IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2003
No. 522

MONTGOMERY COUNTY, MARYLAND,

Appellant

v.

DAVID FALCINELLI, et al.,

Appellees

On Appeal from the Circuit Court for Montgomery County, Maryland
(Ann S. Harrington, Judge)

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises from the police lieutenant promotional process conducted in 1999. It traveled back and forth between the Montgomery County Merit System Protection Board and the circuit court before reaching this Court for review.

The case began when Sergeants David Falcinelli, Russell Hamill, and Zane George[1] filed grievances challenging their eligibility for promotion following a test. (E. 39-42) The Office of Human Resources (OHR) reviewed the grievances and denied relief. (E. 43-45) The sergeants appealed that response and a hearing was held before a neutral fact-finder. (E. 46) Based on the results of the hearing, the Chief Administrative Officer (CAO) also denied the grievances and issued a written decision. (E. 47-63) Next, the sergeants filed an appeal to the merit board, which reviewed the materials compiled by OHR and the CAO, along with additional information submitted by the parties. The board denied the grievances, and the sergeants sought judicial review in the Circuit Court for Montgomery County. (E. 77-86) That review culminated in a remand to the merit board for the board to make additional findings of fact to determine whether the examination fairly appraised the qualifications, fitness, and abilities of the candidates. (E. 96-100)

On remand, the board considered the questions referred by the court and issued a supplemental final decision and order. The second order included additional findings and concluded that the examination fairly measured the qualifications of the candidates. (E. 87-95) For the second time, the sergeants petitioned for judicial review. This time, the circuit

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[1]Sergeants Jacques Croom and Darin Magee later filed grievances regarding the same issue, and OHR consolidated all of the cases.

court held that the record did not support the board's additional findings, reversed the board's decision, and remanded the case for a determination of an appropriate remedy. (E. 101-116) The County filed this timely appeal.

QUESTION PRESENTED

Did the sergeants meet their burden of proving that the examination used to create the eligible list for promotion to lieutenant was flawed by proving that the examination and a previous examination yielded different results, but without offering proof that the test in question was the one that was flawed?

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to this brief.

STATEMENT OF FACTS

To protect against political influence and favoritism and to assure that its employees are highly competent, Montgomery County adopted a merit system. Montgomery County Charter § 401; Montg. Co. Code § 33-5 (1994, as amended). As part of its merit system, the County created processes and procedures to test its police officers for a promotional opportunity.[2] These processes and procedures attempt to determine the level of qualification of each applicant within a group of applicants for a promotional opportunity that either is

[2]The promotional opportunities available to employees in non-public safety positions usually include competition for the position with applicants from outside county government. *See* Montg. Co. Pers. Reg. § 33.07.01.06. The police department limits most of its promotional opportunities to people who are already members of the department. The County believes the process used for police promotions conforms to the merit system principles.

available currently or may be available in the future. The officers who pass the examination are classified as "well qualified" or "qualified" and their names appear alphabetically within those classifications on an "eligible list". (E. 8) The police chief may select officers from either class for promotion, but may select an officer from the qualified class over a well qualified officer only with the approval of the CAO based upon substantiated reasons. Montg. Co. Pers. Reg. 33.07.01.07 § 7-1. The eligible list lasts for a set period of time (in this case 24 months). (E. 9) Once the time expires, the process starts again, and officers who were not selected from the list must take another examination.

To assure fairness and accuracy in the examination process, the preparation of the promotional examination in this case included several stages. First, a cross-section of police lieutenants reviewed the list of tasks, knowledge, skills, and abilities required for an individual to perform the duties of a police lieutenant. They revised these items as appropriate, and conducted the same evaluation of the seven managerial dimensions that OHR would use to rate the candidates. (E. 1-6) Once the job analysis was completed, three lieutenants and a captain developed oral and written exercises to evaluate each candidate in relation to the managerial dimensions and position requirements.[3] More senior officers, the department's majors, reviewed the test, and then several lieutenants participated in a pre-test,

[3]The officers who wrote the examination had displayed good writing skills, logic, and analytical skills. Each drew on personal experience of what the position entailed combined with the managerial dimensions. (E. 50)

where they responded to the exercises as if they were candidates.[4] (E. 50) Each step tried to ensure that the examination would evaluate the candidates properly according to the skills, knowledge, and abilities that an officer needs to perform the duties of a police lieutenant in Montgomery County. As the merit board found, the grievants did not challenge the process used to develop this test. (E. 85)

