



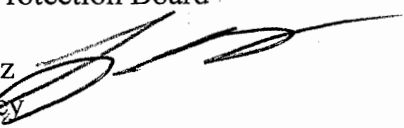
OFFICE OF THE COUNTY ATTORNEY


Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

MEMORANDUM

TO: Charla Lambertsen, Chair
Merit System Protection Board

VIA: Leon Rodriguez
County Attorney 

FROM: Marc P. Hansen 
Deputy County Attorney

DATE: December 17, 2008

RE: Merit System Protection Board – Functions and Authority

In MSPB Case No. 07-17, the Merit System Protection (Board) sustained the appeal of a Department of Public Works and Transportation (DPWT) employee from the imposition of discipline, and, as part of the resolution of the case, ordered the Director of the Office of Human Resources (OHR) to obtain an organizational assessment of a section in the Transit Services Division of DPWT.¹ No appeal was taken from the Board's decision by either the employee/grievant or the County.

Subsequently, the Board asked the attorney representing DPWT in MSPB Case No. 07-17, about the status of the organizational assessment. The Director of OHR informed the Board, through counsel, that the organizational assessment had not been pursued "at this time" because of a pending reorganization of DPWT and the "current budget crisis."² The Board rejected

¹ Effective July 1, 2008, the Department of Public Works and Transportation was abolished and its functions transferred to other departments. The Transit Services Division was transferred to a newly created Department of Transportation. See Bill 4-08.

² The County faced a projected \$400 million budget gap for FY-09 which led the Executive to ask that all departments adopt a savings plan for the remainder of FY-08. There is a projected budget gap of at least \$500 million for FY-10.

OHR's explanation as "totally unacceptable" in a April 15, 2008, memorandum to the Chief Administrative Officer (CAO). The Board demanded that the CAO require the Director of OHR to obtain the organizational assessment. The Board also indicated that it would have no alternative but to refer the matter to the County Attorney under § 33-15(d)³ for enforcement of the Board's order unless the CAO ensured prompt compliance with the Board's order.⁴

The County Attorney wrote the Board on April 28, 2008, indicating that the Board's order for an organizational assessment and demand that the County Attorney take enforcement action under § 33-15(d) raised complex legal issues; accordingly, the County Attorney asked the Board for additional time in order to undertake a thorough legal review of the matter.

Subsequently, in a letter to the Board dated July 18, 2008, the Director of OHR indicated that an organizational assessment would be undertaken by OHR staff. We understand that this proposed solution was acceptable to the Board. Therefore, the matter giving rise to the impending demand for action under § 33-15(d) has been rendered moot.

Although this matter was rendered moot by this turn of events, this Office decided it should complete its legal review of the issues raised by the Board's order in MSPB Case No. 07-17, because the issues raised in the Board's order might recur.

Before this Office issued an opinion on the issues raised in MSPB Case No. 07-17, the Board submitted to the Council a Report on the Annual Public Forum (Report). In the Report, the Board, citing its need during the past year to certify a matter to the County Attorney under § 33-15, recommended that the Council amend Chapter 33 to permit the Board to select its own legal counsel independent of the County Attorney so that the Board, through its own counsel, could "file enforcement proceedings on behalf of the Board in the Circuit Court."⁵ Because this recommendation is related to the issues arising out of MSPB Case No. 07-17, and because this recommendation appears to be premised on certain assumptions about the Board's legal status, we have expanded the MSPB Case No. 07-17 opinion to address the additional legal issues raised by the Report's recommendation.

We would hope to be able to meet with the Board at a mutually convenient time to discuss this Office's analysis after the Board has had time to consider this opinion.⁶

³ Unless otherwise indicated, section references are to the Montgomery County Code (2004).

⁴ Section 33-15(d) states, "Upon the failure of a party to invoke the judicial review provisions of section (a) above or the exhaustion thereof and upon noncompliance with any final decision or order of the Board, the Board may certify the matter to the County Attorney for enforcement. The County Attorney shall promptly institute appropriate civil proceedings in the Circuit Court for Montgomery County to seek enforcement of the decision or order and for any other appropriate relief."

