6, 2000, to the starting date for the new position. Should Appellant decline the offered position, the period for which Appellant is due back pay shall stop as of the date of such declination and the County shall have no further obligation to reinstate Appellant.

ORDER

Appellant's appeal of removal from the position of Chief of Fleet is denied. Appellant's appeal of dismissal from County employment is sustained. The County is ordered to offer to the Appellant the highest non-managerial/non-supervisory DPWT position for which Appellant is otherwise qualified and to pay Appellant back pay at the rate of the offered position from June 6, 2000, to the date Appellant either assumes the offered position or declines such offer.

Case No. 00-22

DECISION ON REQUEST FOR RECONSIDERATION

On December 4, 2000, the Montgomery County Merit System Protection Board (Board) in its decision in Case No. 00-22, and ordered, in pertinent part, that the County offer to the Appellant the highest non-managerial/non-supervisory DPWT position for which Appellant is otherwise qualified and to pay Appellant back pay at the rate of the offered position from June 6, 2000, to the date Appellant either assumes the offered position or declines such offer.

The County has filed a request for reconsideration requesting that the Board amend its order by specifying that the County be ordered to offer the Appellant the highest non-managerial/non-supervisory vacant DPWT position, contending that the current order requires the County to displace another County employee occupying the position that they are required to offer the Appellant. The County also requests that the decision be amended to require the Appellant to accept the County's employment offer within five (5) working days. Appellant contends that as the County has not identified the highest non-managerial/non-supervisory position for which Appellant is qualified, nor specified which, if any, vacant position it intends to offer, there is insufficient information necessary to consider the County's request. Appellant further contends that the County has failed to offer support for the assertion that it would be improper to displace an employee to accomplish this placement. As to a required period of time for acceptance of an employment offer, Appellant submits that the period should be no less than 15 calendar days.

It was and is the Board's intention that Appellant be offered the highest non-managerial/non-supervisory DPWT position for which Appellant is qualified. To grant the County's request that the order be amended by limiting the remedy to a vacant position creates the potential for Appellant to be offered a lesser position, thereby defeating the Board's intention. Further, the Board rejects the contention that the directed offer be limited to a vacant position because of the unsubstantiated claim that to do otherwise would necessitate the termination of an existing employee. In this regard, the Board notes the record testimony that on January 6, 2000, it was decided to remove Appellant from the position of Chief of Fleet and on January 7, Appellant was placed in another position, which Appellant held until Appellant's June 6 termination. It should also be noted in this regard that while the Board certainly does not wish the termination of another employee to accomplish the directed remedy, the Federal Merit System Protection Board, whose decisions the County has cited, has found that circumstances may dictate such a result to remedy an improper personnel action. (See for example Meier v. Dept. of Interior, 3 MSPR 247) In the Board's view, there is a strong likelihood that compliance with its order can be accomplished without terminating another employee.

The Board grants the request that the decision be amended to provide a specified period of time for the Appellant to respond to the ordered offer of a position, and concludes that ten (10) calendar days from the date of the offer is reasonable.

On the basis of the above, the County's request that the decision be amended to limit the offer of the highest non-managerial/non-supervisory position for which the Appellant is qualified to a vacant position is denied; and the request that the decision be amended to specify a period of time for the Appellant to respond to the offer is granted, such period being ten (10) calendar days.

GRIEVABILITY

Case No. 98-01

In Case No. 98-01 (Feb. 24, 1998), the Merit System Protection Board (Board) denied Appellants' appeals of the Labor/Employee Relations Manager's determination that their grievances over the assignment of assorted lawn maintenance duties were not grievable under the administrative grievance procedure. The Board concluded that the administrative grievance procedure could not be used by an employee in a unit of exclusive recognition to grieve over matters covered by the collective bargaining agreement, and that the assignment of the duties at issue was so covered. The Circuit Court for Montgomery County, Maryland affirmed the Board's decision. Upon review, the Maryland Court of Special Appeals found that the Board incorrectly determined that Appellants' disagreement with the County concerning their duty assignments was a matter covered by the collective bargaining agreement, and thus was not grievable under the County's administrative grievance procedure. The Court of Special Appeals reversed the Board's judgement, and remanded the case to the Circuit Court to remand to the Board for further proceedings, consistent with its opinion. The Court of Special Appeals further ordered that costs were to be paid by Montgomery County. The Circuit Court has now remanded the case to the Board for further proceedings consistent with the Opinion of the Court of Special Appeals. Accordingly, the Board remands the grievances to the Montgomery County Director, Office of Human Resources for further processing under Administrative Grievance Procedure 4-4.

Case No. 01-02

Two Appellants appealed the determination of the Labor/Employee Relations Manager (LERM) and the interpretation of the Chief Administrative Officer (CAO). The LERM determined that Appellants' grievances were not grievable under the Montgomery County Regulations. The CAO determined that there is no provision under the retirement article of the Montgomery County Code to allow a refund or other benefit for over-payment regarding their purchase of military leave. The Board has consolidated the appeals.

FINDINGS OF FACT

The Appellants are employed as District Chiefs with the Montgomery County Fire and Rescue Service. In 1999, the County Council enacted Bill Number 18-99. This legislation established the Deferred Retirement Option Plan and also set limitations upon the maximum number of years employees could utilize in connection with obtaining retirement benefits. The Appellants were affected by the new legislation. In May 2000, Appellants wrote to the Benefit Specialist (BS) in the Office of Human Resources (OHR), requesting relief with respect to prior purchase of credits for military service. In June 2000, the BS advised Appellants that the law did

not provide for a refund of unused purchase time. On June 23, 2000, each Appellant filed a grievance under Administrative Procedure 4-4, requesting benefits for monies which they paid to the Montgomery County, Maryland, for the purchase of credits for military service.

By memorandum dated July 6, 2000, the LERM determined that the grievances were not grievable, as the issues raised concerned matters involving an interpretation of the Employees' Retirement System (ERS) of Montgomery County Code, which under Code Section 33-56 should be directed to the CAO.

By letter dated August 4, 2000, the legal representative of the Appellants wrote to the Board appealing the decision of the County, that issues raised in the Appellants' Grievances were not subject to review under the County's Administrative Procedure 4-4, and that they were directed to pursue another forum.

By letter dated September 26, 2000, the legal representative of the Appellants wrote to the CAO requesting an interpretation on having their years of military service credited to their Retirement, and receiving a refund of prior monetary deposits if Appellants could not receive retirement credit. The CAO responded by letter dated November 21, 2000, to the issues raised by the Appellant in their grievances by stating:

> …There is no provision under Chapter 33, Article III of the Montgomery County Code for funds to be removed from the trust fund to refund past purchases of credited service, and IRS Revenue Procedures strictly limit the circumstances under which monies can be distributed from a qualified pension plan, such as the ERS. There is no provision under Chapter 33, Article III of the Montgomery County Code Allowing a retirement benefit to exceed the maximum benefit (as specified under Section 33-42 of the Montgomery County Code), due to past purchases of military service.

This interpretation may be appealed within 15 days to the Merit System Protection Board, under procedures established by the Board. The decision of the Board is final.

By letter dated December 6, 2000, the Appellants' legal representative appealed the decision of the CAO to the Board.

REGULATIONS

Section 33-12 (b) Montgomery County Code is entitled "Appeals of disciplinary actions, grievance procedures" and provides, in pertinent part:

> A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with references 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. Grievances do not include the following" Classification allocation, except due process violations; failure to reemploy a probationary employee;

or other employment matters for which another forum is available to provide relief or the Board determines are not suitable matters for the grievance resolution process. (Emphasis Added)

Section 29-2 of the Montgomery County Personnel Regulations is entitled "Definition" and states:

> A grievance is a merit system employee's formal complaint 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. A grievance may be filed if an employee is adversely affected by an alleged:
>
> (a) Violation, misinterpretation or improper application of established laws, rules, regulations, procedures or policies;
>
> (b) Improper or unfair act by a supervisor or other employee, which may include coercion, restraint, reprisal, harassment or intimidation;
>
> (c) Improper, inequitable or unfair act in the administration of the merit system, which may include promotional opportunities, selection for training, duty assignments, work schedules, involuntary transfers and reductions-in-force;
>
> (d) Improper, inequitable or unfair application of the compensation policy, and employee benefits, which may include salary, pay differentials, overtime pay, leave, insurance, retirement and holidays;
>
> (e) Disciplinary action, which includes written reprimands, forfeiture of annual leave or compensatory time and within-grade restrictions; or
>
> (f) Improper or unfair resignation or termination of employment.

Section 33-56, Employees' Retirement System of Montgomery County entitled "Interpretations" states:

> The Chief Administrative Officer shall have the responsibility for rendering decisions on questions arising under this article. Any member of the county's retirement system and any retiree or designated beneficiary, eligible to receive benefits from the retirement system, may request, in writing a decision on questions arising under this article from the Chief Administrative Officer, who shall respond in writing to such request within sixty (60) days. The response shall include a statement of appeal rights. Decisions by the Chief Administrative

Officer may be appealed within fifteen (15) days to the Merit System Protection Board in accordance with procedures established by the Board. The decision of the Board shall be final.

