Agenda Item 9
July 12, 2011
Public Hearing

MEMORANDUM

July 8, 2011

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: **Public Hearing:** Bill 18-11, Police Labor Relations – Duty to Bargain

Bill 18-11, Police Labor Relations – Duty to Bargain, sponsored by the Council President on recommendation of the Organizational Reform Commission, was introduced on June 14, 2011. A joint Public Safety/Government Operations and Fiscal Policy Committee worksession is tentatively scheduled for July 14 at 10:30 a.m.

Bill 18-11 would make the scope of bargaining with the certified representative of police employees consistent with the scope of bargaining with unions representing other County employees. The Council delayed introducing this Bill until after finalizing the FY12 Budget because these process changes, if enacted, could not take effect until collective bargaining for FY13 begins in the fall.

Background

In its report to the Council dated January 31, 2011, the Organizational Reform Commission (ORC), in ***Recommendation #21,*** recommended amending the Police Labor Relations Law to make the scope of bargaining with the certified representative of police employees consistent with the scope of bargaining with unions representing other County employees.

The full text of the recommendation is below.

The Erosion of Management Rights

The Police Collective Bargaining law establishes the scope of collective bargaining in County Code §33-80. Similar to the collective bargaining laws for Fire and general County employees, the Police Collective Bargaining law requires the Executive to bargain over wages, benefits, and working conditions. Section 33-80(b) also establishes a list of "Employer rights" that the Executive does not need to bargain. However, unlike the collective bargaining laws for Fire and

general County employees, §33-80(a)(7) requires the Executive to bargain over the "effect on employees of the employer's exercise of rights listed in subsection (b)." This provision is generally referred to as "effects bargaining." For example, §33-80(b)(3) grants the Executive the employer's right to "determine the services to be rendered and the operations to be performed." However, under effects bargaining the Executive would have to bargain with the union over the effect on employees of the Executive's decision to modify the services performed. In practice, "effects bargaining" has become the exception that makes most management decisions subject to bargaining.

"Effects bargaining" has hampered the ability of the Police Department to issue directives to govern how police officers must operate. For example, several years ago, the Police Department had to bargain with the FOP over a directive to implement the new computerized police report writing system. This bargaining delayed the implementation of a new system that County management established to improve efficiency. The FOP has recently delayed the implementation of all directives by refusing to respond to them.

- ***We recommend amending §33-80(a)(7) to make the scope of bargaining consistent with the scope of bargaining in the collective bargaining laws for Fire and general County employees.***

Executive's Response

In a memorandum to the Council President dated February 21, 2011, the Executive responded to each of the 28 recommendations in the ORC report. The Executive did not take a position on this recommendation. He stated:

21. Make the scope of bargaining consistent for all County agencies.

The ORC report includes several recommendations concerning the collective bargaining process. Since we are in the midst of bargaining with all three of our employee unions, I do not think it is appropriate to comment on the Commission's recommendations at this time.

Bill 18-11, sponsored by the Council President on recommendation of the ORC would implement ORC Recommendations #21.

Issues

1. What is the history of the "effects bargaining" provision?

Charter §510, adopted by the voters in the 1980 general election, requires the Council to enact a law providing for "collective bargaining with binding arbitration" with a representative of County police officers. Bill 71-81, enacted by the Council on April 6, 1982, established the Police Labor Relations Law (PLRL). The Bill, as introduced, was the product of negotiations

between County Executive Gilchrist and representatives of the Fraternal Order of Police (FOP). The "effects bargaining" provision was added to the Bill at a Council Committee worksession.[1]

The April 6, 1982 Council meeting minutes described the debate over "effects bargaining."[2] Personnel Director Hilliard explained that the decision to exercise a management right was not subject to bargaining, but that the method of implementing it would be subject to bargaining. The example discussed was the decision to lay off employees. The decision to lay off employees would not be bargained, but the decision as to whom to lay off first would be. Councilmember Fosler disagreed with this interpretation of "effects bargaining" and provided the following legislative history:

> [T]he Council defines 'effect' [referring to the "effect on employees of the employer's exercise of rights'] in a restrictive sense. The word shall not be used as a way of initiating collective bargaining over any items that are employer rights. If the interpretation is expanded, the Council will have to consider amendments to the law. (Minutes at p. 3866 at ©10)

Councilmember Scull moved to delete "effects bargaining," but the motion failed by a vote of 3-2. (Minutes at pp. 3867-3868 at ©11-12)

Charter §511, adopted by the voters in the 1984 general election, authorized the Council to enact a collective bargaining law for general County employees with arbitration or other impasse resolution procedures. Bill 19-86, enacted by the Council on June 24, 1986, established collective bargaining for general County employees. The Bill, as introduced, permitted bargaining over the "amelioration of the effect on employees when the exercise of employer rights ... causes a loss of existing jobs in the unit." Municipal and County Government Employees Organization (MCGEO) representatives objected to this language and requested an amendment to include the full "effects bargaining" established in the Police Labor Relations Law.[3] County Executive Gilchrist supported the narrower language in the Bill. James Torgesen of the Personnel Office explained, "that the broader language was included in the police law because, when it was written, management was unaware of the potential impact of 'effects' bargaining..."[4] The Council enacted the Bill without the broader "effects bargaining" provision.

Charter §510A, adopted by the voters in the 1984 general election, required the Council to enact a collective bargaining law with binding arbitration for fire fighters. Fire fighters had been previously added as a separate bargaining unit to the general County employee collective bargaining law. Bill 21-96, enacted on July 23, 1996, established a separate collective bargaining law with binding arbitration for fire fighters. The final law contains the same narrow "effects" bargaining that was in the law for general County employees. The legislative history of Bill 21-96 does not contain a debate over this provision.

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[1] See the 2008 Office of Legislative Oversight Report on the History of the Collective Bargaining laws in Montgomery County, pp. 46-58. The report is available at: http://www.montgomerycountymd.gov/content/council/olo/reports/pdf/2009-5.pdf

[2] April 6, 1982 Council Legislative Minutes at pp. 3864-3868 at ©8-12.

[3] April 22, 1986 Public Hearing Transcript, p. 10 at ©13-14.

[4] June 5, 1986 Council Legislative Minutes, pp. 3-4 at ©15-17.

"Effects bargaining" also became an issue during the Council's consideration of Bill 10-00, enacted on June 6, 2000.[5] Bill 10-00, as introduced, would have expanded collective bargaining rights under the Police Labor Relations Law to police sergeants and created a separate bargaining unit for sergeants. County Executive Duncan proposed 3 primary amendments to the Bill:

1. add a separate bargaining unit for police lieutenants and captains in addition to the separate unit for sergeants;
2. remove lieutenants and captains from the bargaining unit if their primary duty assignment involved human resources, internal affairs, legal, labor relations, or policy development and compliance; and
3. eliminate "effects bargaining" for the police supervisors bargaining unit.

