Agenda Item 6
July 26, 2011
Action

MEMORANDUM

July 22, 2011

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: **Action:** Bill 20-11, Personnel – Collective Bargaining – Public Accountability – Impasse Arbitration

Government Operations and Fiscal Policy Committee recommendation (3-0): disapprove the Bill.

Bill 20-11, Personnel – Collective Bargaining – Public Accountability – Impasse Arbitration, sponsored by the Council President on recommendation of the Organizational Reform Commission, was introduced on June 14, 2011. A public hearing was held on July 12 and a Government Operations and Fiscal Policy Committee worksession was held on July 18.

Bill 20-11 would establish an interest arbitration panel to resolve an impasse, require an impasse arbitration hearing to be open to the public, and modify the criteria for the impasse panel to apply. 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 ***Recommendations #19 and #20,*** recommended amending the County collective bargaining laws to establish an interest arbitration panel to resolve an impasse, require an impasse arbitration hearing to be open to the public, and modify the criteria for the impasse panel to apply.

The full text of the recommendation is below.

Public Accountability in Interest Arbitration

1. Change the criteria for the arbitrator to use to resolve a collective bargaining impasse.

Interest arbitration is a method of resolving disputes over the terms and conditions of a new collective bargaining agreement. Grievance arbitration is a method of resolving disputes over the interpretation or application of an existing collective bargaining contract. County Charter §510 requires the Council to enact a collective bargaining law for police officers that includes interest arbitration. Charter §510A requires the same for firefighters. Charter §511 authorizes, but does not require, the Council to enact a collective bargaining law for other County employees that may include interest arbitration or other impasse procedures. All of these Charter provisions require any collective bargaining law enacted by the Council to prohibit strikes or work stoppages by County employees. The Council has enacted comprehensive collective bargaining laws with interest arbitration for police (Chapter 33, Article V), firefighters (Chapter 33, Article X), and other County employees (Chapter 33, Article VII).

All three County collective bargaining laws require final offer by package arbitration requiring the arbitrator to select the entire final offer covering all disputed issues submitted by one of the parties. The arbitrator is a private-sector labor professional jointly selected by the Executive and the union. Since 1983, there have been 17 impasses resolved by interest arbitration. One of the impasses involved firefighters, one involved general County employees, and the other 15 involved the police.

The arbitrator selected the final offer of the International Association of Fire Fighters (IAFF) in the one impasse with the firefighters and selected the County offer in the one impasse with general County employees represented by the Municipal and County Government Employees Organization (MCGEO). The arbitrator selected the FOP offer in 11 of the 15 impasses with the police. The arbitrator selected the County offer over the FOP offer three times,[1] and the County agreed to the FOP offer after the arbitration hearing one time. One explanation for these one-sided results is a lack of public accountability in the interest arbitration system used to resolve impasses with County unions.

One of the arguments often raised in challenges to interest arbitration laws is the lack of accountability to the public. Legislatures enacting interest arbitration laws have responded to this criticism in a variety of ways. An Oklahoma law authorizes a city council to call a special election and submit the two proposals to the voters for a final decision, if the arbitrator selects the union's final package. The Oklahoma Supreme Court upheld this unusual provision in *FOP Lodge No. 165 v. City of Choctaw,* 933 P. 2d 261 (Okla. 1996). Some laws provide for political accountability in the method of choosing the arbitrator. The Colorado Supreme Court upheld an interest arbitration law, in part, because it required the city council to unilaterally select the list of arbitrators in *FOP Colorado Lodge No. 19 v. City of Commerce City,* 996 P. 2d 133 (Colo. 2000). Finally, many interest arbitration laws provide for accountability by adopting guidelines that the arbitrator must consider, require a written decision with findings of fact, and subject the decision to judicial review for abuse of discretion, fraud, or misconduct. See, *Anchorage v. Anchorage Dep't of Employees Ass'n,* 839 P. 2d 1080 (Alaska 1992).

[1] The FOP appealed two of the three decisions in favor of the County to the Circuit Court. The Circuit Court reversed a portion of the arbitrator's award in 2003 and affirmed the arbitrator's award for the County in 2008.

We note that the Council enacted Expedited Bill 57-10, which modifies the criteria used by the arbitrator in resolving collective bargaining impasses with each County employee union. We support this legislation as a first step in the process of increasing public accountability in the arbitration process used to resolve impasses, but we recommend an additional amendment.

Under the County collective bargaining laws before the enactment of Bill 57-10, an arbitrator could only consider:

a. Past collective bargaining contracts between the parties, including the past bargaining history that led to such contracts, or the pre-collective bargaining history of employee wages, hours, benefits and working conditions;

b. Comparison of wages, hours, benefits and conditions of employment of similar employees, of other public employers, in the Washington Metropolitan Area and in Maryland;

c. Comparison of wages, hours, benefits and conditions of employment of other Montgomery County personnel;

d. Wages, benefits, hours and other working conditions of similar employees of private employers in Montgomery County;

e. The interest and welfare of the public; and

f. The ability of the employer to finance economic adjustments and the effect of the adjustments upon the normal standard of public services by the employer.

The problem with these criteria can be seen in the most recent arbitration awards under the County collective bargaining laws. For example, Arbitrator David Vaughn described his understanding of the statutory criteria as follows:

> *"This provision does not require that any particular factor be considered or that all of them be considered. It simply identifies the factors that I may consider. Thus, I am free to determine whether any particular factor or factors weigh more heavily than others..."* (MCGEO Arbitration Decision of March 22, 2010)

In the 2010 Police arbitration decision, Arbitrator Herbert Fishgold, applying these criteria, found that the FOP's last offer for a 3.5% step increase, at a cost of $1.2 million, and a reinstated tuition assistance program, at a cost of $455,000, was more reasonable than the County's offer of no pay increase or tuition assistance. Mr. Fishgold found that the FOP had already given up a previously negotiated 4.5% cost-of-living increase each of the past two years and had, therefore, done enough to help balance the County's budget. The Council subsequently rejected both of these economic provisions and required all County employees to take furloughs, including police officers, in order to close an unprecedented budget deficit.

The arbitrator should consider the funds available to pay personnel costs before considering comparative salaries and past collective bargaining agreements. The bill, as enacted, requires the arbitrator to evaluate and give the highest priority to the County's ability to pay before considering the other five factors. The amendment that the Council ultimately rejected would have gone further by requiring the arbitrator to determine first if the final offers were affordable without raising taxes or lowering the existing level of public services. Although we support the bill as enacted without this amendment, the amendment would have added important guidance to the arbitrator to determine affordability based upon existing resources only.

- ***We recommend new legislation that would include the amendment that was originally supported by the Council's Government Operations and Fiscal Policy Committee on December 7.***

2. Change the method of selecting the arbitrator.

All three of the County's collective bargaining laws require the appointment of a professional labor arbitrator who is mutually selected by the Executive and the union. Professional labor arbitrators must avoid the appearance of favoring one side or the other in order to continue to be selected. It is especially important for a professional labor arbitrator to avoid a veto by a national union with affiliates representing public employees throughout the nation. The labor arbitrator is accountable to the parties but not to the taxpayers.

The Baltimore County Code has a different system for resolving disputes with unions representing non-public safety employees. The Code requires the appointment of a permanent arbitration panel consisting of five members serving four-year terms. Three members are appointed by the Council, one by the Executive, and one by the certified employee organizations. The members serve without compensation. The law provides for mediation before a professional mediator provided by the Federal Mediation and Conciliation Service, and fact-finding by a neutral selected from a panel of experts provided by an impartial third-party agency. If the parties are still unable to resolve the dispute, the arbitration panel conducts a hearing and issues an advisory decision. The decision of the arbitrator is a non-binding recommendation to the Executive, who makes the final decision.

Although this system has been in place for more than 10 years, only one dispute has been submitted to the Board. In 2008, a jointly selected professional labor arbitrator serving as a fact-finder recommended the employees receive a 3% pay increase after mediation. After reviewing the fact-finder's report and meeting with each party, the Arbitration Board issued a non-binding recommendation of no pay increase. The Executive accepted the Board's recommendation. However, the Baltimore County voters approved a charter amendment in the 2010 general election authorizing, but not requiring, the Baltimore County Council to enact a law requiring interest arbitration for general county employees similar to the law governing public safety employees.

The Baltimore Sun recently reported that the Baltimore County Council is likely to enact an interest arbitration law for general county employees. Although it is likely that Baltimore County will move away from this system, the Colorado Supreme Court, in *FOP v. City of Commerce City*, 996 P.2d 133 (Colo. 2000), held that an interest arbitration statute must require the arbitrator to be accountable to the public. The Court held that the statute did not violate a

provision in the Colorado Constitution requiring political accountability for a person exercising governmental power *only* because it required Commerce City to appoint unilaterally a permanent panel of arbitrators that could be selected by the parties to resolve an impasse.

In New York, the Public Employees' Fair Employment Act, §209, establishes a three-person arbitration board to resolve an impasse between a state or local government employer and a union representing public safety employees. Each side chooses one arbitrator and the two arbitrators select a third neutral party. If the parties are unable to agree, the State Public Employee Relations Board (PERB) provides a list of neutral arbitrators that the parties must choose from by alternate strikes. The list is created by the PERB without input from either party. Section 806 of the Pennsylvania Public Employee Relations Act has a similar provision for a three-person arbitration board, with the third member selected from a list provided by the State PERB if the parties are unable to agree.

Maryland, however, does not have a comprehensive State law governing collective bargaining with State and local government employees and does not have a State PERB with jurisdiction over County government labor relations.[2] Montgomery County collective bargaining laws establish a single labor relations administrator for each bargaining unit to serve as the PERB. The labor relations administrator is jointly selected by the Executive and the union.
Montgomery County collective bargaining laws require the labor professional jointly selected by the parties to serve as both a mediator and the arbitrator. This dual role has the advantage of granting the mediator/arbitrator greater authority during the mediation process. A party must seriously consider any statement about a weakness in a party's position by a mediator who ultimately will resolve an impasse as the arbitrator. Traditional mediation promotes the free flow of ideas between the parties, in part, because the mediator has no authority to impose a resolution. This free flow of ideas is diminished when the mediator will also serve as the arbitrator. A major advantage of the dual role is that the mediator/arbitrator can issue a quicker decision because he or she is already familiar with the issues at impasse. This speed is useful due to the compressed schedule for bargaining, impasse resolution, and budget decisions. However, we believe the better alternative for both mediation and arbitration would be to use a jointly selected mediator and a separate arbitration board.