ISSUES

1. Did the Appellants' grievances set forth matters which are grievable under the County's grievance procedures?

2. Is the interpretation of the CAO arbitrary, capricious and not in accordance to rules, regulations, or laws?

3. Should the Board hold a hearing on the appeals?

POSITION OF THE PARTIES

Appellant's Position

1. The Appellants argue that their grievances are covered by the Administrative Grievance Procedure because they fall within the allowable subject matter as an "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;" and that they are not required to utilize the provisions of the ERS by requesting an interpretation by the CAO pursuant to Section 33-56.

2. With respect to the CAO's determination, the Appellants contend that it is arbitrary, capricious and not in accordance with rules, regulations, or laws.

3. The Appellants request a hearing in connection with their appeal.

County's Position

1. The County maintains that the issues raised in the Appellants' grievances concern an interpretation of the ERS of Montgomery County and, pursuant to Section 33-56, the proper forum would be to seek an interpretation from the CAO, which would be appealable to the Board. The County also contends that section 33-12 (b) of the Code excludes from the Administrative Grievance Procedure employment matters for which another forum is available to provide relief.

2. The County contends that the Retirement Plan Administrator made a good faith interpretation of the documents and instruments governing the retirement system provided by the Appellants.

3. The County did not provide an argument for or against a hearing.

ANALYSIS AND CONCLUSIONS

The Appellants called their complaint, "Grievance/Open Door statement. Since the Open Door Procedure was eliminated some years ago this is not an issue and the Board is treating their filling as an Administrative Procedure 4-4 Grievance.

1. In the Board's view, the issues in the grievances clearly are retirement issues covered by Section 33-56, which mandates as the forum for resolution seeking a decision from the CAO, which is appealable to the Board. Although retirement is mentioned as a possible subject in the Administrative Grievances, the grievances in the instant case are not grievable in that forum because another forum, the interpretation by the CAO, is available to provide relief.

2. Beyond simply contending that the interpretation is arbitrary and capricious, the Appellants offer no specificity. In the Board's view, the CAO's interpretation provided the reasons why monies cannot be refunded to the employees for past purchases of credited services and why their retirement benefit cannot exceed the maximum benefit. Additionally, the CAO's interpretation provided specific citations to support the County's reasons.

3. In the Board's view, there are no issues of fact necessitating a hearing.

CONCLUSION

On the basis of the above, the Board denies the appeals of the dismissal of the grievances as not grievable, and of the CAO's interpretation of the ERS.

MEDICAL

Case No. 01-03

DECISION AND OPINION OF THE BOARD

This is the final decision of the Montgomery County Merit System Protection (Board) on an appeal from the determination by the Montgomery County Government (County) that Appellant was "medically not qualified" for the position of Firefighter/Rescuer I with the Department of Fire and Rescue Services.

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 that includes medical guidelines for each job. An applicant must meet these guidelines in order to be appointed.

FINDINGS OF FACT

On or about June 2000, Applicant applied for the position of Firefighter/Rescuer I with the Montgomery County Department of Fire and Rescue Services and, consistent with the regulatory process, Applicant was required to have a physical examination.

The County's Medical Examiner conducted a pre-placement medical evaluation of the Applicant. In the letter of June 30, 2000, to a Senior Human Resources Specialist in the Office of Human Resources (OHR), the Medical Examiner stated that the Applicant is medically not acceptable due to chronic medication usage, which poses significant and current safety issues for Applicant and others.

In a letter dated July 11, 2000, OHR informed the Applicant that Applicant did not meet the applicable medical requirements in order to be appointed to the position of Firefighter/Rescuer I and that in the opinion of the Medical Examiner, Applicant's condition is not correctable in the immediate future. OHR also informed Applicant that since it is not possible for the County to accommodate Applicant's condition by altering the work requirements of the Firefighter/Rescuer I position, it is necessary that Applicant's name be removed from the eligible list.

According to undisputed information provided by the County Medical Examiner in April 1997, Applicant had surgery to explore a mass detected on a CT scan. Surgery revealed "marked dilated, thromboses retro peritoneal veins in the periaortic and pericaval region" (enlarged veins obstructed with blood clots) with no mass or malignancy seen. At that time the Applicant was placed on Coumadin, a blood thinning medication to prevent further

abnormal clotting which, along with periodic blood test for measuring clotting speed, was the recommended treatment for the rest of Applicant's life. Applicant was not placed under any other restrictions. There is no evidence that taking Coumadin has caused the Applicant any problems.

In this medical evaluation, the County Medical Examiner reviewed the medical information on taking of Coumadin and opined:

> Although the Applicant's therapy has prevented recurrent blood clots thus far, Anticoagulant therapy has substantial danger. The Physician's Desk Reference (PDR) warns, "The most serious risks associated with Coumadin are hemorrhage in any tissue or organ and less frequently necrosis and or gangrene of skin and other tissues." The risk for serious spontaneous hemorrhage is always present and significant, even with close monitoring and does not diminish with length of treatment.
>
> In addition to the risk of spontaneous hemorrhage, the PDR and other resources (American College of Cardiology and American College of Sports Medicine) warn avoidance of trauma and hazardous activity such as contact sports and dangerous work while taking Coumadin. It has been demonstrated that physical trauma, even minor, poses a substantial risk for hemorrhage, which may result in serious or fatal sequelae.
>
> Applicant applied for the position of Firefighter/Rescuer I, which requires essential tasks that are physically hazardous and frequent exposure to multiple and environmental hazards that can influence the effect of Coumadin. Some examples include working on slippery surfaces, working at heights, falling debris, exposure to extreme heat and cold, and encounters with combative or panicked persons. A spontaneous or serious hemorrhage from any trauma can result in sudden vascular, neurological, respiratory, or vision incapacitation that would place the firefighter, coworkers, and the public at great risk.

As to the fact that the Applicant had performed duties as a volunteer firefighter and paramedic in Pennsylvania without problems since starting Coumadin 3 ½ years before, the County Medical Examiner stated:

> Applicant states that Applicant has performed similar duties as a volunteer firefighter and paramedic in Pennsylvania without problems since starting Coumadin 3 ½ years ago. However, a career firefighter is required to work on a regular full-time basis, which further increases the risk of trauma. My concern is not the inability to perform essential job tasks but rather the current risk to the individual and others in performing this particular job while using this particular medication at this dosage for life. The risk of hemorrhage increases with higher doses and with prolonged use. The risk of hemorrhage is related to the level of intensity and the duration of "anticoagulant therapy." (PDR 2000)

As a cardiologist who has prescribed and monitored Coumadin therapy, it is my medical opinion that the risk of hemorrhage for Applicant is significant, current, and ongoing, regardless of the previous work-related history. This is because of the nature of the medication, the dosage, the length of treatment, and the substantial risk for trauma in performing the essential functions of a career firefighter.

The Applicant's condition and treatment program is considered lifetime. There is no reasonable accommodation that I can recommend that would modify or decrease the risks discussed. Therefore, Applicant was rated medically not acceptable for the position of firefighter/rescuer.

ISSUE

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

POSITION OF THE PARTIES

Applicant

The Applicant contends that Applicant's Coumadin Blood Test Treatment has been successful, as evidenced by Applicant having performed as a volunteer firefighter/rescuer, the same job requirements that Applicant would be performing in a Firefighter/Rescuer I position, without any problems to Applicant's safety, the safety of fellow employees, nor the public. Applicant also notes the agreement of Applicant's personal physician that there is no reason that Applicant would be unable to carry out the job of a firefighter/rescuer.

County

The County relies on the medical evaluations and conclusions of the County Medical Examiner that the Applicant is medically not acceptable for the position of Firefighter/Rescuer I.

ANALYSIS AND DISCUSSION

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 by sections 5-12 of the County Personnel Regulations and Administrative Procedures 4-13, Medical Standards.

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 facts.

The procedure followed in response to the application for employment was consistent with regulations, and Applicant was given the opportunity to provide information from Applicant's treating physician. Based on that information, physical examination and testing, medical literature pertaining to the medication in question, essential functions and hazards of Montgomery County firefighter/rescuers, and the Applicant's work-related experience, the County Medical Examiner recommended "medically not acceptable" due to chronic medication usage, which poses significant and current safety issues for Applicant and others. While the Applicant may disagree with the conclusion reached, there is no showing that the County's procedures were improper or that the disqualification is not supported by a preponderance of the evidence.

With respect to the fact that the Applicant may have satisfactorily performed duties similar to those of a Firefighter/Rescuer I as a volunteer, while this is relevant to a medical acceptability determination, it is not dispositive where there is compelling medical information, which we find to exist in the instant case. In this regard, we note the undisputed findings of the County Medical Examiner that the risk of serious spontaneous hemorrhage is always present and significant even with close monitoring and does not diminish with length of treatment.

CONCLUSION

In conclusion, the County procedures were proper and the Applicant's disqualification was supported by a preponderance of the evidence. Based on the facts and conclusions stated above, the Applicant's appeal is denied.

PROMOTIONAL PROCESS

Case No. 00-03

DECISION AND OPINION

This is a final decision of the Merit System Protection Board (Board) on an appeal from the decision of the Chief Administrative Officer denying Appellant's consolidated grievances over Appellant's non-selection for promotion to the rank of Master Police Officer (MPO).

