



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett  
County Executive

Marc P. Hansen  
Acting County Attorney

MEMORANDUM

TO: Duchy Trachtenberg, Chair  
Management and Fiscal Policy Committee

VIA: Marc P. Hansen *MPH*  
Acting County Attorney

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

DATE: July 22, 2010

RE: **Council Authority To Review Out-Of-Cycle Collective Bargaining Agreements**

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You have asked about the Council's role in reviewing the out-of-cycle collective bargaining amendments the County Executive recently submitted to the Council in late June. Council's review of a collective bargaining agreement normally consists of two steps: (1) adoption of a resolution indicating the Council's intent to appropriate funds for or otherwise approve the items necessary for the Executive to implement the amendment; and (2) adoption of a legislative act (an appropriation resolution, enactment of a bill, approval of a regulation, etc.) to implement the provision of the agreement. To assist the Council in fulfilling these responsibilities under the collective bargaining law, the Executive must identify for the Council those provisions that require (1) appropriation of funds or (2) a legislative act.

The amendments submitted to the Council in June contain a provision that grants to represented employees leave in addition to the furlough leave required in the Council Resolution approving the FY11 operating budget. Executive branch agencies have concluded that this leave has no fiscal impact because the leave cannot be taken if overtime would be required to cover the absent employee and the leave may not be paid out at any time, including at separation. On the other hand, Council staff concludes that this leave has a fiscal impact, either through the loss of productivity or a build-up of annual leave that may, at some point in time, be converted to cash.

Council legal staff has concluded, therefore, that the Council may, in its resolution of intent, declare its support or disapproval of the compensatory leave provision—despite the fact

that if the Council were to approve the additional leave, we can discern no tangible act the Council would need to take in order to permit the implementation of this provision. We are not aware that granting the leave would be contrary to any appropriation or budget resolution or contrary to any existing law.<sup>1</sup> Therefore, this provision of the agreement may be implemented by the Executive branch without any affirmative act by the Council being necessary.<sup>2</sup> We disagree with Council legal staff that a resolution of intent, as contemplated in the collective bargaining law, was intended to include a declaration of approval or disapproval regarding the leave provision because such a declaration cannot be linked with a potential affirmative Council action required in order for the Executive to implement the leave provision. Therefore, such a declaration by the Council would have no practical legal impact on the parties' ability to implement the agreement.

We wish to be clear that this advice is predicated on construction of the collective bargaining law and its intent to define the Council's role in the collective bargaining process. This advice does not undermine the Council's authority to set core public policy through legislative acts outside of the collective bargaining laws. As we noted in our previous opinion of May 4, 2009, to Council President Andrews, setting core public policy, 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 Article XI-A of the Maryland Constitution."<sup>3</sup>

## I. INTRODUCTION

The Council has enacted three sets of collective bargaining laws<sup>4</sup> and, although there are some slight differences in the statutory language among the three laws, we believe that Council's role in reviewing a collective bargaining agreement is the same under each law.<sup>5</sup> The Council

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<sup>1</sup> Although the budget resolution is a legislative enactment under the teachings of *Haub v. Montgomery County, Maryland*, 353 Md. 448, 727 A.2d 369 (1999), the Council's resolution of intent is not a law because it does not contain the hallmarks of a law (e.g., presented to the Executive for signature, subject to Council veto).

<sup>2</sup> As a practical matter, we do not understand how one would determine the amount of an appropriation to fund this provision if one were proposed for Council action.

<sup>3</sup> *Save our Streets v. Mitchell*, 357 Md. 237, 252 (2000).

<sup>4</sup> Article V of Chapter 33 governs police (§§ 33-75 to 33-33-85), Article VII of Chapter 33 governs general government employees (§§ 33-101 to 33-112), and Article X of Chapter 33 governs firefighters (§§ 33-147 to 33-157). General government employees actually comprise two separate bargaining units—Service, Labor, and Trades (SLT) and Office, Professional, and Technical (OPT). Most recently, the Council provided collective bargaining for the local fire and rescue departments, which largely mirrors collective bargaining provided to firefighters (§ 21-6).