⁵ Merit System Protection Board Report on Annual Public Forum dated October 23, 2008, p. 5.

⁶ The Board, in its Report, noted that it had not received an analysis on the "complex" issues referenced in the County Attorney's April 28th letter to the Board. Since the matter giving rise to these "complex" issues was rendered moot, this office did not assign a specific deadline to completing its analysis. We apologize to the Board

THE ISSUES

The Merit System Protection Board issued an order in MSPB Case No. 07-17 that sustained an appeal of an employee from the imposition of discipline by the Director of DPWT. The Board revoked the imposition of a two-day suspension; awarded the employee attorney fees; ordered the removal of certain material from the employee's personnel file; and ordered DPWT to reevaluate the employee's most recent performance rating.

The Board also ordered that: (1) the Director of OHR provide the Director of DPWT and certain DPWT managers training "on the various due process requirements in taking disciplinary actions"; and (2) the Director of OHR to obtain from a consultant "an organizational effectiveness" study for the managers in the employee/grievant's section and issue a report to the Director of OHR "on steps to improve the environment" of the applicable division. These two provisions of the order (the Administrative Orders) do not appear to have been requested by the employee/grievant and do not provide remedial relief to the employee in connection with the discipline that formed the reason for the employee's appeal.⁷ In fact, the employee/grievant appeared unconcerned when it appeared that OHR was delaying implementation of organizational assessment, because the employee/grievant took no action to enforce that portion of the order.

Despite the extraordinary nature of the Administrative Orders, the County did not petition the Circuit Court to review the Board's order.

Subsequently, the Board contacted an Associate County Attorney to determine if OHR and DPWT had complied with the Administrative Orders. The Associate County Attorney responded that the departments had performed all of the ordered activities except the organizational assessment. The attorney explained that the organizational assessment had not been done "at this time" because of a pending departmental reorganization and a lack of funds to retain a consultant because of a pending budget crisis.

The Board responded by demanding that the CAO require OHR to undertake the assessment and indicated its intent to seek enforcement of the order through the County Attorney under § 33-15(d).

These circumstances raise this issue: Does the Board have the authority to order a remedy that requires the CAO or Department Heads to undertake tasks that are not related to restoring the rights of a successful employee/grievant?

for not letting the Board know that we intended to work on providing an opinion on MSPB Case No. 07-17, and we hope that the passage of time has not inconvenienced the Board.

⁷ The Administrative Orders may have been an outgrowth of a request by the County to "explain in detail what the County did wrong" in the event the Board found in favor of the employee.

The Board's request that the Council amend Chapter 33 to permit the Board to retain counsel independent of the County Attorney so that the Board can file enforcement proceedings in Court to implement its orders raises these additional issues: (1) Does the Board have legal standing to file enforcement proceedings in Court to implement its orders? (2) Would an amendment to Chapter 33 authorizing the Board to obtain counsel independent from the County Attorney be consistent with Charter § 213?

SHORT ANSWERS

The Board does not have the authority to impose a remedy that requires the CAO or Department Heads to undertake tasks that are not directly related to restoring the rights of a successful grievant. The County Charter has assigned to the CAO the responsibility of implementing the merit system; it is, therefore, within the discretion of the CAO, to decide whether an organizational study should be undertaken or County managers should undergo training. The Board's authority is limited to adjudicating employee grievances and providing advice to the County on matters concerning the merit system.

The Board does not have standing to bring a legal action to enforce its orders because the Board performs a quasi-judicial function in deciding grievances and, like a court, has no legally cognizable stake as a party in the outcome of its orders or their implementation. If legal action were necessary to enforce a final Board order, the County government would need to be the party to bring the action.