- ***We recommend establishment of a three-person arbitration board, with each party selecting one member and the two parties selecting a third neutral party.***

If the parties are unable to agree on a third party, we recommend following the New York and Pennsylvania model of requiring the parties to select a third party from a pre-selected list of neutrals appointed by the Council. The persons on the list would be appointed for a four-year term of office without requiring the concurrence of either the union or the Executive. If the parties are unable to agree on a person from the Council's list, they would be required to select an arbitrator through alternate strikes from the list.

[2] Maryland does have a comprehensive labor relations law governing public school employees and recently established a Maryland Public School Employee Relations Board. However, the members of this Board are jointly selected by the employee unions and public school management.

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.[3] He stated:

19. Modify the criteria for arbitrators to use in addressing a collective bargaining impasse.

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.

20. Change the method for selecting the arbitrator for collective bargaining.

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 20-11, sponsored by the Council President on recommendation of the ORC would implement ORC Recommendations #19 and #20.

Public Hearing

All 7 witnesses at the July 12 public hearing opposed the Bill. Gino Renne, MCGEO President (©36-40), John Sparks, IAFF Local 1664 President (©41-43), and Marc Zifcak, FOP Lodge 35 President (©44-46) each opposed the changes to the criteria for the impasse arbitrator and the creation of a new 3-person arbitration panel. Jean Athey, Peace Action Montgomery (©47-48), Joslyn Williams, President of the Metropolitan Washington Council, AFL-CIO (©49), Elbridge James, Maryland NAACP, and Ryan Dennis, Progressive Maryland also opposed the Bill as an attack on collective bargaining rights.

[3] The Executive has still not taken a position on this Bill since the collective bargaining negotiations with each of the employee unions finished in May.

July 18 Worksession

The Committee reviewed the Bill. Stuart Weisberg, Office of Labor Relations, represented the Executive Branch, and reported that the Executive does not have a position on the Bill. Gino Renne, President of MCGEO answered questions from the Committee. The Committee recommended (3-0) disapproval of the Bill.

Issues

1. Should the criteria for the impasse arbitrator be modified?

Expedited Bill 57-10, enacted by the Council on December 14, 2010, modified the criteria for an impasse arbitrator to consider. After the enactment of Bill 57-10, the Executive was unable to negotiate an agreement with any of the 3 County employee unions. The parties submitted each impasse to an arbitrator who applied the new criteria established by Bill 57-10. In each case, the arbitrator selected the union's last best offer as the most reasonable package. The February 18, 2011 decision of impasse arbitrator Jerome T. Barrett selecting the last best offer of the FOP illustrates how the arbitrator viewed the new criteria. See ©20-31. Mr. Barrett determined that the County could afford to pay a service increment to FOP unit members in FY12 by relying on the FOP's identification of additional available resources. The FOP had identified a waiver of the State maintenance of effort requirement for public school funding, which would be a reduction in services, and raising the utility and recordation taxes. See p. 10 of the decision at ©29. Bill 20-11 would require the arbitrator to assume no increase in taxes and a continuation of the current level of services when determining the County's ability to pay.

During the Council debate on Bill 57-10, the County Attorney, at the request of the Council Staff Director, provided several recommendations to clarify the guidance to an arbitrator that would further the purpose of the Bill in a December 3, 2010 memorandum at ©32-35. The County Attorney pointed out that the Bill would still permit an arbitrator to conclude that the Council could or should raise new or existing taxes, including overriding the property tax limit in Charter §305. The decision to raise taxes should be reserved to the elected County Council and not a private labor arbitrator. The County Attorney recommended amending the Bill to require the arbitrator to first determine the affordability of both final offers assuming no new or increased taxes before considering the other factors. It appears that the County Attorney correctly predicted a problem with Bill 57-10. Bill 20-11 would implement the County Attorney's suggested language. The Committee was reluctant to revisit the criteria for the arbitrator so soon after the enactment of Bill 57-10 last year. **Committee recommendation (3-0):** do not approve the changes to the criteria for the impasse arbitrator.

2. Should the single mediator/arbitrator be changed to a mediator and a separate 3-person arbitration panel?

Bill 20-11 would make 2 significant changes to the impasse resolution process. First, the Bill would split the job of mediator and arbitrator. As IAFF President John Sparks argued at the public hearing, an arbitrator who served as the mediator has the advantage of understanding the disputed issues before the arbitration hearing and may be able to issue a decision quicker. In addition, a mediator-arbitrator carries the additional weight of being the person who would

ultimately resolve an impasse during the mediation process. However, these advantages come with a big disadvantage. The mediator is a facilitator to help the parties resolve the dispute by agreement. Mediation works best when the parties are free to express themselves without fear of retribution or future litigation before the mediator when he or she dons the arbitrator's hat.

The judicial system recognizes this problem. The trial judge is rarely asked to serve as a settlement judge in order to permit the parties to speak freely without a fear of poisoning their case. A party must approach mediation before the arbitrator with caution. The mediation becomes part of the ultimate litigation. A party must be careful not to prejudice their case by an admission or concession in mediation because the mediator could become the arbitrator. One of the fundamental principles of successful mediation is an agreement between the parties that statements made at mediation will never be used as evidence in litigation if there is no settlement. A single mediator-arbitrator promotes a quicker process, but hinders a negotiated settlement at mediation.

Bill 20-11 would also create a 3-person arbitration panel instead of a single arbitrator. Each party would select an arbitrator and the third arbitrator would either be jointly agreed upon or selected from a permanent list of neutral arbitrators appointed by the Council. Several of the speakers at the public hearing correctly pointed out that the arbitrator selected by each party would likely support that party's position. This is expected. The party representative is appointed to ensure that the neutral third party arbitrator understands the position of each party. Most decisions would be rendered by the neutral third party. This type of 3-person arbitration panel is already used by the County to resolve appeals filed by an applicant for a disability retirement pension. See Code §33-43(m). Under current law, the impasse mediator-arbitrator must be approved by each party. The Bill would permit the parties to jointly appoint a neutral third party arbitrator, but would require them to select a neutral by alternating strikes from a list of permanent arbitrators appointed by the Council. The Bill would, therefore, give the Council a greater role in selecting the impasse arbitrator. The Committee concluded that the additional time required by the proposed changes to the arbitration process was not likely to result in more negotiated agreements. **Committee recommendation (3-0):** do not approve the separate 3-person arbitration panel created by the Bill.

3. Should the arbitration hearing be open to the public?

The Bill would also require that the arbitration hearing be open to the public. This will not affect the free exchange of ideas during the negotiations. Public trials are the rule in our legal system. Direct public access and press coverage, except in the rare case where a closed trial is necessary to protect the participants, promotes greater public confidence and acceptance of the result. The Committee did not agree that an open arbitration hearing would improve the impasse resolution process. **Committee recommendation (3-0):** do not require arbitration hearings to be open to the public.

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Bill No. 20-11
Concerning: Personnel – Collective Bargaining – Public Accountability – Impasse Arbitration
Revised: July 13, 2011 Draft No. 2
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) establish an interest arbitration panel to resolve an impasse;
(2) modify the criteria for the impasse panel to consider in arbitration; and
(3) generally amend County collective bargaining laws.

By amending
Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-81, 33-108, and 33-153
By adding
Montgomery County Code
Chapter 33, Personnel and Human Resources
Section 33-103A

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 33-81, 33-108, and 33-153 are amended as follows:

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 certify the impasse for arbitration before an impasse panel selected pursuant to Section 33-103A. The impasse panel must require each party to submit a final offer which shall consist either of a complete draft of a proposed collective bargaining agreement or a complete package proposal, as the impasse [neutral shall choose] panel chooses. If only complete package proposals are required, the impasse [neutral shall] panel must require the parties to submit jointly a memorandum of all items previously agreed upon.

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

(5) On or before February 1, the impasse [neutral] panel must select, as a whole, the more reasonable, in the impasse [neutral's] panel's judgment, of the final offers submitted by the parties.

(A) The impasse [neutral] panel must first [evaluate and give the highest priority to] determine the ability of the County to [pay for additional] afford any short-term and long-term expenditures required by [considering] the final offers:

(i) [the limits on the County's ability to raise taxes under State law and the County Charter] assuming no increase in any existing tax rate or the adoption of any new tax;

(ii) [the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a final offer] assuming no increase in revenue from an ad valorem tax on real property above the limit in County charter Section 305; and

(iii) considering the County's ability to continue to provide the current [standard] level of all public services.

(B) [After evaluating the ability of the County to pay] If the impasse panel finds under subparagraph (A) that the County can afford both final offers, the impasse [neutral] panel [may only] must consider:

(i) the interest and welfare of County taxpayers and service recipients;

(ii) past collective bargaining contracts between the parties, including the bargaining history that led to each contract;

(iii) a comparison of wages, hours, benefits, and conditions of employment of similar employees of other public employers in the Washington Metropolitan Area and in Maryland;

(iv) a comparison of wages, hours, benefits, and conditions of employment of other Montgomery County employees; and

(v) wages, benefits, hours and other working conditions of similar employees of private employers in Montgomery County.

(6) The impasse [neutral] panel must:

(A) not compromise or alter the final offer that [he or she selects] they select;

(B) select an offer based on the contents of that offer;

(C) not consider or receive any evidence or argument concerning the history of collective bargaining in this immediate dispute, including offers of settlement not contained in the offers submitted to the impasse [neutral] panel; and

(D) consider all previously agreed on items integrated with the specific disputed items to determine the single most reasonable offer.

(7) The offer selected by the impasse [neutral] panel, integrated with the previously agreed upon items, [shall] must be [deemed to

represent] the final agreement between the employer and the certified representative, without the necessity of ratification by the parties, and [shall have] has the force and effect of a contract voluntarily entered into and ratified as set forth in subsection 33-80(g) above. The parties [shall] must execute such agreement.

(c) An impasse over a reopener matter or the effects on employees of an exercise of an employer's 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.

* * *

(D) If an impasse is declared under subparagraph (C), the dispute must be submitted to the impasse neutral for mediation no later than 10 days after impasse is declared. If the impasse neutral certifies that an impasse exists after mediation, the dispute must be resolved by an impasse panel selected under Section 33-103A.

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

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

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

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

* * *

(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 for mediation no later than 10 days after either party declares an impasse under subparagraph (B). If the impasse neutral certifies that an impasse exists after

mediation, the dispute must be resolved by an impasse panel selected under Section 33-103A.

(E) The impasse [neutral] panel 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] panel a final offer only on the effect on employees of the employer's exercise of its right; and

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

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

33-108. Bargaining, impasse, and legislative procedures.

