



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

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County Attorney

MEMORANDUM

TO: Aron Trombka, Legislative Analyst
County Council

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

FROM: Edward B. Lattner *EBL*
Associate County Attorney

DATE: September 2, 2003

RE: **Housing Initiative Fund - Closing Cost Grants**

You have asked for our advice on a proposal to use Housing Initiative Fund resources to provide grants to County teachers, police officers, and firefighters to help them pay the closing costs for the purchase of a first home in the County.

QUESTIONS

Specifically, you have asked the following three questions:

1. Do you believe that any law would prohibit the County providing closing cost assistance to certain employees who meet specified eligibility requirements?
2. Does the County's employee discount policy have any affect on a proposed closing cost assistance program?¹

assistance to certain employees. But the proposed grant program would be inconsistent with the collective bargaining policy articulated in the collective bargaining law.

2. The County's employee discount policy prohibits the County from using its purchasing power to obtain employee discounts from County contractors because that would not serve a public purpose. But the County can spend money in the form of employment benefits because the recruitment and retention of qualified employees is a valid public purpose. Thus, the expenditure of public money to help certain employees pay their closing costs is sustainable as a valid public purpose if necessary to recruit and retain those employees and is not inconsistent with the County's employee discount policy.

3. A closing cost "grant program" will likely constitute gross income.

ANALYSIS

I. CHARTER § 407 AND COLLECTIVE BARGAINING LAWS

Our inquiry focused on two County laws—Charter § 407 and the County's collective bargaining laws.

A. Charter § 407

Charter § 407 prohibits County employees from receiving any salary, expenses, or compensation for their work beyond that provided by the Charter, County law, or County personnel regulations. It provides:

No member of the Council and no officer or employee of the County whose salary is fixed, in whole or in part, by this Charter, the laws of the County, or its personnel regulations, shall be entitled, directly or indirectly, to any other salary, expenses, or compensation from the County for performance of public duties except expenses for travel and subsistence incident to the performance of official duties as prescribed by law.

Both the fire and police collective bargaining laws require the “employer” to bargain with the employees’ certified representative (the union) over “[e]mployee benefits such as, but not limited to, insurance, leave, holidays and vacation.”² The impact of the Police Labor Relations Law on the subject initiative should be considered, because all County police officers through the rank of Sergeant are members of the police officers’ collective bargaining unit that is established under the Police Labor Relations Law. The impact of the Fire and Rescue Collective Bargaining Law on the subject initiative should be considered, because all County firefighters through the rank of Captain are members of the career firefighters’ collective bargaining unit that is established under the Fire and Rescue Collective Bargaining Law.

All of the County collective bargaining laws include declarations of Council policy that incorporate the general principle that unilateral employer action is prohibited in areas subject to bargaining. Code § 33-147 (firefighters) states: “Therefore, in order to preserve an appropriate balance between labor and management in the fire and rescue service, once the employees voluntarily select a representative collective bargaining must be used in place of, and not in addition to, existing means to initiate government action on subjects that are appropriate for collective bargaining under this Article.” Code § 33-75 contains a virtually identical statement of Council policy applicable to the police service.

A matter is a mandatory subject of bargaining when it “has a material or significant impact on wages, hours, or other conditions of employment.” *Westinghouse Electric Corp. v. N.L.R.B.*, 387 F.2d 542, 548 (4th Cir. 1967). Contrastingly, when the matter is only “indirectly, incidentally, or remotely related to those subjects,” there may be no duty to bargain. *Id.* at 547.

It is more likely than not, however, that a court would determine that the proposed closing costs assistance “benefit” does have “a material or significant impact on wages, hours, or other conditions of employment.” The safer approach, then, would be to assume that the closing costs assistance benefit that the County Council is proposing to legislatively grant to County police officers and firefighters is an “employee benefit” that falls into the class of “employee benefits,” as defined in Code §§ 33-80(a)(3) and 33-152(a)(3).

The issue then becomes whether the County can implement a unilateral change in benefits or working conditions in an area subject to mandatory bargaining, without violating the

“employer” that is prohibited from “[r]efusing to bargain collectively with the certified representative.”³ Therefore, only the County Executive, as the “employer,” is prohibited from unilaterally implementing a closing costs assistance benefit without first bargaining over that benefit.