Charter § 213 provides that the County Attorney shall be the legal advisor to all instrumentalities of the County government and must represent the County in all actions in which the County is a party. Accordingly, Charter § 213 would need to be amended before the Board could acquire the authority to retain its own counsel independent of the County Attorney.

ANALYSIS

MSPB Case No. 07-17

To evaluate the question presented, a brief examination of the context in which the merit system operates in Montgomery County is necessary.

Montgomery County is a charter home rule county, having adopted a charter form of government as provided for in Article XI-A of the Constitution of Maryland (the Charter Home Rule Amendment). Under the Charter Home Rule Amendment, the voters of each county are authorized to adopt a charter; the charter serves as a "local constitution which forms the framework for the organization of the local government; it is the instrument which establishes the agencies of local government and provides for the allocation of powers among them."

Cheeks v. Cedclair Corp., 287 Md. 595, 606 (1980). In *Cheeks*, the Court of Appeals went on to explain:

A charter is thus a permanent document intended to provide a broad organizational framework establishing the form and structure of government in pursuance of which the political subdivision is to be governed and local laws enacted. It is the organic, the fundamental law, establishing basic principles governing relationships between the government and the people, and among the various governmental branches and bodies.

Id. at 607.

The laws enacted by the Council and the regulations issued to implement those laws must, therefore, be consistent with the Charter—absent the existence of enabling authority emanating from some superior State or Federal law. *See Anastasi v. Montgomery County*, 123 Md. App. 472, 487 n. 6. (1998) (The hierarchy of laws and regulations in Montgomery County begins with the Charter at the top, followed by the provisions of the County Code, then regulations to implement the Code.)

Among the Charter provisions of the County is the requirement that the Council “prescribe by law a merit system”, and the Charter establishes certain details concerning the composition and duties of the Merit System Protection Board. Charter § 401 and § 403. Charter § 404 identifies the duties of the Board as: (1) adjudication of employee disciplinary appeals (quasi-judicial function); (2) conducting certain “watchdog” functions like conducting periodic audits; (3) performing certain advisory responsibilities; and (4) performing other duties assigned by law.

Implementing the quasi-judicial function assigned by Charter § 404 to the Board, § 33-14 sets out the types of relief that the Board may order to resolve an employee grievance. The remedial relief includes:

- (1) Order retroactive promotion or reclassification with or without back pay;
- (2) Order change in position status, grade, work schedule, work conditions and work benefits;
- (3) Order priority consideration be given to an employee found qualified before consideration is given to other candidates;
- (4) Order reinstatement with or without back pay, although the Chief Administrative Officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility;

- (5) Order cancellation of personnel functions found in violation of law or personnel regulation provided that such action may not without due process, adversely affect the employment rights of another employee;
- (6) Grant employee participating in an employee benefit previously denied (training, educational program or assistance, preferential or limited work assignments and schedules, overtime pay or compensatory leave);
- (7) Order removal from administrative or personnel records any reference or document pertaining to an unwarranted disciplinary or adverse personnel action;
- (8) Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale;
- (9) Order the County to reimburse or pay all or part of the employee's reasonable attorney's fees;
- (10) Order such other and further relief as may be deemed appropriate consistent with the Charter and laws of Montgomery County.

This quasi-judicial responsibility assigned to the Board must be contrasted with merit system responsibilities assigned to the CAO. Charter § 402 provides, "The Chief Administrative Officer, under the direction of the County Executive and subject to merit system laws and regulations, shall be responsible for administering the County's merit system." Charter § 211, provides "The Chief Administrative Officer shall, subject to the direction of the County Executive, supervise all departments, offices, and agencies of the Executive Branch"⁸ Consistent with these Charter provisions, § 33-8(a) provides, "The Chief Administrative Officer shall ensure that all supervisors receive continual orientation and training about the intent purpose and principles of the merit system and shall ensure that all supervisors implement the objectives of this article."

