



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

October 16, 2015

Jennifer R. Frankovich
Assistant County Attorney
Baltimore County Office of Law
The Historic Courthouse, Second Floor
400 Washington Avenue
Towson, Maryland 21204

John M. Singleton, Esquire
The Singleton Law Group
Galleria Towers
1447 York Road, Suite 508
Lutherville, Maryland 21093

RE: *In the Matter of: Theodore C. Priester, Jr.*
Case No.: CBA-15-018

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington Ham".

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: Theodore C. Priester, Jr.
Lawrence M. Stahl, Managing Administrative Law Judge
George E. Gay, Director/Office of Human Resources
Keith A. Dorsey, Director/Office of Budget and Finance
Katherine V. Limpert, Retirement Benefits Administrator
Nancy C. West, Assistant County Attorney
Michael E. Field, County Attorney

IN THE MATTER OF
THEODORE C. PRIESTER, JR
- APPLICANT/APPELLANT
2112 EBBVALE ROAD
MANCHESTER, MD 21102

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No.: CBA-15-018

EMPLOYEES RETIREMENT SYSTEM
BOARD OF TRUSTEES
- APPELLEE/APPELLANT

RE: Appeal of Administrative Law Judge *
decision granting service retirement *
allowance but reducing the number of years *
of creditable service in *
HOH case no: 2015-05-R *

* * * * *

OPINION

This case comes to the Board as an appeal by both parties of the final decision of the Administrative Law Judge (Beverungen, J.E.) dated June 12, 2015 ordering that the December 9, 2014 decision of the Board of Trustees of the Employees' Retirement System be Affirmed in part and Reversed in part: stating:

Upon becoming eligible to retire based upon the requirements of B.C.C. §5-1-217(b)(1)(ii), Respondent (Priester) shall be entitled to receive a service retirement allowance from Baltimore County, and the "number of years of credible service" referenced in B.C.C. §5-1-217(b)(1)(ii) shall not include that period of time during which Respondent held the rank of Captain.

The appeal was heard before this Board on the record. A hearing was held before the Board on September 24, 2015. Appellant, Theodore C. Priester, Jr. ("Mr. Priester") was represented by John M. Singleton, Esquire, of the Singleton Law Group. Appellee/Cross-Appellant, Employees Retirement System, Board of Trustees was represented by Jennifer R. Frankovich, Assistant County Attorney, Baltimore County Office of Law.

BACKGROUND

This appeal arises out of the Board of Trustee's ("BOT's") denial of Mr. Priester's application for a service retirement from Baltimore County, Maryland ("County"). Mr. Priester was a 30-year Baltimore County employee, concluding his career as a Captain in the Baltimore County Fire Department ("BCFD"). Mr. Priester was suspended on March 22, 2013 based on an incident that occurred on March 15, 2013. He was eventually terminated by Baltimore County on May 16, 2013. His termination appeal was heard by the Personnel and Salary Advisory Board ("PSAB"). The PSAB deliberated the matter with two members voting for termination and two members voting for reinstatement. On December 9, 2014, a meeting was held by the BOT and upon motion, the BOT voted to deny Mr. Priester's application because he failed to provide honorable and faithful service as a County employee. Keith Dorsey, Director of the Office of Budget and Finance, notified Mr. Priester of the BOT's decision by letter. Mr. Dorsey advised Mr. Priester that his service retirement was denied "based on [BOT's] determination that your service as an employee of Baltimore County was not honorable and faithful and is therefore not credible towards a retirement allowance." Mr. Priester properly appealed the decision to the Office of Administrative Hearings ("OAH") and on February 23, 2015, the first day of a four-day hearing commenced. On May 28, 2015, the hearing concluded.

