

**Office of the County Attorney
Montgomery County, Maryland**

MEMORANDUM

February 19, 1997

TO: Marta Brito Perez, Director
Office of Human Resources

VIA: Marc P. Hansen, Chief *Marc Hansen*
Division of General Counsel

FROM: David E. Stevenson *David Stevenson*
Assistant County Attorney
Counsel to the Office of Human Resources

SUBJECT: Legislative Authority is Not Required in Order to
Establish a Senior Management Salary Schedule

You have informed me that the Office of Human Resources is currently developing a new compensation plan applicable to the heads of departments and principal offices of the executive branch of County government. You have asked whether the County Executive has the legal authority without legislative approval to establish a salary schedule for non-merit employees that is separate from the general salary schedule applicable to merit system employees. You have requested our review of a twelve year old County Attorney's opinion addressing this subject, and you have asked whether there is any need to update that opinion in light of legislative developments that have occurred over the intervening years.

SUMMARY OF CONCLUSIONS

For the reasons explained below, it is our opinion that the County Executive currently has the legal authority to establish a salary schedule for non-merit heads of departments and principal offices within the executive branch of the County. A salary schedule for these non-merit employees can be implemented without the need for legislation, Council resolution, or amendment to the Personnel Regulations. An executive pay plan, however, is subject to the Council's authority regarding appropriations.

FACTS

The Office of Human Resources is currently developing a new compensation plan applicable to heads of departments and principal offices. Preliminary planning for such an initiative has been conducted in past years.

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On August 22, 1985, County Attorney Paul McGuckian concluded that the County Executive has the authority to establish a separate Senior Management Salary Schedule outside the merit system's uniform salary plan for non-merit department/agency heads, without the need for authorizing legislation, or County Council approval. Mr. McGuckian concluded that the framers of our current Charter government intended the County Executive to have discretionary control over the compensation of department heads and the directors of principal offices within the executive branch, subject only to the Council's power regarding fiscal appropriations and the confirmation of appointments. Mr. McGuckian's legal analysis was eminently sound within the context of the Charter and legislative framework that governed circumstances in 1985. A copy of County Attorney McGuckian's opinion is attached to this memorandum.

There has been no relevant change in the Charter framework since 1985, and there has been only one noteworthy change in the statutory landscape over the past ten years. Until 1990, Section 33-11(b) of the County Code, which governs the "Uniform salary plan," expressly provided that the uniform salary plan (entitled the "general salary schedule") is "established for all classes of positions in the merit system" (emphasis added). Section 33-11(b) of the County Code specified that all merit system positions were to be assigned appropriate grades within one generally applicable salary schedule.

On March 27, 1990, the County Executive submitted a bill to the County Council proposing the establishment of a separate salary schedule for seasonal, minimum wage County employees. This bill was introduced by the Council President on April 24, 1990, as Bill No. 40-90. On July 31, 1990, the County Council enacted Bill No. 40-90, which generally amended Section 33-11(b) of the County Code, and provided for three separate salary schedules within the uniform salary plan. Those were: (1) a salary schedule for employees represented by certified employee organizations (unions); (2) a schedule for minimum wage/seasonal employees; and (3) "a general salary schedule for all other employees" (what had formerly been the "general salary schedule" established when Section 33-11(b) was originally enacted). During the process of amending Bill No. 40-90, the longstanding verbiage stating that the uniform salary plan applies to "all classes of positions in the merit system" was deleted from the bill.¹

¹ In 1993, Section 33-11(b) of the County Code was again amended to add a fourth salary schedule, one covering management level police officers.

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Implementing the provisions of Section 33-11(b) of the County Code, Section 9-2 of the County Personnel Regulations 1994² states that: "Subject to approval of the County Council, the Chief Administrative Officer must issue salary schedules for all merit system positions with a minimum and maximum salary for each grade" (emphasis added). This provision was incorporated into the Personnel Regulations in December, 1980, and its language was not substantively changed when the Personnel Regulations were amended and revised in 1994.

LEGAL ANALYSIS

The basic rule of statutory construction is to ascertain the intent of the legislature. Maryland State Police v. Warwick Supply and Equipment Co., Inc., 330 Md. 474, 624 A. 2d 1238 (1993). Accordingly, it is necessary to determine the intention of the County Council regarding the inclusion of non-merit department heads in the uniform salary plan, at the time Bill No. 40-90 was enacted in 1990. Given that Section 33-6 of the County Code defines the term "County employees" ("[a]ll persons employed by the county regardless of merit system status") separately from the term "Merit system employees," the question is whether the Council and the Executive intended the words "all other employees" in Bill No. 40-90 to include non-merit department heads, in addition to the traditionally covered group of merit system employees.