Labor/Employee Relations Manager James Torgesen explained the request to eliminate "effects bargaining" for the new police sergeants unit:

> The duty to bargain the "effects" of an exercise of any of the statutorily defined Employer rights creates restrictions and delays on the Employer's ability to act in the management arena. An example of "effects" bargaining may be seen through the impact on frequently utilized management prerogatives such as the transfer, assignment and scheduling of employees. The use of these management rights is critical to the ability of the Police Department to operate in an efficient and effective manner in the delivery of police services. Before management may proceed to initiate a change in how employees are transferred, scheduled or assigned, the effect of the changes on employees may be subject to bargaining. Consequently, appropriate notice and opportunity to bargain must be extended to the exclusive representative. The result of any "effects" bargaining may place other limitations on management's ability to act such as a notice requirement, waiting period, opportunity for comment, compensation, etc. before a schedule change or transfer may occur. See April 7, 2000 Torgesen memo, p. 3 at ©20.

FOP Lodge 35 President Walter Bader submitted a comprehensive written rebuttal to the Executive Branch complaints about "effects bargaining." See Mr. Bader's June 2, 2000 letter at ©21-28. Mr. Bader argued that "effects bargaining" is a "bedrock" concept of American labor law that would inevitably exist even if the Police Labor Relations Law did not expressly include it.[6] Mr. Bader also disputed the Executive's argument that "effects bargaining" resulted in the delayed implementation of most administrative directives.

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[5] See the 2008 OLO Report at pp. 133-139.

[6] Mr. Bader cites *First National Maintenance Corp. v. NLRB*, 452 US 666 (1981) as legal support for his contention. However, the Supreme Court holding in this case was that an employer did not have to bargain with the union over its decision to shut down one location and dismiss all of its employees working at that location. The language quoted by Mr. Bader was not integral to the holding and was simply a passing reference. We would note that Bill 18-11, as introduced, is consistent with the dicta in this case since it would continue to require the Executive to bargain over the amelioration of the effects of its exercise of a management right that resulted in a loss of bargaining unit jobs.

Bill 10-00, enacted on June 6, 2000, added police sergeants to the existing bargaining unit and left "effects bargaining" unchanged.

2. Do collective bargaining laws for public employees in other Maryland jurisdictions contain an "effects bargaining" provision?

Council staff surveyed collective bargaining laws for State and County employees in surrounding Maryland jurisdictions. The overwhelming majority of collective bargaining laws do not contain an "effects bargaining" provision. Although an "effects bargaining" provision is not unique to the Police Labor Relations Law, it is found only in State laws governing collective bargaining with employees of the Washington Suburban Sanitary Commission (Public Utilities Art. §18-207(a)(7)), the Maryland National Capital Park and Planning Commission (Art. 28 §112.1(j)),[7] and the Montgomery County Housing Opportunities Commission (Housing and Community Development Art. §16-308(a)(6)).

"Effects bargaining" is not provided in the collective bargaining laws covering County employees in Frederick, Harford, Howard, Baltimore, Prince George's, and Anne Arundel Counties or for Baltimore City employees. Neither the collective bargaining law covering State Executive Branch employees (State Personnel and Pensions Art. §3-502) nor the statewide collective bargaining laws covering certificated (Education Art. §6-408) and non-certificated public school employees (Education Art. §6-510) contain an "effects bargaining" provision.

This packet contains:

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[7] Effects bargaining exists for general employees under Art. 28-112.1(j), but not for police officers under Art. 28 §5-114.1.

Bill No. 18-11
Concerning: Police Labor Relations – Duty to Bargain
Revised: June 3, 2011 Draft No. 1
Introduced: June 14, 2011
Expires: December 14, 2012
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Council President on the recommendation of the Organizational Reform Commission

AN ACT to:

(1) modify the scope of bargaining with the certified representative of police employees; and

(2) generally amend County collective bargaining laws.

By amending
Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-80 and 33-81

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 33-80 and 33-81 are amended as follows:

33-80. Collective bargaining.

(a) Duty to bargain; matters subject to bargaining. A certified employee organization and the employer must bargain collectively on the following subjects:

(1) Salary and wages, provided, however, that salaries and wages shall be uniform for all employees in the same classification;

(2) Pension and retirement benefits for active employees only;

(3) Employee benefits such as, but not limited to, insurance, leave, holidays and vacation;

(4) Hours and working conditions, including the availability and use of personal patrol vehicles;

(5) Provisions for the orderly processing and settlement of grievances concerning the interpretation and implementation of the collective bargaining agreement, which may include binding third party arbitration and provisions for exclusivity of forum;

(6) Matters affecting the health and safety of employees; and

(7) Amelioration of the [The] effect on employees when the employer's exercise of rights listed in subsection (b) causes a loss of existing jobs in the unit.

* * *

33-81. Impasse procedure.

* * *

(b) (1) During the course of collective bargaining, either party may declare an impasse and request the services of the impasse neutral. If the parties have not reached agreement by January 20, an impasse exists.

* * *

(3) If the impasse neutral, in the impasse neutral's sole discretion, finds that the parties are at a bona fide impasse, the impasse neutral [shall] must require each party to submit a final offer which [shall] must consist either of a complete draft of a proposed collective bargaining agreement or a complete package proposal, as the impasse neutral [shall choose] chooses. If only complete package proposals are required, the impasse neutral [shall] must require the parties to submit jointly a memorandum of all items previously agreed upon.

(4) The impasse neutral may, in the impasse neutral's discretion, require the parties to submit evidence or make oral or written argument in support of their proposals. The impasse neutral may hold a hearing for this purpose at a time, date and place selected by the impasse neutral. Said hearing [shall] must not be open to the public.

* * *

(c) An impasse over a reopener matter [or the effects on employees of an exercise of an employers right] must be resolved under the procedures in this subsection. Any other impasse over a matter subject to collective bargaining must be resolved under the impasse procedure in subsections (a) and (b).

(1) [Reopener matters. (A)] If the parties agree in a collective bargaining agreement to bargain over an identified issue on or before a specified date, the parties must bargain under those terms. Each identified issue must be designated as a "reopener matter."

[(B)] 2. When the parties initiate collective bargaining under [subparagraph (A)] paragraph 1, the parties must choose, by agreement or through the processes of the American Arbitration Association, an impasse neutral who agrees to be available for impasse resolution within 30 days.

[(C)] 3. If, after bargaining in good faith, the parties are unable to reach agreement on a reopener matter by the deadline specified in the collective bargaining agreement, either party may declare an impasse.

[(D)] 4. If an impasse is declared under [subparagraph (C)] paragraph 3, the dispute must be submitted to the impasse neutral no later than 10 days after impasse is declared.