FINDINGS OF FACT

Medical Condition

The Appellant, a Montgomery County Police Officer since 1987, and currently a Police Officer 3 grade, has had since at least 1995 a medical condition referred to in the case papers as "end stage renal disease," which, at the time of the events in issue, was treated by three time a week dialysis. As a result of this condition, and consistent with the recommendations resulting from medical evaluations in August 1995, Appellant was transferred to the "Restrictive Duty Unit." The County contends that Appellant's assignments since 1995 have all been in keeping with limitations created by his medical condition. The Appellant does not dispute that assignments have been restricted by Appellant's medical condition, but argues that Appellant was performing the same duties as other officers that did not have any medical limitation.

Denial of Promotion

On March 19, 1996, a promotional examination for the rank of MPO and Police Sergeant was announced. The Personnel Bulletin announcing the examination sets forth experience and educational requirements, but makes no reference to medical qualifications. The Appellant participated in that examination process, receiving an examination score of 80 and a rating of "Well Qualified." In May, 1997, the County notified the bargaining representative Fraternal Order of Police that Appellant's medical condition would not permit Appellant to perform the duties of a uniformed officer promoted to the MPO level. It is undisputed that the Appellant was not promoted to MPO solely because of medical limitation, that all others on the "Well Qualified" list were promoted, including some who had a lower score than the Appellant, and that some on the "Qualified" list were promoted to MPO. On July 7, 1997, in response to a grievance, the County Employee Medical Examiner was requested to provide an opinion regarding how the Appellant's medical limitation would affect Appellant's ability to fulfill the duties and responsibilities of Corporal (MPO), as Appellant was among those who were to be considered for promotion. By memo dated July 11, the County Medical Examiner, relying on a medical evaluation done on May 14, 1997, responded, "Appellant is not able to do the full and

unrestricted functions of a police officer...." "The prognosis is poor that Appellant will be able to resume full and unrestricted duties."

Applicable Rules, Regulations, Contractual Language

This matter is before the Board pursuant to Article 44, Section B of the 1996-98 collective bargaining agreement between the County and the Fraternal Order of Police, Montgomery County Lodge 35, Inc., (FOP) which provides:

> Appeals of Promotions. Promotion, selection and non-selection from a properly constituted list of employees in the highest rating category, or any category used for such purposes by the County shall be non-grievable and non-arbitrable under this agreement, but may be appealed through AP (Administrative Procedures) 4-4 to the Merit System Protection Board.

Section IV, Eligibility List Certification, Subsection C, "Use of Eligibility Lists for the Rank of MPO" or Promotion Bulletin #432, IV, C. provides:

> In making promotional decisions, the Chief of Police will make selections from the highest rating category by the candidates' scores in rank order. Exceptions to rank order selection will only be made for the following reasons:
>
> 1. In consideration of the candidate's record of disciplinary action, or when a disciplinary investigation is in process, or charges pending;
>
> 2. In consideration of a candidate's most recent performance evaluation when one or more major work duties and responsibilities has been evaluated as being below requirements;
>
> 3. In consideration of a candidate's special qualifications or skills which are required in the position;
>
> 4. Subject to objectives of achieving workplace diversity.

Article 5-4 of the County Personnel Regulations (1980) provides:

> Each applicant submitted for an examination must be reviewed and evaluated to determine if the applicant is eligible to compete in the examination. Applicants may be disqualified from further consideration or competition for the following reasons:
>
> (a) Lack of required education, experience, license or certification;
> (b) Willful and material falsification of application;
> (c) Prior separation from the County service for cause, or not in good standing;
> (d) Evidence of recent and relevant unsatisfactory work performance;

(e) Evidence of a job-related factor that would hinder or prohibit satisfactory performance of the duties and responsibilities assigned to the position; or
(f) Failure to comply with established procedures or reference and investigatory requirements.

Article 5-10 of the County Personnel Regulations (1980) provides:

> Upon completion of the examination process, the Personnel Office must certify the names of all individuals found qualified for the vacancy for placement on the eligibility list....

Article 5-12 Medical Requirements for Employees/Applicants, of the County Personnel Regulations (1980) provides:

> ...Whenever an employee/applicant is found to have a defect or condition that would impair satisfactory performance of duties, or may jeopardize the health or safety of his/her self, or others, the (CAO) may declare such applicant ineligible for appointment. In the case of an employee, the (CAO) may remove that individual from the position and temporarily place him/her on limited duty or transfer to a position where the individual may be productively employed, or take another personnel action deemed appropriate and reasonable. Prior to making a decision or taking an action based on the medical findings, the (CAO) shall 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 and/or disabled.

Article 11, "Chronic Incapacity" of the County-FOP Bargaining Agreement Provides:

A. Definition of Chronic Incapacity. An injury, illness, or physical or mental condition which causes a chronic, open-ended, and indeterminate inability to continue to perform one or more of the principle tasks of a police officer as set forth in the class specifications.

B. No Effect Upon the Retirement Law. This procedure shall not interfere with, impede, or supersede any provision of the County retirement law.

C. Placement to be Noncompetitive. Placement in any assignment as accommodation for a chronic incapacity shall be in the classification and grade held by the employee at the time of the assignment. Such assignment shall be noncompetitive.

D. Accommodation. The department will use its best efforts to accommodate chronically incapacitated unit members by assigning them to duties within their capacity and with the bargaining unit. If, despite the department's best efforts, no such assignment is made and the member is not retired, the employer will accommodate the unit member in accordance with the Americans with Disabilities Act (ADA). A claim that the accommodation does not satisfy the requirements of the ADA shall not be grievable.

Article 44, of the Collective Bargaining Agreement covering the Appellant provides:

> Promotional Program. Promotions to positions in the unit must be made on a competitive basis after an evaluation of each individual's qualifications. Any promotional program for positions within the unit shall provide that qualified employees are given the opportunity to receive fair and appropriate consideration for higher level positions.
>
> Appeals of Promotions. Promotion, selection and non-selection from a properly constituted eligible list of employees in the highest rating category, or any category used for such purposes by the County shall be non-grievable and non-arbitrable under this Agreement, but may be appealed through AP 4-4 to the Merit System Protection Board.

Departmental Directive, F.C. 380, Disability Policy, Section VI.(B)2, provides:

> When a vacancy exists in a rank which the disabled officer is eligible to be promoted to:
>
> a. The officer will request a waiver from the Disability Review Board for that position to be filled by the requesting officer.
>
> b. The Disability Review Board will request an opinion from the County Medical Section as to how the medical limitations of the officer will affect his/her ability to fulfill the duties and responsibilities of the next rank.
>
> c. The Disability Review Board will review the duties and responsibilities of the position and the medical limitations of the officer and either grant or deny the waiver.
>
> d. If the waiver is granted, the officer can compete for the assignment through the normal process.

POSITIONS OF THE PARTIES

County

The County contends that the Appellant has a chronic medical condition that precludes Appellant from performing the full duties of a police officer, and acknowledges that "Appellant would have been promoted but for Appellant's medical condition." The County further acknowledges that this reason did not meet any of the exceptions from rank order selection provided in Promotion Bulletin #432, but, relying on Article 5-12 of the Personnel Regulations, maintains that if a medical condition precludes a promotional candidate from performing the essential functions of the position, the candidate may be passed over for promotion. It is the County's position that "it is a basic presumption that applicants meet medical requirements and have the ability to perform essential functions of a promoted position." "There is no requirement to promote an employee to a job he/she cannot fully perform."

With respect to the collective bargaining agreement, the County contends that Appellant received fair and appropriate consideration for promotion to MPO, but was disqualified due to Appellant's medical condition.

Appellant

The Appellant contends that the County has violated the Police Labor Relations Law by repudiating the promise that candidates for promotion receive fair and appropriate consideration, and violated its own Personnel Bulletin by passing over a candidate for a reason other than the four provided therein. "The County introduced a new, fifth reason which only was applied to (Appellant) even though the County had known of Appellant's medical condition long before Appellant was placed on the Well Qualified list."

As to the reliance on Personnel Regulation 5-12 "to unilaterally apply the additional requirement for promotion," Appellant contends the County is ignoring Article 11, "Chronic Incapacity" provision of the collective bargaining agreement. In this regard, Appellant contends that assignments were the same as those given to police officers without medical limitations, which were performed the same as officers working along side Appellant. Further as to Personnel Regulations 5-12, the Appellant contends that it cannot be read in isolation from Section 5.4 and 5.10 of the 1980 Personnel Regulations, which establish that all requirements, including medical qualifications, must be determined prior to inclusion of an applicant in an eligibility list.

ISSUES

1. Does the fact that Personnel Bulletin #432 specifies exceptions to rank order selection preclude the County from applying the Personnel Regulations Article 5-12 medical requirements to the selection process?

2. Do Personnel Regulations Articles 5-4 and 5-10 require that medical requirement exclusion be made prior to the construction of a promotion register?

3. Does disqualifying the Appellant from promotion to MPO violate Article 11, "Chronic Incapacity" provision of the County-FOP Agreement?

4. Did the Appellant receive "fair and appropriate consideration" pursuant to Article 44 of the County-FOP Agreement?

5. Did the County make a unilateral change in conditions of employment in violation of the County-FOP Agreement by applying a medical requirement to the selection process?

ANALYSIS AND CONCLUSIONS

1. It is undisputed that the Appellant was passed over for promotion to MPO solely because of Appellant's medical condition. As the County acknowledges, but for

Appellant's medical condition, the Appellant would have been promoted to MPO. It is further acknowledged by the County that the Personnel Bulletin list of exceptions to selection in rank order does not provide for medical limitation. The question then is whether the Article 5-12 Medical Requirements provision of the Personnel Regulations allows the County to disqualify the Appellant from promotion consideration when a medical condition would impair the satisfactory performance of the duties of a position. The Appellant does not dispute the content of Article 5-12, but argues that it cannot be retroactively applied to an existing promotion register.