* * *

(d) Before September 10 of any year in which the employer and the certified representative bargain collectively, the Labor Relations Administrator must appoint a [mediator/arbitrator] mediator, who may be a person recommended by both parties. The [mediator/arbitrator] mediator must be available from January 2 to June 30. Fees and expenses of the [mediator/arbitrator] mediator must be shared equally by the employer and the certified representative.

(e) (1) During the course of collective bargaining, either party may declare an impasse and request the services of the [mediator/arbitrator] mediator, or the parties may jointly request those services before an impasse is declared. If the parties do not reach an agreement by February 1, an impasse exists. Any issue regarding the negotiability of any bargaining proposal must be referred to the Labor Relations Administrator for an expedited determination.

(2) Any dispute, except a dispute involving the negotiability of a bargaining proposal, must be submitted to the [mediator/arbitrator] mediator whenever an impasse has been reached, or as provided in subsection (e)(1). The [mediator/arbitrator] mediator must [engage in mediation] mediate by bringing the parties together voluntarily under such favorable circumstances as will encourage settlement of the dispute.

(3) If the [mediator/arbitrator] mediator finds, in the [mediator/arbitrator's] mediator's sole discretion, that the parties are at a bona fide impasse, or as of February 1 when an impasse is automatically reached, whichever occurs earlier, the dispute must be submitted to binding arbitration before an impasse panel selected under Section 33-103A.

(f) (1) If binding arbitration is invoked, the [mediator/arbitrator] impasse panel must require each party to submit a final offer, which must consist either of a complete draft of a proposed collective bargaining agreement or a complete package

proposal, as the [mediator/arbitrator] impasse panel directs. If only complete package proposals are required, the [mediator/arbitrator] impasse panel must require the parties to submit jointly a memorandum of all items previously agreed on.

(2) The [mediator/arbitrator] impasse panel may require the parties to submit oral or written evidence and arguments in support of their proposals. The [mediator/arbitrator may] impasse panel must hold a hearing open to the public for this purpose at a time, date, and place selected by the [mediator/arbitrator] impasse panel. [This hearing must not be open to the public.]

(3) On or before February 15, the [mediator/arbitrator] impasse panel must select, as a whole, the more reasonable of the final offers submitted by the parties. The [mediator/arbitrator] impasse panel must not compromise or alter a final offer. The [mediator/arbitrator] impasse panel must not consider or receive any argument or evidence related to the history of collective bargaining in the immediate dispute, including any previous settlement offer not contained in the final offers. However, the [mediator/arbitrator] impasse panel must consider all previously agreed-on items, integrated with the disputed items, to decide which offer is the most reasonable.

(4) In making a determination under this subsection, the [mediator/arbitrator] impasse panel must first [evaluate and give the highest priority to] determine the ability of the County to [pay

for additional] afford any short-term and long-term expenditures [by considering] required by the final offers:

(A) [the limits on the County's ability to raise taxes under State law and the County Charter] assuming no increase in any existing tax rate or the adoption of any new tax;

(B) [the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a final offer] assuming no increase in revenue from an ad valorem tax on real property above the limit in County Charter Section 305; and

(C) considering the County's ability to continue to provide the current [standard] level of all public services.

(5) [After evaluating the ability of the County to pay] If the impasse panel finds that under paragraph (4) the County can afford both final offers, the [mediator/arbitrator] impasse panel [may only] must consider:

(A) the interest and welfare of County taxpayers and service recipients;

(B) past collective bargaining agreements between the parties, including the past bargaining history that led to each agreement;

(C) a comparison of wages, hours, benefits, and conditions of employment of similar employees of other public employers in the Washington Metropolitan Area and in Maryland;

(D) a comparison of wages, hours, benefits, and conditions of employment of other Montgomery County employees; and

(E) wages, benefits, hours, and other working conditions of similar employees of private employers in Montgomery County.

(6) The offer selected by the [mediator/arbitrator] impasse panel, integrated with all previously agreed on items, is the final agreement between the employer and the certified representative, need not be ratified by any party, and has the effect of a contract ratified by the parties under subsection (c). The parties must execute the agreement, and any provision which requires action in the County budget must be included in the budget which the employer submits to the County Council.

* * *

33-153. Bargaining, impasse, and legislative procedures.

* * *

(g) If the impasse neutral, in the impasse neutral's sole discretion, finds that the parties are at a bona fide impasse, the impasse neutral must refer the dispute to an impasse panel selected under Section 33-103A. The impasse panel must require the parties to jointly submit all items previously agreed on, and each party to submit a final offer consisting of proposals not agreed upon. Neither party may change any proposal after it is submitted to the impasse [neutral] panel as a final offer, except to withdraw a proposal on which the parties have agreed.

(h) The impasse [neutral] panel may require the parties to submit evidence or present oral or written arguments in support of their

proposals. The impasse [neutral may] panel must hold a hearing open to the public at a time, date, and place selected by the impasse [neutral] panel. [The hearing must not be open to the public.]

(i) On or before February 1, unless that date is extended by written agreement of the parties, the impasse [neutral] panel must select the final offer that, as a whole, the impasse [neutral] panel judges to be the more reasonable.

(1) In determining which final offer is the more reasonable, the impasse [neutral] panel must first [evaluate and give the highest priority to] determine the ability of the County to [pay for additional] afford any short-term and long-term expenditures [by considering] required by the final offers:

(A) [the limits on the County's ability to raise taxes under State law and the County Charter] assuming no increase in any existing tax rate or the adoption of any new tax;

(B) [the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a final offer] assuming no increase in revenue from an ad valorem tax on real property above the limit in county charter Section 305; and

(C) considering the County's ability to continue to provide the current [standard] level of all public services.

(2) [After evaluating the ability of the County to pay] If the impasse neutral finds under paragraph (1) that the County can afford both final offers, the impasse [neutral] panel [may only] must consider:

(A) the interest and welfare of County taxpayers and service recipients;

(B) past collective bargaining agreements between the parties, including the past bargaining history that led to each agreement;

(C) wages, hours, benefits and conditions of employment of similar employees of other public employers in the Washington Metropolitan Area and in Maryland;

(D) wages, hours, benefits, and conditions of employment of other Montgomery County employees; and

(E) wages, benefits, hours, and other working conditions of similar employees of private employers in Montgomery County.

(j) The impasse [neutral] panel must base the selection of the most reasonable offer on the contents of the offer and the integration of any previously agreed-on items with the disputed items. In making a decision, the impasse [neutral] panel must not consider or receive any evidence or argument concerning offers of settlement not contained in the offers submitted to the impasse [neutral] panel, or any other information concerning the collective bargaining leading to impasse. The impasse [neutral] panel must neither compromise nor alter the final offer that [he or she selects] they select.

(k) The final offer selected by the impasse [neutral] panel, integrated with any items previously agreed on, is the final agreement between the parties, need not be ratified by any party, and has the force and effect

of an agreement voluntarily entered into and ratified under subsection (c). The parties must execute that agreement.

* * *

Sec. 2. Section 33-103A is added as follows:

33-103A. Impasse Panel.

(a) *Purpose.* An impasse panel may conduct a hearing and resolve an impasse in collective bargaining between a certified employee representative and the employer under Sections 33-81, 33-108, and 33-153.

(b) *Neutral member.* The Council must appoint 5 neutral impasse panel members for staggered 3-year terms. To implement the staggered terms, the Council must appoint the first and second members to a 3-year term, the third member to a one-year term, and the fourth and fifth members to a 2-year term. After these initial appointments, the Council must appoint all members to 3-year terms, except for any member appointed to fill a vacancy. If a vacancy is created by a neutral member's death, disability, resignation, non-performance of duty, or other cause, the Council must appoint a neutral member to complete the member's term. Each neutral member must be a resident of the County experienced in conducting an adjudicatory hearing.

(c) *Composition.* An impasse panel contains 3 members. One member must be selected by the certified employee representative involved in the impasse. One member must be selected by the employer. The employee representative member and the employer representative member may jointly select the neutral member. If they are unable to agree, they must select a neutral member from the 5 neutral impasse members appointed by the Council by alternating strikes with the

employee representative making the first strike until only 1 neutral member remains.

(d) *Term.* An impasse panel selected under subsection (c) serves until the Council takes final action on the collective bargaining agreement at impasse.

(e) *Procedure.* The neutral member is the panel chair and must preside at any hearing. A majority of the impasse panel must vote for a decision resolving an impasse.

(f) *Compensation.* The employer and the certified representative must pay any fees and expenses for their own representative. Fees and expenses of the neutral member must be shared equally by the employer and the certified representative.

Approved:

Valerie Ervin, President, County Council Date

Approved:

Isiah Leggett, County Executive Date

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Bill 20-11
Personnel – Collective Bargaining – Public Accountability – Impasse Arbitration

DESCRIPTION:	Bill 20-11 would establish an interest arbitration panel to resolve an impasse, require an impasse arbitration hearing to be open to the public, and modify the criteria for the impasse panel to apply.
PROBLEM:	The Organizational Reform Commission recommended these changes to the County collective bargaining laws.
GOALS AND OBJECTIVES:	To increase public accountability in the impasse arbitration process.
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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BILL 20-11

063857

OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

July 8, 2011

TO: Valerie Ervin, President, County Council

FROM: Joseph F. Beach, Director

SUBJECT: Council Bill 20-11, Personnel – Collective Bargaining – Public Accountability – Impasse Arbitration

The purpose of this memorandum is to transmit a fiscal and economic impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

Council Bill 20-11 would establish an interest arbitration panel to resolve an impasse at arbitration, require an impasse arbitration to be open to the public, and modify the criteria used by an arbitrator to evaluate competing final offers before issuing an arbitration award. It requires the arbitrator to give highest priority to the County's ability to afford economic provisions in a collective bargaining agreement.

FISCAL SUMMARY

The bill requires that both parties pay for the services of a mediator, similar to the way both parties pay for the services of a mediator/arbitrator under current legislation. If the mediator determines that impasse has been reached, the proposed legislation requires that arbitration in front of a three-person impasse panel takes place. Each party selects a member to the panel and may jointly select the third neutral member from a list of five Council-appointed impasse panel members. If the parties cannot agree, the third panel member is chosen by alternating strikes until one neutral member remains.

Assessing the fiscal impact of this legislation is dependent on a number of variables including:

- The number of labor mediations that may occur each year and how long the period of mediation lasts;
- The number of labor arbitrations that may occur each year and the duration of each arbitration;
- Whether the management representative on the impasse panel may be a County employee or must be an outside contractor;
- The rates charged by the mediator and the County paid members of the impasse panel.