The common theme of the listed forms of relief that the Board is authorized to grant by § 33-14 is to enforce the rights of and redress the wrongs suffered by merit system employees. Although the catch-all provision in § 33-14(c)(10) might give the impression that a broad range of additional remedies are available for implementation by the Board, statutory construction

⁸ This separation of personnel functions between the Board and the Executive Branch occurred in 1968 when the County revised its Charter to form an Executive Branch of County government. Prior to that time, the Merit Board (known as the Personnel Board) held all of the powers and duties associated with the merit system, including the responsibility for administering the merit system law. With the Charter revision in 1968, the responsibilities for operation of the merit system were divided – the Chief Administrative Officer acquired the responsibility to administer the merit system law, while the Merit Board retained the ability to investigate grievances, hold hearings, decide employee grievances, adopt regulations, and serve as a form of "watchdog" over the merit system. In a 1980 amendment to the Charter, the Personnel Board was renamed the Merit System Protection Board and its authority to issue regulations was transferred to the County Executive. See current Charter § 402.

principles require that it be interpreted to include only forms of relief similar to the types of relief enumerated in the preceding paragraphs:

[W]here the general words in a statute . . . follow the designation of particular things or classes of subjects . . . the general words in the statute will usually be construed to include only those things of the same class or general nature as those specifically antecedently mentioned.

State v. Sinclair, 274 Md. 646, 658 (1975); see also *Tribbitt v. State*, 403 Md. 638, 656 (2008). This construction of § 33-14 (c) (10) makes this statutory provision consistent with the Charter. Simply put, § 33-14 (c) does not empower the Board to require the Executive Branch to exercise a function given to the CAO or the Department Heads by the Charter.⁹

The Administrative Orders issued by the Board in MSPB Case No. 07-17 must be reviewed in the light of these Charter and statutory provisions. The case arose from an appeal surrounding the imposition of discipline. The employee prevailed in the appeal. The majority of the relief granted by the Board reflected items specifically mentioned in § 33-14(c) such as awarding back pay, revoking the suspension, allowing attorney's fees, and removing information from the employee's file. All of this relief restored the rights of the grievant. By way of contrast, however, the Administrative Orders were unrelated to making grievant whole. The Administrative Orders usurped functions assigned to the CAO. It is for the CAO to determine what training County supervisors should undergo in order to ensure that the principles of the merit system are upheld. See § 33-8 (a). Although the Board can conduct periodic studies and audits, this authority does not include the ability to order the CAO to perform the study.

This conclusion is consistent with an earlier opinion of the County Attorney that addressed efforts by the Personnel Board to control functions assigned to the Executive Branch. County Attorney No. 76-036 reviewed the legislative history behind the 1968 Charter amendments allocating the merit system functions among the Board, the CAO, and the Council.¹⁰ The Opinion relied on the 1968 Council approved Charter Commentary. The Opinion notes, quoting from the Commentary, that the "Chief Administrative Officer under the direction of the County Executive [is] responsible for the administration of the personnel system." The Opinion highlights the following language from the Commentary: "The Personnel Board, which now has administrative responsibilities, is relieved of that function." After careful review of the Charter language and its legislative history, the County Attorney concluded that the

⁹ Nor does the Board have inherent authority to impose any order it believes will advance the purpose of the merit system. The Board is an administrative agency and may exercise only the authority granted to it by law:

An administrative agency is a 'creature of statute,' [which] has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.

Adamson v. Correctional Medical Services, Inc., 359 Md. 238, 250 (2000) (citation omitted). An agency's authority usually will not be implied and must be consistent with the act it administers. See *Board of Liquor License Commissioners for Baltimore City v. Hollywood Productions, Inc.*, 344 Md. 2, 11 (1996).

¹⁰ A copy of County Attorney Opinion No. 76-036, dated May 27, 1976, is attached.

