

**Office of the County Attorney
Division of General Counsel
Montgomery County, Maryland**

MEMORANDUM

November 12, 1997

TO: Kenneth E. Clark, Chair
Charter Review Commission

VIA: Charles W. Thompson, Jr. *CWT*
County Attorney *(MHC)*

FROM: Marc P. Hansen, Chief *MPH*
Division of General Counsel
Office of the County Attorney

RE: County Merit System; Term Merit System Employees and Contract Employees

BACKGROUND

The Charter Review Commission is studying the advisability of amending the Charter to authorize the County to use "term merit system employees" and "contract employees".

The County Executive has suggested that the tasks undertaken by the County Government have become so varied and complex that the present merit system structure is no longer flexible enough wholly to meet the challenges of providing high quality services to the citizens of Montgomery County. The County Executive has indicated that flexibility would be enhanced if term merit system employees and contract employees could be added to the core complement of permanent merit system employees to make up the County's workforce.

For purposes of this memorandum, a "term merit system employee" is an employee whose term of employment has been pre-determined. In some cases a term merit system employee may fill a position that will terminate at a pre-determined time. Examples include: (a) a position created to staff a project that is expected to have a limited life (*e.g.*, resolution of year 2000 computer issues); and (b) a position which relies on a funding source that has a limited life (*e.g.*, federal and state grants). In other cases the position may be permanent, but an employee's incumbency in the position is pre-determined. An example might be a position whose incumbent should, for public policy reasons, be limited to a specific term (*e.g.*, staff for the Office of the

Inspector General).¹ Term merit system employees are entitled to all of the rights of the merit system granted by the Charter; *i.e.*, selection, promotion, discipline, and removal based on merit; right to appeal demotion, suspension, or removal to the Merit System Protection Board; and salary set under a general salary plan.

In this memorandum, a “contract employee” means an employee whose merit system rights, if any, are determined in his or her employment contract with the County. If the employment contract so provides, a contract employee may be removed at the will of the County. Unlike a collective bargaining agreement, the employment rights of contract employees may vary. Contract employees might be used to staff pilot projects or enterprise programs.²

QUESTION

The initial question is whether the Charter currently prohibits the use of term merit system employees or contract employees. If not, the question becomes under what conditions, if any, these types of employees should be permitted and what merit system rights should apply to these types of employees. Of course, the latter question raises policy, not legal issues.

ANSWER

1. The Charter permits the use of term merit system employees.
2. The Charter prohibits the use of contract employees.
3. If there is an interest in amending the Charter to permit contract employees, the Charter Review Commission may wish to consider various options. These options include requiring contract employees to be subject to Charter § 314, *Competitive Procurement*. In the

¹Montgomery County Code, § 2-64A, *et seq.*, establishes the Office of the Inspector General. These Code provisions authorize the appointment of an Inspector General to: (1) review the efficiency and effectiveness of County programs and operations; (2) prevent and detect fraud, waste, and abuse; and (3) propose ways to increase legal, fiscal, and ethical accountability of County Government. Section 2-64A(c) provides that the Inspector General may serve no more than two full four-year terms. Section 2-64A(g) provides that “[t]he Inspector General may . . . appoint as **term employees** the staff of the Office of the Inspector General.” (Emphasis added). Although this section fails to designate the length of staff members’ terms, presumably staff terms would coincide with the term of the Inspector General. While employed, these term merit system employees will have the protections and benefits of the County’s merit system.

²Enterprise projects are those where the undertaking is designed to produce significant revenue and is closely parallel to a private business undertaking.

alternative, contract employees could be authorized under Charter § 401, *Merit System*, but with limited merit system rights. For example, a contract employee might only be permitted to appeal a demotion, suspension, or removal to the Chief Administrative Officer whose decision would be final. A contract employee might not be subject to the general salary plan.

The Charter could also specify who could authorize the creation of a position to be staffed by a contract employee and under what circumstances or conditions. The Charter could limit the percentage of contract employees that may be employed in the County Government. In the alternative, the Charter could require the Council to establish by law the conditions under which contract employees could be used.

APPLICABLE LAW³

In November 1968, the citizens of Montgomery County voted to readopt the Montgomery County Charter with major revisions.⁴ The 1968 Charter included Article 4, which establishes a merit system for all County employees.

The *Commentary Upon Proposed Charter, Montgomery County, Maryland*, dated November 5, 1968 (*Charter Commentary*), states that the purpose of Article 4 is “to maintain the merit system in Montgomery County and to strengthen the merit principle and its administration.” *Id.* at 32. The *Charter Commentary*, in relevant part, provides that the County “must operate entirely within the merit system for **all** employees below the department head level.” (Emphasis added) *Id.*

According to the *Charter Commentary*, the provisions of Article 4 were based on the recommendations of the Municipal Manpower Commission.⁵ The Municipal Manpower Commission issued a report entitled *Governmental Manpower for Tomorrow's Cities (MMC Report)*. The *MMC Report* argues that safeguards, such as merit systems, are necessary to prevent employers' decisions being based on political patronage, *i.e.*, making appointments to public office to achieve political advantage or to pay a political debt. *Id.* at 61. The *MMC*

³The Applicable Law and Discussion portions of this memorandum are taken in large measure from a memorandum sent to Marta Brito Perez, Director, Office of Human Resources, from Assistant County Attorney Bernadette Lamson.