On June 12, 2015, Administrative Law Judge ("ALJ") John E. Beverungen issued his Opinion and Order in the matter. ALJ Beverungen found:

I find that Priester's conduct constitutes a dereliction of duty and an abuse of his position as a Captain. In essence, I believe his conduct reflected poorly not only on him but on the rank of captain in the BCFD. It was WWII hero Major Dick Winters who said "we salute the rank, not the man." I believe that sentiment is apropos here. The BCFD Is a paramilitary organization, and Priester's conduct as detailed hereinabove was not "honorable and faithful," and that is

based in large part on the fact that he held at the time the rank of captain. As such, I do not believe Respondent's (Priester) service as a Captain, from 1999 until the date of his termination, qualifies as "credible service" under the B.C.C.

ALJ Beverungen ordered:

[T]he December 9, 2014 decision of the Board of Trustees of the Employees' Retirement System be and hereby is AFFIRMED IN PART AND REVERSED IN PART, as follows:

Upon becoming eligible to retire based upon the requirements of B.C.C. §5-1-217(b)(1)(ii), Respondent (Priester) shall be entitled to receive a service retirement allowance from Baltimore County, and the "number of years of credible service" referenced in B.C.C. §5-1-217(b)(1)(ii) shall not include that period of time during which Respondent held the rank of Captain.

Thereafter, pursuant to B.C.C. §5-1-220.2(b), both parties noted a timely appeal of ALJ Beverungen's Opinion and Order to this Board of Appeals ("BOA"). This appeal is on the record and the authority for which it is granted is found in B.C.C. §5-1-220.2(b) which states in pertinent part:

(ii) The Board of Appeals shall:

1. Conclude a continuation of a hearing within 30 days after the first hearing date; and
2. Issue the Board's order within 15 days after the conclusion of the hearing.

(7) In a proceeding under this section, the Board of Appeals may:

- (i) Remand the case to the Office of Administrative Hearings;
- (ii) Affirm the final order of the Office of Administrative Hearings; or
- (iii) Reverse or modify the final order if a finding, conclusion, or decision of the Board of Trustees or the Office of Administrative Hearings:

1. Is unconstitutional;
2. Exceeds the statutory authority or jurisdiction of the Board of Trustees or the Office of Administrative Hearings;
3. Results from an unlawful procedure;
4. Is affected by any other error of law;
5. Is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
6. Is arbitrary or capricious.

ISSUES

While both parties have appealed this matter to the Board, the reasons for such differ. The basis for Mr. Priester's appeal deals primarily with challenges regarding due process in the procedure, which was used to deny Mr. Priester retirement benefits. The BOT's appeal challenges the authority of the ALJ to bifurcate his findings and award Mr. Priester part of his pension, while revoking part.

STANDARD OF REVIEW

In that this appeal comes to the Board "on the record" this Board "must not engage in judicial fact-finding or substitute [its] judgment for that of the agency." *St. Leonard Shores v. Supervisors of Assessments of Calvert County*, 307 Md. at 447, 514 A.2d 1215. Consequently, it matters not that the reviewing court may have decided differently if it was "in the shoes" of the deciding court, so long as there was some substantial basis for the decision to have concluded the way they did. This in mind, it is necessary for the Board to carefully examine the actual record of the testimony on which the ALJ made his final decision. In conducting such an examination this

Board does not make judgment calls regarding the credibility of witnesses, but rather insures that substantial evidence exists that could factually support the ALJ's conclusions.

EVIDENCE BEFORE THE ALJ

The record in this matter includes testimony from multiple witnesses called by both sides. The ALJ's Opinion and Order makes an effort to summarize the testimony presented, by both parties, over the course of the hearing. ALJ Beverungen's Opinion and Order states the following regarding the testimony offered by the BOT:

Nothing in the foregoing paragraphs should be construed to condone or minimize in any way the Respondent's (Priester) behavior. Each of the female witnesses presented by the County was, in my opinion, credible, trustworthy and articulate. Each recounted how Priester's unwanted and inappropriate conduct affected them on an emotional and professional basis.