Board had inappropriately assigned to itself under the Personnel Regulations (which at that time were still issued by the Board) certain administrative functions that were in contravention of the Charter. Those functions included: maintenance of a position classification plan; approval of continuation of an acting promotion beyond the initial period authorized by statute; and instructing the CAO to establish an affirmative action plan. Hence, the Opinion concluded that those provisions of the Regulations were invalid.

In summary, the Board does not have the authority to impose a remedy that requires the CAO to undertake tasks that are not directly related to restoring the rights of a successful grievant. The Charter has assigned to the CAO the responsibility of implementing the merit system; it is, therefore, within the discretion of the CAO to decide whether an organizational study should be undertaken by the Executive Branch or County managers should undergo training. The Board's authority to resolve an employee grievance is limited to adjudicating the grievance and providing remedial redress to the employee, if the employee prevails.

Report on the Public Forum—Independent Counsel; Authority of Board to Bring Legal Action

In its Report on the Annual Public Form, the Board recommended that the Council amend Chapter 33 to permit the Board to select its own counsel independent of the County Attorney so that the Board could “file enforcement proceedings on behalf of the Board in the Circuit Court.” As previously noted, this recommendation raises two legal concerns: (1) the authority (or standing) of the Board to bring legal action to enforce its orders; and (2) consistency with Charter § 213.

The Board's Standing.

Perhaps the fundamental obstacle to implementing the Board's goal of seeking a means to obtain judicial assistance in enforcing a Board order, is the Board's lack of legal standing to bring a legal action. This obstacle is present whether the Board has counsel of its own choosing or is represented by the County Attorney.

Except for advisory functions and the shared responsibility with the Ethics Commission for protecting whistle blowers under § 33-10¹¹, the Board functions as a quasi-judicial entity. As

¹¹ By citing to § 33-10, we do not opine on whether § 33-10 is altogether consistent with the Charter. We have already noted the provisions in the Charter that seem to limit the role of the Board to quasi-judicial and advisory functions and the concomitant delegation of administrative responsibility for the merit system to the County Executive and the CAO. Moreover, the provision in § 33-10 that permits the Board to remove an employee appears inconsistent with Charter § 215 and § 216. Charter § 215 provides that the County Executive may appoint heads of each department and principle office of the executive branch. Charter § 216 provides that all employees of the executive branch shall be appointed and removed by the heads of the several departments and offices of the County. Accordingly, it does not appear that the Board could remove either an employee or department head without the consent of either the County Executive or the head of the affected department. Compare § 33-10 with §§ 19A-10 (m) and 19A-30 of the Ethics Law which authorizes the Ethics Commission to **recommend** disciplinary actions

a quasi-judicial entity, the Board hears evidence presented by the parties; makes a decision based solely on applicable law and the evidence before it; and renders a decision adjudicating the rights and obligation of specific persons. Board members must act as impartial arbiters, drawing conclusions based on applicable law and the facts found. Like judges (their counterparts in the judicial branch), Board members are not subject to direction by the executive or legislative branches in making their decisions in a particular case. Each member is expected to exercise her or his own independent judgment, unfettered by political influence or favoritism.

When a Board decision is “appealed”¹² to the Circuit Court, the only parties entitled to appear in the Circuit Court are the grievant and the County. The Board is not a party in the Circuit Court action because the Board “has no interest, personal or official, in the matters which come before it other than to decide them according to the law and proved fact, and it is in no sense a party to the proceedings.” See *Board of Zoning Appeals v. McKinney*, 174 Md. 551, 560-61 (1938).¹³

Moreover, the Board is not a legal entity that may seek legal relief on its own behalf. See *Harford Co. v. Tatar, Lininger, Clark & Wood, Inc.*, 278 Md. 330 (1976) (county council’s appeal of an adverse ruling was dismissed, because the council is not the corporate entity and may not maintain an appeal in the council’s name alone.)