⁴The 1968 Charter established the executive/council form of government in Montgomery County.

⁵The American Municipal Association, the American Society of Planning Officials, and the American Institute of Planners formed the Municipal Manpower Commission under a grant from the Ford Foundation. The Municipal Manpower Commission served to formulate guidelines for local governments in their search for a trained and talented workforce.

Report, however, recognizes the necessity of elected officials selecting a working team sensitive to their methods and in agreement with their programs. *Id.* at 62-63. The *MMC Report* explains that elected officials need to choose individuals who share the political views of those elected officials and that this selection process is an integral part of carrying out the will of the voters. *Id.* Nevertheless, the *MMC Report* noted that elected officials must select individuals who have the knowledge, skills, and abilities for the work. *Id.*

Article 4 of the Charter requires the merit system to “provide the means to [obtain] . . . a responsive workforce with personnel actions based on demonstrated merit and fitness.” Article 4 also requires the merit system to provide a system of competitive selection and the right to appeal a decision involving a dismissal, demotion, or suspension to the Merit System Protection Board. Classified employees must have their salaries set under a general salary plan.

Section 402 of the Charter directs the County Executive to implement the merit system law through personnel regulations. The County Executive, with the approval of the County Council, has promulgated personnel regulations governing the administration of “all merit system positions.” Personnel Regulations §§ 1-2 and 3-7(a) expressly include within the definition of a merit system position a position created for a “special term, project, or program.”

Maryland case law indicates that merit system principles serve to prevent abusive political patronage and assure the quality of public servants. In addressing the State of Maryland’s merit system, the Court of Special Appeals recognized that merit systems serve two purposes: (1) “to provide standards of employment . . . and [2] to avoid problems inherent in the political spoils system.” *Secretary, Maryland Department of Personnel, et al. v. Bender*, 44 Md. App. 714, 715, 411 A.2d 107, 108 (1980). *See also State v. Billhimer*, 72 Md. App. 578, 531 A.2d 1298, 1304 (1987).

In 1923, the Supreme Court of Ohio aptly characterized merit system principles:

There is nothing complex or difficult to understand about civil service laws and rules. The fundamental purpose is to establish a merit system, whereby selections for appointments in . . . public service may be made upon the basis of demonstrated relative fitness, without regard to political considerations. To carry out this purpose, elaborate rules have been formulated, designed to facilitate its operation, but not to extend it beyond its legitimate limit.

Curtis v. State ex rel. Morgan, 108 Ohio 292, 140 N.E. 522, 523 (1923). *See also McQuillan, Municipal Corporations*, § 12.75, 15 Am. Jur. 2d, *Civil Service* § 1.

The Maryland courts have also held that merit system appointments do not prevent public employers from restructuring government offices to best serve the public, even if it means the elimination of merit positions. The Court of Appeals has held that public employers may reorganize offices and abolish occupied positions so long as it is done for bona fide reasons and not as a subterfuge to evade the merit system. *McCarty v. Mayor and City Council of Baltimore*,

265 Md. 423, 290 A.2d 521, 523 (1972). See also *Christian v. Cecil County*, 817 F. Supp. 1279 (1993) (“[public employers may] eliminate position provided that such elimination was carried out in good faith and for legitimate . . . reasons rather than as a . . . subterfuge to rid the government of a particular employee.”) In a similar vein, other state courts have recognized that merit system employees are not entitled to their job in perpetuity. *Hartmen v. City of Providence*, 636 F. Supp. 1395 (D.R.I. 1986) (“[the merit system] cannot be construed as a well-spring of tenure for every employee . . . or as a guarantee that a worker may keep his job in perpetuity . . .”) See also *Moore v. State of Alaska*, 875 P.2d 765 (1994) (“state employees are not frozen in jobs simply because they are hired under the merit system”).

Although there is no Maryland case directly on point, other state courts have permitted the appointment of merit employees for a term. *Balcrius v. Hickey*, 436 A.2d 246 (Pa. 1981) (limited term employments in the civil service are permitted as long as the person accepting the appointment receives prior notice); *City of Camden v. Civil Service Commission*, 29 A.2d 733 (N.J. 1943) (Civil Service Act may provide for term appointments); and *Holtendorff v. City of Los Angeles*, 58 Cal. Rptr. 886 (Cal. App. 1967) (housing authority may hire employees for fixed term).