The BOT's first witness was Kathleen Duncan-Fulton, employed by the Baltimore County Fire Department ("BCFD") as an Emergency Medical Technician ("EMT"). EMT Duncan-Fulton testified that both she and Mr. Priester worked at Station 18 (Randallstown). Mr. Priester was her Captain during the days that he worked his day-shift (about a quarter of the time) from approximately the years 2010 until 2013. She testified that shortly after Mr. Priester started working at Station 18, over the span of several months, he would "come up to me on my right side and nibble on my neck and my ear and, um, tell me that he, uh, he thinks I'm wet and tell me about making my nipples hard." She testified that he would do this after coming up from behind her while she was washing dishes or sitting at a computer, working. She also testified that while sitting across from her at the kitchen table Mr. Priester would "call my name and I would look at him put his hands to his face and do like an oral obscene gesture". EMT Duncan-Fulton testified that Mr. Priester would do these types of things "at least once a day on the two days that I would see him

and over a span of several months. EMT Duncan-Fulton stated that after several months of harassment, she told Mr. Priester to stop but shortly thereafter, he started to complain about her job performance.

While the events described by EMT Duncan-Fulton took place in approximately 2010-2011, she did not report them until an incident occurred in 2013. Ms. Duncan-Fulton testified that on March 15, 2013, she had a confrontation with Mr. Priester, over the state of the bathroom. She testified that in certain older stations, there is no designated ladies locker room and therefore, the first floor bathroom is designated the ladies bathroom. She testified that Mr. Priester continued to use the downstairs bathroom and it would be “disgusting after he would come out.” The confrontation with Mr. Priester became loud and animated and led to subsequent meetings between her and Captains Hoffman and Penn, two of the other three captains responsible for Station 18. EMT Duncan-Fulton testified that during the confrontation, Mr. Priester stated “this is his [my] house, he’ll shit wherever he wants” and that she was “supposed to clean the bathroom and like it” and that she would be removed if she refused to clean the bathroom. After the confrontation occurred, several telephone conversations transpired between all three captains and during the course of those conversations, Captains Penn and Hoffman determined it was best to speak to EMT Duncan-Fulton, in person, the next time they were all on shift together.

Both Captains Penn and Hoffman testified in support of EMT Duncan-Fulton’s testimony. In particular, they both testified that there had been previous problems with the way Mr. Priester left the bathroom and that the downstairs bathroom was designated for female use only. Both Captains testified that they had never had any problems with EMT Duncan-Fulton doing her job.

Lieutenant Michelle Stevens testified that she worked with Mr. Priester for approximately six (6) to eight (8) months when Mr. Priester was assigned to Station 2. During that time frame

Lieutenant Stevens testified that while completing work at the computer, Mr. Priester would “put his hand on my leg and run it up my thigh and I would just kind of knock it off and say please don’t do that or laugh it off and just be like whatever.” She also testified that on the fire grounds he would “pat my butt or just do inappropriate behavior. Him touching females.” Lieutenant Stevens also testified that Mr. Priester would call her “toots” and make inappropriate gestures and that Mr. Priester “crossed my line.” When asked why she did not immediately report Mr. Priester’s inappropriate conduct, Lieutenant Stevens testified she did not want to be “labeled.” Upon questioning by Battalion Chief Hill, she testified that she reported Mr. Priester’s conduct. She testified that she tried her best “not to put yourself in that situation and don’t go into closed rooms ... you’re going to protect yourself.” When asked whether she considered Mr. Priester’s behavior “regular joking”, Lieutenant Stevens responded:

Sometimes it was just that. If he could get a rise out of me or to see what I would do but, you know, I’m (inaudible) he thought – it’s the way that I felt. But I think like, you know, you don’t want behavior and you say stop and they do it again and they do it again and they’re in a position of power. It’s a very difficult situation to be in. Feb. 23, 2015, Tran. p 172.

On cross-examination Lieutenant Stevens reiterated that while she had a high opinion of Mr. Priester’s fire suppression skills, his other conduct was, at times, intimidating and also testified that “he’s a very strong person. I would say it was – it’s not only his size but his personality is very strong.”