In the Board's view, it is clear that County Personnel Regulation Article 5-12 may be applied to the selection process, notwithstanding the fact that it was not specified in the Personnel Bulletin list of exceptions to rank order selection. The Personnel Bulletin is essentially a vacancy announcement, albeit one which contains a relatively complete description of the process to be followed in making a selection. Article 5-12 of the Personnel Regulations unambiguously provides that the CAO may declare an applicant who is found to have a condition that would impair satisfactory performance of duties "ineligible for appointment." In this regard, it should be noted that at the conclusion of the Personnel Bulletin there is a list of applicable sources, one of which is the County Personnel Regulations. Accordingly, the County's reliance on Article 5-12 to disqualify the Appellant was not a violation of Regulations.

2. The Appellant argues that even if Article 5-12 is applicable, a medical disqualification must be made prior to the construction of a promotion register. That is, once rated Well Qualified, the County cannot thereafter disqualify. Articles 5-4 and 5-10 describe a process that implies review of qualifications taking place before further consideration or competition, and that once having cleared the process, an applicant may participate in the exam. However, as noted above, Article 5-12 has no such implied limitation, stating, "...the (CAO) may declare such applicant ineligible for appointment." In the Board's view, such declaration can be made at any stage of the promotion process. Promotion registers are used for two years. To follow the Appellant's logic, if some reason for disqualification came up during that two year period, the County would be precluded from acting on it.

3. Article 11, "Chronic Incapacity" of the County-FOP Agreement creates an obligation on the County to attempt to accommodate employees with chronic health conditions which interferes with the ability to perform police officer tasks. There is no contention that this provision was not complied with in the manner in which the Appellant's physical condition was dealt with since 1996. That is, the Appellant does not dispute Appellant's placement in a "restricted duty" status, nor contend that Appellant's assignments were not an accommodation to Appellant's physical situation.

Beyond the creation of an obligation to accommodate chronic health conditions, the Board sees no application to this provision of the agreement to the dispute herein. There is nothing in the wording or intent of Article 11 that obligates the County to promote the Appellant to MPO notwithstanding his condition. Accordingly, the Board concludes that Article 11 of the agreement has not been violated.

4. The allegation of lack of fairness seems to rest on the contention that since the Appellant was satisfactorily doing the same work as employees without physical limitations, the fact that Appellant had such a limitation should not impair Appellant's promotion to MPO. The Appellant's placement in a restrictive duty status was done so that Appellant could continue to work as a police officer, notwithstanding the medical condition. The Board however does not view this as creating an entitlement to promotion to MPO. Police Officer 3 and MPO are different positions. Appellant was seeking to compete for the MPO position, which permitted the County to make a determination as to physical impairment. We see no unfairness to it being determined that the Appellant was physically unfit to be promoted to the higher graded position.

5. The Board sees no merit to the Appellant's contention that the County introduced a fifth exception to rank order selection, thereby violating the contract and the County Labor Relations Law. The Article 5-12 basis for disqualification on the basis of medical condition has always been there. There is no showing that the application of the Article to the facts of the instant case constitute any sort of change in conditions of employment, or in any other manner violate the contract or the Labor Relations Law.

ORDER

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

Case No. 00-03

SUPPLEMENTAL DECISION

This is a supplemental decision of the Merit System Protection Board (Board) on the appeal of Appellant following the Memorandum Opinion and Order of the Circuit Court for Montgomery County, Maryland, remanding the case to the Board to determine the Appellant's status at the time Appellant was denied the promotion to Master Police Officer (MPO), particularly to make a finding as to whether the Appellant was on "restricted duty" status at the time Appellant was denied the promotion.

BACKGROUND

The case concerned Appellant's grievance over non-selection for promotion to the rank of MPO, which was, undisputedly, solely because of Appellant's medical condition. The Board rejected Appellant's contentions that Appellant's disqualification was violative of law or regulation, or that it was "unfair," and, based on the evidence in the record, denied the appeal.

In the Board's original Decision's Findings of Fact, the Board found that in August 1995, Appellant was transferred to the "Restrictive Duty Unit," and then noted the County's contention, not disputed by the Appellant, that Appellant's assignments had been restricted by Appellant's medical condition. In the Circuit Court's review of the

decision, it is stated that the Board's decision was based on five listed "findings of fact," the third of which is stated as, "(Appellant) had been working on restricted duty assignments, for medical reasons, without interruption, since August 1995."

POSITION OF THE PARTIES

Upon receipt of the Court remand, the Board issued an Order providing the parties an opportunity to file briefs on the question posed in the remand. Their positions, as set forth in the submissions received, are summarized as follows:

The County

The County contends that the Appellant was obviously in " 'restricted duty status' in a general, practical sense." In support of this, the County recounts:

- Appellant's August 1995 transfer to the Police Department's "Restricted Duty Unit."

- The County Medical Examiner's February 1996 conclusion that Appellant be considered "fit for full duty with temporary restrictions."

- Appellant's June 1996 performance evaluation which notes that Appellant "was on light duty due to a medical condition."

- The Chief of Police August 1996 communication to the Appellant informing him:

> Due to implementation of the County's new payroll system, the necessity to modify our procedure for tracking employees in the Restricted Duty Unit must change.
>
> Instead of transferring your position (to the Personnel Section) as a means of monitoring your status, we will track by project code on your timesheet. . . .
>
> We will continue to carry you in a restricted duty capacity until you return to full duty. This action will allow us to more accurately monitor first responder capability and track your progress toward recuperation or alternatives to full duty.
>
> You will continue to report to your current supervisor, and perform the same duties in the same location with the same hours, if you are currently in a restricted duty capacity.

- Appellant's February 1997 receipt of an involuntary disability retirement (subsequently rescinded as a result of a grievance resolution).

- Appellant's doctor's May 1997 communication that Appellant "may return to light full time - no lifting, pushing, pulling...."

- Appellant's failure to request a waiver of his restricted duty status.

The County contends that Appellant's transfer to the Germantown station did not mean that Appellant had been returned to full, unrestricted duty status, as evidenced by the above described performance evaluation that discusses the administrative tasks Appellant was performing, and by the August 1996 memo from the Chief of Police.

The County's brief concludes, ". . . the evidence in this case shows that (the Appellant) was in a 'restricted duty' status due to Appellant's medical limitation at the time Appellant was denied promotion to the rank of Master Police Officer in May 1997."

The Appellant

The Appellant contends that Appellant was transferred out of the Restricted Duty Unit one year after Appellant's August 1995 assignment there, and was thereafter given "regular" assignments with "full police powers." The Appellant contends that duty status in the Police Department is defined by Function Code 380 as "Full Duty," or "Restricted Duty," with the latter further differentiated between "Limited Duty" ("a specific, temporary medical limitation exists regarding the type of degree of duties the officer is physically capable of performing;") and "Light Duty," ("temporarily incapacitated such that they cannot perform all the duties of their assignment. . . .")

According to the Appellant, on the basis of the conclusion of the County-contracted physician who examined him in February 1996, that Appellant was not medially disabled, the County Medical Examiner determined that Appellant was "fit for full duty with temporary restrictions." "Effective September 1, 1996, (Appellant) was transferred out of the Restricted Duty Unit to a regular duty position with full police powers . . . ." Appellant contends that thereafter "Appellant was not in a light, limited, or no duty status, and that Appellant's condition remained fully controlled. . . ."

ISSUES

1. What was the Appellant's status at the time Appellant was denied promotion to MPO, particularly whether Appellant was on "restricted duty" status?

2. Does the record, as supplemented by the parties submissions, provide a basis for the Board to modify its decision?

ANALYSIS AND CONCLUSIONS

1. It is undisputed that, at least in 1995, there was a specific status category called "restricted duty," and assignments to a "Restricted Duty Unit," and that in August 1995, Appellant was placed in that category and given such an assignment. In the Board's view, while after August 1996, Appellant's status lacked the form of his prior designation and assignment, substantively Appellant was still in a restricted duty status, which was handled by different procedures than had previously been used. As set out in the Police Chief's August 29, 1996 memorandum to the Appellant, because of changes in the payroll system, instead of Appellant being assigned to the Restricted Duty Unit, Appellant's status was to be identified by the manner in which Appellant entered Appellant's time,

but clearly, Appellant's duties were still to be restricted/limited because of Appellant's medical condition.

The record is replete with evidence to support the fact that at the time Appellant was denied a promotion, Appellant's duty assignments were consistent with restricted status, notwithstanding that Appellant might have had assignments with "full police powers." In a February 20, 1996 letter from Dr. Blank to the Medical Examiner, it is stated, ". . . I would restrict Appellant from hazardous duty in order to protect Appellant's access from injury." In the Medical Examiner's February 26, 1996 memorandum to the Chief of Police, it is stated, "It is therefore my recommendation that (Appellant) now be considered fit for full duty with temporary restrictions." (Emphasis supplied) Appellant's June 1996 performance evaluation references Appellant's "light duty due to a medical condition." In the Medical Examiner's July 31, 1996 memorandum to the Chief of Police, it is stated, ". . . I am now recommending that (Appellant) be processed for medical disability retirement." "It is now apparent that the prognosis for (Appellant) returning to full and unrestricted duties as a police officer is, at best, poor."