[(E)] 5. The impasse neutral must resolve the dispute under the impasse procedure in subsection (b), except that:

[(i)] A. the dates in that subsection do not apply;

[(ii)] B. each party must submit to the impasse neutral a final offer on only the reopener matter; and

[(iii)] C. the impasse neutral must select the most reasonable of the parties' final offers no later than 10 days after the impasse neutral receives the final offers.

[(F)] 6. This subsection applies only if the parties in their collective bargaining agreement have designated:

[(i)] A. the specific reopener matter to be bargained;

[(ii)] B. the date by which bargaining on the reopener matter must begin; and

[(iii)] C. the deadline by which bargaining on the reopener matter must be completed and after which the impasse procedure must be implemented.

[(2) Bargaining over the effects of the exercise of an employer right.]

[(A) If the employer notifies the employee organization that it intends to exercise a right listed in Section 33-80(b), the exercise of which will have an effect on members of the bargaining unit, the parties must choose by agreement or through the process of the American Arbitration Association an impasse neutral who agrees to be available for impasse resolution within 30 days.]

[(B) The parties must engage in good faith bargaining on the effects of the exercise of the employer right. If the parties, after good faith bargaining, are unable to agree on the effect on bargaining unit employees of the employer's exercise of its right, either party may declare an impasse.]

[(C) If the parties bargain to impasse over the effects on employees of an exercise of an employer right that has a demonstrated, significant effect on the safety of the public, the employer may implement its last offer before engaging in the impasse procedure. A party must not exceed a time requirement of the impasse procedure. A party must not use the procedure in this paragraph for a matter that is a mandatory subject of bargaining other than the effects of the exercise of an employer right.]

[(D) The parties must submit the dispute to the impasse neutral no later than 10 days after either party declares an impasse under subparagraph (B).]

[(E) The impasse neutral must resolve the dispute under the impasse procedures in subsection (b), except that:

(i) the dates in that subsection do not apply;

(ii) each party must submit to the impasse neutral a final offer only on the effect on employees of the employer's exercise of its right; and

(iii) the impasse neutral must select the most reasonable of the parties' final offers no later than 10 days after the impasse neutral receives the final offers and, if appropriate, must provide retroactive relief.]

[(F) If the impasse neutral has not issued a decision within 20 days after the impasse neutral receives the parties' final offers, the employer may implement its final offer until the impasse neutral issues a final decision.]

Approved:

Valerie Ervin, President, County Council — Date

Approved:

Isiah Leggett, County Executive — Date

LEGISLATIVE REQUEST REPORT

Bill 18-11
Police Labor Relations – Duty to Bargain

DESCRIPTION:	Bill 18-11 would make the scope of bargaining with the certified representative of police employees consistent with the scope of bargaining with unions representing other County employees.
PROBLEM:	The Organizational Reform Commission recommended this change to the Police Labor Relations Law.
GOALS AND OBJECTIVES:	To increase the authority of the Chief of Police to exercise management rights.
COORDINATION:	County Executive, County Attorney, Human Resources
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Organizational Reform Commission Report. Robert H. Drummer, Senior Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	Not applicable.
PENALTIES:	None.

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Re: Deferral of Bill No. 76-81, Open Meetings for Homeowners Associations

Bill No. 76-81, Open Meetings for Homeowners Associations, was called for final reading. The Council had before it for consideration Draft No. 4, dated March 30, 1982.

Due to lack of time, the Council postponed enactment of Bill No. 76-81, and requested that the Housing Committee meet with interested people to discuss the amendments proposed by the Office of Consumer Affairs.

(The Legislative Session was recessed at 1:10 P.M., and reconvened at 2:30 P.M.)

Re: Enactment of Bill No. 71-81, Collective Bargaining for Police

Bill No. 71-81, Collective Bargaining for Police, was called for final reading. Mr. Hillman, Special Counsel for Labor Relations, appeared before the Council to respond to inquiries.

Mr. Hillman stated that the confusion in the Council's earlier discussion resulted from the fact that Draft No. 4 does not reflect an amendment made by the Council at its last worksession on this bill. Subsection (1), page 20, through subsection (2), page 21, were deleted in their entirety and were included in Draft No. 4 by mistake.

Without objection, the Council agreed to delete all of the language in subsections (1) and (2), pages 20 and 21.

The Council reviewed the remainder of Bill No. 71-81 and raised questions as to the various provisions of the bill.

Councilman Fosler stated that he has had a difference of interpretation with the Executive Branch as to the meaning of the phrase "effect on employees" as used in Section 33-80(a)(7), page 18, as being an item that is subject to collective bargaining as a result of the exercise of an employer's right. Mr. Hilliard would draw a distinction between the decision itself (such as a decision to lay off employees), and the way in which the decision is implemented (which employees to lay off first). The former would be prohibited, but the latter would

be bargainable in Mr. Hilliard's interpretation. However, Councilman Fosler expressed the view that the employer's rights extend to the implementation of the decisions; the "effect" is the consequence of the implementation.

Mr. Hillman stated that he would agree with Councilman Fosler's interpretation. The effect is the consequence to the employees. In a common labor relations situation, an employer would not have to bargain over the decision to shut down a plant, nor the implementation of the shutdown. However, the employer does have a duty to bargain over the effects on employees, such as severence pay and seniority rights.

President Potter expressed the view that a more precise phrase would be "bargain over the amelioration of the effects on employees."

Mr. Hillman expressed the view that the phrase suggested by President Potter is unnecessary because the words that have been used already have well-established meanings.

At the suggestion of President Potter and without objection, the Council restored the word Any in line 4, page 22.

Mr. Hillman responded to questions of Councilmembers concerning provisions that have been deleted from the bill because they have been addressed in other contexts or locations in the bill.

Upon motion of Councilman Fosler, duly seconded and without objection, the Council restored the language of subsection (b)(2), page 19, as follows: (2) To maintain and improve the efficiency and effectiveness of operations;.

After discussion and without objection, the Council inserted the word only after "employees" on line 11, page 18, to clarify that collective bargaining is permitted concerning pension and retirement benefits for active employees only.

During the discussion of the addition of the word "only" on line 11, page 18, the Council considered adding the word to the body of Section 33-80 to clarify that the listing of bargainable items was exclusive. However, after consideration of the fact that some subjects may arise in the future that are not enumerated, the Council added the word "only" on line 11 to clarify that the pensions of already-retired employees are not bargainable.

At the suggestion of President Potter, upon motion of Councilman Gudis, duly seconded and without objection, the Council deleted the word [such] from line 18, page 23, and inserted the words necessary to implement the agreement after the word "action" in the same line.

At the suggestion of President Potter and without objection, the Council deleted the word [most] from line 5, page 25, and inserted in lieu thereof more. The Council also corrected the spelling of the word "empowered" on line 18, page 30.

