



OFFICE OF THE COUNTY ATTORNEY

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County Executive

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MEMORANDUM

TO: Philip M. Andrews, President
County Council

VIA: Leon Rodriguez *LR*
County Attorney

FROM: Marc P. Hansen *Marc Hansen*
Deputy County Attorney

Edward B. Lattner *Edward Lattner* *EL*
Chief, Division of Human Resources & Appeals

DATE: May 4, 2009

RE: Council's Role in Collective Bargaining—A Primer

The Council has asked the Office of County Attorney to prepare a “primer”¹ of the Council’s role in the collective bargaining process. We have understood our task to be to provide a brief overview of the steps in the collective bargaining process that require the Council’s participation. This memorandum is not intended to be an exhaustive analysis of the County’s collective bargaining laws.

The primary sources for describing the Council’s role in the collective bargaining process are the County’s three collective bargaining laws. These three collective bargaining laws were enacted to implement Charter §§ 510, 510A, and 511. These sections authorize the Council to enact legislation providing for collective bargaining with police officers, fire fighters, and general government employees, respectively.² Although the Charter requires legislation with “binding arbitration” only for police officers and fire fighters, all three collective bargaining laws

¹ According to Webster’s *New World Dictionary of the American Language*, a primer is a textbook that gives the first principles of any subject.

² The Council enacted three corresponding sets of collective bargaining laws: Article V of Chapter 33 for police (§§ 33-75 to 33-85), Article X of Chapter 33 for fire fighters (§§ 33-147 to 33-157), and Article VII of Chapter 33 for general government employees (§§ 33-101 to 33-112).

provide for binding arbitration between the employees and their employer—the County Executive.

The Council's Role in Collective Bargaining

Step 1: Presentation of collective bargaining agreement for Council approval.

The Council's role in collective bargaining begins after the parties (the executive and the union) submit their final agreement³ for Council action. The collective bargaining laws provide⁴ that, in each annual proposed operating budget, the County Executive must describe any collective bargaining agreement or amendment to an agreement that is scheduled to take effect in the next fiscal year and estimate the cost of implementing that agreement. By April 1, unless extenuating circumstances require a later date, the County Executive must submit to the Council for review all terms and conditions in any agreement requiring an appropriation of funds or enactment, repeal or modification of a County law.⁵

One could well ask why the Council has any role in the collective bargaining process if the Charter provides for binding arbitration. The reason is that, under the Maryland Constitution, core legislative functions, such as adopting a budget, imposing taxes, and enacting legislation, must be made by an elected legislative body—*i.e.* the County Council. Having elected officials make government policy “is essential to the system of representative democracy provided for in Art. XI-A of the Maryland Constitution.”⁶ *Save Our Streets v. Mitchell*, 357 Md. 237, 252 (2000). So, Step 1 is an unavoidable part of any collective bargaining process.

³ The parties may have reached final agreement through negotiations or it may have been imposed through impasse arbitration.

⁴ The police, fire, and general government collective bargaining laws are substantially similar, but not identical, in so far as the Council's role is concerned.

⁵ The police collective bargaining law requires the County Executive to submit “any term or condition of a collective bargaining agreement which requires an appropriation of funds or enactment, repeal or modification of a County law.” § 33-80(g). The fire collective bargaining law requires the County Executive to submit any term or condition “that requires an appropriation of funds, or are inconsistent with any County law or regulation, or require the enactment or adoption of any County law or regulation, or which have or may have a present or future fiscal impact.” § 33-153(l). Finally, the general governmental employee collective bargaining law requires the County Executive to submit any term or condition “that requires an appropriation of funds, or the enactment or adoption of any County law or regulation, or which has or may have a present or future fiscal impact.” § 33-108(g).

⁶ Montgomery County is a charter home rule county organized under Art. XI-A of the Maryland Constitution.

Step 2: Council indicates whether it intends to fund or otherwise implement the agreement.

By May 1,⁷ the Council must indicate by resolution whether it intends to appropriate funds or otherwise implement the provisions of the agreement requiring Council review, and if not, its reasons for rejecting that part of the agreement. All three collective bargaining laws expressly provide that the Council may accept or reject any “part” of or “item” within an agreement that require an appropriation of funds or legislation.

Step 2 may present two conundrums under certain circumstances:

(A) The Council has the authority to reject a part of an agreement submitted for Council approval—e.g. the Council could decline to fund a provision in an agreement that permits police officers to use personal patrol vehicles outside the County. The union and Executive often will argue that the item being rejected should not be viewed in isolation because it is only one part of a larger agreement. That agreement contains many items some of which may have only been agreed to in exchange for the item being rejected by the Council. This reality of contract formation puts the Council in the difficult position of having to balance the reasons for rejecting the item against the perceived or real inequity this decision may visit on one or both parties to the agreement. Perhaps in mitigation of this, the collective bargaining law provides that the parties may re-negotiate any item in the agreement during the re-negotiation process described in Step 3, below.