The Board concludes, in response to the question posed by the remand from the Circuit Court, that Appellant, at the time Appellant was denied promotion to MPO was on "restricted duty" status.

2. In the Board's initial consideration of this case, our view of the evidence with respect to Appellant's status was that Appellant had been specifically assigned to a "Restrictive Duty Unit," and, thereafter, Appellant's assignments had been restricted by Appellant's medical condition, a condition that continued to exist at the time Appellant was not promoted. The Board's analysis and disposition focused on the undisputed facts of Appellant's medical limitation and the fact that Appellant's assignments took into account the nature of Appellant's medical disability, not on whether Appellant was technically assigned to a restricted duty unit. Given the existence of limitations on Appellant's assignments, and the applicable laws and regulations discussed in the original decision, the Board concluded that to disqualify Appellant from promotion to MPO did not violate law or regulation, and was not unfair. The parties' submissions provide no facts at variance from those relied upon by the Board. Accordingly, the Board, for the reasons discussed in its original decision, finds no basis for modifying it's order denying Appellant's appeal.

ORDER

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

Case No. 00-07

DECISION AND OPINION

This is a decision of the Montgomery County Merit System Protection Board (Board) on an appeal from the decision of the Chief Administrative Officer denying Appellant's grievance over not being selected for promotion to the rank of Captain.

FINDINGS OF FACT

On June 10, 1998, the County Office of Human Resources issued Personnel Bulletin Number 447, announcing the promotional examination for the rank of police Captain. The Bulletin, in pertinent part, provided for minimum qualifications, examination date and process information, scoring procedures, and use of the eligibility list. As to the latter, the Bulletin stated, in pertinent part:

> In accordance with Personnel Regulations, Section 6.3, when a position is to be filled, the appointing authority shall be provided an eligible list that has been certified by the Office of Human Resources. Subject to the County's diversity objectives, the appointing authority shall be free to choose any individual from the highest rating category.
>
> In making promotion decisions, the Chief of Police may consider the following: examination results, past performance evaluations, length of service, time in current rank, commendations, reprimands, disciplinary actions, and other information pertinent to the candidate's suitability and potential for successful performance in the higher rank. Information may be obtained by a review of personnel files, examination results, personal interviews or recommendations from supervisors. The selection process must be conducted in a consistent manner at each stage of consideration.
>
> The Chief of Police may formally delegate to others authority to review and consider the Departmental personnel file, Office of Internal Affairs summary and the above listed factors for each person in the highest rating category and, based on the information, to recommend officers for promotion. Examination results, for the purpose of selection decisions, will be defined as the adjectival rating (Well Qualified, Qualified or Not Eligible for Promotion). Recommending officers must be at least equal in rank to the promotion position. Several individuals may serve as a recommending panel. Panels should include minorities and women when possible. The individual examination scores remain in the possession of the Office of Human Resources and are not being released to the Department and therefore will not be a matter of consideration in the promotional selection decision for any candidate. This procedure is consistent with the Personnel Regulations, Section 6-3, Selection Procedures. (Emphasis supplied)

Pursuant to the Bulletin's schedule, an examination was conducted and, based on the examination scores, the Office of Human Resources provided to the Department of Police (Department) the names, in alphabetical order, of the seven candidates rated "Well Qualified" including the Appellant.

On July 29, 1998, a meeting was held to discuss the seven promotional candidates competing for the Captain rank. Candidates were discussed based on the notes taken by each committee member from the documentation review. Opinions and recommendations were voiced by the committee members for the Chief of Police to consider. The grievance record sets forth the committee members' individual recollections of the meeting, their understanding of the process, and their own bases for reaching recommended conclusions. It is undisputed that the examination scores of the candidates under consideration were not available. At the conclusion of the meeting, the Chief left the room for approximately 20 minutes. When the Chief returned, the Chief made a decision for selection promotion to the rank of Captain, which was not the Appellant.

POSITION OF THE PARTIES

The Appellant contests what is described as the "abandonment of the use of competitive scores" in the selection process, contending that the procedure used was unregulated and a complete breakdown of the promotional process. In this regard, Appellant relies on the decision of the Court of Special Appeals of Maryland (Court) in the matter of Joseph Anastasi v. Montgomery County, Maryland, 123 Md. App. 472 (1998) (Anastasi II), wherein the Court reviewed and approved the Department's use of a "rank order with exception" promotional procedure. That is, a promotional process that relied on examination scores, with the exception of disqualifying an applicant because of negative information in their personnel file. Additionally, the Appellant contends that the selection procedure violate County Charter and Code merit system requirements, noting in this regard the lack of specific selection criteria, as illustrated by the varying consideration bases cited by the members of the selection committee.

The County contends that Anastasi II is court approval of only one way of making selections, but does not require that it is the only way. The County further contends that the selection process used is consistent with the merit principles, noting that the Department developed a formal selection process that solicited input from senior staff, rather than being casual and unrecorded; that all members of the selection committee reviewed the same documents; that the review was documented and the committee's notes were used for the selection meeting; that the selection committee was familiar with all the candidates prior to the meeting; and that all of the members of the committee participated in the meeting and voiced their recommendations to the Chief.

ISSUE

Was the process used in selecting a candidate for promotion to the rank of Captain violative of law or regulation, or in any other manner improper?

ANALYSIS AND CONCLUSIONS

In the Board's view, the rank order by exception procedure approved in Anastasi II is not required and is not the only acceptable process for selecting candidates for promotions. The Appellant in Anastasi II contested being passed over for promotion because of negative information in Appellant's personnel file, notwithstanding Appellant's test score being higher than the selectee. The Court concluded that the procedure used complied with the dictates of the County Charter and Code, noting the fact that promotions were made primarily by rank order, and the fact that problems with each candidate were discussed and analyzed by the committee of high-ranking officers was sufficient to assure that each candidate was considered equally and according to relevant, rational criteria. The Board sees nothing in Anastasi II which would stand for the proposition that the only acceptable selection procedure is one that would rely on test scores. What the Court did say in Anastasi II is that the selection process used must be one that "ensured open, equal, and rational consideration of each candidate." In the Board's view, the process used in this matter met this requirement. The Well Qualified list was developed independently by the Department by Human Resources, on the basis of examination scores. Once a Well Qualified list was established, a procedure was followed that provided for each member of the selection committee to be provided the same information on all candidates, and at the selection committee meeting each was permitted to fully participate in the discussion, including the opportunity to make recommendations on the basis of whatever they felt were appropriate considerations. It is demonstrated that each candidate received equal consideration by each committee member, based on the method they chose to evaluate the candidates. After receiving the input of the senior officers, the Chief made a selection.

Finally, with respect to the Chief's selection, which the Appellant contends had no relationship to relative scores of the individuals on the Well Qualified list, the procedure utilized provided for a selection from among those candidates with the highest test scores. The senior officers on the selection committee were given an opportunity to provide input into the process, and to make recommendations on their choices. The fact that the Chief's selectee may not have been recommended by members of the committee, and the fact that the Chief did no reveal the reasoning to the Chief's staff, as the Appellant argues, does not render the procedure flawed. As noted above, what is required is a process that ensures open, equal, and rational consideration, which, in the Board's view, took place in the instant circumstances.

Accordingly, in the Board's view, the selection process in the matter before us was not violative of law, regulation, or in any other manner improper.

CONCLUSION

Having concluded that the process used was not violative of law, regulation, or in any other manner improper, the Appellant's appeal is denied.

CASE NO. 00-07

SUPPLEMENTAL DECISION AND ORDER

This is the supplemental final decision of the Montgomery County Merit System Protection Board on the appeal of Appellant from the denial of Appellant's grievance over not being selected for promotion to the rank of Captain. The matter is before the Board pursuant to the decision of the Circuit Court for Montgomery County, Maryland (Court), reversing the Board's decision and remanding the case for fashioning an appropriate remedy.

FINDINGS OF THE COURT

The Court found that the selection process procedures used by the County denied the Appellant a fair opportunity to be considered for promotion, and violated the County Charter and Code, and concluded:

> … that there should be remedial action. However, it would be inappropriate for this Court to decide whether Petitioner should receive redress in the form of back-pay, retroactive promotion, future promotions or something else…. The Montgomery County Code grants discretion to the Merit Board to fashion remedies for violations of the Merit System Law…. This Court will not restrict the Merit Board's authority to fashion the appropriate remedial measures, and will remand the instant case to the Merit Board so that it may provide remedial action in accordance with this opinion.

POSITION OF THE PARTIES

To assist the Board in carrying out the direction of the Court, the Board requested that the parties file briefs on the appropriate remedy to be accorded the Appellant for the selection process violations found by the Court, and their reasons therefore.

Appellant

1. The Appellant contends that the appropriate remedial action is a retroactive promotion with back pay to August 2, 1998, the date a different candidate was promoted. The Appellant contends that such a remedy is consistent with the Circuit Court's order, with practices of the Board, and the Circuit Courts in such case. The Appellant alternatively contends that at a minimum, even if a retroactive promotion was not called for in the instant case, there is no doubt that the Appellant must be accorded the next promotion to a Captain's position which comes available in the Police Department.

2. The Appellant also contends that it is appropriate that the Board award reasonable costs and attorney fees because of the requirement to pursue this matter to the Circuit Court and back.