President Potter requested that the record reflect the intent of the Council that deletion of the section concerning "Use of Official Time" from page 31 does not give employees the right to use official time for union business. Mr. Hillman indicated that this is an item that is left to the bargaining process.

At the suggestion of President Potter and without objection, the Council inserted a comma after the word "interest" on the sixth line of subsection (c), page 32.

(The Council recessed from 3:10 P.M. to 3:30 P.M. to allow Councilmembers an opportunity to read through Bill No. 71-81 in view of the error that had been made in Draft No. 4.)

At the suggestion of Mr. Hillman and without objection, the Council deleted [33-80(c)(2)] from line 30, page 9; line 7, page 10; and line 18, page 11; and deleted the phrase [disagreement over obligation to bargain collectively] from line 1, page 10.

At the suggestion of President Potter and without objection, the Council deleted the word [jointly] from line 23, page 24, and inserted the word jointly after the word "submit" on line 24, page 24.

Councilman Fosler stated that the legislative history of Bill No. 71-81 should be clear that the Council defines "effect" as used in Section 33-80(a)(7) in a restrictive sense. The word shall not be used as a way of initiating collective bargaining over any items that are employer rights. If the interpretation is expanded, the Council will have to consider amendments to the law.

Councilman Scull stated that he agrees with Councilman Fosler's views on the meaning of the word "effect;" however, he does not believe that subsection (7) of Section 33-80(a) is needed. He believes that the language of the subsection is vague and the examples given during the worksession as to problems that might arise were not great enough to justify leaving such vague wording in the law.

Mr. Hillman stated that an employer right is the ability to lay off employees. The union might want to bargain about how to achieve the lay off, such as whether it should be done on the basis of seniority, on the basis of job classification, or by department. Those are the kinds of effects on employees that unions traditionally bargain about, and are the kinds of effects intended by Section 33-80(a)(7). The decisions about whether to lay off and how many employees are to be affected are clearly employer's rights.

Councilman Scull moved, duly seconded, that the Council delete subsection (7) from Section 33-80(a), page 18.

Councilman Scull expressed the view that the language of subsection (7) is vague and will raise more problems than it will solve. The employer has certain rights to hire, transfer, assign and schedule employees, and cannot do anything that does not have an effect on employees. He pointed out that establishing a legislative history does not have the force and effect of law; it reflects only the views of Councilmembers. Every word used in labor relations laws is significant. He stated that he has not heard a strong argument for retaining the subsection.

In response to President Potter's suggestion that the phrase "bargain over the amelioration of the effects on employees" be inserted in subsection (7), Mr. Hillman stated that that is largely what the subsection means, but there may be times when the employer does not want to "ameliorate" the effects. An employer may want to bargain and make the effects on employees harsher.

Mr. Katz, representing the Fraternal Order of Police, noted that the Permanent Umpire will make the decision about which items are bargainable and which are not. If the Council does not like his decision, the Council can amend the law.

Councilman Scull's motion failed, Councilmembers Gelman and Scull voting in the affirmative, Councilmembers Potter, Fosler and Crenca voting in the negative, Councilman Gudis not voting and Councilwoman Spector being temporarily absent.

President Potter stated that he voted in the negative because he believes that there is a substantial area of concern. The language may be vague, but he believes that there is a basic advantage in leaving fairly broad what can be negotiated. It would be disadvantageous to both parties if too much is excluded.

Councilman Fosler expressed the view that there are legitimate concerns as to how subsection (7) will be interpreted. One of the key factors in determining whether it will work successfully is how reasonable both parties are and how good the Permanent Umpire is in making his determinations. It is a subject that bears watching to see what develops. It is an item that may require modification in the future.

Upon motion of Councilwoman Crenca, duly seconded and without objection, the Council approved the following amendments as reflected in Draft No. 4 of Bill No. 71-81 (amendments approved by the Council during this Legislative Session are in addition; capital letters indicate language added after introduction and strike-throughs indicate language deleted after introduction of the bill):

MONTGOMERY COUNTY COUNCIL

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PUBLIC HEARING

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April 22, 1986

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Bill 19-86 *
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The hearings were held in the Third Floor Hearing Room, County Office Building, 100 Maryland Avenue, Rockville, Maryland, at 7:30 p.m., William Hanna, President, presiding.

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PRESENT:

WILLIAM HANNA	President
NEAL POTTER	Vice President
SCOTT FOSLER	Member
DAVID SCULL	Member
ESTHER P. GELMAN	Member
MICHAEL GUDIS	Member
ROSE CRENCA	Member

The Executive Branch is opposed to any expansion of the meaning of effects bargaining under Section 107(a)(7). Without careful delineation of of the subject matter in this area, negotiating the effects on employees of management actions can undermine the employer's ability to function.

As an example, management must be in a position to transfer employees based on organizational need, typically, to improve the effectiveness of operations and delivery of services. Under the suggested amendment, management could be precluded from transferring bargaining unit employees until the economic impact of the transfer on employees was negotiated.

The preservation of employer rights is important in assuring that the Government's ability to manage programs and provide services in an efficient and effective manner is not obstructed. The Executive Branch supports the clarification and the elaboration of these rights in contrast to what is currently in the Police law.

In particular, management must have the right to set standards and take advantage of new technology or research which improves the delivery of services. The mechanics of the bargaining process

APPROVED

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Thursday, June 5, 1986 Rockville, Md.

The County Council for Montgomery County, Maryland, convened in the Council Hearing Room, Stella B. Werner Council Office Building, Rockville, Maryland, at 10:15 A.M. on Thursday, June 5, 1986.

PRESENT

William E. Hanna, Jr., President	Neal Potter, Vice President
Esther P. Gelman	Michael L. Gudis
Rose Crenca	David L. Scull

ABSENT
Scott Fosler

The President in the Chair.

SUBJECT: Executive Regulation No. 145-85, Personnel Regulations

ISSUES DISCUSSED: The memorandum to the Council from Council Staff Director Spengler, dated June 3, 1986, setting forth the issues to be reviewed; the provision in Section 1-13(c) regarding the time frame for which an employee can receive a remedy from the date of filing the action; the position of the Personnel Office that no harm is done to the employee until a decision is made regarding the reclassification request, grievance, or appeal, and, therefore, there is no need for a retroactive provision; the concern of Mr. Thompson, attorney for the Montgomery County Government Employees' Organization (MCGEO) that the provision of Section 1-13 eliminates the retroactive provision for reallocations, which are likely to affect large classes of employees such as the nurses, but retains it for individual position reclassifications; concerns expressed by various Councilmembers that future reclassification/reallocation actions not take as long as it took to reclassify the nurses; the five-year cycle for reclassification reviews and the ability of the Personnel Office to keep up with that schedule; the opinion of Councilmember Gelman that it was inappropriate for the County to appeal a decision of the Merit System Protection Board regarding the reclassification of the nurses, another desire for the County Attorney to brief and consult with the Council before initiating such action; the desire of Councilmember Potter to differentiate in Section 1-13 between those persons who file a request routinely at the beginning of a five-year reclassification review cycle in order to obtain the maximum benefit if their position is reclassified or reallocated upwards, and those cases where retroactivity is justified, and his inability to find the appropriate language to make the

On page 31, lines 13 through 17, delete subsection (d) of Section 6-4, Probationary Period, in its entirety;

Agreed to meet again to review the Personnel Regulations from 1:30 to 4:30 P.M. on June 6 and from 2:00 to 5:00 P.M. on June 19, with the day of June 27 being held for an additional worksession if needed.

