MFP Committee #1
November 23, 2009
Worksession/Action

MEMORANDUM

November 19, 2009

TO: Management and Fiscal Policy Committee

FROM: Leslie Rubin, Legislative Analyst
Office of Legislative Oversight

SUBJECT: **Follow-up Worksession on OLO Report on Hiring Persons with Disabilities**

This worksession addresses Office of Legislative Oversight (OLO) Report 2008-9, *Hiring Persons with Disabilities: A Review of County Government Practices*. This worksession follows-up on the October 5th worksession where the Committee discussed whether to recommend to the Council the establishment of (1) a special hiring authority, and/or (2) a hiring preference, to hire persons with disabilities into County Government merit system positions. At the October worksession, the Committee requested input on these two options from the Commission on People with Disabilities and deferred action to this meeting.[1]

This memorandum is organized as follows:

- **Part A** briefly describes special hiring authorities and hiring preferences;
- **Part B** summarizes recommendations from the Commission on People with Disabilities; and
- **Part C** summarizes the Committee's options.

The following Executive branch representatives are scheduled to attend the November 23rd worksession:

Office of the County Attorney	Ed Lattner, Division Chief, Division of Human Resources and Appeals
Office of Human Resources	Joe Adler, Director
Department of Health and Human Services	Jay Kenney, Chief, Aging and Disability Services
Commission on People with Disabilities	Mark Maxin, Chair

The Council is scheduled to take action on this report tomorrow morning. See November 20, 2009 Memorandum from Leslie Rubin, Legislative Analyst, to full Council (Agenda Item #3).

[1] See October 8, 2009 Memorandum from Councilmember Trachtenberg to Cindy Buddington of the Commission on People with Disabilities (attached at ©1). The Commission sent its response to Councilmember Trachtenberg on November 13, 2009. See November 13, 2009 Letter from Mark Maxin, Chair of the Commission on People with Disabilities, to Councilmember Trachtenberg (attached at ©2).

A. Description of a Special Hiring Authority and a Hiring Preference

The packet for the Committee's October 5, 2009 worksession outlined two alternative approaches for the recruitment, selection, and hiring of persons with disabilities into County Government merit system positions: a "special hiring authority" and/or a "hiring preference."

Special Hiring Authority. The "special hiring authority" model most often suggested for the County Government to follow is the federal government's "Schedule A" hiring program, which allows federal agencies to directly hire people with specific types of disabilities ("mental retardation," "severe physical disabilities," and "psychiatric disabilities") into vacant positions while bypassing many components of the federal government's competitive hiring process (analogous to the County's merit system). A hiring manager may hire a Schedule A applicant without advertising the job or considering other applicants, and Schedule A job applicants can apply for jobs directly to agencies, rather than through the federal USA Jobs program.

A person appointed under Schedule A must have proof of the disability, have a certification of job readiness, and must meet all of the required qualifications for a position. After two years of satisfactory service in a position, a Schedule A appointment may be noncompetitively converted to the competitive service.

In a July 2009 memorandum, the Office of the County Attorney concluded that the current language governing the merit system in the County Charter would need to be amended in order for the Council to pass a law establishing a special hiring authority.[2] To accomplish a Charter change, the Committee can either:

- Refer the issue to the Charter Review Commission, which could choose to study the issue (or not) and make a recommendation to the Council;[3] or
- Recommend directly to the Council that it adopt a resolution proposing an amendment to the Charter.[4]

According to Amanda Mihill, Council staff to the Charter Review Commission, if the issue is referred to the Charter Review Commission, the complexity of the question could likely hinder the Commission's ability to make a recommendation to the Council in time to place recommended Charter language on the ballot in the November 2010 election. If the Council directly proposes a Charter amendment in the next election cycle, the proposal would go to County voters for approval or rejection in the November 2010 election.[5]

Hiring Preference. The Office of the County Attorney also advised that the Council could amend County law to establish a "hiring preference" for persons with disabilities without amending the Charter.[6] Depending on how a hiring preference was structured, a hiring preference could allow a job candidate with a disability who was put into the highest rating category after a competitive rating process to receive a hiring preference (appointment to a position) over candidates without disabilities.