Code § 33-80 (g) and Code § 33-153 subsections (n), (o), and (p), which provide for the employer’s submission of a contract to the County Council for review and implementation, make it clear that the County Council is not considered to be an agent or representative of the “employer” under either the police or firefighters collective bargaining laws. And Code §§ 33-82(a)(8) and 33-154(a)(8) of the Code, which make it a prohibited practice for the employer to oppose “the appropriation of funds or the enactment of legislation by the county council to implement an agreement reached between the employer and the certified representative,” also clearly indicate that the County Council is not considered to be an agent or representative of the “employer” who can be charged with, or found to have committed, a prohibited practice.

Although Council enactment of a closing costs assistance law would be inconsistent with its statement of legislative policy that unilateral employer action is prohibited in areas subject to bargaining, this conflict does not deprive the Council of legislative authority to enact the law because a “declaration of policy” is considered a mere “preamble” to the statute; not part of the operative, binding provisions of the statute. *Dillon v. State*, 277 Md. 571, 573-74, 582-83 (1976); *Battle v. State*, 65 Md. App. 38, 47 (1985), *cert. denied*, 305 Md. 243 (1986).

But even if the previously enacted declarations of policy were considered substantive provisions of law, their existence would not bar the County Council from enacting new, conflicting legislation. A legislative body is always free to enact a new law within a subject area, even if the new law happens to conflict with a law previously enacted by the same legislative body. *Montgomery County v. Bigelow*, 196 Md. 413, 423 (1950). Where there is a conflict between a previously existing law, and a subsequently enacted law, the subsequent law is not invalidated; rather, the prior enactment is impliedly repealed. *Id.* at 423.

II. EMPLOYEE DISCOUNT POLICY

The County’s employee discount policy (1) prohibits vendors from using County

public purpose. *Snowden v. Anne Arundel County*, 295 Md. 429, 456 A.2d 380 (1983). The County's use of its purchasing power to extract employee discounts from County contractors does not serve a public purpose. But the County can spend money in the form of employment benefits because the recruitment and retention of qualified employees is a valid public purpose. Thus, the expenditure of public money to help certain employees pay their closing costs is sustainable as a valid public purpose if necessary to recruit and retain those employees.

III. TAX CONSEQUENCES

The IRS will consider a "grant program"⁴ to pay closing costs for teachers, police, and firefighters gross income. IRC § 61 states the general rule that defines gross income to include all income from whatever source derived. Generally, all income is subject to taxation unless excluded by law.⁵ Moreover, closing cost grants provided in the context of an employer-employee relationship suggests that the "grant" is compensatory or some form of fringe benefit, and IRC § 61 (a)(1) of the Code includes compensation for services as gross income.

Grant payments are not excludable from gross income as an employment fringe benefit. Although the Code specifically excludes certain employee benefits and fringe benefits from gross income such as cafeteria plan benefits under IRC § 125 of the Code, or certain enumerated fringe benefits under IRC § 132 such as transportation fringe benefits, there is no similar exclusion in the Code for employee reimbursement of closing cost expenses. In fact, relocation benefits paid by the employer, including closing costs paid by the employer, are includible in an employee's gross income.

Neither are grant payments excludable from gross income as a social benefit program. While the IRS has held that payments made under legislatively provided social benefit programs for promotion of the general welfare are excludable from gross income, this general welfare fund doctrine applies only to governmental payments out of a welfare fund based upon the recipients' need, and not as compensation for services.⁶ The IRS has stated that benefits payable regardless

⁴ County loans to cover closing costs made to first time homebuyers in the County who are teachers, police, and firefighters will not be considered taxable income if the loans are secured, bear a reasonable rate of interest, and set forth specific repayment provisions. Further, the homeowner may deduct the interest paid on these

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of the financial status, health, educational background, or employment status of the recipient are not excludable from gross income under the general welfare doctrine.

Therefore, unless closing cost "grants" paid to teachers, police and firefighters are paid out of a general welfare fund in the interest of the general public and follow decades of Revenue and Private Letter Rulings and other guidance issued by the Service as highlighted in footnote 4 below, then the grant is taxable when either distributed or constructively received by the recipient. Further, if closing cost "grants" are paid in the context of the employer-employee relationship, then the grant is includible in gross income as taxable wages.

CONCLUSION

If you have any questions, please do not hesitate to contact me.

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cc: Charles W. Thompson, Jr., County Attorney
David E. Stevenson, Associate County Attorney
Connie Donovan, Assistant County Attorney