When OHR had the examination ready, the personnel bulletin was issued, outlining the requirements for promotion and the examination procedure for the rank of police lieutenant. (E. 7-10) The bulletin explained that the process would include a written exercise, a presentation exercise, and a structured oral interview. (E. 7) Candidates were informed that the test would evaluate their performance based on seven managerial dimensions: problem analysis, decision making, planning and organization, leadership and supervision, sensitivity, oral communication, and written communication. (E. 8-10) Additional details regarding the scoring process, conversion of the final scores,[5] and the creation of an eligible list also appeared in the bulletin. (E. 8-9)

To preserve objectivity, OHR recruited police captains and lieutenants from other local jurisdictions to serve as raters. (E. 52) The raters participated in two days of training, during which they studied the specific responsibilities of police lieutenants in Montgomery

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[4]The pre-test was videotaped for later use in training the examination raters. (E. 50)

[5]Candidates with adjusted scores of 80 and above would be placed in the well-qualified category; candidates with adjusted scores of 70 to 79 would be placed in the qualified category; and candidates with scores below 70 would not be eligible for promotion. (E. 8)

County and the details of the scoring process. The training gave the raters guidance for evaluating candidate performance in relation to the managerial dimensions, completing the rating sheets, handling rating errors, and reaching a consensus on each dimension for each candidate. (E. 52-53) During the examination period, the raters served on panels of three and evaluated two candidates each day. The composition of the panels changed daily to foster independent thinking. (E. 53)

An additional component of the process involved the use of proctors. The police department selected several lieutenants and captains to serve as proctors, and they each received two hours of training on providing instructions and materials to the candidates. To ensure consistency, the proctors used instruction scripts and read them verbatim to the candidates. (E. 53)

With all of this preparation in place, the first five days of the examination went as planned. On the sixth and final day, one proctor did not read from the script and failed to provide one group of five candidates with the written information that the other candidates had received to prepare for the oral presentation portion of the examination. The error was not discovered until the five affected candidates already had begun their oral presentations. When they finished, OHR informed the rating panel of the mistake and asked if anyone thought the lack of complete instructions affected the candidates' performance. Most of the raters believed that the candidates performed sufficiently to rate them, so the panel completed the rating process. (E. 53)

When the Director of OHR learned of the error, she contacted the Chief of Police. After considering the options for handling the error, the Director asked the CAO to invalidate the first examination and to approve administration of a second examination due to the omission made by one of the proctors. The CAO did so, and the process of preparing an examination began again.[6] (E. 16, 58)

In preparing the second exam, OHR attempted to replicate the first test, using the same number and type of exercises. (E. 58) Starting with the existing job analysis, which had not changed in the interim, OHR proceeded with the rigorous planning process used for the first examination—the same group of police officers developed the exercises for the second exam; department management again reviewed the test; and existing lieutenants again participated in a pre-test to discern any problems. New raters were recruited from other jurisdictions and provided with the same two-day training, and many of the same proctors participated.[7] Like the first test, the second examination included a written exercise, a presentation exercise, and a structured oral interview. (E. 44, 58-59) And, again, the raters evaluated the candidates in panels of three that rotated each day to minimize discrepancies. (E. 44, 58-59, 90) As with the first test and as the merit board found, the grievants did not challenge the methods used for developing this second test. (E. 93-94)

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[6]The circuit court upheld the ability of the County to invalidate the first test in the first judicial review of the case, and no appeal was taken from that ruling. (E. 96-97)

[7]The proctors who made the error in the first examination did not participate in the second testing process. (E. 59)

All but one of the original candidates took the second examination. (E. 59) The eligible list showed Sergeant Falcinelli in the well-qualified category; Sergeants George and Hamill rated qualified; and Sergeants Croom and Magee rated not eligible for promotion. (E. 38) Although no eligible list was created based on the first examination, the record revealed that these sergeants would have been placed in the well-qualified category based on their prior scores. (E. 59)