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[2] 7-29-09 Memorandum from Marc Hansen, Deputy County Attorney, to Michael Faden, Council Senior Legislative Attorney [hereinafter "7-29-09 OCA Memo"], attached at ©5.

[3] The Charter Review Commission has the authority to study the issues it chooses and *is not required* to study or make recommendations on all issues referred to it.

[4] See Montgomery County Code § 16-14. Typically, the Council adopts a resolution with proposed amendments to the County Charter the July before an election.

[5] In July 1994, an Assistant County Attorney drafted Charter language that would allow the Council to establish a special hiring authority. For the Committee's reference and only as an example, this language stated:

> The Council may establish by legislation a special hiring authority to permit the recruitment, selection, and hiring of persons with disabilities in the County work force, with personnel actions based on factors other than merit system principles.

See OLO Report 2008-9, *Hiring Persons with Disabilities: A Review of County Government Practices*, at Appendix O-4 (July 21, 1994 Memo from Steven Gilbert, OCA, to Jane Lawton, Special Assistant to the County Executive, at p. 4.

[6] 7-29-09 OCA Memo at p. 7 (©11).

B. Recommendations from the Commission on People with Disabilities

At Councilmember Trachtenberg's request, the Commission on People with Disabilities ("Commission") provided comments on the Committee's consideration of a special hiring authority and a hiring preference.[7] The Commission endorses the establishment in the County Government of both a special hiring authority and of a hiring preference for persons with disabilities who meet the disability criteria for federal government's "Schedule A" program or of the Department of Veteran's Affairs.

The Commission also made several other recommendations regarding the County Government's hiring, tracking, and accommodation of persons with disabilities. See the Commission's full letter, which is attached beginning at ©2.

C. Options for the Committee

The table below summarizes the options for MFP Committee action, with a brief description of the potential result of each option.

Options for Changing the Merit System Hiring Process for Persons with Disabilities

Option			Requires Amendment to...	Potential Result*
1	Special Hiring Authority	Refer Charter amendment issue to the Charter Review Commission	n/a	The Charter Review Commission could choose to review the issue and make a recommendation to the Council about whether to amend the Charter, or it could choose not to review the question.
2	Special Hiring Authority	Recommend Council resolution to place Charter amendment on ballot	County Charter	Hiring of persons with disabilities directly into merit system positions. A hiring manager could directly hire a person with a disability into a merit system position and bypass the typical merit system hiring process. Candidates would need to possess the knowledge, skills, and abilities required for the position.
3	Recommend Council establish a "hiring preference" in law		County Law	Hiring of persons with disabilities into merit system positions if they are among the highest rated candidates in a normal competitive hiring process. A candidate with a disability would receive a hiring preference over candidates without disabilities if the candidate with a disability was put into the highest rating category after a competitive rating process.
4	Special Hiring Authority *and* Hiring Preference		County Charter ***and*** County Law	Hiring of persons with disabilities directly into merit system positions ***and*** hiring of persons with disabilities into merit system positions if they are among the highest rated candidates in a normal competitive hiring process.

* Final results of any changes would be based on the details of any system or change ultimately made by the Council.

The Committee may also recommend that the Council maintain the status quo and not pursue either a Charter amendment or a hiring preference.

[7] See 11-13-09 Letter from Mark Maxin, Chair of the Commission on People with Disabilities, to Councilmember Trachtenberg, Chair of the MFP Committee.

ATTACHMENTS	BEGINS AT:
10-8-09 Memorandum from Councilmember Trachtenberg to Cindy Buddington of the Commission on People with Disabilities	©1
11-13-09 Letter from Mark Maxin, Chair of the Commission on People with Disabilities, to Councilmember Trachtenberg, Chair of the MFP Committee	©2
7-29-09 Office of the County Attorney Memorandum on Noncompetitive Hiring of Persons with Disabilities	©5

Rubin, Leslie

From: Trachtenberg, Duchy
Sent: Thursday, October 08, 2009 4:33 PM
To: cbuddington@hotmail.com
Cc: Luecking, Betsy; Rubin, Leslie; Bowser, Alan; Beyer, Dr. Dana
Subject: Request for Commission Input