<sup>5</sup> This is not to say that all the differences among the collective bargaining laws are insignificant. For (footnote continued on next page . . .)

must review every term in an agreement that it concludes requires legislation or an appropriation of money to implement that term.

Moreover, the Council's review of a collective bargaining agreement is the same regardless of whether the agreement is the result of term bargaining (including a reopener) submitted as part of the Executive's proposed annual operating budget or an out-of-cycle amendment. Therefore, the advice provided by this office in its May 4, 2009, memorandum ("Council's Role in Collective Bargaining—A Primer") to then-Council President Philip Andrews regarding the Council's role in the reviewing an agreement produced during term bargaining applies equally to the Council's role in reviewing an agreement produced during out-of-cycle bargaining.<sup>6</sup> A copy of that opinion is attached.

## II. PROCEDURE FOR COUNCIL REVIEW OF AGREEMENTS

All three collective bargaining laws provide the same timetable for Council action on collective bargaining agreements. The Executive must submit to the Council by April 1<sup>7</sup> any term in a collective bargaining agreement requiring Council action.<sup>8</sup> For each such term, the Council must adopt a resolution by May 1 indicating its intent to appropriate funds or enact legislation to implement that term of the agreement. If the Council resolves to reject any part of the agreement submitted for its review, it must designate a representative to meet with the parties (the County Executive and the union) and present its views in the parties' further negotiations.<sup>9</sup> 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

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(... footnote continued from previous page)

example, only the police collective bargaining law requires the County Executive to bargain over the "effect on employees of the employer's exercise of" management rights, § 33-80(a)(7), or provides for single-issue impasse arbitration, § 33-81(c).

<sup>6</sup> This office noted that the procedures for Council review of an agreement also applied to the Council's review of an out-of-cycle agreement. May 4, 2009, memorandum at 3 n.7.

<sup>7</sup> The Council, by majority vote taken on or before May 1, may defer the May 1 deadline no later than May 15. In the case of an out-of-cycle amendment, the Council President must set new action deadlines which result, to the extent feasible, is a similar timetable relative to the date the Council received the amendment.

<sup>8</sup> As a practical matter, the Executive transmits the entire agreement to the Council and attaches a chart identifying those terms the Executive believes require Council review.

<sup>9</sup> The collective bargaining laws governing firefighters 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.

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.<sup>10</sup>

### III. CONSTRUCTION OF THE COLLECTIVE BARGAINING LAWS

The cardinal rule of statutory interpretation is to ascertain the intention of the legislature. To determine what that intention is, we look first to the language of the statute because that is the primary source of legislative intent. In construing statutory language, Maryland courts have instructed that we must avoid constructions that are illogical, unreasonable, or inconsistent with common sense. *Mayor & City Council v. Bunting*, 168 Md. App. 134, 141-42, 895 A.2d 1068, 1072 (2006). While there are canons of statutory construction that one can employ to exploit the subtle differences in the description of the Council's role in each of these collective bargaining laws, we believe, as shown below, that myopic focus on those differences would lead to nonsensical results.

An analysis of the language in each of the collective bargaining laws detailing the Council's role in reviewing a collective bargaining agreement is in order. All three collective bargaining laws set out (1) the terms of the agreement that the Executive must "describe" to the Council, (2) the terms of the agreement that the Executive must "submit" to the Council, and (3) the subject of the resolution the Council must adopt indicating its intent to appropriate funds or otherwise implement the agreement.

#### A. Executive Description Of Agreement To Council

##### 1. Specific Provisions

##### a. Police

**"In each proposed annual operating budget, the County Executive shall 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."** (Emphasis added.)