Accordingly, with respect to enforcing the Board’s orders, it is the prerogative of the parties to decide what enforcement action, if any, is necessary. Certainly, the parties must comply with a lawful, final order of the Board.¹⁴ A grievant who has obtained relief from the

against employees and empowers the appointing authority to impose discipline. In addition, the authority to impose a fine of up to \$2,000 authorized under § 33-10 appears inconsistent with Maryland Code Annotated Art. 25A, § 5(A) which limits the authority of the County to impose civil fines not exceeding \$1,000. The Board can certainly protect whistleblowers by restoring the rights of a whistleblower in the same way that the Board may restore the employment rights of a successful grievant.

¹² Under the Maryland Rules of Procedure, a person aggrieved by the Board’s decision may file a Petition for Judicial Review with the Circuit Court. The Petition is treated as an original action so that the Circuit Court does not sit, in a strict sense, as an appellate court. The Circuit Court actually exercises original jurisdiction when reviewing the decision of an administrative agency upon Petition for Judicial Review. *Murrell v. Mayor and City Council of Baltimore*, 376 Md. 170, 185 (2003). Perhaps because the Circuit Court reviews the Board’s decision on the record and must give deference to the Board’s decision, the use of the term “administrative appeal” or “appeal” has understandably arisen as a shorthand way to refer to the process of obtaining Circuit Court review of a decision by a quasi-judicial administrative agency.

¹³ We are aware that the doctrine explained in *McKinney* has been limited by more recent cases. See *Calvert County Planning Commission v. Howlin Realty*, 364 Md. 301 (2001). In *Howlin*, the Court of Appeals approved the participation of the Planning Commission in an appeal of a decision of the Commission regarding the subdivision of land. The Court concluded that administrative agencies that have a quasi-judicial function as “but one mechanism for carrying out their general responsibility to implement broader legislative policy” have a sufficient stake in the outcome of a judicial challenge to a quasi-judicial decision of the agency to justify the agency’s participation in the case. Unlike a planning commission, the Board’s responsibility for implementing the merit system is limited to adjudicating employee grievances.

¹⁴ This opinion does not address the enforceability of a Board order that contains provisions that are beyond the Board’s authority to give, like the Administrative Orders in MSPB Case No. 07-17.

Board may seek to enforce that relief by returning to the Board for additional relief, including asking the Board to seek the assistance of the County Attorney under § 33-15 (d).

Independent Counsel.

Charter § 213 provides:

The County Attorney shall be the chief legal officer of the County, conduct all the law business of the County, be a legal advisor to the Council, and be the legal advisor to the County Executive, all departments, and other instrumentalities of the County government. The County Attorney shall represent the County in all actions in which the County is a party The County Attorney may, with the approval of the Council, temporarily employ special legal counsel to work on problems of an extraordinary nature when the work to be done is of such character or magnitude as to require services in addition to those regularly provided by the County Attorney.

Accordingly, until the Charter is amended, the Council could not enact legislation authorizing the Board to retain special counsel independently of the County Attorney. Under Charter § 213, the County must represent the County in all legal actions and special counsel may not be retained without the consent of the County Attorney.¹⁵

In this regard, the Charter Review Commission considered the issue of providing legal counsel to constituent offices within the County government in 2002. Although the Commission recommended amending the Charter to permit that Council by law to provide legal counsel to offices of the Legislative Branch of County government, the Commission decided against recommending similar treatment for quasi-judicial bodies. See 2002 Report of the Charter Review Commission (May 2002), pages 5-7.¹⁶

In summary, Charter § 213 prohibits the Board from obtaining its own legal counsel independent of the County Attorney.¹⁷ More fundamentally, the Board lacks legal standing to seek enforcement of its orders while filing a legal action in the Circuit Court

¹⁵ Thus, § 33-14 (b) provides that the Board may request outside counsel “when the board and the county attorney determine that a representational conflict exists within the county attorney’s office.”

¹⁶ In 2002 voters approved an amendment to Charter § 108 which now provides in relevant part that, “The Council may employ or retain special legal counsel to assist it in the exercise of its powers, and may provide by law for special legal counsel to assist, advise, or represent any office of the legislative branch in exercise of its duties. Any special legal counsel employed or retained under this section shall be subject to appropriation and is not subject to Section 213.”