MEMORANDUM

October 8, 2009

To: Cindy Buddington, Chair
Commission on People with Disabilities

From: Councilmember Trachtenberg, Chair
Management and Fiscal Policy Committee

Subject: **Request for Comments on Proposed Changes to Hiring Practices in the County Government Merit System**

On behalf of the County Council's Management and Fiscal Policy Committee, I am writing to request the Commission's input on an important issue currently before the Committee. The Committee is considering several changes to the Montgomery County's Charter and/or law that would alter the County Government's hiring practices with respect to people with disabilities. In particular, the Committee members would appreciate the Commission's views on:

1. Recommending an amendment to the County Charter to allow the County Government to establish a special hiring authority within the County merit system that would permit an alternative approach for the recruitment, selection, and hiring of people with disabilities into merit system positions; and
2. Establishing a hiring preference in the law that would allow the County Government to place a job applicant with a disability on a "priority eligible list" for job applicants, if the person was put into the highest rating category during a competitive rating process for an open position.

The Committee discussed these issues at its October 5, 2009 worksession. A summary of the issues is contained in the sta memorandum prepared for that meeting, available at:
http://www.montgomerycountymd.gov/content/council/pdf/agenda/cm/2009/091005/20091005_MFP1.pdf.

The Committee intends to finalize its recommendations to the Council on these issues in November. In order for your comments to be incorporated into the material prepared by staff for the Committee's next worksession on these issues, ple provide them to Leslie Rubin, Office of Legislative Oversight, 100 Maryland Avenue, Rockville, MD 20850 (leslie.rubin@montgomerycountymd.gov), no later than November 16, 2009.

Thank you in advance for taking the time to assist the Committee.

cc: Tim Firestine, Chief Administrative Officer
Kathleen Boucher, Assistant Chief Administrative Officer
Uma Ahluwalia, Director, Department of Health and Human Services
John Kenney, Chief, Aging and Disability Services, Department of Health and Human Services

COMMISSION ON PEOPLE WITH DISABILITIES
November 13, 2009

The Honorable Duchy Trachtenberg, Chair
Management and Fiscal Policy Committee (MFP)
Montgomery County Council

The Commission very much appreciates the desire, vision and courage of the Council to address the critical issue of unemployment of individuals with disabilities that has been an ongoing problem for our County. We are pleased to be able to provide a response to your October 8, 2009 memo to the Commission on People with Disabilities requesting input regarding the MFP Committee's consideration of:

1. A hiring preference for persons with disabilities,
2. A Charter amendment to create a Special Hiring Authority for persons with disabilities, and
3. Overall comments and recommendations regarding County employment procedures and practices.

Prior to addressing the specifics of these initiatives, it is important for the Council to understand why such initiatives are needed. Citizens with disabilities have historically faced severe unemployment, under representation and isolation in our County, State and in our Nation. The hiring initiatives before you are important, not only as some amendment to merit staffing procedures, but because they remind us that society's barriers in employing people with disabilities to be amongst the most vexing, challenging and important civil rights issues of our time. Unlike every other form of discrimination, disability discrimination requires us to surmount barriers, that is, to make reasonable accommodations or take other actions, like the hiring initiatives today, to help assimilate citizens with disabilities into our society.

The Commission agrees with the County that initiating the foregoing hiring initiatives and flexibilities would not violate the law. Unlike other protected classes such as race, national origin and sex, the ADA Amendments Act (ADAAA), which was effective January 1, 2009, does not permit a claim of so called "reverse discrimination." Specifically the ADAAA expressly provides that "Nothing in this Act shall provide the basis of a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability." See Section 501(g) of the ADAAA.

Similarly, the Equal Protection Clause of the 14th Amendment of the U.S. Constitution does not provide a bar to such initiatives and flexibilities based on an applicant's disability. This is because disability is not a suspect or quasi-suspect class and requires only a rational basis for instituting such initiatives. See City of Cleburne, Texas, v. Cleburne Living Center, 437 U.S. 432 (1985). The rational basis test is not a demanding standard. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." Id. The rational basis for implementing such flexibilities include, but is not limited to, the interest in promoting diversity, the poor track record in hiring individuals with severe disabilities in the County as well as many of the reasons discussed below.