The change in their promotion status prompted the sergeants to file grievances challenging the validity and fairness of the process.[8] (E. 39-42) The sergeants hired a witness to evaluate the discrepancy between the scores on the two tests. Amy A. McCarthy, Ph.D., an economist and consultant, submitted a report in which she compared the results of the two tests and concluded that the differences in the scores did not result from random error in the testing process. (E. 66-67) She did not assess whether either examination fairly tested the applicants, and the grievants chose not to present any evidence that impugned the fairness or accuracy of the test that was used to create the eligible list.[9]

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[8]The eligible list created from the results of the second test yielded 17 or 18 applicants in the well qualified category and 6 in the qualified category. Before the list expired, approximately 10 of those sergeants were promoted to lieutenant. (E. 20, 26, 32, 38, 91) As Falcinelli rated well qualified after both tests, other considerations apparently motivated his grievance.

[9]Apparently, Dr. McCarthy was engaged after the first merit board decision, so her analysis was not part of the CAO's decision-making process that formed the basis of the grievants' original appeal to the merit board. While Dr. McCarthy compared the results of both tests and determined that the results showed that the two tests were different, she conceded that she did not know why. In fact, she offered no opinion concerning the validity of either exam as a fair and accurate measure of the candidates' abilities, nor did she relate

The County also sought expert analysis of the different scores and guidance as to the validity of the test by consulting with Paul Hanges, Ph.D., Associate Professor, Department of Psychology, University of Maryland at College Park. (E. 60) Dr. Hanges considered the method of calculating the scores in relation to two aspects of reliability[10] and concluded that the second test (the test used to create the eligible list) met professional standards for reliability. (E. 64-65)

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her findings to the Standards for Educational and Psychological Testing of the American Psychological Association, despite the importance the grievants gave these standards in their argument before the circuit court. Since the standards do not fall within her field of expertise, she undoubtedly recognized the impropriety of opining on their relationship to the examination results she reviewed. (E. 68-74)

[10]Dr. Hanges' report evaluated the two examinations based on internal consistency reliability and inter-rater reliability and found the tests to meet these standards of reliability. (E. 64-65)

ARGUMENT

The sergeants did not meet their burden of proving that the examination used to create the eligible list for promotion to lieutenant was flawed by proving that the examination and a previous examination yielded different results, but without offering proof that the test in question was the one that was flawed.

The lower court fell prey to the sergeants' seductive reasoning that the County must prove the validity of a test if a person who takes two or more similar examinations does not score the same on each of them. This topsy-turvy reasoning contradicts the sergeants' burden to prove that the test used in establishing the eligible list was flawed in a way that violated the protections of the merit system. Arguing solely that a comparison of the test results reflected a dissimilarity in the tests, the sergeants never produced any evidence that the County used a flawed test to create the eligible list.

To adopt the sergeants' arguments creates an oxymoron out of the County's merit system. The sergeants acknowledge in their grievances that the merit system compels "recruitment, selection and advancement . . . on the basis of . . . relative abilities, knowledge and skills. . . ." Montg. Co. Code § 33-5(b)(2). Yet, they urged the circuit court to use the same purportedly flawed test to allow those who were promoted based on the test to remain lieutenants and also to promote those who grieved.[11] Either the test that created the eligible

[11]This view makes a mockery of the merit system. Nothing in the County's merit system law suggests that two wrongs must be adjusted in this fashion. If the list is based on a flawed examination, then it should not be used at all and the process for promotion should begin anew. The sergeants recognized this result as the proper one and chose not to seek to enjoin promotions from what they allege is an illegal list, nor did they seek to implead those sergeants who did not grieve, but who might be affected by such a decision. One need only

list evaluated the "relative abilities, knowledge and skills" of the applicants or it did not. If the exam measured those characteristics, then the County met its obligation to the officers and the public under its merit system. If the test did not measure the candidates' qualifications properly, then the County did not meet its obligation to the community that depends upon the system to assure it of highly competent government employees. The record reflects that the sergeants utterly failed to present evidence that the test did not a fairly and accurately measure their relative abilities, knowledge, and skills. For that reason the lower court's decision must be reversed and the merit board's decision must be affirmed.

The standard of review does not permit judicial factfinding.