The County currently has $46,000 budgeted for mediation and arbitration and related costs for FY12. Based on the County's experience with the market, the cost of an arbitrator ranges from $1,500 to $3,000 per eight-hour day or part thereof.

Potential Range of Mediation/Arbitration Costs

Number of Mediations	Number of Arbitrations	Days of Duration	Average Daily Cost	Total Cost
3	3	3	$ 1,500	$ 27,000
Total Cost For 6 Year Period				$ 162,000
3	3	3	$ 3,000	$ 54,000
Total Cost For 6 Year Period				$ 324,000

Projections above assume:
1) All 3 union contract awards go through mediation and arbitration
2) County is responsible for half of the cost of the mediator, the management selection to the impasse panel, and half the cost of the neutral selected through alternating strikes
3) Mediation and Arbitration occur each year

The part of the legislation that would give the highest priority to the County's ability to afford the economic provisions of the final offers without raising taxes or lowering the existing level of public services is identical to previously offered amendment to Expedited Bill 57-10. The fiscal impact of this aspect of the bill also will depend on a number of variables which cannot be reliably predicted or quantified at this point including:

- the fiscal magnitude of the labor issues subject to mediation and arbitration; and
- the impact of the subject legislation on changing the outcome of arbitrator rulings[1].

It is common for the final offer packages of the County and the unions to differ by substantial amounts. Since these awards can set a settlement pattern with other employee groups, the ultimate final potential cost of arbitration awards could differ by tens of millions of dollars depending on which offer is selected by an arbitrator. For example, in the 2010 arbitration case with the Fraternal Order of Police in which service increments was the primary economic matter in dispute, the difference between the County's final offer and the FOP's was approximately $1.6 million. However, the cost of extending service increments to all employees across all County agencies was nearly $35 million.

[1] According to the Office of Human Resources, of the 19 Labor Arbitration rulings since 1988, the Arbitrator has ruled against the County Government 15 times.

ECONOMIC SUMMARY

The Department of Finance does not believe that the subject legislation has a quantifiable economic impact on Montgomery County because the size of the workforce it affects is small in relation to the total County resident workforce and the impact of the legislation on the outcome of mediation and arbitration can not be reliably determined or quantified.

The following contributed to and concurred with this analysis: Stuart Weisberg, Office of Human Resources, Michael Coveyou, Department of Finance, and Lori O'Brien, Office of Management and Budget.

JFB:lob

c: Kathleen Boucher, Assistant Chief Administrative Officer
Lisa Austin, Offices of the County Executive
Joseph Adler, Director, Office of Human Resources
Karen Hawkins, Acting Director, Department of Finance
Michael Coveyou, Department of Finance
Stuart Weisberg, Office of Human Resources
Lori O'Brien, Office of Management and Budget
John Cuff, Office of Management and Budget
Amy Wilson, Office of Management and Budget

In the Matter of Interest Arbitration Between :

Montgomery County Maryland (Employer)

And

FOP Lodge 35 (Union)

APPEARANCES:

For the Employer: William Snoddy, Esq.
Associate County Attorney
101 Monroe Street, 3rd Floor
Rockville, MD. 20850

For the Union: Margo Pave, Esq.
Zwerdling, Paul, Kahn & Wolly, P.C.
1025 Connecticut Avenue, Suite 712
Washington D.C. 20036

Introduction

The Montgomery County Police Labor Relations Act, Chapter 33, Section 33-81 of the Montgomery County Code (herein after referred to as PLRA) provides that when an impasse has been reached in negotiations, the parties are to submit their final offer, and an Impasse Neutral is to select, as a whole, the "most reasonable" of the two Final Offers.

The parties reached impasse on January 20, 2011, and based on a prior arrangement, the undersigned Impasse Neutral conducted a day of mediation and two days of arbitration during the week of January 23, 2011. Following the County statute, the parties presented testimony, evidence, exhibits and argument. Counsel for each party presented closing arguments in place of briefs on January 28. A transcript made at the hearing was received by the undersigned on February 9, 2011.

A review of Herbert Fishgold's Opinion and Award (FOP Exh. 4) involving a similar process last year with the same parties shows a clear parallel to this Impasse Neutral's experience in the instant case. A portion of his thinking is quoted here:

"Much of the hearing was taken up with economic presentations by both sides with regard to the FY 2011 budget deficit, the long range CIP projection, the breakdown of cost, programs, services, and purchases under the tax-supported Operations Budget which funds compensation, and Capital Budget for facilities , which is largely funded by borrowing, with each party seeking to support their respective positions, with FOP pointing to "priorities", and County pointing to balancing public interest with a deficit budget.

"While these presentations obviously are the type of economic data useful in the context of complete collective bargaining or multi-year considerations of proposed general wage increases, they have a much more limited application in this narrow reopener ---."

The impasse procedure of the PLRA, amended last year, places a complex series of requirements for the Impasse Neutral to follow in selecting the more reasonable Final Offer.

The amended copy of PLRA presented to the Impasse Neutral was extremely edited with single and double underlining, and single and double parentheses, which denoted language added at various times and the language deleted. Thus making it very difficult to read intelligently. To over come that difficulty, the text is set out below in 12 sequential steps without harming the intent of PLRA:

The Impasse Neutral must first evaluate and give the highest priority to the ability of the County to pay for additional short-term and long-term expenditures by considering:

1) the limits on the County's ability to raise taxes under State law and the County Charter:
2) the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a Final Offer; and
3) the County's ability to continue to provide all public service.

After evaluating the County's ability to pay based on the 1, 2 and 3 above, the impasse neutral may only consider the following in making a decision:

4) the interest and welfare of County taxpayers and service recipients:
5) past collective bargaining contracts between the parties, including the bargaining history that lead to each contract;
6) a comparison of wages, hours, benefits, and conditions of employment of similar employees of other public employers in the Washington Metropolitan Area and in Maryland;
7) a comparison of wages, hours, benefits and conditions of employment of other Montgomery County employees;
8) wages, benefits, hours and other working conditions of similar employees of private employers in Montgomery County.

The Impasse Neutral must:

9) not compromise or alter the final offer that he or she selects:
10) select an offer based on the contents of that offer;
11) not consider or receive any evidence or argument concerning the history of collective bargaining in this immediate dispute, including offers of settlement not contained in the offers submitted to the impasse neutral;
12) consider all previously agreed on items integrated with the specific dispute items to determine the single most reasonable offer.

The 12 items listed above are the PLRA language in the sequence as it appears in the PLRA. The numbering will facilitate easy referencing.

The Issue

The parties have placed before the Impasse Neutral a single issue, which is described as Cash Compensation for police offices covered by the FOP collective bargaining agreement, pursuant to the limited re-opener provision of the MOA that the parties mutually agreed upon in June 2010.

The Parties' Final Offers

The parties' Final Offers are provided below exactly as submitted, including strike-outs and emphasis bolding.

County Final Offer

Article 5 Tech Pay

Section C. Multilingual Pay Differential

3. Compensation. Compensation is determined by the officer's certified language level. Compensation is paid for all hours actually worked during a pay period. Officers certified at the basic skill level will receive one dollar per hour for all hours actually worked. Officers certified at the advanced skill level will receive two dollars per hour for all hours actually worked.

Certified Officers will indicate on their time sheets the multilingual skill code ML1 for Basic Skill certification, and ML2 for Advanced Skill certification.

4. Overtime. Certified officers will be paid overtime on the multilingual differential only for use of the skill during hours subject to overtime pay, ie. in excess of the regular workday or workweek.

5. Transfer. It is recognized that once an employee is designated in a skill level, he/she may be transferred to an assignment where the skill is needed.

6. For the duration of this agreement, no new officers will be tested for entrance into the multilingual program. In the event that a bargaining unit member leaves the multilingual program during the term of this agreement, the Employer, based upon operational need, may elect to allow a new bargaining unit member into the program to fill the vacant skill set.

Article 28 Service Increments

Section H. Longevity. Effective July 1, 1999, a longevity step will be added to the pay plan at the beginning of year 21 (after 20 years of completed service) equal to a three and one-half percent increase. **Effective July 1, 2011, there will be no new movement to the longevity step of the duration of this agreement.**

Add as new Section I – Effective July 1, 2011, service increments will be suspended for the duration of this agreement for all qualified bargaining unit members.

Article 31 Reopener

Section F. Reopener Matters

Second Year. Reopen for bargaining in the first year of the agreement for 2nd year of the contract on or before November 1, 2010 with timetable and impasse procedures set forth in PLRA, Section 33-81 on the following subjects:

1. Cash Compensation for FY 12
2. Whether a third year with a reopener on cash compensation will be added.

The County proposes not to extend the current agreement for a third year. This effectively ends the current agreement on June 30, 2012 as noted in the County proposal for contract duration in Article 47.

Article 36 Wages

Section A, Wages. Effective July 1, 2007, the salary schedule shall be increased by adding $3,151 at Step 0, year 1 with increments and promotions for all other steps and pay grades calculated from the new Step 0, Year 1 basis. Increments and longevity shall continue to be calculated as required by Article 28. The percentage increases upon promotion shall continue (up to the maximum for each rank) to be: 5% between PO I and PO II; 5% between PO II and PO III; 5% between PO III and MPO; 10% between MPO and Sergeant; and, subject to Section D, infra, 5%between POC and POI. (Appendix T)

~~Effective the first full pay period following July 1, 2008, each unit member shall receive a wage increase of four (4) percent. Effective the first full pay period following July 1, 2009, each unit member shall receive a wage increase of four and one quarter (4.25) percent.~~ **Effective the first full pay period following July 1, 2011, each unit member shall receive a wage reduction of five and one half (5.5) percent. Any previously postponed GWA will not be paid in FY12 or any future fiscal year.**

Article 47 Duration of Contract

This agreement shall become effective on July 1, 2010 and terminate on June 30, 2012 ~~unless extended to June 30, 2013 pursuant to Article 31 Reopener~~.

FOP Final Offer

Article 5 Tech Pay

Section C. Multilingual Pay Differential.

Add a new sub-section:

6. For FY12, at the County's option, no new officers will be tested for entry in to the Multilingual program.

Article 28 Service Increments

Add a new section to Article 28:

Section I. FY12 Increment and Longevity Step Increases. For FY 12 only, qualified unit members shall continue to defer one (1) 3.5% step. Qualified unit members shall receive one (1) 3.5% step on their service increment date. Increment and Longevity steps will not be paid if not funded by the County Council.

Article 31 Reopener

Section F. Reopener Matters.