The strongest evidence that the County Council intended the term "a general salary schedule for all other employees" (as enacted in Bill No. 40-90) to refer to all other merit system employees not already included in the other specified salary schedules, is the fact that Bill No. 40-90 includes no specific statement that the amendment to Section 33-11(b) of the Code was intended to include non-merit positions within the ambit of the uniform salary plan.

Section 33-11(b) is a component of Article II of Chapter 33 of the Code. Section 33-5(e), which is the first section of Article II, provides: "This article shall apply to all merit system employees defined herein. Not included under this article unless specifically stated to the contrary are those positions excluded by section 401 of the county charter as amended and any other positions so excluded from the merit system under other provisions of county law." Since Section 401 of the County Charter expressly excludes "the heads of the departments, principal offices and agencies" from the merit system, none of the laws included in Article II, including

² The Personnel Regulations are approved by County Council Resolution pursuant to Method 1 of Section 2A-15 of the County Code.

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the provisions of the uniform salary plan set forth in Section 33-11(b), apply to these non-merit positions/employees, "unless specifically stated to the contrary." (Emphasis added). The relevant phrase appearing in Code Section 33-11(b), namely "a general salary schedule for all other employees," falls short of specifically stating that it applies to positions excluded from the merit system by Section 401 of the County Charter.

Nor is there any evidence in the legislative history of Bill No. 40-90 indicating that the County Council or its staff understood Bill No. 40-90 as intended to include non-merit department heads within the coverage of the uniform salary plan. The Bill title to Bill No. 40-90 states that it was intended to: (1) allow salary schedules to be added to the uniform salary schedule; (2) require the Council to consider certain information in setting salary rates; (3) provide for amendments to the salary plan by Council resolution; (4) make technical and stylistic changes; and (5) generally amend the personnel law regarding salary schedules. There is no language in the Bill title indicating that Bill No. 40-90 was intended to extend the coverage of the uniform salary plan to include non-merit department and office heads, positions that traditionally have been considered exempt from the uniform salary plan.

The original Bill No. 40-90 included the existing text of Section 33-11(b) stating that the uniform salary plan applies to "all classes of positions in the merit system." According to the Council staff memorandum of July 31, 1990, this verbiage was deleted from the Bill following the Personnel Committee's work session of June 25, 1990. The Council staff memo of July 31, 1990, says nothing indicating that the Council intended to place non-merit department heads within the coverage of the uniform salary plan. The Council staff memo does, however, plainly state (at pages 3 and 4) that the Personnel Committee amended the Bill to authorize the Council to initiate salary plan amendments by resolution. The past practice had been that all salary plan amendments were initiated exclusively by the Executive branch. The phrase stating that the uniform salary plan applies to "all classes of positions in the merit system" was apparently deleted from Bill 40-90 because it was part of the sentence of former Section 33-11(b) that gave the Chief Administrative Officer sole authority to initiate salary plan amendments.

An implied extension of the uniform salary plan to cover non-merit system positions would also appear to be inconsistent with Section 33-5(c) of the Code. Section 33-5(c) states that it is the purpose of Article II to implement the Council's legislative responsibilities to the merit system under the County Charter, "including provisions for salaries and wages for all classified employees of the merit system under a uniform salary plan" (emphasis added). In this regard, it is important to note that the second paragraph of Section 401 of the County Charter provides that: "Salaries and wages of all classified employees in the merit system shall be determined pursuant to a uniform salary plan" (emphasis added).

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It is also important to bear in mind that the uniform salary plan established in Section 33-11(b) is intertwined with, and virtually inseparable from, the position classification requirements of Section 33-11(a) of the Code. For example, Section 33-11(b)(3) states that "[a] salary schedule must include grades, salary rates, and salary ranges for each grade," Section 33-11(b)(4) states that "[t]he Chief Administrative Officer must assign each occupational class to an appropriate grade under an approved salary schedule," and Section 33-11(b)(5) provides that the CAO must ensure that occupational classes involving comparable duties are paid comparable salaries. With respect to classification, Section 33-11(a)(1)(B) mandates that the CAO "assign all positions in the merit system to proper classes" (emphasis added), and Section 33-11(a)(1)(C) requires the CAO to "assign pay grades to classes." Section 33-11(a) does not contemplate the inclusion of non-merit positions in the County classification framework. The clear statutory linkage between the classification and salary plan frameworks, establishing that classification is required only for merit system positions, serves as a strong indication that the uniform salary plan is intended for application only to merit system positions.