##### b. General Government Employee

**"In each proposed annual operating budget, the County Executive must describe any**

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<sup>10</sup> If the Council deferred the May 1 deadline, the May 10 deadline is automatically postponed for an equal number of days.

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.**" (Emphasis added.)

c. Fire

**"In each proposed annual 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."** (Emphasis added.)

2. Analysis

With the stylistic substitution of the word "must" for "shall," all three collective bargaining laws require the Executive, each year, to "describe" for Council review, as part of the **annual proposed operating budget, any agreement that is scheduled to take effect in the next fiscal year and estimate the cost of implementing that agreement in the next fiscal year.** With regard to a term agreement, the Council must review the agreement if it requires an appropriation of money to implement in the coming fiscal year. With regard to an out-of-cycle amendment, the Council having already adopted the annual operating budget the previous May, the issue is the cost of implementing the amendment during the fiscal year in which the Executive presents the amendment to the Council—the Council must review the amendment if it will require a supplemental appropriation to implement or it is inconsistent with the operating budget resolution (which is a legislative enactment).

This language makes clear that one of the Council's substantive concerns is determining the cost of implementing an agreement while it is preparing the upcoming budget resolution. (The Council's other substantive concern is legislative.) The procedure for Council review (discussed at the conclusion of this memorandum) supports this conclusion—all three collective bargaining laws require the Council finalize action on any term collective bargaining agreement before the final budget resolution is adopted.

B. Executive Submission Of Agreement To Council

1. Specific Provisions

a. Police

The County Executive must submit to the Council "any term or condition of a collective bargaining agreement which requires **an appropriation of funds or enactment, repeal or modification of a County law**" (Emphasis added.)

b. General Government Employee

The County Executive must submit to the Council "any term or condition of the collective bargaining agreement 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." (Emphasis added.)

c. Fire

The County Executive must "identify" to the Council all terms and conditions in the agreement that "(1) require an appropriation of funds, or (2) are inconsistent with any County law or regulation, or (3) require the enactment or adoption of any County law or regulation, or (4) which have or may have a present or future fiscal impact." (Emphasis added.)

2. Analysis

This is where the three collective bargaining laws differ. With regard to financial review, the police law requires the Executive to submit to the Council for review any term of the agreement that "requires an appropriation of funds." But the general government employee and fire laws require the County Executive to also submit any term that "has or may have a present or future fiscal impact."

The laws also differ in terms of legislative review. The police law requires the Executive to submit for Council review any term of the agreement that requires "enactment, repeal or modification of a County law." But the general government employee law requires the Executive to submit any term requiring "the enactment or adoption of any County law or regulation." And the fire law builds upon this requirement, directing the Executive to also identify any terms that "are inconsistent with any County law or regulation."

Despite the different language, all three collective bargaining laws require the Executive to submit for Council review those terms of an agreement that the Executive cannot implement absent some affirmative Council action (appropriation of funds or enactment of legislation). We believe that the differences merely reflect the reiteration in different language over time of the roles of the Executive and the Council in submitting and reviewing collective bargaining agreements, without an intent to change the meanings of those provisions.<sup>11</sup> A literal reading of

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<sup>11</sup> As Mr. Drummer notes in the MFP worksession memo, the Council enacted the Police collective bargaining law on April 6, 1982 (Bill 71-81); the Council enacted the general government employee collective bargaining law on June 24, 1986 (Bill 19-86) and the Council enacted the fire and rescue collective bargaining law on July 23, 1996 (Bill 21-96).

the differences among the collective bargaining laws would lead to illogical results. For example, no one could reasonably suggest that the Executive need not submit for Council review a provision in an agreement with the general government employee or fire union that called for repeal of a County law because, unlike the police collective bargaining law, the general government employee and fire collective bargaining laws do not explicitly require the Executive to submit that type of provision to the Council. Similarly, it would be illogical to conclude that the Executive need not submit for Council review a provision in an agreement with the police or general government employee unions that was merely "inconsistent" with a County law or regulation because, unlike the fire collective bargaining law, the police and general government employee collective bargaining laws do not explicitly require the Executive to submit that type of provision to the Council.