County

1. The County asserts that current law would require the Police Department to revise the selection process and re-select an individual for promotion. The County states that two cases, *Prince George's County versus O'Berry* and *Andre et al versus Montgomery County Personnel Board,* hold that a complainant's request for retroactive promotion, back pay and benefits are prohibited and inappropriate. The County contends that the Board should issue an order requiring the Police Department to revise its promotional procedures to comply with County rules and regulations and to redo the selection process.

ISSUE

1. What is the appropriate remedy for violations found by the Court?
2. Is the payment of attorney fees appropriate?

ANALYSIS AND DISCUSSION

1. In the Board's view, the Appellant's proposed remedy of a retroactive promotion is not, in the circumstances of the instant case, appropriate because there is no finding by the Circuit Court that the Appellant would have been selected if there had been no procedural errors. In fact, there were a total of seven candidates who were considered for the position and six were not selected, including the Appellant. The Board also rejects the County's proposed remedy of redoing the selection process, which we view as unreasonable, because of the passage of time (about three years).

In the Board's view, the appropriate remedy in the instant case would be to afford the Appellant priority consideration for future Captain positions, a remedy which would provide the Appellant an opportunity to be considered for selection to fill a Captain position prior to other applicants. However, the Board has been administratively advised that the Appellant was promoted to a Captain effective May 6, 2001.

Accordingly, no further compliance is required with respect to the promotion of the Appellant. In the Board's view, since the Circuit Court found that the Police Department denied the candidates "a fair opportunity to be considered for promotion," by failing to observe the County's personnel laws and regulations, the Police Department should ensure that its promotional procedures comply with applicable Montgomery County Rules and Regulations.

2. Section 33-14 (c) of the Montgomery County Code empowers the Board to order the payment of attorney fees in the circumstance of a decision in favor of Appellant. In the view of the Circuit Court findings that the Police Department denied the candidates "a fair opportunity to be considered for promotion," by failing to observe the County's personnel laws and regulations and, an order for the payment of allowed attorney fees and costs is appropriate.

CONCLUSION AND ORDER

Accordingly, having found that priority consideration for the next available Captain position was the appropriate remedy, and that the Appellant has recently been promoted to the rank of Captain, the Board finds that no further remedy with regard to promotion is required. The County is hereby ordered to reimburse to the Appellant such attorney fees and costs that the Board determines are appropriate. The Board orders the Police Department to revise its promotional procedures to comply with applicable County rules and regulations.

Case No. 01-06

ORDER

On February 22, 2000, two Appellants filed grievances over their non-selection to the rank of Lieutenant in the Montgomery County Police Department. According to the Appellants, at a June 21-22, 2000 Step III meeting chaired by an Office of Human Resources (OHR) specialist, witnesses were not sworn and there was no process for compelling witness testimony or the production of documents. Appellants contend that in the course of the meeting, the Department's representative instructed Department employees not to answer questions posed by Appellants' attorney or to allow certain lines of attempted inquiry.

On July 26, 2000, the Appellants filed identical grievances, referencing their previous grievances over their non-selection for Lieutenant rank, and contending that ". . . the Step III process was arbitrary, inequitable, unfair, inconsistent, capricious, and violative of merit principles, merit system law, the county charter, and personnel regulations." As relief, Appellants requested "An evidentiary hearing on my grievance conducted by a designee of the CAO who is not an official or employee of OHR." Undisputed is the fact that no determination regarding the non-selection grievance has yet been rendered.

Administrative Procedure 4-4, Grievance Procedure, Section 6.4, provides, in pertinent part, for a disposition of a grievance by the Chief Administrative Officer, and, in section 6.5, for a dissatisfied employee to appeal such a disposition to the Board. In the view of the Board, in the instant case where there has been no disposition of the grievances over non-selection, the appeal going to the manner in which the non-selection grievance procedure operates, is interlocutory and therefore not properly before the Board at this time. In this regard, the regulatory grievance procedure contemplates the right of an appeal to the Board of a disposition of a grievance, which has not yet been rendered.

Based on the above, the appeal in the above referenced matter is dismissed, without prejudice to the right of the Appellants to raise matters related to the processing of their grievances in any subsequent appeal of a disposition of their grievances over their non-selection for Lieutenant positions.

TIMELINESS

Case No. 01-07

FINDINGS OF FACT

Appellant is employed as a Senior Legislative Analyst with the Montgomery County Council. Appellant was initially hired by the Montgomery County Department of Social Services in February 1979, as a dual merit system employee of the State and County governments. In January 1989, Appellant accepted a promotion to a County merit system position, still working with the Department of Social Services. Subsequently, Appellant transferred to current position.

In a memorandum to the Director, Office of Human Resources (OHR), dated September 14, 1999, Appellant requested a transfer of service from the State of Maryland Retirement System to the Montgomery County Retirement System.

The memorandum was forwarded to the Manager, Benefits and Records Management (BRM), who denied Appellant's request to transfer service credits in a memorandum dated September 20, 1999, noting that applications to transfer service must be made within one year of entry into the accepting system. Appellant was advised that the transfer of State credit is an item covered during new employee orientation, and that employees transferring into a merit system position are required to attend new employee orientation to receive information such as this.

Appellant was additionally advised that in 1990, the State Legislature enacted legislation (House Bill 687) to provide for a one-time window of opportunity for individuals who had not previously transferred retirement service credit, to transfer such service, provided it was requested by June 28, 1991. Notification of this special opportunity was distributed by OHR in May 1991.

In a response dated October 14, 1999, Appellant stated that they had not been informed of the opportunity to transfer State credits at the new employee orientation, and that Appellant had not received any correspondence from OHR regarding the window of opportunity in 1991.

In an October 15, 1999 response, OHR noted that the transfer of State credits is governed by State law, and that the County was obligated to comply with State law in this matter.

In an October 27, 1999, memorandum to the BRM, Appellant requested the following:

State law under discussion:

Information on how requirements were met to notify County employees about the opportunity in 1991 to transfer State service credits.

Paperwork from Appellant's personnel file regarding Appellant's appointment to Social Services Administrator in January 1989, to include any communication about the employee orientation session.

Procedure to file an appeal regarding OHR's decision that Appellant was not eligible to transfer State retirement benefits to the County retirement system.

OHR responded to Appellant in a memorandum dated November 5, 1999, and provided the requested documents for items #1, #2, and #3. With respect to item #4 the memorandum stated "under the County's retirement law Section 33-56, you may request interpretation of this issue from the CAO."

In a letter dated September 6, 2000, from the Appellant's attorney to the Director, OHR, he stated that he had previously represented a similarly situated County employee who was permitted to transfer State credits into the County system. In the letter, the attorney notes that under Administrative Procedure 4-4, a grievance must be filed within twenty calendar days from the date the employee knew or should have known that a problem existed, and states:

> …(Appellant) became aware of unequal treatment with respect to credited service at a meeting with me today. Accordingly, Appellant would have until September 26, 2000, to file a grievance.

On September 25, 2000 Appellant filed a grievance under Administrative Procedure 4-4, requesting that the County waive the one year transfer period, so that the period of service previously served with the Montgomery County Department of Social Services can be transferred from the State Retirement System to the County Retirement System.

ISSUES

Was Appellant's grievance timely filed?

ANALYSIS AND DISCUSSION

Appellant contends that although Appellant attended new employee orientation in 1989, Appellant was not given any information regarding the transfer of Appellant's State retirement service credits. Appellant also contends that Appellant never received a copy of the bulletin informing County employees of a one-time window of opportunity to transfer State service credits to the Employees' Retirement System of Montgomery County (ERSMC), that was distributed in May 1991. Appellant contends that Appellant filed a timely grievance on September 25, 2000, within twenty calendar days from when Appellant became aware of a similarly situated County employee being granted relief by Montgomery County with respect to the transfer of prior State credits into the County system.

The County contends that Appellant's grievance is not timely filed, since it stems from the denial of a request for transfer of service credits eleven months prior, on September 20, 1999. The County further contends that employees transferring into a merit position are required to attend new employee orientation, and that the transfer of State credit is an item that is covered in the new employee orientation, which Appellant acknowledges attending in 1989. Additionally, there is no record that Appellant responded to the one-time window of opportunity to transfer State service credits, that was provided for by House Bill 687.

Administrative Procedure 4-4, Section 6.0, states that a grievance must be filed within 20 calendar days from the date that the employee knew or should have known that a problem existed. In the Board's view, Appellant knew or should have known that a problem existed, on September 20, 1999, when Appellant's request for transfer of service credits was denied, and certainly by November 5, 1999, when advised that under the County's retirement law 33-56, Appellant could request interpretation of Appellant's issue from the CAO, which Appellant did not do. As to the contention that the September 2000 receipt of information regarding a similar case serving as a "triggering event" for a denial that occurred in September 1999, the Board has ruled consistently that an employee cannot use knowledge of another employee's grievance as an alternate operating date from which the time to file a grievance runs. (See MSPB Case No. 89-02; MSPB Case No. 97-11; MSPB Case No. 98-04; MSPB Case No. 99-21; and MSPB Case No. 00-05. In all of these cases, the Board ruled that the complaints were not timely filed.

