



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett  
County Executive

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County Attorney

MEMORANDUM

TO: Phil Andrews, Chair, Public Safety Committee  
Nancy Navarro, Chair, Gov't Operations and Fiscal Management Committee  
Montgomery County Council

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

DATE: September 26, 2011

RE: **Pension Bargaining Over Non-Employees**

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You have asked whether the County Executive, as the statutory employer under the County's collective bargaining laws, must bargain with the employees' certified representatives (the unions) over retirement benefits for future County employees. The short answer is no because each union bargains only on behalf of the employees within its respective bargaining unit(s); none can bargain on behalf of those who are not (yet) employed by the County or those who are retired from the County. While the parties' bargaining over pensions may inure to the benefit of a prospective employee, the unions do not represent, and the parties are not bargaining over, the interests of non-employees.

A brief discussion of the parameters of collective bargaining will illuminate the issue. A union bargains only on behalf of the employees within its bargaining unit(s) as described in its respective collective bargaining law. In the police collective bargaining law, those employees are defined as

any police officer classified as a sergeant, master police officer I, master police officer II, police officer I, police officer II, police officer III, or police officer candidate, or an equivalent nonsupervisory classification, but not a police officer in any higher classification.

§ 33-76.<sup>1</sup> In the fire fighter collective bargaining law, those employees are defined as follows:

a fire and rescue employee in the classification of Fire/Rescue Captain,

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<sup>1</sup> Unless otherwise indicated, all references are to the Montgomery County Code (2004), as amended.

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Fire/Rescue Lieutenant, Master Firefighter/Rescuer, Firefighter/Rescuer III, Firefighter/Rescuer II, and Firefighter/Rescuer I, but not:

(A) an employee in a probationary status;  
(B) an employee in the classification of District Chief or an equivalent or higher classification; or

(C) a Fire/Rescue Lieutenant or Captain whose primary assignment is in:

- (i) budget;
- (ii) internal affairs;
- (iii) labor relations;
- (iv) human resources;
- (v) public information; or
- (vi) quality assurance.

§ 33-148(4). Finally, in the general government employee collective bargaining law, those employees are defined as follows:

(4) Employee means any person who works for the County government, except:

(A) a confidential aide to an elected official;  
(B) a person holding a position designated by law as a non-merit position;

(C) a head of a principal department, office, or agency;  
(D) a deputy or assistant to a head of a principal department, office, or agency;

(E) an employee who provides direct staff or administrative support to the head of a principal department, office, or agency, or to a deputy or assistant within the immediate office of a head of a principal department, office, or agency;

(F) an employee who reports directly to, or whose immediate supervisor is:

- (i) the County Executive;
- (ii) the Chief Administrative Officer; or
- (iii) a principal aide of the County Executive or Chief

Administrative Officer;

(G) an employee who works for:

- (i) the Office of the County Executive;
- (ii) the Office of the Chief Administrative Officer;
- (iii) the County Council;
- (iv) the Office of the County Attorney;
- (v) the Office of Management and Budget;

- (vi) the Office of Intergovernmental Relations;
  - (vii) the Office of Human Resources;
  - (viii) the Merit System Protection Board; or
  - (ix) the Ethics Commission;
- (H) an employee in a temporary, seasonal, or substitute position, unless the position is in a job class in which the incumbents are predominantly career merit system employees;
- (I) a recently-hired employee who has not completed the probationary period;
- (J) an employee in the police bargaining unit;
- (K) an employee in the firefighter/rescuer bargaining unit;
- (L) a uniformed officer in the Department of Correction & Rehabilitation at the rank of Lieutenant or higher;
- (M) subject to any limitations in State law, a uniformed officer in the Office of the Sheriff at the rank of sergeant or higher;
- (N) an employee who is a member of the State merit system;
- (O) a supervisor, other than a Sergeant in the Department of Correction and Rehabilitation;
- (P) an employee in a position classified at grade 27 or above unless the employee's position is reclassified or reallocated on or after July 1, 2002, to a non-supervisory position at grade 27 or above; or
- (Q) an employee in a position classified in the Management Leadership Service.

§ 33-102(4). Although they are represented by one union (MCGEO), the collective bargaining law actually divides general government employees into two separate bargaining units, SLT (service, labor, and trades) and OPT (office, professional, and technical). § 33-105(a).

Over the years, the Council has amended the collective bargaining laws to increase the scope of these bargaining units (e.g., the police bargaining unit now includes sergeants, the fire fighter bargaining unit now includes certain lieutenants and captains, and the general government employee bargaining unit includes certain temporary employees, in addition to correctional and deputy sheriff sergeants). Presently, only approximately 15% of all County positions remain outside a collective bargaining unit.

The unions bargain only on behalf of the employees within their respective bargaining units. Thus, by definition, the unions do not bargain on behalf of individuals who are not yet employed by Montgomery County.<sup>2</sup> A union cannot file a contract grievance on behalf of such

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<sup>2</sup> Each of the three collective bargaining laws limits the County Executive's duty to bargain pension and other retirement benefits to "for active employees only." § 33-80(a)(2) (police), 33-152(a)(2) (fire fighters), and 33-

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an individual. Moreover, such an individual could not file a prohibited practice charge. A prohibited practice charge can only be filed by a union, the employer, or an individual employee. § 33-82(c) (police, § 33-154(c) (fire fighters), and § 33-109(c) (general government employees).

I trust this adequately responds to your request. If you have any questions concerning this matter, or if I can be of any further assistance, please do not hesitate to contact me.

cc: Karen Orlansky, Director, Office of Legislative Oversight  
Marc P. Hansen, County Attorney

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107(a)(2) (general government employees). The phrase "active employees only" was probably included to make clear that the unions do not represent pensioners. We do not believe that the absence of this limiting phrase in describing the remaining subjects of mandatory bargaining indicates that the unions represent either prospective employees or pensioners when bargaining those other subjects of mandatory bargaining.