Likewise, we believe that the requirement in the general government employee and fire collective bargaining laws that the Executive also submit for Council review any term that "has or may have a present or future fiscal impact" is not meant to give the Council a larger role in authorizing those agreements than the role it has in reviewing a police agreement. We agree with Council staff on this point:

We could not find any legislative history indicating that this difference in the language concerning Council approval of collective bargaining agreements was intended to create a significant distinction in the Council's authority. The new language added in later collective bargaining laws appears to be intended to convey the same result—the Council retains the ultimate authority over fiscal matters.

July 12, 2010, Drummer MFP worksession memorandum at 3.

We conclude that the Council's authority over fiscal matters is encapsulated in its appropriation authority. In reviewing a collective bargaining agreement, the Council has two concerns: (1) does the agreement require legislation and (2) does the agreement require an appropriation. Whether an agreement "has or may have a present or future fiscal impact" serves the purpose of alerting the Council to fiscal impacts that may affect future budgets. But any meaningful action by the Council on committing to funding or not funding those items would be both practically and legally premature. The need for an appropriation (like the need for legislation) is a clear test of those items on which the Council must adopt a resolution of intent under the collective bargaining laws. Our conclusion that the necessity for an appropriation is the determinative factor for Council review is supported by the requirement, in all three collective bargaining laws, that the Council's resolution of intent must indicate whether it will appropriate sufficient funds to implement the agreement.

C. Council Resolution Of Intent To Implement Agreement

1. Specific Provisions

a. Police

The Council "shall indicate by resolution its intention to **appropriate funds for or otherwise implement the agreement** or its intention not to do so, and shall state its reasons for any intent to reject any part of the agreement." (Emphasis added.)

b. General Government Employee

The Council "must indicate by resolution its intention to **appropriate funds for or otherwise implement the items that require Council review** or its intention not to do so, and must state its reasons for any intent to reject any such item." (Emphasis added.)

c. Fire

The Council "must indicate by resolution its intention to **appropriate funds for or otherwise implement the agreement** or its intention not to do so, and must state its reasons for any intention to reject any part of the parties' final agreement." (Emphasis added.)

2. Analysis

Here, all three collective bargaining laws agree: the Council must adopt a resolution indicating its intent to appropriate funds for or otherwise implement the agreement.

IV. COUNCIL REVIEW OF THE AGREEMENTS SUBMITTED BY THE EXECUTIVE

The Council can voice its disapproval of the compensatory leave provided for in several of the amendments. But the Executive can still implement that term of the amendments and provide the bargained-for compensatory leave in the current fiscal year, because he can do so without the Council appropriating funds or taking any other affirmative action in the current fiscal year. As previously noted, new are not aware that implementing the compensatory leave provision is contrary to any appropriation or laws.

Finally, we note that the Council's resolution of intent need not address the appropriation of funds for the FY12 police tuition assistance program. As noted earlier, the collective bargaining laws require the Executive to "describe" for Council review, as part of the annual proposed operating budget, any agreement that is scheduled to take effect in the next fiscal year and estimate the cost of implementing the agreement in the next fiscal year. Presumably, with regard to an out-of-cycle amendment, the issue is the cost of implementing the amendment



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during the fiscal year in which the Executive presents the amendment to the Council. Council staff correctly notes that the Executive will have to seek, and the Council will have to address, the appropriation of money for the police tuition assistance program as part of the FY12 annual operating budget. This does not preclude the Council from adopting a resolution on the matter, but the matter is not "ripe" until the Council considers the FY12 operating budget.