The next witness to testify on behalf of the BOT was retired EMT District Lieutenant Barbara Greenfeld. EMT Lieutenant Greenfeld was still working in the fire department on March 15, 2013, the date of the confrontation between EMT Duncan-Fulton and Mr. Priester over the condition of the bathroom. Lieutenant Greenfeld testified that she heard about the confrontation “through the

grapevine.” She testified that shortly after the confrontation, while she was visiting Station 18, Captain Hoffman informed her that EMT Duncan-Fulton had contacted Fair Practices and at this point she thought “that there had to be a little more to it than just the bathroom incident.” At that point, Lieutenant Greenfeld advised Captain Hoffman that if EMT Duncan-Fulton needed “back-up” to have EMT Duncan-Fulton call her and also reported to Captain Hoffman “two incidents that I could remember that I had with – with Captain Priester.” She then testified that approximately six (6) months prior to speaking to Captain Hoffman, she was running a call with Mr. Priester and while they were loading a patient on a stretcher into the back of the Medic Unit, she climbed up on the first step [of the Medic Unit] and:

[F]elt a hand at my ankle and that just went all the way up my leg into my crotch area. So I turned around, T.C. stand – Captain Priester’s standing behind me. Some of these guys were standing back there and they’re all laughing. So I got in the Unit and just finished my job. Feb. 23, 2015, Tran. p. 199.

Lieutenant Greenfeld also testified that in 2013, while conducting training at Station 18 with the Truck and Engine crew (approximately eight (8) people present), Mr. Priester approached her from behind and “he puts his lips all over my face and my ear and I know I just screamed and you know, everybody’s laughing. They think it’s a big joke. I finished training and left.” She testified that she stopped visiting the Station and that she “really protected myself while on calls with him. I just didn’t let him get behind me.” Finally, she testified that paramedic Glen Harris reported that there was an incident between Mr. Priester and a nurse from Northwest Hospital. Lieutenant Greenfeld testified that when she attempted to speak to the nurse about the incident, the nurse refused to talk about what transpired and said that she did not want to make a formal charge against Mr. Priester. When asked on cross-examination why she would not report Mr. Priester immediately after he put his hands on her crotch she replied:

The Fire Department people work very closely with one another. You depend on them to be there to protect your back, to support one another ... there's not any part of that job you could do by yourself ... And you don't want to alienate those people by being a tattletale, the – you know, the person that turns someone in and gets them in trouble.

I've had Captains before that have ordered their crews not to help a certain person. You know, I'm telling you right now do not help that person. And when you're on an emergency incident you don't want – you – need that help. Feb. 23, 2015, Tran. pp. 204-205.

Paramedic Amber Kelly testified that she had interactions with Mr. Priester while doing paramedic training under the guidance of Paramedic Glen Harris, also located at Station 18. She testified there were times when she was sitting outside at the picnic table, “Mr. Priester would come up behind me and put his hands on my shoulders and rub my shoulders and down into my back and neck.” She also testified there was an incident “where he placed his hand on my knee and slipped his hand up slightly approximately an inch toward my thigh.” Also, Paramedic Kelly testified “there were times where he would come up behind me and whisper in my ear and when he would do so it would be taking that large breath in order to blow into my ear.” She also testified that he walked into the kitchen in nothing but his boxer shorts. She testified that while Paramedic Harris expressed concern about Mr. Priester's conduct towards her and advised her that she could make a formal complaint about Mr. Priester. Paramedic Kelly testified that she was reluctant to make a formal complaint because she was training and wanted to be hired by the BCFD. She testified that she would relocate her seat or move to a different room in an effort to avoid Mr. Priester. She testified her body language made it clear that Mr. Priester's conduct was unwanted, that she did not feel the “conduct was professional at all and would make me certainly

nervous for other potential students.” Finally, Paramedic Kelly testified that she believed Mr. Priester would have influence over whether or not she was hired, upon completion of her training.