Judicial review of an administrative decision requires the court to determine whether the decision is "in accordance with the law or whether it is arbitrary, illegal, and capricious." *Moseman v. County Council*, 99 Md. App. 258, 262, 636 A.2d 499, 501, *cert. denied*, 335 Md. 229, 643 A.2d 383 (1994) (citations omitted). The reviewing court will not substitute its judgment for that of the agency when the issue is fairly debatable and the record contains substantial evidence to support the administrative decision. *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 576-577, 650 A.2d 226, 230 (1994). The court may substitute its judgment only as to an error made on an issue of law. *Columbia Road Citizens' Association v. Montgomery County*, 98 Md. App. 695, 698, 635 A.2d 30, 32

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carry this argument to its conclusion to see how collusion among test takers can assure promotions for all of them, if they prove there is a flaw in the testing process. Instead of competitive exams for promotion, the officers effectively propose that the merit system be converted to a judicial system so that they can be guaranteed a promotion.

(1994). The lower court side-stepped the prohibition against judicial factfinding when reviewing an administrative decision and declared that the promotional test was flawed as a matter of law, thus allowing the court to overturn the agency's decision. This conclusion is simply wrong.

Decisions of agencies are entitled to the greatest weight and to a presumption of validity, viewing the decision in the light most favorable to the agency. *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 68-69, 729 A.2d 376, 381 (1999). Substantial evidence has been described as "more than a 'scintilla of evidence,' such that a reasonable person could come to more than one conclusion." *Relay Improvement Association v. Sycamore Realty Co.*, 105 Md. App. 701, 714, 661 A.2d 182, 188 (1995), *aff'd*, 344 Md. 57, 684 A.2d 1331 (1996) (citations omitted). Moreover, the agency resolves any conflicting evidence, as well as any inconsistent inferences, from such evidence. *Wisniewski v. Department of Labor, Licensing and Regulation*, 117 Md. App. 506, 517, 700 A.2d 860, 866 (1997) (citations omitted).

The present case involves several promotional grievances. In these cases, the employee has the burden of proof. *See* Montg. Co. Admin. Proc. 4-4, Grievance Procedure § 4.1 (1992). This procedure coincides with the general practice before an administrative agency, where the proponent of a proposition to change the status quo bears the sole burden of persuasion:

> It is never the case that the [administrative agency] must be either 1) persuaded by the appellant to act or 2) persuaded by the opponents not to act

> . . . There is only one burden of persuasion, and it points in only one direction . . . The tribunal that needs to be persuaded may always conclude, "We have heard what the applicant had to say and we have heard nothing to the contrary, but we are still not persuaded."

Angelini v. Harford County, 144 Md. App. 369, 377, 798 A.2d 26, 31, *cert. denied*, 370 Md. 269, 805 A.2d 265 (2002). Although the merit board had to consider the evidence and make findings of fact based on the record, the board did not have to accept the sergeants' analysis or the County's view, but simply could be unpersuaded that the score differences between the two exams proved anything as to the validity of the test used to create the eligible list:

> Mere non-persuasion . . . requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard.

Angelini, 144 Md. App. at 378, 798 A.2d at 31 (quoting *Starke v. Starke*, 134 Md. App. 663, 681, 761 A.2d 355, 364 (2000)) (emphasis omitted). The County did not have to prove a negative. Instead, the sergeants had to prove the unfairness of the test by producing facts to support a finding that the exam was flawed, but they did not do so.

The burden of proof required both production of evidence and persuasion of the factfinder.

Throughout the grievance process and the subsequent reviews, the sergeants had the burden of producing evidence to support their argument that the second examination was flawed *and* to persuade the finder of fact. The difficulty of doing so became clear during the first review by the board, where it explained that the evidence did not seem to show which

of the two examinations was defective—perhaps the first examination did not measure the candidates' qualifications accurately and the second test did so. (E. 85)

On remand, no one disputed that the scores yielded different results on the two tests. The difference alone, however, did not answer the question of whether the different scores meant that one of the tests did not satisfy the merit system requirement that all candidates have a fair opportunity to compete for the position. Even if an inference could be drawn that at least one of the exams was faulty, it remained impossible to determine which test failed to measure the candidates' abilities properly. The sergeants provided no additional evidence to support a finding that the second test was flawed, but relied solely on the lower scores they received, which placed them in a different category on the eligible list. (E. 91) With no clear proof, the sergeants failed to persuade the board that the score difference meant the second test was flawed.

The board made no error that would permit the circuit court to substitute its judgment for that of the board.