Second Year. Reopen for bargaining in the first year of the agreement 2nd year of the contract on or before November 1, 2010 with timetable and impasse procedures set forth in PLRA, Section 33-81 on the following subjects:

1. Cash Compensation for FY 12
2. Whether a third year with a reopener on cash compensation will be added.

~~Third Year. Reopen for bargaining in the second year of the agreement for 3rd year of the contract on or before November 1, 2011 with timetable and impasse procedures set forth in PLRA, Section 33-81 on the subject of Cash Compensation for FY 13.~~

~~If the parties have not reached agreement by January 20 2011, an impasse shall be deemed to exist, and the impasse procedure provided in PLRA Section 33-81 shall be implemented.~~

Article 36 Wages

Section A. Wages. Effective July 1, 2007, the salary schedule shall be increased by adding $3,151 at Step 0, Year 1 with increments and promotions for all other steps and pay grades calculated from the new Step 0, Year 1 basis. Increments and longevity shall continue to be calculated as required by Article 28. The percentage increase upon promotion shall continue(up to the maximum for each rank) to be: 5% between PO1 and PO11; 5% PO11 and PO111; 5% between PO111 and MPO; 10% between MPO and Sergeant; and, subject to Section D, infra, 5% between POC and PO1. The four and one quarter (4.25) percent wage increase scheduled to take effect in the first full pay period following July 1, 2009 shall be postponed, and shall not be effective during fiscal years 2010, 2011 **and 2012.**

Article 47 Duration of Contract

This agreement shall become effective on July 1, 2010 and terminate on June 30, 2012, ~~**unless extended to June 30, 2013 pursuant to Article 31 Reopener.**~~

Although not part of this Final Offer, FOP Lodge 35 offers the Employer the following:

Article 36 Wages

Section F. Lateral Entry

3. Notwithstanding the provisions of Section F, for employees hired during Fiscal Years 2011 and 2012, the County at its option may suspend in Fiscal Years 2011 and 2012 only, the requirement that within-grade advancement will be based on one additional 3.5 percent step for each year of qualifying experience.

Discussion and Evaluation of Parties Positions

As cited above, the Impasse Neutral must first evaluate and give the highest priority to the County's ability to pay for additional short and long term expenditures by considering three topics. The parties did not agree on which short and long term expenditures the Impasse Neutral must consider in making a decision. The FOP believes that only expenditures related to the parties' Final Offers are to be considered. The County believes that the Impasse Neutral must consider all expenses of the County.

The PLRA language is not clear on which interpretation is correct. However, of the three topics to consider in assessing expenditures (ability to raise taxes, burden on tax payers, and ability to continue public services) none mentions all County expenditures. One topic (burden on taxpayers) refers to "revenues needed to fund a final offer". Since there is no reference to all County expenditures, this Impasse Neutral will focus only on the expenditures caused by Final Offers.

The FOP suggested that if the Impasse Neutral concludes that only last offer expenditures need be taken into account, the Impasse Neutral might move beyond these first three requirements of the PLRA, because the FOP Final Offer involves no cost increase. In testimony and exhibits, the County reported on their effort to cost-out both final offers. They

found that the County Final Offer had a negative cost, or savings of $6,729,690, and the FOP Final Offer cost $1,438,560, and with an annualized cost of $2,124, 430.

County Ability to Pay Additional Costs (Items 1, 2, 3)

The Impasse Neutral must first evaluate and give the highest priority to the ability of the County to pay for additional short-term and long-term expenditures by considering:

1. the limits on the County's ability to raise taxes under State law and the County Charter:
2. the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a final offer; and
3. the County's ability to continue to provide all public service.

The County's first witness, David Platt, Chief of Commerce in the Department of Finance testified that the County's ability to raise real property tax is limited to the cost of living in the previous year. Since the 2010 the cost of living was 1.70%, the County revenue from real property tax may not exceed 1.70%. The cost of living in 2009 was 0.23%, and in 2008 it was 4.52%.

In FOP cross examination, the witness agreed that the outlook for inflation is positive and that it will impact real property tax revenue positively. Also on cross, the witness admitted the stock market is on the rise, another positive factor.

The FOP argued that Montgomery County's economic data picture is better than the national data presented in County Exhibit 1. For example County unemployment at 5.5% is just over half National unemployment rate. Therefore, the County rate could almost be considered full employment.

Also based on data in County Exhibit 1, the FOP pointed out that County estimates of income taxes and real property taxes show an increase in tax income of $122 million in 2012 over 2011 or a 3.3% increase. These numbers are a clear sign of the beginning of a recovery from recession.

The County pointed out that the initial estimates the County made on 2011 and 2012 tax income were made when the 2010 budget was approved. Then nine months later in December 2010, new estimate were made for 2011 and 2012. The December 2010 estimates lowered the expected tax income by $85 million for 2011, and $73.8 million for 2012.

Therefore, the new tax income estimate for those two years (2011 and 2012) was lowered by nearly $160. million. These new, greatly lower, tax income estimates, following a nine month period during which signs were pointing to economic recovery, seem inconsistent with County data offered in Co. Exh. No. 1. at p. 13. In an Economic Indicator Dashboard on page 13, the County presents eight indicators with four indicating upward movement, three indicators holding steady, and only one moving down.

The County explanation that "draw downs" justify the December 2010 new lower tax income estimates is unconvincing.

The next County witness, Joseph Beach, was the Director of the Office of Management and Budget. He explained that a budget gap of 300 million dollars presented an over whelming challenge to the County, its citizens, and services. The budget gap is the difference between total projected resources and the total projected uses.

FOP argued that the budget gap is exaggerated by the County confusing wants and needs, and its failure to set priorities based on real needs. Some building programs are ill adviced in the face of budget gaps. Money should be shifted to needs, while wants should be deferred. The counter to that was the operating budget is "not a list of what we would like to do or a wish list. It's what we feel by law or a policy we're obligated to do as well."

The witness explained that the capital budget is not available to supplement the operating budget, since expenditures from the former can only be used to create assets such as buildings and other real property.

In cross examination, the FOP elicited the confirmation that Operating Budget and the Capital Budget, while separate, have movement of money between them. They are not wholly discrete, they interact and affect one another. The example discussed was 73.4 million dollars taken from the Operating Budget and placed in the Capital Budget for capital expenditures, on debt service for example.

Also in cross examination, the FOP elicited the fact that new revenues in 2012 are anticipated to be 5.13% higher than they were in 2008, a significant increase by next year compared with the year the recession started.

The witness testified that the FOP assumption that the County Government can control the school board in terms of teacher wages and other specifics is simply wrong. State law limits County Government influence with concepts such "maintenance of effort." The Government can seek wavers from the State Board of Education to save some costs, but that path is never assured.

When the County does not fund the MCPS at the "maintenance of effort" level, the State will penalize the County by withholding funds that would otherwise be provided to the County. To avoid that the County can seek a waiver from the State and avoid the penalty. While getting a waiver is not a sure thing, it can provides significant savings to the County. It could be as much as 100 million dollars. The County plans to request a waiver for 2012 once they fail to meet the "maintenance of effort." If the waiver is granted for 2012, the County would not need to spend $82 million on "maintenance of effort."

The burden on tax payers is already very heavy and the property tax constitutes 38% of the County's tax revenue. There is a legal limit on tax increases, as well as a practical reluctance to raising the property tax rate under present circumstances, in light of tight family and business budgets, which add to taxpayers stress.

The level of State aid to local government is questionable given the 1.5 billion dollar State shortfall anticipated. The budget problem the County faces is not a cyclical problem; it is a structural budget problem, which requires bringing down long term continuing cost increases, such as labor and staffing costs. So wage and benefit reductions are part of the County's strategy to get the budget under control. The problem is that over the past ten years labor costs have gotten excessive and must be reduced. While labor cost are the primary problem because they constitute 80% of the operating budget, other cost such as debt service also must be brought under control.

The County has done and will do other things to bring down spending, none of which is easy. Hiring freeze of past years, and wage freezes, furloughs, shortened hours in libraries and recreation centers, cut back on maintenance for facilities, roads and transit have been instituted. And there are more to come.

The FOP believes they have done their part to help the County by repeatedly deferring negotiated pay increases.

Reductions made in 2011 will not be restored, they are the new base, which will be cut farther in 2012. Uncontrollable costs are another problem that makes the County's job of balancing the budget that much harder. For example, K-12 and community college enrollment increases, energy/fuel costs and State shifting costs to local government.

On the latter point of the State shifting costs to local government, the FOP pointed out that no such idea was in the Governor's budget

Increasing real property tax would requires a unanimous vote of the County Council, which seems very unlikely.

The FOP raised questions about the reserve fund in which the County was placing 106.8 million dollars. The witness explained that the County was following its reserve policy, which is to cover costs that are not provided for in other sections of the budget. There are serious risks in not having sufficient reserves set aside. A strong reserve is a good management practice.

The third County Witness, Alexander Espinoza, from the office of management and budget, is the person who testified on the costing of the two Final Offers, discussed above. In cross examining the witness's costing of the FOP Final Offer, the FOP attempted to establish that pay increases provided in the labor agreement, which were deferred by the FOP, and therefore not paid to police officers will be a savings for the County. The witness answered that it would be a cost to the County, but suggesting it wasn't a saving. Cross examination focused on whether lower costs were reflected in the costing process by the fact that retiring police officers are replaced by new officers who are paid lower salaries than the retiree they replaced. A series of witness responses were inconclusive.

The fifth witness for the FOP, Amy McCarthy, is a private economist. During her testimony, she used FOP Exhibit 3 to illustrate her testimony. The chart on page 19 shows the County

projection of huge budget gaps for the years 2007 through 2011. Then as each budget years ends, the County achieves a balanced budget. She testified that the County uses these exaggerated budget gap projections to suggest that a particular year will end in a huge debt, but it never does. Her chart suggests that 2011 and 2012 are likely to end the same way. The County has year after year managed to convert what appears to be a huge budget gap into a balanced budget. Repeatedly, the County has exaggerated future expenditures to create the impression of a huge budget gap. This year, they are using the exaggerated budget gap to cut six million dollars from police officers pay.

The chart on page 16 shows various tax rates of all the counties in Maryland. Montgomery County's property rate is substantially below the other jurisdictions, 25% below the average rate. This is caused by the cap on the County's tax rate. The chart also shows that the County's utilities tax and recordation tax are below other jurisdictions' tax rates.

Observations on the County's Ability to Pay (Items 1,2, 3)

Is the huge projected budget gap based on too little tax income or too large anticipated expenditures? The cap on taxes is real, but the size of anticipated expenditures is likely to be smaller, based on FOP exhibit 3.

The County is relatively better off economically than the national economy.