Paramedic/Fire Fighter Glen Harris testified that he worked with Mr. Priester at Station 18. He testified that Battalion Chief (“BC”) Joseph Brown interviewed him in connection with his investigation into allegations made against Mr. Priester’s conduct. First, he testified about the day of the confrontation between Mr. Priester and EMT Duncan-Fulton. He testified upon hearing the confrontation escalate he went to the kitchen and observed “EMT Duncan actually moving about the room ... for lack of a better term ... to get away, I guess is the best way to put it.” He also testified that EMT Duncan-Fulton had confided in him about Mr. Priester’s conduct, generally, and that she felt it wasn’t a “friendly environment ... it was more of an aggressive environment ... an uncomfortable environment.” Paramedic Harris testified about an incident that he witnessed between Mr. Priester and Paramedic Kelly (when she was training) where he (Priester):

[L]eaned onto her, on the, rails of the chair and requested a light from her. She seemed very uncomfortable with that. And it was noticeable because she’s one of the people where she’s normally pretty, um easy going ... But I could tell by her behavior that she stiffened up and that was uncomfortable for her. March 11, 2015, Tran. pp. 76-77.

Paramedic Harris also testified that during Mr. Priester’s suspension several of the members of Station 18 attended a funeral for one of the member’s father. He also testified that Mr. Priester attended and told a group of them “those bitches better watch out” and that he later reported this to BC Brown.

Battalion Chief Peter Hill testified that he has held the position of Battalion Chief for 6 years and has been with the department for a little over 28 years. BC Hill testified that he interviewed EMT Duncan-Fulton and recalled her telling him that Mr. Priester would:

[B]e whispering in her ear, while she was sitting at the, you know, at the computer table in the Captain's Room. He made comments about her nipples, making her wet, telling her he can make her wet, I know you're wet, he would blow gently on her neck, nibble on her ears. One time she said – she actually said on several occasions he approached behind her while she was washing dishes and put his hands on the counter beside her and pressed his body up against her from behind. March 11, 2015, Tran. pp. 225-226.

BC Hill stated he interviewed EMT Duncan-Fulton's partner, EMT Thomasina Calhoun, and EMT Calhoun "reaffirmed everything she [EMT Duncan-Fulton] had told me." Next, BC Hill he testified that he spoke to Lieutenant Greenfeld who reported the same conduct she testified about earlier during the hearing. He testified that he interviewed now Paramedic Amber Kelly who was completing her paramedic training, at that time. BC Hill testified that he recalled Lieutenant Stevens reporting that she was "intimidated" by Mr. Priester and that she talked about the "touching, the pressing up against her body, the blowing on her neck, whispering in her ear." BC Hill also testified that he re-interviewed some of the members of Station 18, specifically Fire Specialists Jeff Geho and Robert Lim. He stated he believed that FS Geho and Lim's original interviews reflected a culture wherein FS Geho and Lim would be "faithful to their Captain." He testified that reporting sexual harassment carries a "stigma" for the rest of your career. BC Hill testified that he has a background in conducting investigations and at the time he re-interviewed FS Geho "he came in the door ... and [swore] up and down that he didn't know anything." By the actions of FS Geho, BC Hill testified, "I knew I was on the – right path." With regard to the

allegations against Mr. Priester. He testified that the members of Station 18 who worked directly under Mr. Priester are “always going [to go] down with the ship.”

Division Chief Mark Ewers testified that he served on the Personnel and Salary Advisory Board (“PSAB”) that heard the personnel charges brought against Mr. Priester. He testified that at the hearing Mr. Priester’s union representative proffered that Mr. Priester was pleading “no contest of the charges.” Chief Ewers testified that, in light of his plea, Mr. Priester was advised that the PSAB would review all of the witness statements and based on those statements, make a recommendation regarding discipline. Chief Ewers testified that the PSAB found Mr. Priester guilty of 19 of the 21 personnel charges and recommended that he be terminated.