Appellant references the settlement of another case similarly situated to Appellant's as indicative of unequal treatment being afforded to Appellant. In the referenced case, the agreement concerned the settlement of a specific grievance, and timeliness was not at issue. The Board sees no parallel between the two cases, noting that the timeliness issue of the instant case is whether it was timely filed from the 1999 period when Appellant's request was denied. Additionally, Appellant cites MSPB case 89-26, which was remanded to the County. In the referenced case, the CAO was required to notify each eligible employee who had attained five years of service, the opportunity to purchase certain credited hours of service. A certified letter to an employee's old address was returned as undeliverable, and there was no indication of a follow up to obtain a proper address. In the Board's view, an undeliverable address is not at issue in the instant case, where notification to the Appellant was covered during new employee orientation and also in a OHR Personnel Bulletin advising all employees of an open window of opportunity for the transferring of retirement service credits.

With respect to Appellant's request for information regarding the procedure to file an appeal, Appellant states that the November 5, 1999, letter from the BRM didn't advise Appellant as to Appellant's right to file a grievance. As the Board determined in MSPB 99-21, the statute on transfers of retirement service includes no provision that government denying transfers of credits must advise applicants of the right to appeal the denial of transfer. There is no law, regulation or administrative procedure that required correspondence from OHR to include any advice on grievance rights.

CONCLUSION AND ORDER

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

Case No. 01-07

DECISION ON REQUEST FOR RECONSIDERATION

This is a decision of the Montgomery County Merit System Protection Board (Board) on the request for reconsideration of Appellant from the Decision and Opinion of the Board denying Appellant's appeal from the determination of the Montgomery County Labor/Employee Relations Manager that Appellant's grievance was not timely filed.

Subsequent to the filing of the request for reconsideration, the Appellant advised the Board that Appellant had requested from the Chief Administrative Officer (CAO) an interpretation with regard to Appellant's situation pursuant to the provisions of Section 33-56 of the Montgomery County Code. In light of that request, the Appellant requested that the Board reconsider its Decision and Opinion and take no further action on the case pending receipt of an interpretation from the CAO, ". . . that the Board reconsider its decision so that its decision would not be a final one, thereby obviating any need for litigation at this time."

Section 33-56 of the Montgomery County Code assigns to the CAO the responsibility of deciding questions arising under the retirement system and provides the right of employees to request from the CAO a decision on questions arising under the Article. Such decisions may be appealed to the Board under procedures established by the Board, with the decision of the Board being final. In the Board's view, in the circumstances of this case, processing of an interpretation request to the CAO under the above-described procedures should not serve to stay the Board deciding the separate question of whether the Appellant's grievance in the instant case was timely filed. According, the request that the Board take no further action on the case is denied.

In the request for reconsideration, the Appellant asserts that the Board's decision is based upon findings of contested facts which could only be determined by the Board after the conduct of a hearing. Contrary to this contention, the Board's determination that Appellant's grievance was not timely filed was based on the undisputed facts of the September 20, 1999 denial of Appellant's request to transfer Appellant's retirement credits and the November 5, 1999 communication advising Appellant that under the County's retirement law 33-56, that she could request interpretation of Appellant's issue from the CAO. As the facts of such notification were not in dispute, that is, when Appellant knew or should have known that a problem existed, no basis for a hearing was shown.

The Appellant further asserts in the request for reconsideration that the Board has misconstrued the principles announced in its decision in Case No. 89-26, and deviated from them without adequate explanation. The facts of Case No. 89-26 are clearly distinguishable from the instant case. In Case No. 89-26, the Board found that the County had failed to meet its responsibility to notify an employee who had relocated and therefore not received notice of their right to transfer retirement credits. The employee subsequently filed a grievance concerning the purchase of such credits, and such grievance was considered untimely. The Board decision does not indicate when the employee became aware of their rights, or how long after being denied the right to transfer the credits, the employee filed a grievance. The Board stated, in pertinent part:

> Therefore, it was the judgement of the Board that the County's failure to meet the legal mandate must result in the acceptance of a grievance, irrespective of when filed after such violation.

In the instant case, as stated above, the Appellant clearly knew or should have known of the existence of the problem when in September through November 5, 1999, Appellant's request for the right to transfer retirement credits was denied. Appellant's grievance was not filed until September 25, 2000, almost one year later. Accordingly, on undisputed facts, it is clear that the grievance was untimely filed.

TRANSFER

Case No. 01-04

DECISION AND OPINION OF THE BOARD

This is a final decision on an appeal from the determination by the Montgomery County Government (County) to hold Appellant's grievance in abeyance and allow Appellant the opportunity to petition the Circuit Court to direct the Police Department to show cause why the right of a hearing under the Law Enforcement Officer's Bill of Rights (LEOBR) should not be afforded to Appellant.

FINDINGS OF FACT

The Appellant is employed as a Sergeant with the Montgomery County Department of Police. Effective December 19, 1999, Appellant was transferred from the Tactical Section of the Special Operations Division to a Patrol Shift in the Wheaton District because of Appellant's involvement in a November 24, 1999, incident in which Appellant was alleged to have purposely fired Appellant's weapon, which was loaded with simulated ammunition, at close range at another police officer.

Appellant filed an Administrative Grievance on January 6, 2000. The grievance concludes with the allegation:

> My transfer is arbitrary and capricious and violates the county charter, county code and personnel regulations. My transfer is punitive and constitutes an illegal punishment for alleged misconduct. Transfer is not a disciplinary action authorized by Montgomery County Personnel Regulations Paragraph 28-3.

In a response dated January 27, 2000, the Chief of the Police Department stated:

> In taking the action, it was not my intention to discipline the Grievant for their behavior. I was not seeking retribution. In fact, the administrative investigation was still ongoing at the time I made the decision to transfer the Grievant and it may still result in personnel actions that are separate and distinct from the transfer. I was merely seeking to ensure that the person who was leading the Tactical Division was someone whose judgement I had unwavering confidence in and I felt as though I could not wait until the disciplinary process ran its course before I removed Grievant from the unit.
>
> Function Code 325 provides that "the Chief of Police reserves the right to transfer permanently or temporarily, any employee…." Additionally, Section 22, *Transfer*, of the Montgomery County Personnel Regulations

(as amended 1994) states that transfers are a prerogative of management and employees who appeal an involuntary transfer must show that the action was arbitrary and capricious or discriminatory. It also contains an illustrative list of reasons for transfers, that includes "the resolution of a grievance or other problems affecting the operational efficiency of a unit or organization."

In transferring the Grievant, the action was taken pursuant to the rights reserved in Function Code 325 and Section 22. Additionally, the Grievant has failed to show that the action taken was arbitrary and capricious or discriminatory.

At the commencement of the Step III grievance meeting, the County raised as a procedural issue that the Appellant's claim that the transfer was punitive and constituted illegal punishment for alleged misconduct was arguably covered by the LEOBR, and would therefore be excluded from the coverage of the Administrative Procedure 4-4. Relying on cited law, regulation, and court cases, the Step III Final Complaint Designation states in pertinent part:

> In conclusion, with consideration given to the comments submitted the County Attorney's recommendation that the Grievance Procedure be held in abeyance to allow the Grievant the opportunity to petition Circuit Court to direct the Police Department to show cause why the right of a hearing under the LEOBR should not be afforded is adopted. Then should the Grievant's petition be denied, the Grievance Procedure would be resumed.

APPLICABLE LAWS AND REGULATIONS

Montgomery County Code Section 33-12 (b) "Grievances." states:

> … Grievances do not include the following: Classification allocations, except due process violations; failure to reemploy a probationary employee; or other employment matters for which another forum is available to provide relief or the board determines are not suitable matters for the grievance resolution process.

Administrative Procedure 4-4, Section 4.5 (C), provides with respect to "Standing to File Grievances."

> Law enforcement officers may not use the grievance procedure to appeal matters which are subject to the appellate process provided under the Law Enforcement Officers' Bill of Rights.

Administrative Procedure 4-4, Section 4-11 (A) (B), provides with respect to "Technical and Procedural Review of Grievances."

When the employee files the grievance at the first step of the grievance

procedure he/she should send a copy of the grievance to the Labor Employee Relations staff in the Personnel Office. (Instructions are included on the standard form.)

> The Personnel Director or designee will decide whether the issue is grievable (i.e., not excluded from the scope of the grievance procedure), has been timely filed, and is otherwise in compliance with this procedure.

Montgomery County Personnel Regulations 22-2 provides "Reasons for Transfer." An employee may be transferred on the basis of:

(a) A voluntary request;
(b) A lack of funding resulting from budgetary limitations or loss of Federal/State funds;
(c) A change in the approved work program/plan/design;
(d) An administrative reorganization
(e) A technological change or advancement that impacts on work force needs;
(f) A change in an employee's physical or mental condition;
(g) The resolution of a grievance or other problems affecting the operational efficiency of a unit or organization;
(h) For training or development; or
(i) The need for additional personnel at a specific work site.

Montgomery County Personnel Regulations 28-3 lists the "Types of disciplinary actions" and they are: Oral Admonishment, Written Reprimand, Forfeiture of Annual Leave or Compensatory Time, Within-Grade Reduction, Suspension, Suspension Pending Investigation of Charges or Trial, Demotion, and Dismissal.