(B) The Council’s vote at Step 2 is an expression of the Council’s intention. This means the vote is not binding. For example, the Council might vote to express an intention to pass legislation authorizing a retirement incentive program. But when the vote on the legislation is actually taken, a majority of the Council may no longer feel a retirement incentive program is in the public interest and the legislation fails to be enacted. This action may come after the timelines designed to allow the parties to engage in further negotiations (see Step 3, below) has passed. Of course, if such a situation were to arise, both parties could agree to go back to negotiations, but it is unclear that one party could force the other to negotiate.

Step 3: Re-negotiation.

If the Council resolves to reject any part of the agreement submitted for its review under Step 2, it must designate a representative to meet with the parties (the County Executive and the

⁷ The Council, by majority vote taken on or before May 1, may defer the May 1 deadline no later than May 15. In addition, all the collective bargaining laws provide that these procedures apply to Council review of wage or benefits adjustments after the first year of any multi-year agreement as well as any out-of-cycle amendments. In the latter instance, the Council President must set new action deadlines for any amendments received after May 15.

union) and present its views in the parties' further negotiations.⁸ The parties must attempt to negotiate an agreement acceptable to the Council. The collective bargaining laws do not prohibit the parties from re-negotiating any item, and so the parties are not restricted to negotiating only on the item rejected by the Council. Either party may make use of the impasse procedure, and the Council's representative must participate in any impasse procedure in order to state the Council's position. The parties must submit the results of the negotiation or impasse to the Council by May 10.⁹

The Fire and general government employee collective bargaining laws provide that the Council must again indicate by resolution whether it intends to appropriate funds for or otherwise implement the agreement as renegotiated by the parties. This language is absent from the police collective bargaining law. Although this language is absent from the police collective bargaining law, § 31(A)(3) of the police collective bargaining agreement suggests that the Council would be asked to consider the parties' renegotiated agreement.

The Council may accept or reject any re-negotiated item in the agreement to the extent that the item requires an appropriation or legislation to implement.¹⁰

Step 4: The aftermath.

All the collective bargaining laws state that every collective bargaining agreement must provide either for automatic reduction or elimination of wage or benefits adjustments if the Council fails to take action necessary to implement the agreement or fails to appropriate sufficient funds for any fiscal year when the agreement is effective.¹¹

Conclusion

The role assigned to the Council in the collective bargaining process is, in many key

⁸ The collective bargaining laws governing fire fighters and general governmental employees provide that those further negotiations are "on items that the Council has indicated its intention to reject." The police collective bargaining law does not contain this limiting language. Moreover, § 31(A)(1) of the police collective bargaining agreement provides that if any economic provision of the agreement becomes inoperative for any reason, including Council refusal to fund, then all economic provisions are reopened for negotiation.

⁹ If the Council deferred the May 1 deadline, the May 10 deadline is automatically postponed for an equal number of days.

¹⁰ Although the collective bargaining laws are silent on this point, we do not believe that Council rejection of an item at this stage would trigger another round of re-negotiations. To construe the collective bargaining laws otherwise would lead to a potentially endless cycle of negotiations.

¹¹ Interestingly, the collective bargaining law applicable to general government employees also states the following: "The Council must take any action required by the public interest with respect to any matter still in dispute between the parties. However, any action taken by the Council is not part of the agreement between the parties unless the parties specifically incorporate it in the agreement." § 33-108(I). Nevertheless, the Council action will generally remain binding on all parties as a matter of law.

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respects, at odds with collective bargaining as it is practiced in the private sector. Private employers have different goals and are responsible to a different constituency than a public employer. The County, as the employer, must exercise many core functions (appropriation of funds and enactment of legislation) through an elected legislative body.¹² Neither an arbitrator nor the Executive and union by agreement can set core public policy. Thus, in many respects the agreement reached by the Executive and union (either through consent of the parties or by way of arbitration) is not a true agreement—it is more in the nature of a proposal or offer which must be accepted by the Council.

We hope the Council will find this primer helpful. If we can provide further assistance in this matter, please let us know.

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¹² See Elkouri & Elkouri, *How Arbitration Works* (6th ed. 2003) 1306. Not surprisingly, Elkouri, long regarded the “bible” for labor relations, devotes a separate chapter to arbitration in the public sector.