APPELLANT’S WITNESSES

Dennis Degross testified on behalf of Mr. Priester. Mr. Degross is a 23 year employee with the BCFD. He testified that Priester is man of integrity and that he has never seen Mr. Priester make suggestive remarks to female employees.

Robert Dill, who retired from the BCFD as a Captain in 2008 testified that he believes that Mr. Priester was a very good firefighter, although he conceded that he did not have much contact with him after his retirement in 2008. Mr. Dill opined that Mr. Priester provided honorable and faithful service to Baltimore County and testified that he worked with Mr. Priester between the years of 1983-1992.

Jeff Geho, who has been employed by the BCFD as a firefighter for 23 years testified that Mr. Priester was his Captain between he years 2010-2013. He testified that he believes that Mr. Priester was a very good Captain who “made the job fun.” He testified that he knew Katie Duncan-Fulton, and believes she is not a good employee and alleged that she spends most of her

time at the station smoking cigarettes and talking on her cell phone. Mr. Geho testified that he heard Ms. Duncan-Fulton call Mr. Priester a “fat f*cking pig” and has never seen or heard Mr. Priester make any inappropriate or sexual comments.

William Gilbert, who retired from the BCFD as a lieutenant in 2008 testified that in the beginning of his career he worked with Mr. Priester as a paramedic and that he believes that Mr. Priester always emphasized professionalism and that he provided honorable and faithful service to Baltimore County.

Jhett Lewis, a former employee of the BCFD who retired in 2011 as a Captain testified that at the time of his retirement the County had initiated an investigation and threatened charges against him for misconduct. Mr. Lewis testified that he would trust Mr. Priester with his life and he believes Mr. Priester rendered honorable and faithful service to Baltimore County. Mr. Lewis testified that in his opinion whether one renders honorable and faithful service is in the “eyes of the beholder.” Mr. Lewis testified that he was never assigned the same shift as Mr. Priester and that he does not socialize with him.

From the review of the record summarized above it is clear that ALJ Beverungen’s findings of fact were supported by competent, material, and substantial evidence in light of the entire record as submitted; and were not arbitrary or capricious. It appears from the record that ALJ Beverungen found the testimony of the women involved to be credible and it is not the role of this Board to supplant our opinion as to credibility for that of the actual fact finder. Consequently, notwithstanding other procedural arguments in this matter, there exists substantial evidence on which ALJ Beverungen could have based his ruling regarding “honorable and faithful” service.

APPELLANT'S ARGUMENTS

The Appellant, in his argument before this Board, has focused on what he deems flaws in the process, rather than disputing the facts that were presented before the ALJ.

The term "creditable service" is defined in §5-1-201(i) of the Code's "Definitions" section as "prior service plus membership service, for which credit is allowable as provided in §§ 5-1-208 through 5-1-212 of this subtitle." The term "membership service" means "honorable and faithful service as an employee rendered while a member of the retirement system" (§ 5-1-201 (p)). What is not clearly defined by the Code, or anywhere else is the terms "honorable and faithful". It is the failure to clearly define these terms that Mr. Priester believes is the root of his argument that he has been denied due process. Mr. Priester argues that the "honorable and faithful" standard used to revoke his pension is void for vagueness and should be struck down. Mr. Priester argues that there must be legally adequate standards and guidelines for triers of fact to apply and administer the law. *Blaker v. State of Board of Chiropractic Examiners*, 123 Md.App. 243 (1998). The Court in *Blaker* stated that due process requires that "persons of ordinary intelligence and experience be afforded a reasonable opportunity to know what is prohibited, so that they may govern their behavior accordingly. *Id.* at 256. Mr. Priester argues that there is nothing in the pension statute that describes the circumstances in which a pension will be revoked or forfeited.