People with disabilities are disproportionately poor. Their ability to enjoy a quality of life is substantially undermined by the daily financial struggle they face every day. Among all adults in our country age 21+, people with disabilities are almost 3 times more likely to be below the Federal Poverty Level (11.4% vs. 3.6%) - The U.S. Census Bureau 2006 American Community Survey. In Montgomery

County, of the 40,000 individuals with disabilities, 43 % are unemployed and 31% of working age adults (ages 18-64) with disabilities report that they are unemployed.

The presence of individuals with disabilities in the County workplace and other Federal state and private sector jobs benefits the society as a whole. Exposure to people with disabilities helps to undue the myths, fears and stereotypes that, according to the Supreme Court in Arline v. Nassau County Board of Education, 480 U.S, 273 (1987) can be far more limiting than the underlying medical condition itself. Providing employment also helps to integrate this often invisible constituency, into the fabric of our society. By becoming our co-workers, neighbors and friends, the quality of their lives and the quality of our lives improves...as we grow together as a diverse and enriched society.

Moreover, "individuals with disabilities are an untapped source of excellent applicants," that can make outstanding employees. Accordingly, the Federal Government has special appointing authorities for persons with disabilities. To be eligible for these noncompetitive, Schedule A appointments, a person must meet the definition for being disabled and have a severe physical, cognitive, or psychiatric disability and be able to perform the job. See 5 C.F.R. 213.3102(u). Federal employers may also give a noncompetitive temporary appointment of more than 60 days (see 5 CFR 316.302(b)(4)) or a term appointment (see 5 CFR 316.402(b)(4)) to a veteran: retired from active military service with a disability rating of 30 percent or more; or rated by the Department of Veterans Affairs (VA) within the preceding year as having a compensable service-connected disability of 30 percent or more. The person must also obtain a certification letter which has historically been from a State Vocational Rehabilitation Office or the Department of Veterans Affairs and eligible for appointment under these special authorities.

For all the reasons stated above we recommend that the County:

1. Provide a hiring preference to applicants who are certified as meeting Schedule A criteria by the State Division of Rehabilitation Services or that of the Department of Veterans Affairs as having a disability for merit protection jobs and are ranked amongst those within the well qualified category.
2. Establish a special hiring authority for persons with a disability who are certified as meeting Schedule A criteria by the State Division of Rehabilitation Services or that of the Department of Veterans Affairs as having a disability and assess job readiness for use in direct hire as an exception to merit staffing procedures. This special hiring authority would be used to appoint certified disabled applicants as they do for Schedule A hiring exceptions of the Federal government. See 5 C.F.R. 213.3102(u). Please see recent changes to 5 C.F.R 213 http://74.125.95.132/search?q=cache:hyMz4KC-aW8J:www.chcoc.gov/Transmittals/Attachments/trans755.pdf+5+CFR+213.3102%28u%29&cd=6&hl=en&ct=clnk&gl=us This authority allows agencies to hire individuals with targeted and certified disabilities who are job ready directly into available positions for which they are qualified without competition. EEOC's LEAD initiative has developed brochures entitled "The ABCs of Schedule A for the Hiring Manager", the Human Resources Professional, and the Disability Program Manager. Please see link to these brochures at http://www.eeoc.gov/eeoc/initiatives/lead/abcs_of_schedule_a.cfm See also direct hiring authority to appoint veterans with a 30% or more service connected disability as referenced above.
3. Include on its employment application form a voluntary disability disclosure option. This option would be utilized if the applicant wishes to be considered for a disability hiring preference. This information would be kept confidential from the hiring manager until the applicant is considered in the well qualified category and then only disclosed if a person wanted to be considered for a preference.
4. Track and consider data that is collected from the voluntary disclosure of applicants with disabilities when evaluating diversity related pay for performance standards of department heads and managers or otherwise when assessing how the County is performing in hiring employees with disabilities.
5. Include and consider employees with disabilities on interviewer panels in the selection process.
6. Continue the Customized Employment Internship Program which provides part-time, non-merit County Government jobs for a maximum time period of two years, and that the County has the

authority to automatically convert the applicants to permanent County jobs non-competitively for which they are qualified.