¹⁷ The Board in its Report noted that a special personnel investigator appointed under § 33-13(A) would need to be an attorney admitted to practice law in order to prosecute a Complaint under § 33-10. The special investigator may file a complaint, but the County Attorney’s Office must provide the attorney to prosecute the matter on behalf of the special investigator. This is a process similar to that used by the Ethics Commission in prosecuting complaints adjudicated by the Ethics Commission. See § 19A-10(f). When performing this function, the County Attorney

Charla Lambertsen
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December 17, 2008

We want to clearly acknowledge that the Board performs an essential function in maintaining the integrity of the County's merit system. The County Attorney's Office has an obligation to assist the Board in fulfilling its mission and continues to stand ready to do so.

As previously mentioned, we would be happy to meet with the Board at a mutually convenient time to discuss any questions or concerns the Board may have regarding this opinion.

MPH:pas:A08-00642

cc: Timothy L. Firestine, Chief Administrative Officer
Phil Andrews, President, Montgomery County Council
Duchy Trachtenberg, Chair, Management and Fiscal Policy Committee
Michael Faden, Sr. Legislative Attorney, Montgomery County Council
Joseph Adler, Director, Office of Human Resources
Susan John, Legislative Analyst, Montgomery County Council
Ed Lattner, Chief, Division of Human Resources and Appeals
Karen Federman Henry, Chief, Division of Finance and Procurement

lambertsen re mspb authority opinion
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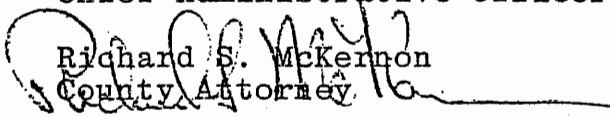
invokes the Office's fire-wall policy. This policy establishes a fire-wall between the attorney performing the prosecutorial function and the attorney advising the quasi-judicial body. The fire-wall policy is in all material respects identical to the policy followed by the Maryland Office of the Attorney General.

OFFICE OF
THE COUNTY ATTORNEY
MONTGOMERY COUNTY, MARYLAND

No. 76.036

Date May 27, 1976

TO: William H. Hussmann
Chief Administrative Officer

FROM: 
Richard S. McKernon
County Attorney

OPINION: Personnel Board-Administrative Responsibilities Exercised
by the Personnel Board Contrary to the Charter of
Montgomery County.

You have requested the opinion of this office as to whether the Personnel Board may have exceeded its authority under the Charter by injecting itself into personnel administration.

It is the opinion of this office that the present Charter relieved the Personnel Board of all administrative responsibilities which it formerly exercised under the Council-Manager form of government. However, an examination of the Personnel regulations and certain communications from the Personnel Board shows that the Board is still involved in personnel administration contrary to Article 4 of the County Charter.

Section 402 of the Charter specifically provides that the administration of the merit system is to be the responsibility of the Chief Administrative Officer under the direction of the County Executive.

The duties of the Personnel Board are set forth in Section 404 of the Charter which provides:

"The County Personnel Board shall, subject to the approval of the County Council, adopt regulations not in conflict with this Charter, covering the classification of all positions in the Executive and Legislative Branches under the merit system; minimum qualifications for any such positions, methods of determining such qualifications, and methods of selection for any such position; probationary periods, promotions, transfers; causes for removal

from any such position and methods of removal, including demotions, furloughs and reduction of staff; annual, sick and other leave; prohibitions against political activity; maintenance of personnel records; and similar personnel matters. Such regulations shall have the force and effect of law. The Board shall prepare and recommend to the County Council a system of retirement pay and from time to time may prepare and recommend modifications thereof. 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 Personnel Board, and in such event the charges against him shall be stated in writing, in such form as the Board shall require. The decisions of the Personnel Board in such appeals shall not be subject to review except by a court of competent jurisdiction."