The absence of clear evidence of a flaw in the test, combined with the small number of applicants whose scores varied greatly on the examination, suggested to the board that the second test was fair and reliable. (E. 93) In addition, the sergeants failed to persuade the board that the second exam did not measure the candidates' performance and abilities fairly. The record before the board showed that, although the results differed for some applicants, the process for preparing the examination, the approach used, and the training of raters and proctors was identical in each instance. (E. 58-59, 93) The sergeants cannot and do not

quarrel with the methodology used in preparing and using the examination. Indeed, the process complies with every reasonable requirement for test preparation and use.

With no evidence before it from which to conclude that either test was substantively flawed, the board could not find that either examination was invalid:

> [T]he possibility of error causing lack of correlation goes to either the first or the second examination, or both. That is, while [the officers] sought to have the first examination be the basis for determining the list of best qualified candidates, throwing out the second examination, it could just as well be argued that the first examination was somehow flawed and that the second examination is an accurate determinate of qualifications, fitness and ability to be promoted to the rank of Lieutenant.

(E. 92-93) Except for the low correlation between the scores on the two examinations, "[t]here is no evidence, or contention, that the individual examinations failed to fairly appraise and determine the qualifications, fitness and ability of the competitors." (E. 93-94) People rarely perform identically on successive tests. APA Standards, p. 25.[12] A change in scores for an individual can result from anxiety and distractions, or a person's score can improve due to his own learning and development during the time between the first and the second test. APA Standards, pp. 26-27. None of these situations establishes error or unreliability of the test. *Id.* And, quite clearly, the sergeants' consultant did not contend that the test used to create the eligible list failed to properly measure the sergeants' relative abilities, knowledge, and skills—she simply said that the scores differed.

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[12]A shortened form has been used for this reference. The full citation is American Educational Research Association, American Psychological Association, and National Council on Measurement in Education, Standards for educational and psychological testing (1999).

The board affirmatively found that the second examination measured the qualifications of the candidates fairly. (E. 94) Although substantial evidence must exist in the agency record to support the specific findings made by an administrative agency, the analysis also requires that the party with the burden of proof persuade the agency:

> [A]ll that was required was that the Board be not persuaded that there was a need for additional towing services. To the extent its finding was weightier than that, the incremental weight was surplusage. Far less is required to support a merely negative instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something.

Pollard's Towing, Inc. v. Berman's Body Frame & Mechanical, Inc., 137 Md. App. 277, 289, 768 A.2d 131, 137 (2000).

In the present situation, the board evaluated the facts before it and explicitly found that the difference in scores between the two exams resulted from random error and not from a flaw in the exam:

> [T]he second examination consisted of different exercises, which candidates might score differently on, even if in both cases the exercises reflect the duties of a Lieutenant. Similarly, the raters were different, and while each group of raters received the same training, they were different people rating different exercises. The Board concludes that such "random" factors produced the lack of correlation, and the fact the correlation was quite low does not support a contrary finding.

(E. 93) The applicants never identified a source of the systematic error[13] that they claim occurred in the examination process. Logically, two exams that measure the same qualities of the candidates to assess their fitness to serve as a police lieutenant will involve different exercises, different fact patterns, and use different raters.[14] To view these differences as systematic error would nullify the process—the department would have to give the same examination to applicants for the lieutenant position year after year. This would make no more sense than requiring the Board of Law Examiners to use the same questions for the bar examination in February and July, year after year.

The merit system protects "the opportunity of employees to compete fairly for promotion." *Prince George's County v. O'Berry*, 133 Md. App. 549, 552, 758 A.2d 632, 633 (2000). Even when a flaw is found in an examination or the process used for promotion, "[t]he potential for promotion is what was wronged, not a right to promotion." *Andre v. Montgomery County*, 37 Md. App. 48, 62, 375 A.2d 1149, 1156 (1977). Once the County discovered the discrepancy in the instructions given by the proctor, fairness dictated that the County ensure the applicants of a level playing field. Although some officers may have

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[13]The APA Standards define systematic error as "[a] consistent score component. . .not related to the test performance." APA Standards, p. 183. The goal of the standards is to avoid flaws in the construction of a test (e.g., the test does not measure relevant knowledge) or in the administration of the test (e.g., using biased raters). *Id*. at 26, 76-77. The record in this case did not contain evidence of systematic error in the second examination.