7. Continue the partnership with the Division of Rehabilitation Services (DORS) to provide a Quest Internship program for people with disabilities who are clients of DORS for either a full time 3 month or 6 month training opportunity with the stipend being provided by DORS.
8. Require all employees and managers receive special training on hiring flexibilities, including the direct hire authority, disability hiring preference, internship projects and reasonable accommodation process. The Commission applauds the County's recent efforts to train its managers on their reasonable accommodation responsibilities, although periodic training should be incorporated in the future.
9. Review and revise the County's Reasonable Accommodation Procedures. The County's reasonable accommodation regulations read more like fitness for duty regulations than reasonable accommodation procedures. The County's Reasonable Accommodation Manual is an improvement over the regulation but requires additional clarity and there are more effective procedures, like the Equal Employment Opportunity Commission's own internal procedures that could serve as an excellent model. The County should also establish a centralized non-departmental reasonable accommodation fund, including sign language interpreting services, to ensure that managers won't deny an accommodation for purely financial reasons. We would be happy to talk more with OHR staff to help address my concerns and the concerns of the Commission.
10. Make its Information Technology more accessible. One of the great leaders of the Commission as well as the Maryland Disability Community was the late Dr. Harold Snider. Mr. Snider, who had vision greater than most was blind and could not use the County's web to apply for a job because it was inaccessible to him. While the County has improved in this area it must provide more attention and staff so it will not be vulnerable to allegations of Title I of the ADA and violations of the Assistive Technology Act...[1] Accordingly, the Commission will appoint a Commissioner to work with the County to improve access to its website.
11. Establish diversity performance standards for department heads and managers that require, consistent with the law, that these managers understand and utilize these disability hiring initiatives and flexibilities, understand and apply the County's reasonable accommodation procedures and reasonably and timely accommodate employees with disabilities, and otherwise promote a diverse, welcoming and accessible work environment for disabled employees and citizens.

It is not enough to create these flexibilities and initiatives, and training is not enough either. The County leadership must encourage managers to utilize them. Without consistent leadership, the foregoing initiatives would be of little value. We thank Joe Adler, Director, Office of Human Resources and his staff for their vision of increasing employment opportunities. We thank the County Council for its cutting edge leadership in seeking an Office of Legislative Oversight review and best practice recommendations to improve the employment of people with disabilities. On behalf of the Commission, I want to thank you for the opportunity to provide comments on one of the greatest challenges of people with disabilities. We look forward to meeting with you to further discuss these issues.

Sincerely,

Mark Maxin

Mark Maxin, Chairman

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[1] Although section 508 of the Rehabilitation Act of 1973 as amended, expressly requires accessible information technology for Federal agencies, section 508 is incorporated by and through Section 103(e)(6) of the Assistive Technology Act of 1998 (AT Act) and is applicable to the County and the State of Maryland, see Public laws 100-407 and 103-218. Specifically, the AT Act provides that a state who is a recipient of federal funds, such as Maryland, "will comply with guidelines established under section 508 of the Rehabilitation Act of 1973." See also the "continuing obligations" of section 101(e)(3) of the AT Act.

OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

MEMORANDUM

TO: Michael Faden, Senior Legislative Attorney
County Council

FROM Marc P. Hansen Marc Hansen
Deputy County Attorney

Edward B. Lattner, Chief EBL
Division of Human Resources and Appeals

Anne T. Windle Anne T. Windle
Associate County Attorney

DATE: July 29, 2009

RE: **Noncompetitive Hiring of Persons with Disabilities**

The County is considering a recommendation to establish a program to hire persons with disabilities on a noncompetitive basis. The County Charter requires that all personnel actions taken under the merit system be "based on demonstrated merit and fitness." Based on the history of this Charter provision, we have concluded that the Charter forbids the use of a noncompetitive hiring process based on an immutable, non-merit factor such as a disability. Although the Charter, forbids the use of a noncompetitive rating process based solely upon an immutable, non-merit factor such as disability, the County Council could amend the County Code to place a person with a disability on a priority eligible list for job applicants, if that person is first placed in the highest rating category through a competitive process.