(The Council recessed at 12:20 P.M. and reconvened at 2:14 P.M.

SUBJECT: Bill No. 19-86, County Employee Collective Bargaining

ISSUES DISCUSSED: The staff summary, dated June 5, 1986, setting forth issues on the subject continued from the last worksession of May 29, 1986; Issue 4.D. of the summary, Binding Grievance Arbitration; the proposed amendment to pages 19 and 20 of the subject bill that would require binding grievance arbitration for discipline and discharge cases and advisory arbitration for other cases, unless the parties agree that the decision in a particular case will be binding.

ACTION: Agreed to retain the language contained in the bill on pages 19 and 20 regarding binding arbitration.

ISSUES DISCUSSED: Issue 4.E. of the summary, "Effects" Bargaining; the proposed amendment to page 20, lines 4 through 6, that would substitute the broad language from the police collective bargaining law on "effects" bargaining for the language in the bill which confines "effects" bargaining to the exercise of management rights when the exercise of management rights causes the loss of bargaining unit jobs; the County Executive's opposition to the amendment, as set forth on pages three and seven of his memorandum of May 29, 1986; the statement by Mr. Thompson, attorney representing MCGEO (Local 400), that the broader language is usually included in collective bargaining legislation, and is needed in the subject bill; the statement by Mr. Rogers, representing the County Executive, that the amendment should not be included in the bill because it would limit the power of the government to act in emergency and security situations and to make changes within the government involving technology and standards; the statement by Mr. Torgesen, staff of the Personnel Office, that the broader language was included in the police law because, when it was written, management was unaware of the potential impact of "effects" bargaining; the opinion of Mr. Willcox, special attorney, that the inclusion of the amendment could delay the implementation of a government action which might result in litigation; President Hanna's belief that inclusion of the amendment might interfere with the government's ability to implement improvements; Councilmember Potter's suggestion that an amendment might be drafted that would distinguish between actions the government must take in carrying out its responsibilities and actions the government could take to harass employees; Councilmember Potter's belief that a broader definition of "grievance procedure" is needed; the statement by Councilmember Fosler concerning the need for continuous communication between employees and employers when collective bargaining for public employees is initiated to avoid misunderstandings, and his support of the provision

included in the bill on "effects" bargaining; whether a government action resulting in the relocation of an employee's work place should be a subject of collective bargaining; Councilmember Gelman's suggestion that the bill could be amended to provide priority transfer to other County positions for employees who are being relocated similar to the priority granted to County employees who have lost their jobs as a result of a reduction in force action.

ACTION: Agreed to support the language in the subject bill regarding "effects" bargaining (subsection 33-107(7)) unless an acceptable amendment is drafted, as suggested by Councilmember Potter, that would distinguish between employer rights that must be exercised by the government and employer rights that might be exercised by the government as a form of employee harassment.

Adopted the following amendment proposed by Mr. Thompson:

In subsection 33-107(b)(17), after "representative," substitute , for [.] and add unless another date for notification is agreed upon by the parties.

ISSUES DISCUSSED: Issue 6 of the summary, Bargaining Impasse to be Broken with Fact-finding, not Binding Arbitration (Section 33-108); the statement by Mr. Thompson in opposition to the procedure set forth in the subject bill for the submission of the recommendations of the mediator/fact-finder and both negotiating parties to the County Council because he believes negotiators will make a greater effort to reach an agreement on issues if only the report of the mediator/fact-finder is submitted to the Council when the parties fail to reach an agreement; Councilmember Hanna's observation that the subject bill provides that, after the mediator/fact-finder makes recommendations on dispute issues, the parties are permitted to bargain an additional 10 days before the report of the mediator/fact-finder and the position of the two parties are submitted to the Council; the statement by Councilmember Fosler concerning the Personnel Committee's review of this issue, and its support of Section 33-108, as written; Councilmember Scull's concern that the Council's role in the bargaining process under the subject legislation is too broad and should be limited to budgetary and legislative actions; the language in the law (subsection 33-108(k)) which indicates that actions taken by the Council in resolving issues that are in dispute shall not be part of the agreement between parties unless the parties specifically incorporate them in the agreement; Mr. Willcox's suggestion that additional language could be added to indicate that matters that are still in dispute or that do not involve legislation or significant expenditure of capital will not be included in the contract; Councilmember Potter's concern regarding the language in subsection 33-108(i) which indicates that the Council will state its reasons for any intent to reject any part of the items agreed to by the negotiating parties; Mr. Willcox's suggestion that subsection 33-108(i) could be revised for clarification; the need for a technical amendment in the last sentence of 33-108(g).

ACTION: Amended, without objection, subsection 33-108(g), the last sentence, to substitute to which the parties have for [that has been agreed] and to add , after "to."

OFFICE OF HUMAN RESOURCES

Douglas M. Duncan
County Executive

Marta Brito Perez
Director

MEMORANDUM

April 7, 2000

TO: Michael Faden, Senior Legislative Attorney

VIA: Marta Brito Perez, Director, Office of Human Resources

FROM: James E. Torgesen, Labor/Employee Relations Manager

SUBJECT: Bill No. 10-00 - Collective Bargaining -Police Supervisors

You have requested additional explanation and comments from the Executive Branch concerning the amendments affecting collective bargaining rights for police supervisors as proposed by the County Executive. The following is an explanation of the rationale for these amendments addressing the three areas affected; unit structure, position exemptions and scope of bargaining.

Unit Structure

The Police Labor Relations Law, as in each of the other County labor laws, includes as a critical component of the law the definition of a unit of representation for the purpose of collective bargaining. In determining an appropriate unit of representation, labor relations criteria that are commonly used include an evaluation of: the desires of employees, the history of representation, the extent of union organization and community of interest. While all four elements may have impact on unit determination, community of interest is of prime importance. Community of interest generally includes similarities in duties, skills and working conditions.