#### V. CONCLUSION

As we noted in our earlier memorandum, in many respects an agreement reached by the Executive and the union is more in the nature of a proposal or offer submitted for Council review to the extent implementation of that agreement requires actions that are uniquely within the Council's purview. Those actions are the ability to enact legislation (including approval of regulations) and the ability to appropriate funds. Those powers cannot be contracted away by the Executive and the union, nor can they be delegated to an impasse arbitrator. They are critical expressions of core public policy, entrusted only to an elected legislative body.

Enclosure (May 4, 2009 memorandum)

cc: Isiah Leggett, County Executive  
Nancy Floreen, President, County Council  
Councilmember Valerie Ervin  
Councilmember Nancy Navarro  
Timothy Firestine, CAO  
Joseph Adler, Director, OHR  
Steve Farber, Council Staff Director  
Robert H. Drummer, Senior Legislative Attorney

## ADDENDUM

### COLLECTIVE BARGAINING LAWS ENACTED BY THE COUNTY COUNCIL (Excerpts Regarding Council Review Of Agreements)

#### Police - Section 33-80

(g) Submission to Council. A ratified agreement shall be binding on the employer and the certified representative, and shall be reduced to writing and executed by both parties. **In each proposed annual operating budget**, the County Executive shall 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. Any term or condition of a collective bargaining agreement which **requires an appropriation of funds or enactment, repeal or modification of a County law** shall be timely submitted to the County Council by the employer by April 1, unless extenuating circumstances require a later date. If a later submission is necessary, the employer shall specify the submission date and the reasons for delay to the Council President by April 1. The employer shall make a good faith effort to have such term or condition implemented by Council action. Each submission to the Council shall include:

- (1) all proposed legislation and regulations necessary to implement the collective bargaining agreement;
- (2) all changes from the previous collective bargaining agreement, indicated by brackets and underlines or a similar notation system; and
- (3) all side letters or other extraneous documents that are binding on the parties.

(h) Council review. On or before May 1, the County Council shall indicate by resolution its intention to **appropriate funds for or otherwise implement the agreement** or its intention not to do so, and shall state its reasons for any intent to reject any part of the agreement. The Council, by majority vote taken on or before May 1, may defer the May 1 deadline to any date not later than May 15. If the Council indicates its intention to reject any part, it shall designate a representative to meet with the parties and present the Council's views in their further negotiations. This representative shall also participate fully in stating the Council's position in any ensuing impasse procedure. The parties shall thereafter meet as promptly as possible and attempt to negotiate an agreement acceptable to the Council. Either of the parties may initiate the impasse procedure set forth in Section 33-81. The results of the negotiation or impasse procedure shall be submitted to the Council on or before May 10. If the Council has deferred the May 1 deadline, that action automatically postpones the May 10 deadline by the same number of days.

(i) Adjustments. Any agreement shall provide either for automatic reduction or elimination of conditional wage or benefits adjustments if:

- (1) the Council does not take action necessary to implement the agreement, or
- (2) **sufficient funds are not appropriated for any fiscal year when the**

**agreement is in effect.**

(j) **Later years.** The process and timetable in subsection (h) apply to Council review of wage or benefits adjustments after the first year of any multi-year agreement.

(k) **Out-of-cycle amendments.** The process in subsection (h) applies to Council review of any amendment to a collective bargaining agreement that the Council receives after May 15 of any year, but the deadlines in subsection (h) do not apply. The Council President shall set action deadlines which result, to the extent feasible, in a similar timetable relative to the date the Council received the amendment.

#### **General Government Employees - Section 33-108**

(g) **In each proposed annual 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**. The employer must submit to the Council by April 1, unless extenuating circumstances require a later date, any term or condition of the collective bargaining agreement 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**. If a later submission is necessary, the employer must specify the submission date and the reasons for delay to the Council President by April 1. The employer must expressly identify to the Council and the certified representative any term or condition that requires Council review. Each submission to the Council must include:

- (1) all proposed legislation and regulations necessary to implement the collective bargaining agreement;
- (2) all changes from the previous collective bargaining agreement, indicated by brackets and underlines or a similar notation system; and
- (3) all side letters or other extraneous documents that are binding on the parties.