BACKGROUND

In June of 2008, the Office of Legislative Oversight issued Report Number 2008-9, Hiring Persons with Disabilities: A Review of County Government Practices (OLO Report). The OLO Report notes that "a recurring question during the course of conducting the study was, 'Why doesn't the County Government develop a special hiring authority to hire persons with disabilities into merit system jobs?' " OLO Report at 93. The OLO Report continues, "The model most often suggested for the County Government to follow is the Federal Government's

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Schedule A hiring program, which allows federal agencies to directly hire a person with a disability into a vacant position on a noncompetitive basis. The County Attorney advises that creating this sort of program requires an amendment to the County's Charter." *Id.*[1]

ANALYSIS

I. The Charter requires that the County determine an individual's merit and fitness through a competitive rating process.

The Charter requires that all personnel actions under the merit system be based upon demonstrated merit and fitness. Specifically, Charter § 401 calls upon the County Council to establish by law a merit system for all County employees,[2] which "shall provide the means to recruit, select, develop, and maintain an effective, non-partisan, and responsive work force **with personnel actions based on demonstrated merit and fitness**" (emphasis added).[3] Provisions like Charter § 401 are intended to increase the efficiency of the public service by abolishing the spoils system, providing for appointments on the basis of merit and fitness rather than on political or personal considerations, assuring tenure, and providing opportunity for advancement.[4]

Code § 33-9(a) implements Charter § 401 by providing that "[t]he county's policy shall be to take all personnel actions on the basis of merit and fitness without regard to political affiliation or non-merit factors . . . such as sex, marital status, race, religion, national origin, age or handicap."

What did the Charter intend to achieve by employing the phrase "demonstrated merit and fitness"?[5] To be sure, the language of Charter § 401 is silent with respect to whether competition

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[1] Schedule A permits, but does not require, a hiring manager to select a Schedule A applicant without considering other applicants. "To be hired 'under Schedule A' an applicant must meet the minimum job qualifications, demonstrate job readiness, and provide documentation of 'mental retardation, severe physical disabilities, or psychiatric disabilities.' " OLO Report at 26. Individuals hired pursuant to Schedule A are not initially merit system employees, but may noncompetitively become merit system employees after two years of satisfactory service.

[2] The charter provides that certain high level employees are outside the merit system.

[3] The Charter provides that even probationary, temporary, and term employees, all of whom may be exempted from the merit system, must still be recruited, selected, and promoted by the County on the basis of demonstrated merit and fitness.

[4] *Secretary, Maryland Department of Personnel v. Bender*, 44 Md. App. 714, 411 A.2d 107 (1980), *aff'd*, 290 Md. 345, 430 A.2d 66 (1981).

[5] The cardinal rule of statutory construction is to ascertain and effectuate the intent of the law. *Johnson v.*

must be employed as part of the process of determining an individual's "merit and fitness". Nevertheless, after reviewing the history of Charter § 401 and how the County has implemented the merit system, we have concluded that the phrase "demonstrated merit and fitness" was intended to require open competition as a key component in reaching a determination concerning an individual's fitness for a County position. The history of the merit system created by the Charter, however, also reveals an intent to permit certain narrow exceptions to the competition requirement. But these exceptions were not so broad as to encompass an exemption from competition for a class of individuals defined by an immutable characteristic shared by members of the class, such as the presence of a disability.

A. The County has historically used a competitive rating process to demonstrate merit and fitness in all personnel actions.

In 1945 the General Assembly established a "civil service" system for the County.[6] Prior to 1945 the County operated under a "spoils system".[7] In 1948 the County adopted a Charter Home Rule form of government under Article XI-A of the Maryland Constitution. The 1948 Charter reflected the "informed consensus" to end the "spoils system" by adopting "strict personnel practices."[8]

The 1948 Charter used general, non-specific language to implement this policy goal of creating a civil service system. Article V, Sec. 1, b., merely required the Personnel Board to adopt personnel regulations that addressed "minimum qualifications for any such positions, methods of determining such qualifications, and methods of selection for any such positions."