An examination of the Commentary on Article 4 of the proposed Charter, prepared on behalf of the County Council on July 10, 1968, shows that the drafters of the Charter intended to relieve the Personnel Board of its administrative responsibilities, while retaining with the Board the power, subject to the approval of the Council, to adopt regulations governing the merit system except with respect to salary and wage scales. The Board also retained its appellate power and continued to be the "watch dog" of the merit system. The Commentary on Article 4 of the Charter provides on pages 32 and 34 that:

"This article is designed to maintain the merit system in Montgomery County and to strengthen the merit principle and its administration.

* * *

It makes the Chief Administrative Officer under the direction of the County Executive responsible for administering the personnel system. This gives the County Executive and the Chief Administrative Officer authority necessary for efficient administration but it does not permit a patronage system.

* * *

The Personnel Board, which now has administrative responsibilities, is relieved of that function. It remains independent of the Executive, however, and retains the power, subject to the approval of the Council, to adopt regulations governing the merit system except with respect to salaries and wage scales. (Emphasis added.)

* * *

The duties of the Personnel Board with respect to investigating grievances and hearing and deciding appeals from dismissals, demotions and suspensions remains unchanged. The Board's duties with respect to adoption of personnel regulations remain unchanged except that the responsibility for establishing uniform salary and wage scales is transferred to the Council. The Board will continue to be the 'watch dog' of the merit system."

As originally submitted to the Council by the Charter Revision Commission, Article 4 would also have relieved the Personnel Board of its responsibility for adopting amendments to the Personnel Regulations. This recommendation, which was proposed by the Municipal Manpower Commission, was not followed by the County Council. Nevertheless, the following statement from the proposed Commentary on the Charter prepared by the Charter Revision Commission's Committee on Style seems to be still entitled to some weight, even though the Council removed this statement from the Commentary:

"The Municipal Manpower Commission, based on a national study of all kinds of personnel systems, concluded that independent personnel commissions should exercise only advisory, investigatory and appellate functions. They reasoned that to separate the vital personnel function from the executive simply is not good managerial practice. The Commission also found, in interviews throughout the country, that the quality of personnel was highest in merit system [sic] administered by the chief executive."

It is, therefore, clear from an examination of the Charter and both the proposed and adopted Commentary, that the new Charter relieved the Personnel Board of any administrative responsibilities which it may have exercised under the prior Charter. However, despite the clear language in the Charter giving responsibility for personnel administration to the Chief Administrative Officer, and the language in the Commentary which indicates that Article 4 of the Charter was designed to relieve the Personnel Board of this responsibility, the Board, nevertheless, in the exercise of its authority under Section 404 of the Charter to adopt Personnel Regulations, subject to the approval of the Council, gave itself significant administrative responsibilities contrary to the provisions of the County Charter. Those responsibilities which we believe the Board is presently exercising in contravention of the Charter are as follows:

1. The establishment, maintenance and revision of a position classification plan as provided in Section 33-6(a) of the Personnel Regulations.
2. The veto and correction of classification assignments made by the Chief Administrative Officer and the establishment of classification standards for new positions as authorized by Section 33-6(j).
3. The reclassification of positions on appeals by employees as provided in Section 33-6(p).
4. The approval of temporary downgrading of positions as required by Section 33-6(u).
5. The approval of the conduct by the Chief Administrative Officer of non competitive qualifying entrance or promotional examinations on a continuous basis as provided in Section 33-10(t).
6. The establishment and implementation of promotional examination and eligible list procedures as authorized by Section 33-10(f).
7. The approval of the continuation of an acting promotion beyond the initial three month period as required by Section 33-18(p).
8. The designation of those personnel records which it may deem necessary for the administration of the merit system as authorized by Section 33-33(a).
9. The issuance of instructions to the Chief Administrative Officer with respect to the establishment of an Affirmative Action Plan.