Article 27, Sub-Section 730, Annotated Code of Maryland, Hearing before demotion, dismissal, transfer, etc.; limitation of actions. (a) Notice; record, provides transfer as potential discipline as stated below:

> If the investigation or interrogation of a law enforcement officer results in the recommendation of some action, such as demotion, dismissal, transfer, loss of pay, reassignment, or similar action which would be considered a punitive measure, then, except as provided under subsection (c) of this section and except in the case of summary punishment or emergency suspension as allowed by Sub Section 734A of this subtitle and before taking the action, the law enforcement agency shall give notice to the law enforcement officer that he is entitled to a hearing on the issues by a hearing board. The notice shall state the time and place of the hearing and the issues involved. An official record, including testimony and exhibits, shall be kept of the hearing.

Article 27, Sub-Section 734, Annotated Code of Maryland, states:

> Any law enforcement officer who is denied any right afforded by this subtitle may apply at any time prior to the commencement of the hearing before the

hearing board, either individually or through his certified or recognized employee organization, to the circuit court of the county where he is regularly employed for any order directing the law enforcement agency to show cause why the right should not be afforded.

POSITION OF THE PARTIES

Appellant

The Appellant contends that Appellant's transfer violates Montgomery County Personnel Regulations 28-3 because the personnel regulations define the types of disciplinary sanctions available and transfer is not listed. Appellant further contends that MCPR 22-2 lists permissible reasons for involuntary transfer, and disciplinary is not among them. Additionally, Appellant contends that since Appellant's transfer violates MCPR 28-3 and not the LEOBR, the County's Grievance Procedure is the appropriate forum for this matter. The Appellant contends that the Department's claim that the transfer was motivated by doubts about Appellant's judgement is a subterfuge to evade the restrictions of MCPR 28-3 and MCPR 22-2.

The Appellant contends that in order for a law enforcement officer to invoke the LEOBR procedural protections, including the right to a hearing, there must first be a threshold investigation or interrogation of the officer which results in the recommendation of some action, which would be considered a punitive matter. Appellant contends that since there was not an investigation or interrogation (within the meaning of LEOBR), but an inquiry which resulted in the recommendation of some action, which would be considered a punitive matter, Appellant's case does not fall within the purview of the LEOBR. Appellant also contends that transfer based on productivity or performance is not a punitive measure within contemplation of the LEOBR.

The Appellant argues that because there has been no Step III Grievance Meeting Appellant has not had the opportunity to present facts, which will demonstrate that Appellant's case should not proceed under the LEOBR. The Appellant argues that the case should reconvene to allow Appellant and the Police Department to present facts to support their respective positions. After considering these facts, should the Chief Administrative Officer (CAO) determine that Appellant's transfer was not within the purview of the LEOBR, then the CAO can make a determination on the remaining issues. The Appellant argues that there is no requirement in the case law that only a court can determine whether a personnel action must proceed under the LEOBR.

County

The County refers to Article 27, Section 730, Annotated Code of Maryland, which provides that transfer is a potential disciplinary action against police officers. The County argues that since transfer is a potential disciplinary action and the Appellant's case involves transfer, it is covered by the LEOBR.

The County contends that Maryland State Law requires that any matter alleged by a law enforcement officer to be disciplinary or punitive must be reviewed under procedures prescribed by the LEOBR. Since the Appellant alleges that Appellant's transfer is a disciplinary action by stating "My transfer is punitive and constitutes an illegal punishment for alleged misconduct," Appellant's case is covered by the LEOBR.

The County further contends that Administrative Procedure 4-4, Section 4-5 (C) prohibits the appeal of matters concerning law enforcement officers and that Section 33-12 of the Montgomery County Code limits the processing of Appellant's complaints through the County's Grievance Procedure because Appellant has another forum, the LEOBR.

The County also contends that since the Appellant has elected to pursue the position that Appellant's transfer is punitive, then the appropriate forum to render a decision as to whether the action is punitive is the LEOBR. The County supports this argument with reference to the Court of Appeals, which established in Moats et. al. that the LEOBR is the exclusive remedy in matters of departmental discipline and that the exclusivity of that forum cannot be waived.

ISSUES

1. Is the subject matter of the grievance, Appellant's involuntary transfer from the Tactical Section, covered by the LEOBR?

2. Is the Appellant's transfer covered by the Montgomery County's Administrative Grievance Procedure?

3. Did the County raise the issue of grievability in a timely manner pursuant to the provisions of the grievance procedure?

4. Did the County's failure to hold a Step III grievance meeting on the issue of the application of LEOBR violate law or regulation, or otherwise prejudice the Appellant?

5. Are there material issues of fact necessitating a hearing before the Board?

ANALYSIS AND DISCUSSION

1. The Appellant alleges in Appellant's grievance that Appellant's transfer is arbitrary, capricious and violates the county charter, and specifically, "My transfer is punitive and constitutes an illegal punishment for alleged misconduct." Article 27, Sub-Section 730, Annotated Code of Maryland, provides transfer as a potential discipline. The Court of Appeals established in Moats et al. the LEOBR to be the exclusive remedy in matters of departmental discipline and that the exclusivity of that forum cannot be waived. In the Board's view, since the Appellant alleges that this transfer is punitive and

Maryland law requires that any matter alleged by a law enforcement officer to be disciplinary or punitive must be reviewed under procedures prescribed by LEOBR, the instant case is covered by the LEOBR.

Appellant contests coverage of the LEOBR because transfer is not listed as a form of disciplinary action under MCPR 28-3, and because the procedures for discipline set forth in the LEOBR were not followed in the circumstances of this transfer. While not raised by the Appellant, in the Board's view, added to this argument for non-LEOBR coverage should be the fact that in the Chief's response to Appellant's grievance it is stated that, "it was not my intention to discipline the Grievant. …" However, it is the specific scope of the LEOBR to cover disciplines, including transfer, "which would be considered a punitive measure," which was exactly what the Appellant alleged in Appellant's grievance. The fact that an action taken may additionally violate the MCPR does not affect the exclusive coverage of the LEOBR. It should be noted in this regard that the Appellant can raise in LEOBR proceedings, allegations concerning a failure by the County to use appropriate pre-disciplinary procedures.

2. In the Board's view, the Appellant's grievance is not grievable because Administrative Procedure 4-4, Section 4-5 (C) prohibits the appeal of matters which are the subject of the Appellate process provided under the LEOBR and Section 33-12 of the Montgomery County Code excludes from the definition of grievance matters for which another forum is available, which in this case is the LEOBR.

Having concluded that the Appellant's grievance is covered by the LEOBR, in the Board's view, Appellant may not use the Grievance Procedure to appeal this case.

3. Administrative Procedure 4-4, Section 4-11 (A) (B) clearly implies that when a grievance is filed at Step I, the Personnel Director or designee will decide whether the issue is grievable. The Personnel Director or designee accepted the Appellant's grievance and held Steps I and II. The County made an allegation that the grievance is not grievable in Step III. In the Board's view, while it is desirable that such allegations be made as early as possible, nothing in the grievance procedure precludes such issues from being raised when the grievance is at Step III, and it is a basic principle of law that issues of legal jurisdiction can always be timely raised.

4. The Board sees no merit to the Applicant's contention that Appellant's Step III Hearing should be reconvened in order to provide Appellant an opportunity to present facts which will demonstrate that Appellant's case should not proceed under the LEOBR. In this regard, the question of the coverage of the LEOBR is an issue of law properly before the Board reviewing the County's determination. There are no apparent issues of fact that would necessitate further Step III processing.

5. In the Board's view, there are no material issues of fact necessitating a hearing before the Board nor does the Appellant allege such issues. Rather, the issue presented is one of law, whether the Appellant is covered by LEOBR.

CONCLUSION

On the basis of the above, the Board concludes that the County's action to hold the Administrative Grievance in abeyance and allow the Appellant the opportunity to petition Circuit Court to direct the Police Department to show cause why the right of a hearing under the LEOBR should not be afforded is consistent with law and regulation. Therefore, Appellant's appeal is denied.

OVERSIGHT RESPONSIBILITIES

CLASSIFICATION AUDIT

In April 2001, the Board submitted its audit report on the County's Classification and Compensation Plans and Procedures to the County Council, County Executive and the Chief Administrative Officer. The Board had contracted with Fox Lawson & Associates, LLC, Phoenix, AZ to conduct the audit and provide a comprehensive report that would identify the system's strengths and opportunities for improvement, along with specific recommendations.

The purpose of the audit was to determine whether the present procedures were being administered as currently prescribed, and were meeting the needs of the County and its managers to attract and retain a quality work force while assuring equitable treatment of employees at all levels. The audit reflected that the system overall, is being administered appropriately. The Board provided the Council with comments on the audit recommendations, but offered no recommendations which would require the Council to regulate a change in the existing system at this time.

County Personnel Regulations require the Board to have an audit of the entire system conducted at least once every five years.

PERSONNEL REGULATIONS REVIEW

The Board's involvement in the initiative to revise the Personnel Regulations began in August 1997, when the Board reviewed and commented on the Regulatory Reform Task Force's final report which dealt with the regulations. In August 1999, the Board completed a review of the initial proposed changes to the regulations and submitted comments to the Director, Office of Human Resources. In 1999, 2000 and 2001 the Board forwarded many comments to the Council's Management and Fiscal Policy Committee (MFP), and also made presentations at MFP Committee work sessions.

In June 2001, the Board submitted its final comments and recommendations to the MFP Committee. The revised Personnel Regulations became effective October 7, 2001.

HEARINGS AND APPEALS

The Board continued to direct most of its time towards appellant duties and responsibilities by deciding appeals and issuing written decisions.