The County's personnel law gave definition to the principles of a civil service system that was intended to be created by the 1948 Charter and it did so by requiring the use of a competitive rating process to determine merit and fitness. The personnel law generally required, subject to certain narrow exceptions, an open competitive examination process to determine job qualifications of an individual. The 1950 County Code required the Personnel Board to prepare examinations to establish lists of individuals eligible to hold a County position. The examination was required to be "competitive, free, and open to **all** persons" subject to the authority of the Personnel Board to place limitation as to "age, sex, health, physical condition, moral character and "**performance** of the duties" of the position to be filled.[9] (Emphasis added) The implication

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Mayor and City Council of Baltimore City, 387 Md. 1 (2005).

[6] 1980 Report of the Charter Review Commission, p. 10.

[7] *Id.*

[8] *Id.* at 11.

[9] 1950 County Code, § 150-12 a.

of this provision is clear: consideration of an individual's immutable characteristics that were unrelated to the ability of the applicant to perform the job was not permitted.[10]

The current Charter was approved by the voters in 1968, and created an Executive Branch of government headed by an elected County Executive. The 1948 Charter provisions regarding the personnel system were transplanted "virtually intact" into the 1968 Charter.[11] The County personnel law implementing the 1968 Charter remained largely unchanged from the 1950 personnel law regarding the requirement to use competitive examinations, except that the Code provided, pursuant to the new Charter, that the Chief Administrative Officer would implement the merit system in place of the Personnel Board. The implication regarding the prohibition against considering characteristics of an individual unrelated to the potential to perform job duties found in the 1950 Code was made, at least in part, explicit in the 1972 Code which explicitly prohibited discrimination on the basis of "race, creed, color, or national origin."[12]

The 1972 Code made the County's use of a competitive rating process even more apparent. Section 33-5(l) of the 1972 Code provided "for the appointment, advancement and retention of employees on the basis of merit and fitness to be ascertained in most cases by competitive examination without regard to race, religion or political affiliation." Section 33-10(d) of the 1972 Code provides: "As a general policy, entrance and promotional examinations to establish or re-establish a list of eligible applicants or promotional candidates shall be administered on a competitive basis."

In 1980 the Charter was amended placing more explicit language in the Charter regarding the nature of the merit system. This language, which remains in the current Charter, states,

> The merit system shall provide the means to recruit, select, develop, and maintain an effective, non-partisan, and responsive work force with personnel actions based on demonstrated merit and fitness.

The current Code and personnel practice implements this Charter language through the use of open competition. For example, § 33-5(b)(2) states that "the recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills, including the full and open consideration of qualified applicants for initial appointments."

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[10] That which necessarily is implied in a law is as a much a part of the law as that which is expressed. *Stanford v. Maryland Police Training and Correctional Commission*, 346 Md. 374 (1997).

[11] 1980 Report of the Charter Review Commission, p. 11.

[12] 1972 County Code § 33-9 (i).

Reliance upon a competitive rating process to demonstrate merit and fitness is reflected in current personnel practice. The OHR Director first reviews and evaluates all applications to ensure that each applicant is eligible for the announced vacancy; the OHR Director may disqualify, at any point in the hiring process, an applicant who lacks the required minimum qualifications for the position. Montgomery County Personnel Regulations § 6-4(b) (eff. Oct. 21, 2008) ("MCPR"). Then, "[t]he OHR Director must establish a competitive rating process to create an eligible list for employment or promotion . . . ." MCPR § 6-5(a)[13] The focus of this competitive rating process is to determine the relative merit and fitness of the candidates. MCPR § 6-5(b)(2) states that the competitive rating process must result from a job analysis that documents the knowledges, skills, and abilities required to perform essential functions of the job" and must "assess the employee's ability to perform important aspects of the job."

At the conclusion of the rating process, whether making an initial appointment or a promotion, the OHR director must create an eligible list of qualified applicants "grouped in appropriate rating categories." MCPR § 6-9. The appointing department director must fill a vacant position from an eligible list and, "consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category." MCPR § 7-1(a).

Where a priority eligible list exists, the appointing authority must comply with the priority consideration provisions. MCPR § 7-1(b). A priority eligible list is a list of applicants who have priority consideration. MCPR § 1-55. Priority consideration means consideration of an applicant to a vacant position before others are considered. It does not guarantee that the candidate will be selected. MCPR § 1-54.