Mr. Priester further argues that the BOT has engaged in unconstitutional and illegal action by failing to comply with its own statutory mandate to adopt procedural and substantive regulations. Mr. Priester implies that such regulations would put County employees on notice regarding the "rules of the road" for these important cases, which could result in a complete forfeiture of pension eligibility. Mr. Priester cites the BOT enabling statute which states: the Employees Retirement Board of Trustees shall: (1) Adopt rules for the transaction of its business"

BCC Section 3-3-905. Additionally the statute states: “subject to the limitations of this subtitle, the Board of Trustees shall, from time to time, establish rules and regulations for the administration of the funds created hereby and for the transaction of its business.” BCC section 5-1-239. Mr. Priester argues that such enabling legislation mandates that a clear definition of “honorable and faithful” service be provided.

Additionally, Mr. Priester argues that the BOT should not have made an initial decision to revoke a pension unless certain procedural safeguards were implemented and followed. Pursuant to section 5-1-240 of the BCC: “The Board of Trustees may hold hearing when deemed necessary in the performance of its duty, the hearing to be governed by the rules and regulations of the Board, and the Board shall not be bound by technical rules of evidence.” Mr. Priester argues that procedural due process was denied to him at the earliest, and perhaps the most important stage of the proceeding, the BOT’s initial denial of Mr. Priester’s pension benefits.

While not directly challenging the veracity of the testimony that was presented, Mr. Priester further argues that the employee’s duty of honorable and faithful service is a duty to the public, not his fellow employees. Mr. Priester argues that the vast majority of reported cases addressing pension forfeiture involve the commission of crimes and a violation of the public trust which potentially brought the employee’s entire career under a cloud of suspicion. Mr. Priester contends that he did not do anything that adversely impacted the honorable and faithful service he provided to the public for his entire career. He further contends that he did not engage in any actions that publicly humiliated the Fire Department, or resulted in any civil actions against the Department.

Mr. Priester argues that the conduct alleged to have occurred did not even give rise to the level of actionable sexual harassment. Mr. Priester cites *Mendoza v. Borden, Inc.* 195 F.3d 1238 (11th Cir. 1999) which held that to establish a claim for sexual harassment under Title VII, the

conduct must be sufficiently severe or pervasive to alter the employee's terms or conditions of employment. Mr. Priester argues, that while his conduct may have been obnoxious or rude, it was not actionable on Mendoza.

Instances in which the Baltimore County ERS have denied pension benefits based on the issue of "honorable and faithful" service have been previously reviewed by the Court of Special Appeals. In *ERS v. Brown*, 186 Md. App. 293 (2009) the Court considered the case of a police officer with 17 years of service with the Baltimore County Police Department who pleaded guilty to possession of cocaine. In the investigation and administrative hearings, Brown conceded that he had used illegal drugs for many years and bought cocaine from dealers on the street, many of whom knew he was a police officer. The Court held that the Baltimore County Board of Appeals could as a matter of law determine that Brown's illegal conduct equated to a failure to render "honorable and faithful," resulting in the denial of his pension. The Court stressed that it is up to the fact finder to determine whether as a matter of fact the conduct should result in the forfeiture of pension benefits. *Id. at 305*. The Court explained that the fact finder must examine the totality of circumstances and make an *ad hoc* decision on the basis of numerous variables in determining whether an employee's pension benefits are properly denied. *Id. at 317*.

As the ALJ Beverungen is the fact finder in this matter, the Court in *Brown* made it quite clear that he was the one who is to determine the issue of "honorable and faithful" as a matter of fact after reviewing the evidence before him. In this case, ALJ Beverungen was not required to make a finding of "sexual harassment," but rather solely had to determine if the behavior alleged was enough to fall short of "honorable and faithful." As it is clear from the testimony noted above, there is substantial evidence to support the ALJ's finding of fact, therefore this Board cannot substitute our judgment for that of the ALJ, who heard the evidence and was able to assess

credibility of the witnesses. While there may be always two sides to every story, it is not this Board's role to choose which is credible, but rather only if there is substantial evidence to support the ALJ's finding of such.