FOP has highlighted some sources of available funds for police compensation. For example a waiver of the maintenance of effort in 2012, raising the utility and recordation taxes.

The County has already made a number of service reductions, which probably has made taxpaying citizens unhappy. But more cuts may be necessary. The County's AAA Bond rating shows the County numbers are sound.

Wage Comparisons (Items 6, 7, 8)

The County's fourth witness, Michael Nodol, is a consultant on finance and management for government organizations. The witness conducted a 79 page study on the bargaining unit, area police compensation, wage trends, economic downturn, recruiting and retention, and the County Final Offer.

FOP cross examination focus only on recruiting and retention. Nothing else in the report was challenged. A brief summary of some key findings:

- Police compensation is among the highest in the region.
- County ranks relatively lower in the region, near mid point on per capita income, median family income, employment level, job creating in past 3 years, owner housing cost, recent home sale price.
- Big wage gains since 2007, move County from 5th place to 1st.
- More than 3% of local job base eroded.
- 5.5% wage reduction needed in FY 2012 to return to a new normal.

- With wage reduction police will still rank number 2 in region.
- Wage reduction will reduce the need for layoffs and service cuts.

Observations on Wage Comparisons:

Compared with other nearby jurisdictions, the County police enjoys high compensation, while the community they serve has lost some of it prosperous status.

Comparison of Two Final Offers (Items 9, 10, 12)

Below is a side by side comparison of the five articles addressed in the Final Offers:

Article 5 Tech Pay:

Both Offers recognize the need for limiting the expansion of the multilingual program during the term of this agreement.

Article 28 Service Increments:

The County proposes that effective July 1, 2011, for the duration of the agreement, service increments will be suspended and no new movement to the longevity steps will occur.

The FOP proposes to continue to defer one 3.5% step during FY12, and qualified members to get 3.5% on their service increment date.

Article 31 Reopener

The two Offers are identical, except that the County proposes the current agreement end June 30, 2012. This does not represent a disagreement since the parties in Article 47 below agree on date as the end of their current agreement.

Article 36 Wages:

The County proposes a 5.5% wage reduction beginning in July 2011. The County proposes that "any previously postpone GWA will not be paid in FY12 or any future fiscal year."

The FOP proposes to continue to defer the previously deferred 4.25% through 2012.

The FOP included an offer to the County that they labeled "not part of the Final Offer". It will be ignored by the Impasse Neutral.

Article 47 Duration of Contract:

The two Offers propose that their current agreement terminate on June 30, 2012.

Observations on the Final Offers (items 9 and 10):

The offers are close to agreement or in agreement on 3 of the 5 issues. On the remaining two, the offers are far a part. The FOP offer shows flexibility and is consistent with FOP behavior during the last two years as it continued to defer benefits provided in the parties' agreement. Consistent with its cost cutting efforts and its claim of a seriously out-of balance-budget, the County proposes a significant reduction in wages. Either final Offer will constitute a significant cost to the County. The FOP has argued that either offer will have a negative impact on police officers.

Award

Based on the above discussion, analysis and observations, the Impasse Neutral finds the FOP Final Offer, on the whole, the more reasonable of the two offers.

Jerome T. Barrett, Impasse Neutral Falls Church, Virginia

February 18, 2011

OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc P. Hansen
Acting County Attorney

MEMORANDUM

TO: Steve Farber
Council Staff Director

VIA: Marc P. Hansen
Acting County Attorney

FROM: Edward B. Lattner, Chief
Division of Human Resources & Appeals

DATE: December 3, 2010

RE: Bill 57-10E (Personnel - Collective Bargaining - Impasse Procedures)

You have asked us to determine if Bill 57-10E provides sufficient guidance to an arbitrator in light of its stated goal—requiring the arbitrator to consider, first and foremost, the County's ability to pay for a labor contract in light "of the severe short-term and long-term budget pressures the County faces." You have also asked us to suggest amendments that would help the legislation achieve that goal.

Background

All three collective bargaining laws provide that an arbitrator[1] resolves an impasse during collective bargaining by selecting either the union's or the Executive's final offer covering all of the disputed issues. The arbitrator is a private sector labor professional jointly selected by the Executive and the union. Bill 57-10 would modify the criteria used by the arbitrator to evaluate the parties' proposals before issuing an award by requiring him or her to give highest priority to the County's ability to pay when deciding between the union's and the Executive's final offers. Council Vice President Ervin's November 19, 2010, memorandum makes clear that the bill is designed to ensure that the arbitrator's assessment of final competing offers is grounded in the reality "of the severe short-term and long-term budget pressures the County faces."

Mr. Drummer's November 23, 2010, memorandum to the Council correctly states the

[1] The FOP and IAFF collective bargaining laws refer to an "impasse neutral" while the MCGEO law refers to a "mediator/arbitrator." By whatever designation, the person's role is the same.

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present state of the law and the effect of the proposed amendment.

> Under current law, the arbitrator makes an award after considering 6 factors, including the County's ability to pay as only one of the 6 factors. The law does not require the arbitrator to place greater weight on anyone of the 6 factors and does not require the arbitrator to consider all 6 of the factors. For example, an arbitrator is free to value a union's comparison with higher wages and benefits paid by another public employer greater than the County's financial ability to match them. Bill 57-10 would require the arbitrator to evaluate and give the highest priority to the County's ability to pay for economic provisions before considering the other 5 factors.

The Bill

Bill 57-10E combines two of the six factors currently considered by the arbitrator ((1) the interest and welfare of the public and (2) the ability of the employer to finance economic adjustments and the effect of the adjustments upon the normal standard of public services by the employer) into the following predominant factor:

> The impasse neutral must first evaluate and give the highest priority to the ability of the County to pay for additional short-term and long-term expenditures by considering:
> (i) the limits on the County's ability to raise taxes under State law and the County Charter;
> (ii) the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a final offer; and
> (iii) the County's ability to continue to provide the current standard of all public services.

While this language is legally sufficient, alternative language would strengthen the bill's stated goal of requiring the arbitrator to consider, first and foremost, the County's ability to pay for a labor contract in light "of the severe short-term and long-term budget pressures the County faces."

First, as a standard to be applied by the arbitrator, "the limits on the County's ability to raise taxes under State law and the County Charter" is somewhat mercurial. While State law does impose an absolute cap on the County's ability to tax residents' income, and the County Charter requires that all nine Councilmembers approve certain increases in the property tax, the County enjoys extraordinarily broad authority to impose other taxes under § 52-17 of the County Code. In construing the scope of § 52-17, the Court of Appeals has held that if the State had the power to impose a tax, the County has the same power. *Waters Landing Limited Partnership v.*

Montgomery County, 337 Md. 15, 25, 650 A.2d 712 (1994).[2] Presently, County taxes include fuel energy, carbon emissions, cell phone usage, and hotel/motel usage. The language in the bill leaves ample room for the arbitrator to conclude that the Council could or should increase those taxes (or impose new taxes). The language in the bill also permits the arbitrator to conclude that all nine Council members could or should increase the property tax beyond the Charter-imposed tax limitation. Accordingly, we recommend that this provision be amended to require that the arbitrator evaluate the County's ability to pay for short-term and long-term expenditures by assuming no increase in the then-current tax rates. The setting of tax rates should be the exclusive province of the County's elected officials, not a private sector labor professional.

Second, although the bill is borne of the current fiscal shortfall, it could have the effect of requiring the arbitrator to select a proposal requiring significant spending increases in times of fiscal largess because consideration of "the ability of the County to pay" is not limited to fallow economic times. Thus, if and when (hopefully when) the County's coffers are full, consideration of "the ability of the County to pay" would militate in favor of the proposal calling for a corresponding increase in spending on a labor contract. If the purpose of the bill is to require the arbitrator to consider the County's ability to pay when times are tough, then the bill should provide some objective trigger for mandatory consideration of that factor (e.g., this factor applies only when revenues drop by X%).

Third, the bill requires the arbitrator to consider the County's ability to pay "for **additional** short-term and long-term expenditures" (emphasis added). Presumably, consideration of the County's fiscal health is therefore limited to those final offers that propose expenditures above and beyond those previously provided to bargaining unit members.[3] Thus, the arbitrator would not consider the County's fiscal health at all if the union's proposal held costs constant and the Executive's proposal reduced those costs. If the purpose of this bill is to make affordability the arbitrator's predominant factor, then it should not be limited to those proposals that would increase spending; it should be the predominant factor in reviewing every proposal. The word "additional" should be stricken.

Finally, although the bill gives predominance to affordability, it does not preclude an arbitrator from determining that the other factors overcome that predominance. We suggest an amendment that would limit the arbitrator's ability to consider the other factors to situations where the arbitrator finds that both proposals are affordable.

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[2] Some items are beyond the County's taxing power (e.g., alcoholic beverages, gasoline).

[3] It is unclear whether this would be limited to expenditures provided for in the prior labor agreement or expenditures actually authorized by the Council in the most recent annual operating budget.

cc: Kathleen Boucher, Assistant Chief Administrative Officer
Joseph Adler, Director, OHR
Stuart Weisberg, Office of Human Resources
Robert H. Drummer, Senior Legislative Attorney

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UFCW LOCAL 1994
Municipal & County Government Employees Organization

GINO RENNE PRESIDENT
YVETTE CUFFIE SECRETARY-TREASURER
NELVIN RANSOME RECORDER
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UNITED FOOD & COMMERCIAL WORKERS LOCAL 1994 · 600 SOUTH FREDERICK AVENUE :: SUITE 200 · GAITHERSBURG, MD 20877 · 301-977-2447 · 800-948-0654 · FAX 301-977-6752

Testimony of Gino Renne
Bill Nos. 18-11, 19-11, 20-11

I am here today in opposition to the unrelenting attack on the rights of working people—employees of this County—to bargain collectively. Each of these bills would weaken that right and turn the collective bargaining process into a 3 ring circus.

The purpose of these bills is to maintain an empty façade for a process that has been hollowed out from within. These proposals are nothing more than political theater, hypocritical and cynical attempts to dodge responsibility for governing and to play to the media's anti-union bigotry. It is galling, too, that when you follow the logic string to the source of these ideas, you find that they germinated in places with no economic or cultural link to our County—one small Maryland County or in small, rural states where right-to-work attitudes are nurtured by right-wing politicians.