Desires of employees. To formulate a position on this matter, the Chief of Police met with all supervisors within the Department. Two separate meetings were held, one with sergeants and one with all other supervisors. The Chief concluded from those two meetings that employees in the ranks of sergeant, lieutenant, and captain were interested in having their wages, benefits, and working conditions established through the collective bargaining process.

History of representation. Over the years, various police organizations have represented the interests of police supervisors at all ranks. In the public testimony on the bill, the Fraternal Order of Police (FOP) emphasized its history of individual representation of sergeants. In fact, the FOP has been active in the individual representation of supervisors at all levels. Likewise, the Alliance of Police Supervisors has represented supervisors of all ranks in various capacities.

In the public testimony, the FOP contended that the structure of a separate unit including all three supervisory ranks will have the "unit be represented by a company union." The proposed amendments do nothing to alter the manner in which bargaining unit employees select their chosen representative. The FOP or any other labor organization is free to compete for the representation rights of the bargaining unit. The representative will be determined by a majority of the eligible employees voting. If unit members do not approve of the representation, the law provides a means to change the representative. To suggest that employees would somehow permit an employer-sponsored organization sorely underestimates the intelligence and desire for self determination of the employees involved.

Extent of union organization. Throughout the metropolitan area and Maryland, police supervisors have organized for the purpose of collective bargaining in a number of jurisdictions. The unit structure is mixed. Attached is a chart which provides the jurisdiction, labor organization, unit status, and ranks involved. The public testimony indicated that Prince George's County had one unit that included all police officers through lieutenant. The unit structure in Prince George's County actually provides for a separate unit for supervisors, but for bargaining purposes the supervisors are included under the same labor agreement as the non-supervisory personnel.

Community of interest. The County Executive proposed amendments create a separate supervisory bargaining unit to include sergeants, lieutenants and captains. These three ranks share a primary and common job duty: the responsibility for supervision of police employees and resources. The sergeant has day-to-day responsibility for shift supervision including assigning work, reviewing performance, approving leave, and recommending and approving training. The lieutenant is the principal supervisor of all police patrol shifts and special assignment teams. The captain is the principal supervisor of an operational unit. Included in the supervision at all levels is the responsibility for the administration and enforcement of labor agreements on behalf of the County as the employer. A separate supervisory unit preserves the identity of the supervisory structure.

Although compensation and benefits are similar to the existing police bargaining unit as the result of "pass through," supervisors have their own salary schedule. Also, although sergeants do work the same shift structure as those whom they supervise, as noted earlier their primary role is one of supervision.

Creating a separate supervisory unit also helps eliminate conflicts of interest that arise when supervisors are placed in the same unit as non-supervisory employees. Supervisors must apply the many provisions of the contract to the employees they supervise. As disagreements arise concerning the application of the contract the interests of the supervisor are blurred if they are covered by the same agreement that they are being required to enforce. For example, in a grievance proceeding, subordinate employees might expect supervisors to act more like employee advocates than representatives of management if both are part of the same unit.

The public testimony stated that the County Executive's proposed amendments are seeking to "drive a wedge" between supervisory and non-supervisory employees. The focus of

the proposed amendments is on the supervisory community of interest. It is the County's position that the proposed unit structure will further identify and preserve this important element within the Police Department.

Position Exemptions

The Executive Branch amendments seek to exempt from coverage employees who perform certain critical functions within the police department impacting labor relations. Supervisory employees in human resources, legal, labor relations, internal affairs, policy development and compliance should be excluded from the bargaining unit. Supervisory personnel in these work units are actively engaged in representing Departmental management interests and or assisting in the formulation of policies which impact areas affecting labor relations.

Scope of Bargaining

The requested amendments preclude bargaining on the "effects" of the Employer's exercise of a management right for the proposed supervisory unit. The duty to bargain the "effects" of an exercise of any of the statutorily defined Employer rights creates restrictions and delays on the Employer's ability to act in the management arena. An example of "effects" bargaining may be seen through the impact on frequently utilized management prerogatives such as the transfer, assignment and scheduling of employees. The use of these management rights is critical to the ability of the Police Department to operate in an efficient and effective manner in the delivery of police services. Before management may proceed to initiate a change in how employees are transferred, scheduled or assigned, the effect of the changes on employees may be subject to bargaining. Consequently, appropriate notice and opportunity to bargain must be extended to the exclusive representative. The result of any "effects" bargaining may place other limitations on management's ability to act such as a notice requirement, waiting period, opportunity for comment, compensation, etc. before a schedule change or transfer may occur. The requested amendments retain the status quo for the non-supervisory bargaining unit and provide, in essence, a scope of bargaining for supervisory employees which is consistent with bargaining rights extended to all other County employees.

In summary, the Executive's proposed amendments provide a reasoned approach to establishing the appropriate collective bargaining unit for supervisors. In particular, we believe that the proposed unit structure will preserve the supervisory community of interest. We look forward to addressing these issues with the Council and employee representatives.

cc: Charles A. Moose, Chief of Police
Bruce Romer, Chief Administrative Officer

Montgomery County Lodge 35, Inc.

June 2, 2000

RECEIVED COUNCIL
00 JUN 2 A10:13

Honorable Derick Berlage
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Bill 10-00 *Collective Bargaining - Police Sergeants*

Dear Mr. Berlage:

Again, on behalf of Lodge 35 and its members, including police sergeants, I want to thank you and the co-sponsors of Bill 10-00 for supporting the sergeants collective bargaining bill, legislation which you appropriately indicated is long overdue.

As stated in prior correspondence and statements before the MFP Committee, police sergeant collective bargaining is very common in Maryland and throughout the country. Similarly, the inclusion of police sergeants and even lieutenants within the same bargaining unit, or under the same collective bargaining agreement, is an established practice.

Unfortunately, the major issues are being distorted by the irrational objection of the administration to so-called "effects bargaining." This distraction must, we feel, be addressed head-on to avoid future controversy, litigation, and misperception. Moreover, "effects bargaining" has been used as a red herring by our opponents.

The stated purpose of the Police Labor Relations Act ["PLRA"] is "to promote a harmonious, peaceful and cooperative relationship between the county government and its police employees and to protect the public by assuring, at all times, the responsive, orderly and efficient operation of the police department." The law further recognizes that "[s]ince unresolved disputes in the police service are injurious to the public and to police employees as well, adequate means should be provided for preventing such unresolved disputes and for resolving them when they occur." PLRA § 33-75.

We have honored this public policy and, indeed, since April 1982 when the current law was enacted, there have been no job actions by police officers; no picketing; no slowdowns; and no other actions that impaired our ability to serve the public. This is a significant tribute to a thoughtfully crafted law that was the result of hard work by the County Council, the Gilchrist Administration, and Lodge 35.