[14]The sergeants attempted to rely on these minor differences in the second petition for judicial review, but these claims remain distinct from the requisite flaw in construction or bias of the raters.

preferred to re-take the identical test, giving everyone essentially extra time to contemplate their answers, the County chose to prepare a new examination using the same process as it used for the first examination. This is all the merit system requires.

The absence of any proof that the second test did not address lieutenant duties and qualifications or that the raters exhibited bias supports the inference that the different scores resulted from random error and not from a systematic error in the construction of the test. By administering a new test prepared in the same way and measuring the same qualifications, the County protected the opportunity of all candidates to compete for the promotion fairly. The circuit court erroneously pronounced the matter one of law, despite the factual nature of this key issue. In light of the consistent mechanism for preparing and giving the test, with no evidence to disprove its validity, the merit board properly found that the second test was valid.

The merit system contemplates promotion of the fittest, not promotion of the litigious.

The sergeants have argued throughout this case that problems encountered in the administration of the examination should require their promotion. While structured in terms of the alleged violation of merit system principles, the argument ignores the most basic principle of the merit system—promotions should be based on relative knowledge, skills, and abilities. *See* Montg. Co. Code § 33-5. Clearly, retroactive promotion should be an appropriate remedy for an officer who is passed over for illegal, discriminatory reasons. It also may be appropriate when an officer is able to show that the person promoted was not

qualified for the position and the litigant seeking the promotion is objectively more qualified than any other applicant. But retroactive promotion when a candidate simply scores differently on an examination than he did on a prior exam deviates from the core principles that the merit system intends to foster.

A decision of the Supreme Court of New Jersey issued earlier this year illustrates the court's limited role in reviewing promotional examinations. The case arose from a police promotional exam given under the state's constitutionally recognized civil service system. The complaint alleged that the officers who took a make-up exam had an unfair advantage over the original test-takers, because the first group discussed the contents of the exam with some of those who took the make-up exam. The New Jersey court determined that the appropriate remedy was to invalidate the results of the make-up examination and to prohibit the promotions of those officers who took that exam. *In the Matter of Police Sergeant, City of Patterson,* 176 N.J. 49, 66-67, 819 A.2d 1173, 1183 (2003). In doing so, the court recognized the limited role a court has in reviewing these types of administrative processes, even under its State Constitution, due to the expertise necessarily involved in the examination process:

> Moreover, we noted that "the judiciary is not disposed to engage in a critical supervisory examination of the composition of the questions to be propounded to candidates in promotional tests . . . or to exercise an appellate review of the scoring of the answers . . . ." [citations omitted] Rather, the preparation and administration of civil service examinations is an administrative function delegated most liberally to the authorized examiners of the Department . . . by the Legislature. The fulfillment of that function is a matter requiring special expertise, involving as it does the determination of what job knowledge, skills

> and abilities are necessary or desirable in a candidate for a particular position, and the highly technical problem of devising suitable examination questions which will demonstrate as accurately as possible whether an applicant possesses those requirements sufficiently to qualify for the position. In view of the above, the courts cannot intervene to nullify a civil service examination unless it is clearly shown that the Department has abused its discretion.

Police Sergeant, 176 N.J. at 59, 819 A.2d at 1179 (quoting *Brady v. Department of Personnel*, 149 N.J. 244, 257, 693 A.2d 466, 472 (1997)).

In the case before this Court, the sergeants did not seek to invalidate the promotions based on what they contend was a flawed exam. Instead, they argue that they should be promoted. Yet, the sergeants cannot attribute a merit system principle to advance this contention. Just as significantly, the sergeants never presented the merit board with proof that the test used to create the eligible list was flawed. Without that evidence, promotions made based on the list should not be set aside, nor should the grievants be promoted over the less litigious, but equally well-qualified candidates for promotion.

CONCLUSION

The sergeants failed to meet their burden of persuading the board that the discrepancy between the scores on the two tests resulted from a flaw in the test, or that the exam used to create the eligible list did not fairly appraise and determine the relative qualifications, fitness, and ability of the candidates. The record contained no evidence of a flaw in the examination, but rather supported the merit board's denial of the grievance. This Court should reverse the circuit court's ruling and affirm the merit board's decision.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

APPENDIX