Think about what you are doing here:

• Proposing "public" bargaining is just another ploy for shedding your responsibility to County residents. Our recent experience informs us that the public was thoroughly involved in the last round of bargaining. Certainly, one of the major impediments to an equitable agreement was the incessant effort on the part of the County Executive to run to the press with details of negotiations at every possible opportunity. Moreover, real bargaining requires parties to engage in serious and frank discussion, and to put forth proposals that may not always completely satisfy their respective constituents. When bargaining is

made open to public scrutiny, there is no incentive for parties to engage in such real bargaining. Instead, parties are rewarded for public posturing and coming up with sound bites to defend their respective positions. This degrades the real collective bargaining process, which is already subject to public scrutiny at the point at which parties reach agreement and that agreement is rigorously examined and voted upon by this Council. That process, as currently constituted, makes this sort of law unnecessary and reveals it as the cynical political ploy that it is.

• Plans to reformulate the arbitration system is at best superficial and inconsequential, at worst a more expensive provision, that would not improve the bargaining process.

• Eliminating "effects" bargaining for County police officers would enable the Police Department to evade responsibility for incompetent management and add a layer of fog to management decisions.

It is a waste of the County's resources and an affront to taxpayers and County workers to once again devote more time and money to nibble around the edges trying to devise new ways to hobble the collective bargaining law.

Last year, we criticized proposals to weaken the law's arbitration provisions as nothing more than an effort by the Council and the Executive to dodge responsibility for management failures and the outcome in bargaining. That legislation was nevertheless enacted, yet we saw the union positions prevail in each case within that weakened arbitration process.

This council has zero credibility with our union right now. Madam president, you sat across the table from us at the Woodside Deli this Spring and personally assured us that the council had no intention of taking action on the ORC recommendations concerning collective

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bargaining- claiming that these recommendations were not only outside of the Commission's purview, but were inappropriate and ridiculous. Yet here we are today. Ms. Ervin, legislation motivated by retribution and fragile egos, does not make good policy.

Collective bargaining for Montgomery County workers has been evolving since the early 1970s when the County adopted a thoroughly ineffective "meet and confer" process. The system that we have today was put into effect in 1986 with legislation that ended meet and confer and adopted full-scale negotiations on economics and working conditions. It was the product of very hard work by a highly motivated group of political, community, labor, and business leaders. I was proud to be among them.

The County Council was "authorized" to develop collective bargaining in 1984 under the terms of a ballot proposition adopted by County voters. The conditions for all three units were deplorable because there was no legal compulsion on the part of the County to deal honorably with its workforce. Our memory of the pre-bargaining era drives us to fight hard against any proposals that would redirect us toward those bad old days.

The Council's current forays into "amending" collective bargaining are largely prompted by a misreading of the political winds—a belief that they can distract attention from management failures and a lack of political leadership by flogging the County's workforce and blaming us for the County's fiscal woes.

We also see a "herd mentality" within the Council, responding like deer in the headlights to the editorial opinions of the Washington Post where anti union sentiment is rife. We would caution Council members that the Washington Post's editorial page never appears on a ballot.

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Voters cast their votes with the expectation that individuals who are elected to the Council will demonstrate leadership.

Economics, of course, is the core of our disagreement with the Council and the Executive. Our mission is to advocate for our members within the legally established framework of collective bargaining. Management's job is to craft the choices and marshal the resources of the County to, first and foremost, govern prudently by providing residents with taxpayer services: public safety, education, recreation, health and a social safety net. Our members are the keystone of the County's resources.

We remind you that the current collective bargaining system has yielded voluntary acceptance of wage freezes and major sacrifices by the workforce that saved taxpayers tens of millions of dollars over the past three years in return for the County's assurances of employment security and with the full expectation that we will recover these losses over time as the economy is restored.

As difficult as the past three years have been for all working families, and especially our members, one can only imagine what would have been the fate of Ride On bus operators, nurses and health professionals, drivers and laborers in DPW, corrections officers, deputy sheriffs, librarians and other general government workers in this era of retrenchment if they had to endure this recession without union representation. One can only imagine the deterioration in services that County residents would have had to endure if the County's elected officials had been left to their own devices to deal with the effects of this national recession.

We do not speak for the County's police officers or firefighters, but we are closely aligned with them in the defense of collective bargaining.

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We note that the County Council has proposed legislation that would alter the effects bargaining procedures for the County police force. I would like to convey MCGEO's strong opposition to this legislation for the same reason that we oppose the other bills: this is a cynical attempt to place blame on County workers (in this case the police officers who protect our County), who did not create this mess and should not be used as political pawns for Council members who seek to advance their own agendas. This police legislation is particularly shameful, since it alters workers right to bargain at a time when workers need strong representation the most—when jobs are lost due to economic conditions outside the workers' control.

I submit that there is no need for these changes and there is still time and opportunity for the Council to redirect your efforts toward building a sustainable model of County government where all the stakeholders who work and live here—residents, business interests and the workforce—can collaborate and thrive in an environment that puts people above politics.
Thank you.

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LOCAL 1664

Montgomery County Career Fire Fighters Ass'n., Inc.

Testimony by John J. Sparks JS
President, IAFF Local 1664
Public Hearing - Bills 18-11, 19-11 & 20-11
July 12, 2011

I am John Sparks, President of the Montgomery County Career Fire Fighters Association, IAFF Local 1664. I am here today to speak in opposition to the three bills that, if adopted, would adversely impact collective bargaining for County employees, while at the same time produce little or no savings for County Government. While the three bills address different aspects of the collective bargaining process, and Bill 18-11 does not directly impact collective bargaining for fire fighters and paramedics, all three bills suffer from a common set of deficiencies.

First, we believe that the Organizational Reform Commission, whose recommendations form the basis of these bills, overstepped its bounds. The original charge given to the ORC did not include consideration of changes to the County's collective bargaining laws; and for good reason. It is our understanding that most members of the ORC had little or no experience in matters pertaining to labor relations and collective bargaining, and the results of their work that are incorporated in these bills demonstrate this lack of experience. Most of the recommended changes to the collective bargaining process contained in these bills are not well thought out and contain serious flaws.

For instance, Bill 19-11, if adopted, would move the date for completing the term bargaining and impasse resolution procedures up two weeks. Yet at the same time, it doesn't move up the start of term bargaining by a similar period of time. More importantly, experience has shown that the County is unable to provide complete and meaningful responses to the Unions' request for financial data until mid-December and perhaps even into January in any given fiscal year. Thus, substantive bargaining over economic proposals cannot occur until that point in time, which would be close to or beyond the early January date that the bill would establish as the point in time that statutory impasse occurs.

Second, Bill 19-11 would require that the Unions' initial proposals on economic items and the County Executive's counter-proposals on those items be made available for public review. This proposed amendment would add no value at all to the collective bargaining process, and in fact, could actually harm the process. We agree with the observation of ORC Commissioner Susan Heltemes that the integrity of the collective bargaining process relies on all persons involved in the negotiations to maintain confidentiality until a final agreement is reached; and that if initial proposals were made public, outside pressures would more often than not lead to breakdowns and stalemates in the bargaining process.

Further, to think that requiring proposals to be made public will influence the parties to moderate their initial offers is simply naïve thinking. In addition, anyone who has participated in

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collective bargaining knows full well that the final outcome in collective bargaining usually bears little resemblance to the initial proposals. This proposed law change would neither generate any savings for the County, nor would it create any improvements to the collective bargaining process.

We do, however, agree with the proposed amendment in Bill 19-11 that would require the County Executive to submit to the Council by March 15 any term of a labor contract which requires an appropriation of funds or change to County law. Such notification should occur at the same time the County Executive submits his proposed operating budget, not two weeks later.

Turning to Bill 20-11, we note, with objection, that the impasse resolution procedure would be changed to prohibit the same individual from serving as both the mediator and impasse arbitrator, as is the case now. In making this recommendation, the ORC commented in its report that the free flow of ideas during mediation is diminished when the mediator also serves as the arbitrator. Speaking from years of experience, I can tell you that just the opposite is true. Having the same individual appointed as both mediator and arbitrator facilitates rather than inhibits the discussion that occurs during mediation, and creates a greater chance of reaching a full or partial agreement prior to arbitration.

Also, there is no doubt that requiring different individuals to serve as mediator and neutral arbitrator would significantly increase the time needed to complete the impasse resolution process. Under the current system, the impasse neutral gains valuable insight as to the purpose, intent and practical application of the parties' contract proposals during mediation. Significant time is saved in a subsequent arbitration proceeding by the impasse neutral having previously gained this understanding. Time that is already at a premium would have to be spent educating a different person serving as the arbitrator as to the context and parameters of the parties' proposals.

Further, the provision of Bill 20-11 that would create a tripartite arbitration board, with the Union and the Employer each appointing a partisan representative, can be summed up best as being nonsensical. In every case, without exception, each partisan member of the arbitration board will vote to select the Last Best Final Offer of the party that appointed him or her. Any information that the neutral arbitrator needs about the Last Best Final Offers is provided during the arbitration hearing. We view this tripartite board proposal as being mere "window dressing" rather than serving any useful purpose.

In addition, the five-member impasse panel that Bill 20-11 would create for the purpose of selecting a neutral arbitrator in the absence of a joint selection by the parties is actually counterproductive. The language of the bill restricts panel eligibility to individuals who are County residents. All affected parties, including County taxpayers, are best served by having arbitrators who have considerable experience in interest arbitration deciding cases of such critical importance. There is simply not a large (i.e., adequate) pool of candidates with the desired qualifications living in Montgomery County. Moreover, it is wrong to think that arbitrators who live in the County are, for that reason, best qualified to understand and resolve issues involving the allocation of County funds.

Finally, Bill 20-11 would amend the County collective bargaining laws by changing the criteria that guide an arbitrator in selecting one of the two competing Last Best Final Offers. More specifically, the bill would add criteria that the Council considered and rejected just six or seven months ago. The criteria that were not adopted were rejected for good reason. They would unfairly tip the impasse resolution scale far in the direction of the County Executive.

Nothing has occurred in the last few months from which to conclude that those rejected criteria should now be adopted. While interest arbitrators selected the Last Best Final Offer of the employee representative in all three cases occurring this past winter, it was not because the existing criteria are deficient or slanted in a way to produce results that are favorable to the employees; it was because, *as the Council quickly recognized*, the Last Best Final Offer that the County Executive submitted in each case contained *extreme* proposals that went far beyond what was necessary to address the County's fiscal problems. The existing criteria in the collective bargaining laws have been written to achieve the desired end result: the selection of the Last Best Final Offer that contains the most fair and balanced resolution to a collective bargaining impasse. Moreover, the Council still serves as the final arbiter on whether the economic provisions of a collective bargaining agreement are put into effect.

We urge the Council to reject the objectionable elements of the bills that have been highlighted herein.

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Montgomery County Lodge 35, Inc.