18512 Office Park Drive Montgomery Village, MD 20886
(301) 948-4286 • FAX (301) 590-0317

Our law was the first collective bargaining law enacted in Montgomery County. It includes specific reference to "effects bargaining." On the other hand, the County Employees and Firefighter laws do not make such specific reference, but those laws do indeed require "effects bargaining."

It is because the older Police law makes specific statutory reference to "effects" that there is been very little litigation or dispute over the issue. In contrast, the newer County Employees law has been clarified through dispute and litigation. Indeed, MCGEO has had to file more Unfair Labor Practices Charges since their law was enacted in 1986 than has the FOP under the PLRA enacted in 1982.

It is in the spirit of resolving this issue here and now, rather than later, that we present the following for Council review and consideration.

EFFECTS BARGAINING

One of the bedrock concepts in American labor relations jurisprudence is "effects bargaining." Effects bargaining is basic to the practice of collective bargaining in practically every jurisdiction. It is a necessary component of the exercise of "management rights" both in the public and private sectors.

The National Labor Relations Board [NLRB] in its landmark decision *Ozark Trailers, Inc.*, 161 NLRB 561, 63 LRRM 1264, 1266 (1966) cited to earlier precedent in defining this concept, and explained that even when an employer is undertaking a managerial decision, such as the decision to completely shut down operations - perhaps the most fundamental management right of all:

> an employer is still under the obligation to notify the union of its intentions so that the union may be given an opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision.

This duty cannot be neatly limited to a specified list of subject areas or scenarios. As Hill and Sinicropi explain in their often-cited text *Management Rights*, (BNA Books, 1989) at p. 412:

> The courts have not limited the scope of effects bargaining to a specific list of subjects. All aspects related to that decision may be encompassed in the broad scope of effects bargaining.

Indeed, as the NLRB has often recognized:

> The effects are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a [management] decision which cannot be revised. An interpretation of the law which carries the obligations to 'effects,' therefore, cannot well stop short of the decision itself which directly affects 'terms and conditions of employment.'

Ozark Trailers, *supra*, at p. 1269. This iron link between the exercise of any management right and the duty to bargain how that exercise is to be effectuated is not set out in the text of the Federal Labor Management Relations Act, 29 U.S.C. §151 *et seq.* (LMRA). The LMRA merely requires that private sector employers "meet at reasonable times and c&a2661H"management rights" and "effects bargaining"

arise inexorably from the process of defining the frontier between what constitutes "wages, hours, and other terms and conditions of employment," and what subjects lie outside the duty to bargain.

The propriety of the concept of "effects bargaining" was approved by the U. S. Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). There, the Court said:

> [B]argaining over the effects of a [managerial] decision must be conducted in a meaningful manner and at a meaningful time....[The union] has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered.

452 U.S. at 682.

The twin concepts of "management rights" and "effects bargaining" have continued to be applied in public sector collective bargaining throughout the United States. Pursuant to the Civil Service Reform Act of 1978, employees of the Federal Government were granted collective bargaining rights. While the parameters of those rights are somewhat different than for the private sector (e.g. Federal employees are not permitted to strike), the basic concepts remain the same. As the U.S. Court of Appeals for the District of Columbia observed in *Dept. of Defense v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982):

> Even with regard to reserved management rights, the Act authorizes collective bargaining over the 'procedures which management officials of the agency will observe in exercising [their] authority....'

Thus, "effects bargaining" is also described as the duty to bargain over the procedures for implementing a managerial decision.

The same concepts have also been applied in Montgomery County collective bargaining laws, whether or not the County statute specifically includes a detailed guide to effects bargaining. The County Collective Bargaining Law, § 33-101, *et seq.*, Mont. Co. Code, 1994, and the Fire and Rescue Collective Bargaining Law, § 33-147, *et seq.*, Mont. Co. Code, 1994, do not include the general reference to effects bargaining found in the County's Police Labor Relations Act at § 33-80(a)(6). Nevertheless, "effects" or "procedural implementation" bargaining have been determined to be a necessary concomitant to the subjects of bargaining outlined in the County Collective Bargaining Law at § 33-107(a).

In *Montgomery County Government v. MCGEO-UFCW Local 400*, Case 90-1, the Montgomery County Labor Relations Administrator (LRA) determined that four bargaining proposals by MCGEO regarding contractual procedural regulation (by the use of seniority) of the County's implementation of the management rights to transfer, promote, fill vacancies, and assign overtime are "legal" proposals under County law. In reaching that decision, the LRA reviewed major precedents in state and local public sector bargaining affirming the concepts of effects bargaining. In that case, even the County conceded some of the basic premises of effects bargaining. The LRA noted:

> In any event, the County's position throughout has been that it is legal and appropriate to entertain and discuss 'seniority' proposals, and to agree to same, when it is 'post-decisional' i.e. after the County decides that services and operating efficiencies are not substantially impaired....
>
> The four proposals as written do not violate the County's prerogatives. The County concedes that the proposals fall within the general definition of 'conditions of employment' under [the statute] ... and since seniority matters are of fundamental concern to employees, the County violated the statute by failing to bargain.

This decision brings us full circle to the premise enunciated by the Supreme Court in *First National Maintenance, supra*: "[The union] has some control over the [managerial] decision...."

As we have referenced, the Police Labor Relations Law includes at Section 33-80(a)(7) the duty to bargain:

> The effect on employees of the employer's exercise of rights enumerated in subsection (b) hereof.

Section 80(b) lists management rights under the PLRA.

Whether or not such a provision were to be included in any collective bargaining legislation covering police supervisors or other County employees not presently covered by a collective bargaining unit, the concept of "effects bargaining" is so deeply ingrained in American labor relations jurisprudence, that any statute directing collective bargaining regarding any subjects traditionally included within the concept "wages, hours, and other terms and conditions of employment" necessarily includes effects bargaining.

During the 18 years of the parties' experience with the PLRA, there have been few if any formal controversies regarding the scope of proper subjects of bargaining. This excellent experience has been fostered by the detailed clarity of the bargaining duty under the PLRA. Removal of the specific reference to effects bargaining from any future law would simply raise the possibility that sergeants, through their union, will have to clarify that such bargaining is required through litigation, such as occurred shortly after the promulgation of the County Collective Bargaining Law in 1996.

LAW SHOULD BE CONSISTENT

A problem with exclusions of specific reference to "effects bargaining" is that two groups of police employees will be bargaining under different statutes. This is akin to a football game where one team plays under NFL rules and the other plays under Canadian Football League [CFL] rules. Clearly, confusion and disputes will result.

Moreover, established legislative terms and understandings will be disputed and a new law will need to be defined through dispute resolution mechanisms and litigation. This is not in the larger interest of the sound public policy articulated at § 33-75.

The PLRA represents a balance of the interests between Management and the Union. American labor law has evolved over scores of years as a result of the struggles of employees to achieve democracy in the workplace on the one hand, and management to hold onto what it perceives as its "prerogatives."