The employer must make a good faith effort to have the Council approve all terms of the final agreement that require Council review.

(h) The Council may hold a public hearing to enable the parties and the public to testify on the agreement.

(i) The Council may accept or reject all or part of any term or condition that requires Council review under subsection (g). On or before May 1, the Council must indicate by resolution its intention to **appropriate funds for or otherwise implement the items that require Council review** or its intention not to do so, and must state its reasons for any intent to reject any such item. The Council, by majority vote taken on or before May 1, may defer the May 1 deadline to any date not later than May 15.

(j) If the Council indicates its intention to reject any item that requires Council review, the Council must designate a representative to meet with the parties and present the Council's views in the parties' further negotiation on items that the Council has indicated its

intention to reject. This representative must also participate fully in stating the Council's position in any ensuing impasse procedure. The parties must meet as promptly as possible and attempt to negotiate an agreement acceptable to the Council. Either party may at this time initiate impasse procedures under this Section. The parties must submit the results of the negotiation, whether a complete or a partial agreement, to the Council on or before May 10. If the Council has deferred the May 1 deadline, that action automatically postpones the May 10 deadline by the same number of days. The Council then must consider the agreement as renegotiated by the parties and indicate by resolution its intention to appropriate funds for or otherwise implement the agreement, or its intention not to do so.

(k) Any agreement must provide for automatic reduction or elimination of wage or benefits adjustments if:

(1) The Council does not take action necessary to implement the agreement or a part of it; or

(2) **Sufficient funds are not appropriated for any fiscal year when the agreement is in effect.**

(l) 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.

(m) Later years: The process and timetable in subsections (i) and (j) apply to Council review of wage or benefits adjustments after the first year of any multi-year agreement.

(n) Out-of-cycle amendments. The process in subsections (i) and (j) applies to Council review of any amendment to a collective bargaining agreement that the Council receives after May 15 of any year, but the deadlines in those subsections do not apply. The Council President must set action deadlines which result, to the extent feasible, in a similar timetable relative to the date the Council received the amendment.

#### **Firefighters - Section 33-153**

(l) **In each proposed annual 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. The annual operating budget must include sufficient funds to pay for the items in the parties' final agreement.** The employer must expressly identify to the Council by April 1, unless extenuating circumstances require a later date, all terms and conditions in the agreement that:

- (1) **require an appropriation of funds, or**
- (2) **are inconsistent with any County law or regulation, or**
- (3) **require the enactment or adoption of any County law or regulation, or**
- (4) **which have or may have a present or future fiscal impact.**

If a later submission is necessary, the employer must specify the submission date and the reasons for delay to the Council President by April 1. The employer must make a good

faith effort to have the Council take action to implement all terms and conditions in the parties' final agreement.

(m) Each agreement submitted to the Council must include:

- (1) all proposed legislation and regulations necessary to implement the agreement;
- (2) all changes from the previous collective bargaining agreement, indicated by brackets and underlines or a similar notation system; and
- (3) all side letters or other extraneous documents that are binding on the parties.

(n) The Council may hold a public hearing to enable the parties and the public to testify on the agreement.

(o) The Council may accept or reject all or part of any term or condition in the agreement which:

- (1) **requires an appropriation of funds, or**
- (2) **is inconsistent with any County law or regulation, or**
- (3) **requires the enactment or adoption of any County law or regulation, or**
- (4) **which has or may have a present or future fiscal impact.**

On or before May 1, the Council must indicate by resolution its intention to **appropriate funds for or otherwise implement the agreement** or its intention not to do so, and must state its reasons for any intention to reject any part of the parties' final agreement. The Council, by majority vote taken on or before May 1, may defer the May 1 deadline to any date not later than May 15.