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Statement of Fraternal Order of Police,
Montgomery County Lodge 35

Tuesday, July 12, 2011

We are here again because the County clearly wants the priority of County police officers to be fighting for their rights rather than providing services to the public. For shame, because despite years of VOLUNTARY concessions by police officers made during the County's tight fiscal situation, and as the County budget increases, we have to be here to spend our time defending a process that has worked for nearly three decades. It worked up until the day politicians found process under law inconvenient to their purpose.

The County Council has several bills before it. These bills arise from a very questionable set of recommendations in the January 2011 report of the Organizational Review Commission. The most questionable is based on a recommendation on so called "effects bargaining."

The capital budget is in the billions of dollars, yet the commission had some special interest in the collective bargaining process which has worked well for over 28 years. The commission showed no interest in either the very high salaries of non-represented, non-union employees or the means which their salaries and benefits are established. Clearly the commission was carrying water for political interests. This recommendation is outside the scope of the commission's charge and should be dismissed.

Employee contract negotiations are no different than any other negotiations the County engages in for services. The County employs both represented and non-represented employees. It seems odd that the Commission focused on employee contracts for a minority of county-compensated employees. There are 15,000 county employees and 22,000 MCPS employees. There are but 1200 police officers.

The minutes of the commission do not show any detailed discussion of what is called "effects bargaining". Apparently, they did some of their work in secret while maintaining a misperception of openness and transparency. Their work seems more political, and devised in secret without scrutiny or accountability. In its final report, the commission makes conclusions based on either secret conversations that are not documented or were documented and are now withheld from public view. We have filed a complaint with the police department to have them investigate. This is a matter of management's integrity and accountability. [Attached]

Their conclusions are based upon a false premise. Either the commission made up what it asserts to be facts, or someone gave false and misleading information. [See PIA records

request and response, attached] In any event, we met with the commission and were never afforded any opportunity to respond to any allegations or assertions concerning "effects" that were ultimately presented in the final report.

Since there are only two parties to "effects bargaining", it is patently unfair that the commission heard from only one party and never afforded FOP Lodge 35 any opportunity to respond. The commission called its credibility into question through this one-sided approach. Also, clearly, as noted by one commission member, effects bargaining was not within the charge of the commission. For whatever reason, the co-chairs of the commission and a majority of that commission allowed it to be used for political purposes with little or no consideration to fairness, balance, perspective or veracity. We have responded to portions of the commission's report. [Attached]

"Effects bargaining" comes out of a case that was decided by the United States Supreme Court. It is a complex topic, rarely understood by its critics. **Effects bargaining has never had any adverse impact upon our ability to respond to calls for service or to protect the public.** Indeed, we estimate that about 95% of the police department's business is not subject to bargaining and we have no interest in requiring such bargaining. Penultimately, under our law, issues subject to "effects bargaining" are subject to an expedited resolution process. In 2004 we agreed to a law change that sets a very short period to go to impasse and resolve effects matters. Management has rarely, if ever used that process and has no right to complain.

Some, notably Councilmember Phil Andrews, have consistently distorted the facts and been less than candid about effects bargaining. Mr. Andrews uses the in-car video program as an example that he claims makes his point. Assuming, *arguendo*, that in-car video involves effects bargaining, the fact is that the county proposed a **pilot** program. The County began bargaining cameras, and bought them. They were installed in vehicles and operating. Several legal issues arose during discussions as several cameras were field tested. Our chief concern was the wiretap laws and public and officer privacy rights.

The County, not FOP Lodge 35, sought to discontinue discussions. Then Chief Charles Moose contacted us and asked to call off negotiations because the County wanted to return the cameras and use the money for something else. In any bargaining, once a party abandons or withdraws its proposal, the proposal is off the table. Thereafter, we went through several rounds of term negotiations and the County never raised the subject, nor did they pursue it in any other manner until very late in term bargaining in December 2007. The issue was resolved and an agreement signed in 2008. We have testified under oath to the history of this subject. Mr. Andrews' uninformed statements have not been under oath.

We have little interest in most operational policies, such as processing prisoners, opening facilities, determining functions like school resource officers, determining enforcement priorities and the like. To our knowledge we have only been to impasse on one issue, and that was successfully mediated prior to a hearing. Other issues that have successfully bargained and agreements reached include technology changes affecting the way work is done, increasing the

number of supervisors on the midnight shift, and reducing the number of master police officers. There are others.

It is far more likely that inept management and ineffectual leadership hinder police operations. We meet with police management quarterly in a labor relations meeting, we resolve issues in the workplace daily and we have solicited regularly for any outstanding items the County wishes to discuss. [Attached] In fact, most issues arising from operational changes are resolved without controversy. But the issue must be brought to our attention. If there is a problem with police officers checking email, we were not made aware of it until today's newspaper was delivered to our office.

Again, contract negotiation with employees is no different than contract negotiation with any other service provider. Public access to proposals during bargaining harms the ability to openly discuss all options. The County does not make public negotiations with Live Nation, Costco, Westfield or other corporations with which it deals. Additionally, the premise that the public has no input in the collective bargaining process is false. The public is at the table. We serve and live in the County.

The commission fails to show that the fair and level playing field established under the Police Labor Relations Article for impasse arbitration is in any way deficient. In recommending a change to the impasse procedure the commission fails to cite one arbitration decision that was unsound. The only fact cited is the number of arbitrations and who prevailed. This is analogous to determining that the rules of baseball must be changed based on the number of time the New York Yankees make it to the World Series. No one has identified any deficiency in the impasse arbitration process other than the FOP has been found to be more reasonable than the County more often than not. We are not surprised by that statistic.

The police officers in Montgomery County want to return to work. Instead, we are called here to address baseless attacks on our rights under law a process that has kept police officers doing what they should be doing: protecting and addressing the public safety concerns of the community.

Peace Action Montgomery

Montgomery Co, MD *Power for Peace*

Testimony in Opposition to Bill 19-11
Personnel-Collective Bargaining -Public Access
July 12, 2011

My name is Jean Athey and I am coordinator of Peace Action Montgomery. On behalf of our organization and in support of Montgomery County workers, I offer these observations regarding Bill 19-11 dealing with collective bargaining for County workers.

Given the sharp decline in union membership in the private sector, it is understandable that the public is generally unaware of how collective bargaining works and what it is intended to accomplish. It is not merely —as some would suggest—an arrangement that caters to unions and workers. Rather, as you know, collective bargaining provides a mechanism that enhances the roles of both management and workers. That is, it is a means to accommodate the needs of each side as expressed by their representatives.

We fear that piecemeal changes to address aspects of public policy, such as this, without a broader effort to put the policy in context generally result in unintended and often negative consequences.

That is how we view this current proposal for so-called "open" bargaining sessions. First of all, if the Executive and his designated negotiators are not representing the public, who are they representing when they negotiate with employee organizations?

As taxpayers, we expect our elected representatives to do exactly that: represent us.

Opening these sessions in the way that is proposed will hamper open and frank discussion and encourage both sides to play to real or perceived audiences. Bargaining of any type is most effective when the parties feel free to exchange views candidly.

And please note: Open negotiations would, by definition, be open to union members as well as those who are opposed to bargaining. That could be a combustible mix that could produce lots of heat, but not very much light and precious little progress toward an equitable and productive workplace.

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An Organization of 2,600 Dues-Paying Members in Montgomery County

We agree with the comments of Organizational Reform Commissioner Susan Heltemes who said:

"Initial disclosures of proposals would likely establish unrealistic expectations not only for management, but also for employees since initial proposals are usually not where the negotiations come down at the conclusion of bargaining. If opening proffers were open to the public, it is likely that outside input could obstruct the bargaining process and interfere with tight timelines and strategy. Such obstruction could alter the negotiating process and ultimately end in more arbitration and deterioration of what has become a respected form of negotiation for our public sector employees."

We strongly recommend that the Council and the Executive restrain the urge to enact these or any other changes to the labor laws unless and until the public interest is clearly identified, which we don't think it has been in this case.

And finally, as concerned citizens, we would like to express our disappointment with the recent actions in the County relating to union negotiations. For example, as you surely know, the arbitrator for the MCGEO impasse stated that the union's proposal met the county's goals for saving money but in a way that was fairer to employees. But this arbitration was totally ignored. This appeared to us to be bad-faith negotiating on the part of the County, at best.

So now there is a new version of labor relations law before the Council. We wonder why the County didn't follow its own rules previously in its negotiations with its workforce and we ask why the workers should expect the County to follow new rules when it has shown such disrespect for the current ones.

Thank you.

TESTIMONY OF JOSLYN N. WILLIAMS
PRESIDENT METROPOLITAN WASHINGTON COUNCIL, AFL-CIO
ON BILLS 19-11 AND 20 -11
July 12, 2011

Good afternoon. My name is Joslyn Williams and I'm President of the Metropolitan Washington Council, AFL-CIO, the umbrella organization for nearly 200 area unions representing over 150,000 area union members and their families.

Brother Renne has done his usual superb job of laying out a convincing case against the bills before you, so I won't belabor the points he's already touched on. What I'd like to do instead is to say just how disappointing and deeply frustrating it's been this year to find these sorts of attacks on public workers occurring here in Montgomery County.

The local labor movement has rallied and marched in the streets of the nation's capitol this year against the ongoing attacks on Wisconsin's public workers – indeed at one point we took over a building where lobbyists were holding a fundraiser for Wisconsin republican leaders. In the district, we played a vital role in firing DC Mayor Adrian Fenty, who had scapegoated public workers as well, most notably hardworking teachers in the city's schools.

As we watched such attacks spread to other states like Ohio and New Jersey, we congratulated ourselves that in Montgomery County we were fortunate to enjoy a collaborative relationship with county political leaders who not only appreciated workers and the union movement, but celebrated and were proud of that relationship.

That relationship extends beyond legislation, politics and negotiations: we're proud that the DC Labor FilmFest, one of the biggest and most successful such film festivals in the country, is held every year at the American Film Institute, where, i might add, the workers are all union members as well.

So I don't mind telling you that it's been terribly disappointing to find myself at demonstrations in recent months against some of our friends sitting here on the dais before me. Political leaders we've been proud to work with and call friends. Visionaries who understood that we all sink or swim together in this community.

Yet somehow, whatever it is that's infected the body politic in Wisconsin, in Ohio and in New Jersey seems to have seeped into Montgomery County as well. Maybe it's a virus in the water.

Let me suggest to you that the people who work for you – county employees and indeed all public workers – are not the enemy. They're taxpayers and consumers and they're voters, too. We need to work together to solve the common economic problems we face. If we do not, the county will suffer, as will the workers and ultimately, you too will have to face the political consequences.