It is out of respect for the manner in which the PLRA was drafted in response to a Citizen Initiative that Lodge 35 has not sought to expand the scope or parameters of the PLRA beyond the inclusion of sergeants under the same law. (We were honest and open with the 1982 Council and Executive, as well as political candidates since that time, that we intended to continue to push for inclusion of sergeants.) Unfortunately, the Duncan Administration has exploited this legislation and the OLO study of the police complaint system to attack an established law.

"EFFECTS BARGAINING" IS WIDELY MISUNDERSTOOD

"Effects bargaining" has been blamed for all sorts of perceived evils unrelated to the concept. Interestingly, the department issues internal directives regularly. Very few of those directives involve bargaining. Those that do, generally address mandatory bargaining, not effects. For instance, directives and policies on arrest procedures, enforcement priorities, district boundaries, crime reporting, selective enforcement, issuance of citations, jurisdiction, department organization, search and seizure, prisoners and fugitives, community services, and public relations rarely result in bargaining of any kind. And when they do, bargaining is limited to small and specific portions that involve working conditions.

Part of the confusion has been the result of Contract Article 61 *Directives and Administrative Procedures*. That Article requires that "[n]egotiable matters pertaining to administrative procedures, department directives, and rules referenced in this agreement . . . are subject to addition, change, amendment, or modification, only after specific notice is provided to the union with an opportunity to bargain and after the parties reach agreement. If no agreement is reached, the addition, change, amendment, or modification shall not be implemented." The Article further provides that

"[c]hanges to directives, rules and procedures not enumerated in th[e] agreement, or the effects on employees of the employer's exercise of a management right as enumerated in Article 42 § A, which involve matters appropriate for collective bargaining will be proposed by the County to the Union for bargaining. Thereafter, and before implementation, bargaining and agreement shall occur. Failing agreement, the dispute will be resolved pursuant to the impasse procedures . . . of Chapter 33, § 33-81(b) of the Montgomery County Code."

This Contract Article simply affords the County flexibility to seek change without waiting for bargaining on a successor (or term) contract. An analogy to the County's budget process might be appropriate.

In March of each year the Executive submits a recommended budget to Council. Council spends considerable time analyzing and questioning the recommendation. By law, a date is set for approval of the budget that becomes effective on July 1.

Should the Executive desire to amend or supplement the budget after July 1, s/he must follow certain procedures and submit the request to Council. As you well know, certain requests are barred until after January 1. Charter § 307. Emergency appropriations to meet specific circumstances can be made at any time. Charter § 308. In both cases, public notice is required. These charter provisions apply to all county agencies, including public safety.

Council will deliberate and discuss these supplemental budget requests. Year after year, we read of the Executive's expressed frustration with Council for doing its job. Executives have accused Council of micro-managing, interfering, endangering public safety, etc. The rhetoric goes on year after year, budget after budget. Such is the nature of our democratic form of government.

Like the budget process, the term bargaining process takes place at certain times. Contracts last for not less than one, nor more than three years. In November, we commence the process. If no resolution is reached by January 20, impasse reached. All issues must be resolved by February 1 and portions of the Agreement requiring Council action must be submitted as part of the Executive's Recommended Budget. By May 1, the Council must indicate its intent to accept or reject all or any portion of the agreement. If any portion is rejected, the parties enter into a process for resolution. The contract becomes effective on July 1.

Therefore, for purposes of our analogy, term bargaining is like the annual budget process. Interim bargaining under Article 61 and "effects bargaining" is like supplemental budget requests.

Both the budget and bargaining processes require deliberation and review by the parties, neither interferes with the efficient and effective delivery of essential public services. Both are subject to complaints by the Executive!

In this regard, management is critical of Lodge 35 for its thorough analysis of issues submitted for bargaining, saying this is time-consuming. Like legislatures and good business in all segments of our society, all parties have a duty to be thorough. We do not take our obligations lightly.

Another recent management complaint has been the delay in bargaining "effects" and non-effects issues midterm in the contract. Both sides have been responsible for delay in various matters. If this is a concern of either management or the union, either is free to require the other to bargain through established procedures, e.g. Charge of Prohibited Labor Practice.

Penultimately, it must be restated that the Police Complaint Process study that brought this issue to the forefront of attention is mostly unrelated to any collective bargaining. The investigation of most complaints against police officers, and all complaints alleging excessive use of force, is governed by the Law Enforcement Officers' Bill of Rights. Article 27, § 727, *et seq.* of the Annotated Code of Maryland.

That law affords police officers certain procedural rights in investigations, including the right to ten (10) days to obtain representation before being subjected to questioning of the officer concerning his/her conduct. Hence, no matter how serious the allegation, the officer has ten days after notification to make a statement, but management frequently postpones asking for that statement, thereby delaying the process. But, as stated, this is state law, not collective bargaining.

Management complains of this law and says, that because of "effects bargaining" it can't engage in corrective action to prevent inappropriate conduct. Our response is simple: In the very few cases where this has been at issue, we demanded due process for our members and management tried to deny that due process notwithstanding the constitution and Personnel Regulations Section 3.2 *Due Process*. Management can submit a proposal to bargain, but hasn't. To say that "effects bargaining" is at the root of all evil is disingenuous at best. (Even management touts the low number of complaints relative to the amount of police activity.)

I further note that it has been those areas where the LEOBR or an unfettered management right applies that have been the subject of most criticism. The Department of Justice was falsely told by police management that FOP Lodge 35 delayed the disciplinary process and Lodge 35 provided proof that it did not. DoJ found many management, not FOP, deficiencies and the recently signed Agreement with DoJ preserved all contract and PLRA rights while requiring changes in certain management (not FOP) practices.

In sum, this issue has been exploited and misunderstood. Most collective bargaining involves mandatory subjects of bargaining, not "effects." "Effects bargaining" exists even when a statute does not create it, for there is no bright line test to determine if a matter is a mandatory subject of bargaining or an effect of the exercise of a management right.

Our law, unlike the other County bargaining laws, sets forth by statute what others have had to define through litigation. Our job as police officers is a tough one. The public is better served when we negotiate according to statute than when we litigate over it.

Our goal is to avoid continuing controversy, not to create it. We therefore urge Council to include sergeants in the bargaining unit under the law that has existed for 18 years.

We look forward to working with you, the MFP Committee, and full Council on this most important legislation.

Sincerely,

Walt

Walter E. Bader
President

Enclosures (Reference material; MCGEO ULP Case 90-1)

cc: Mr. Andrews, Lead, MFP
Mrs. Dacek
Mr. Denis
Mr. Ewing
Mr. Leggett
Mrs. Praisner, Chair, MFP Committee
Mr. Silverman
Mr. Subin, President