(p) If the Council indicates its intention to reject any part of the parties' final agreement, it must select a representative to meet with the parties and present the Council's views in the parties' further negotiation on matters that the Council has indicated its intention to reject. This representative must also participate fully in stating the Council's position in any ensuing impasse procedure. The parties must meet as promptly as possible and attempt to negotiate an agreement acceptable to the Council. Either party may at this time initiate impasse procedures under this section. The parties must submit the results of the negotiation, whether a complete or a partial agreement, to the Council on or before May 10. If the Council has deferred the May 1 deadline, that action automatically postpones the May 10 deadline by the same number of days. The Council then must consider the agreement as renegotiated by the parties and indicate by resolution its intention to appropriate funds for or otherwise implement the agreement or its intention not to do so.

(q) Any agreement must provide for automatic reduction or elimination of wage or benefits adjustments if:

- (1) the Council does not take action necessary to implement the agreement or a part of it; or
- (2) **sufficient funds are not appropriated for any fiscal year when the agreement is in effect.**

(r) Later years. The process and timetable in subsections (o) and (p) apply to Council

review of wage or benefits adjustments after the first year or any multi-year agreement.

(s) Out-of-cycle amendments. The process in subsections (o) and (p) applies to Council review of any amendment to a collective bargaining agreement that the Council receives after May 15 of any year, but the deadlines in those subsections do not apply. The Council President must set action deadlines which result, to the extent feasible, in a similar timetable relative to the date the Council received the amendment.

#### **Local Fire and Rescue Departments - Section 21-6**

(i) During the course of negotiating, either party may declare an impasse and request the services of the impasse neutral, or the parties may jointly request those services before declaring an impasse. **Except where specified otherwise in this Section, the timetable and process for impasse resolution, including Council review, must follow the timetable and process in Section 33-153.**

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(o) The final offer selected by the impasse neutral, 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. The parties must execute that agreement.

(p) The Executive must submit to the County Council for review any element of an impasse neutral's decision that:

- (1) requires an appropriation of funds;
- (2) is inconsistent with any County law or regulation;
- (3) requires the enactment or adoption of any County law or regulation; or
- (4) has or may have a present or future fiscal impact.

(q) The Council must consider any decision or part of a decision referred to it under subsection (p) and notify the parties within 60 days if it disapproves the decision or part. The Council may extend this time by resolution.



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett  
County Executive

Leon Rodriguez  
County Attorney

MEMORANDUM

TO: Philip M. Andrews, President  
County Council

VIA: Leon Rodriguez  
County Attorney *LR*

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

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The Council has asked the Office of County Attorney to prepare a “primer”<sup>1</sup> 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.<sup>2</sup> Although the Charter requires legislation with “binding arbitration” only for police officers and fire fighters, all three collective bargaining laws

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

<sup>2</sup> The Council enacted three corresponding sets of collective bargaining laws: Article V of Chapter 33 for police (§§ 33-75 to 33-33-85), 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 agreement<sup>3</sup> for Council action. The collective bargaining laws provide<sup>4</sup> 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.<sup>5</sup>

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.”<sup>6</sup> *Save Our Streets v. Mitchell*, 357 Md. 237, 252 (2000). So, Step 1 is an unavoidable part of any collective bargaining process.

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

<sup>4</sup> 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.

<sup>5</sup> 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).

<sup>6</sup> 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,<sup>7</sup> 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

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<sup>7</sup> 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.

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union) and present its views in the parties' further negotiations.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

#### 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.<sup>11</sup>

### Conclusion

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

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<sup>8</sup> 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.

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

<sup>10</sup> 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.

<sup>11</sup> 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.<sup>12</sup> 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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<sup>12</sup> See Elkouri & Elkouri, *How Arbitration Works* (6<sup>th</sup> ed. 2003) 1306. Not surprisingly, Elkouri, long regarded the “bible” for labor relations, devotes a separate chapter to arbitration in the public sector.