Although the uniform salary plan was amended by Bill No. 40-90, there has been no corresponding amendment of the classification requirements of Section 33-11(a). If, during the amendment of Section 33-11(b) in 1990, the County Council had intended the deletion of the reference to "merit system positions" as a substantive change in the law, then the Council would also have been expected to delete the corresponding reference in Section 33-11(a) to the classification of "positions in the merit system," or in the alternative to require that non-merit employees be assigned a class. Nowhere in the Council staff memo of July 31, 1990, is there any indication that the Council intended to include non-merit system positions within the scope of the classification system. Since the Council did not amend the classification subsection of Section 33-11, this serves as an indication that the deletion of the reference to merit employees from Section 33-11(b) was simply a matter of stylistic modification, and not a manifestation of intent to include non-merit department heads within the purview of the uniform salary plan.

It is also important to note that Section 9-2 of the Personnel Regulations has not been amended in the wake of the enactment of Bill No. 40-90. Section 9-2 of the Personnel Regulations continues to specify that the CAO must issue salary schedules "for all merit system positions." If either the Executive or the Council had intended Bill No. 40-90 to include non-merit positions within the coverage of the uniform salary plan, it would stand to reason that someone would have suggested a corresponding amendment to broaden the coverage of Personnel Regulation 9-2. This continued administrative interpretation of Section 33-11(b) is an indication of the Council's intent. National Asphalt Pavement Association v. Prince George's County, 292 Md. 75, 80, 437 A. 2d 651 (1981).

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CONCLUSION

Accordingly, the County Council did not intend to include department heads and the heads of principal offices of the executive branch within the uniform salary plan when Bill No. 40-90 was enacted in 1990. Therefore, Mr. McGuckian's opinion continues to serve as a sound and effective statement of the law concerning the discretionary authority of the County Executive to fix the salaries of the non-merit heads of departments and principal offices of the executive branch of the County. A salary schedule for these non-merit employees can be developed by the County Executive without the need for any legislation, Council resolution, or amendment to the personnel Regulations, subject only to the Council's authority regarding appropriations.

DES

Attachment

cc: Charles W. Thompson, Jr.
Michael Faden

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M E M O R A N D U M

August 22, 1985

TO: William P. Garrett
Personnel Director

FROM: Paul A. McGuckian
County Attorney

RE: Establishing a Senior Management Salary Schedule

You have requested our opinion with respect to the authority of the County Executive to establish a separate Senior Management Salary Schedule for Non-Merit Department/Agency heads, without approval of the County Council.

Section 401 of the County Charter prescribes a County merit system and requires the establishment of a uniform salary plan for all classified employees. The Charter requirement is implemented by law in Section 33-11(b) of the Montgomery County Code, 1984, which establishes a uniform salary schedule and provides, in pertinent part, "The chief administrative officer shall, subject to the approval of the County Council, promulgate and from time to time amend the general salary schedule, compensation policies for overtime, pay differential and other appropriate salary and wage benefits."

Specifically excluded under the mandate of Section 401 of the Charter are certain appointed positions, including the heads of the departments and the heads of the principal offices and agencies, as defined by law. These enumerated positions are therefore outside the confines of the merit system and the uniform salary plan requisite to the merit system.

However, Sections 204 and 210 of the Charter explicitly address the question of the compensation of the County Executive and Chief Administrative Officer respectively. The County Executive's compensation must be prescribed by the Council by law, in accordance with Section 204, and Section 210 requires compensation of the Chief Administrative Officer to be set by the County Executive, subject to the approval of the Council.

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The absence of specific reference to County Council responsibility in connection with establishment of salaries of the other enumerated positions would compel the conclusion that the Council has no approval power over establishment of salaries for these several appointed positions. Section 215 of the Charter, for example, prescribes Council approval of County Executive appointees, but does not reference compensation. By contrast, Section 216 specifies that salaries of other employees of the Executive Branch shall be fixed under the merit system by the heads of the several departments, offices and agencies.

We therefore conclude there is no legal impediment to establishment of a separate Senior Management Salary Schedule by the County Executive without Council concurrence. By extension of this interpretation, adjustments to such a salary schedule could also be effected without County Council approval. Under this analysis, Council control would come solely through its power over appropriations, and confirmation of appointments.

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