While the process by which Mr. Priester came to lose his pension benefits may not be ideal, this Board does not find that due process has been denied. The Court of Appeals has held that a public employee's pension benefits may be denied without a hearing, provided the employee is given the opportunity for a *de novo* adversarial hearing before the decision becomes finalized. *Hill v. Baltimore County*, 86 Md. App. 642 (1991). Additionally, as to whether Mr. Priester was on notice of what types of behavior may cause him to lose his pension benefits, the Board finds that the behavior described by the witnesses who testified before the ALJ, is of the nature of behavior, no matter what you officially call it, that the average adult citizen would know to be so extremely offensive as to warrant possible sanction from one's employer. While such behavior may have once, long ago, been tolerated or overlooked in the workplace, it is now common knowledge that behaving in such a manner can have serious repercussions involving one's employment status. Consequently, the Board finds that Mr. Priester was on notice as to the consequences of his behavior.

ALJ'S AWARDING OF PARTIAL PENSION BENEFITS

ALJ Beverungen found that the behavior in *Brown* was more egregious, longstanding, pervasive and deleterious to the public health, safety and welfare than the misconduct and harassment by Mr. Priester. ALJ Beverungen further noted the testimony of Chief Hohman describing how Mr. Priester's conduct was particularly egregious due to his rank of Captain. ALJ

Beverungen took this testimony into consideration and found that Mr. Priester's years as Captain would not be deemed "credible service" thus, pension benefits for those years were denied.

The term "creditable service" is defined in §5-1-201(i) of the Code's "Definitions" section as "prior service plus membership service, for which credit is allowable as provided in §§ 5-1-208 through 5-1-212 of this subtitle." The term "membership service" means "honorable and faithful service as an employee rendered while a member of the retirement system" (§ 5-1-201 (p)).

At the time Priester applied for retirement he had accrued the minimum years of service time. In order to attain "creditable service" toward retirement, an employee must serve honorably and faithfully "while a member of the retirement system" B.C.C. § 5-1-201 (p). In prior Maryland cases if an employee, at any time while a member of the retirement system, fails to serve honorably and faithfully, he/she surrenders their entire benefit. This Board is not aware of, nor have any cases been brought to our attention, in which an employee has been awarded partial pension benefits apportioned as to years in which the misconduct occurred. The statutory language "while a member of the retirement system" implies a requirement that an employee must serve honorably and faithfully during the entire time of employment. This Board can assume that if the statute intended to make allowances for the apportionment of denied pension benefits, language encompassing such a scenario would have been clearly enunciated in the statute itself. While ALJ Beverungen's decision to only deny Mr. Priester's pension benefits from the time period when he served in the rank of Captain can be deemed as a fair and pragmatic attempt for equity, this Board finds that there is no authority to do so pursuant to the County Code.

CONCLUSION

The County requires that service which is creditable towards retirement be honorably and faithfully served. This Board finds that the ALJ finding that Mr. Priester's service fell short of "honorable and faithful," was based on substantial evidence. This Board, however, finds no precedent allowing the ALJ to deny pension benefits for only part of Mr. Priester's employment with Baltimore County. Consequently, the Board REVERSES the portion of the ALJ order which allowed Mr. Priester to retain his pension benefits for the time period before his promotion to the rank of Captain and finds that Mr. Priester's pension benefits must be denied in full.

ORDER

THEREFORE, IT IS THIS 16th day of October, 2015, by the Board of Appeals of Baltimore County,

ORDERED that the decision of the Administrative Law Judge that Mr. Priester's service was not "honorable and faithful" be and the same is hereby **AFFIRMED**; and it is further

ORDERED that the decision of the Administrative Law Judge allowing Mr. Priester to retain his pension benefits for the time period prior to his promotion to the rank of Captain, be and the same is hereby **REVERSED**; and it is further

ORDERED that Mr. Priester's retirement benefits are hereby **DENIED IN FULL**.

In the matter of: Theodore C. Priester, Jr./CBA-15-018

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Andrew M. Belt, Panel Chairman



Benfred B. Alston



Jane M. Hanley