DISCUSSION

I. Term Merit System Employees

The Charter, personnel regulations, and case law combine to provide support for hiring term merit employees. The Charter requires that the County provide all employees with certain merit system rights.⁶ These rights include selection of employees through a competitive appointment process and the right to appeal a premature dismissal to the Merit System Protection Board.

The Personnel Regulations address the issue of hiring term merit system employees and specifically authorize the hiring of those employees for pre-determined terms. County Regulations §§ 3-7 and 3-10. The Regulations provide that full-time and part-time positions include a “position created for a **special term**, project, or program.” (Emphasis added). Thus, the language of the County’s Personnel Regulations contemplates the employment of County employees for finite terms.⁷ The appointment of term merit employees is consistent with case

⁶Section 401 of the Charter provides that union employees “may be excluded from provisions of the merit system to the extent that such provisions are subject to collective bargaining pursuant to legislation enacted under Section 510 or Section 511 of this Charter.”

⁷Montgomery County Code § 33-6 defines merit system employees as being incumbents of “full time or part time year round **permanent** career positions.” (Emphasis added). Under the Code, therefore, only permanent career employees are entitled to appeal to the Merit System

law since the County would fill those positions through the competitive selection process. As a result, the County would maintain high standards of employment and help prevent the evils of political favoritism. *See Bender and Billhimer.*

The appointment of term merit employees is eminently fair to all prospective employees. In *Balcrius*, the Pennsylvania court held that term positions are permissible under merit system principles as long as applicants receive prior notice of those conditions of employment.⁸

Although there is no Maryland case addressing this question, there is no reason to believe that a Maryland court would reach a result contrary to the principles set out in *Balcrius*. Maryland courts permit a government to organize and manage its offices in a manner that includes eliminating occupied positions so long as there is a legitimate reason to do so and those decisions do not undermine the merit system. In *McCarty* the Court of Appeals permitted the elimination of current positions so long as government employers did not make those decisions as part of a subterfuge.⁹

An example of a permissible reason for creating term merit system employee positions is the legislation establishing the Office of the Inspector General. As already noted, that legislation provides for the Inspector General to appoint term merit employees to staff positions. These term merit appointments allow the Inspector General through a competitive process to select a working team that is compatible philosophically with the Inspector General's views, but at the same time does not permit the appointment of a class of employees owing their jobs to the political patronage system.

II. Contract Employees

Protection Board in the event of removal. The Code does not expressly deny a term merit system employee the right to appeal to the Merit System Protection Board. *See* § 33-12. Sections 3-4 and 3-5 of the Personnel Regulations, on the other hand, define a merit system position more broadly than the Code because it includes incumbents of term merit system positions. Accordingly, the Personnel Regulations grant term merit system employees the right to appeal to the Merit System Protection Board. In this regard, we think the Personnel Regulations are more consistent with the Charter and consideration should be given to amending the Code.

⁸We assume the County intends to provide ample notice of fixed employment terms to applicants through vacancy announcements and position descriptions.

⁹We note that Charter § 401 requires the merit system provide a means to "maintain an effective" workforce. We acknowledge, therefore, that the wholesale use of term merit system employees, without adequate justification, may run afoul of the Charter.

We believe the Charter prohibits hiring contract employees. Sections 216 and 401 requires that every County employee, unless excepted by the Charter, be hired, removed, and a salary established under the merit system. Therefore, at a minimum, the Charter requires the County to hire employees through a competitive selection process, base personnel actions on demonstrated fitness, and grant employees the right to appeal certain employment decisions to the Merit System Protection Board. Except in the context of the collective bargaining agreement, the County may not abridge these merit system protection rights by negotiating employment agreements with contract employees.

CONCLUSION

Under the current Charter, all County employees, including term merit employees, must receive those rights guaranteed to County employees by the Charter. We do not mean to imply, however, that term merit system employees must receive all of the same **benefits** (as distinguished from core merit system **rights** guaranteed in the Charter) enjoyed by permanent merit system employees. We read nothing in the Charter which would mandate that all merit system employees receive the same benefits like health insurance, life insurance, and reduction in force benefits. Only those core merit system rights set out in the Charter must be given to merit system employees. Subject to the collective bargaining provisions in the Charter already noted, it is the County's obligation to provide these core merit system rights to all employees; this prevents the County from utilizing contract employees.

We trust that this memorandum will be helpful to the Charter Review Commission in reviewing this important issue. If the Commission has further questions or concerns regarding this matter, please let us know.

cc: Bruce Romer, Chief Administrative Officer
Marta Brito Perez, Director, Office of Human Resources
Robert Kendall, Director, Office of Management and Budget
Steve Farber, Director, Council Staff
Mike Faden, Senior Legislative Counsel
Deborah Snead, Assistant to the Chief Administrative Officer
David Stevenson, Associate County Attorney
Bernadette Lamson, Assistant County Attorney