Given the long and consistent history of the County merit system's use of competition, we conclude that the Charter intended to establish a personnel system that measures "merit and fitness" though the crucible of competition open to all applicants without regard to personal characteristics unrelated to the performance of the position's duties. There are, however, a few, narrow exceptions to this general rule.

B. The County has permitted the use of a noncompetitive rating process only in narrow circumstances.

The County has historically permitted the use of a noncompetitive rating process only in

[13] The need for a competitive rating process is also reflected in the County's equal employment opportunity and affirmative action program. Code § 33-9(a) states that the County's equal employment opportunity and affirmative action program must "ensure all persons an equal opportunity to enter and progress in the county's service **on the basis of open competition and demonstrated ability**. (Emphasis added.)

narrow circumstances. Section 150-12(b) of the 1950 Code authorized the Personnel Board[14] to "give noncompetitive examinations to test fitness for reinstatement, transfer, or promotion when in the Board's opinion competitive examinations are impractical or undesirable." And while the 1972 Code explicitly favored a competitive rating process, it did allow for noncompetitive examinations where a competitive rating process "would not be practical or in the best interest of the county government and its merit system, (for example only one applicant has applied, unskilled laborer positions, development and maintenance of a career service, etc.)." 1972 Code § 33-10(e).

Current personnel practice restricts the use of a noncompetitive rating process to three situations: (A) creation of an eligible list for appointment or promotion to positions involving unskilled manual labor and for other classes of work if a competitive process is impractical (MCPR § 6-7), (B) promotion of an employee who was demoted as a result of a disability or a reduction-in-force (MCPR § 27-2(b)),[15] and (C) certain priority eligible lists that allow an employee to receive priority consideration for another position at or below the grade level of an employee's prior position where an employee has lost his or her job due to circumstances beyond the employee's control (MCPR § 6-10(a)(1) - (3)). In all cases the employee or applicant must be fit for the position sought.

C. Use of a noncompetitive rating process for individuals based upon a non-merit factor such as disability would violate Charter § 401.

As seen the Personnel Regulations permit the use of a noncompetitive rating process in a limited number of circumstances—specific hard-to-fill job classes or current employees (who already obtained their jobs through a competitive rating process) demoted through no fault of their own. The extension of a noncompetitive rating process to persons based solely upon an immutable non-merit factor such as disability is dissimilar from the existing uses of the noncompetitive process permitted under Charter § 401. The use of a noncompetitive rating process in that manner would require an amendment of Charter § 401.

The noncompetitive rating process permitted under MCPR § 6-7 is limited to certain job classes, it does not extend to persons based solely upon an immutable non-merit factor such as disability. MCPR § 6-7 allows the OHR Director to establish an eligible list for employment or promotion on a noncompetitive basis "for positions involving unskilled manual labor and for other classes of work if a competitive process is impractical." In these cases, all applicants who

[14] The Personnel Board was the forerunner of the Merit Board.

[15] These first two situations are addressed in MCPR 6-5(a): "The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a noncompetitive process is appropriate under Section 6-[7] or 27-2(b) of these Regulations." The regulation incorrectly refers to § 6-6. MCPR § 6-7 deals with noncompetitive promotion.

met the minimum qualifications are certified to the eligible list. This noncompetitive rating process is used only where a competitive process is impractical or (e.g., difficult-to-fill or difficult-to-retain job classes), where further screening or competition among applicants is felt unnecessary. For example, this practice has been applied to jobs that require difficult to obtain degrees or licenses, that have a high turnover rate, or for jobs that have salary requirements that are difficult to meet because of market demand and have very few applicants. The noncompetitive rating list contemplated under this section does not benefit a discrete class of individuals but is intended to facilitate and promote the efficient filling of positions to carry out the mission of the County. And selection from a noncompetitively rated eligible list is still based on demonstrated merit and fitness.

Noncompetitive promotion under MCPR § 27-2(b)(2) is limited to current employees, individuals who already obtained their jobs through a competitive rating process. This provision allows a department director to noncompetitively promote a current employee who was demoted as the result of disability or reduction in force, or who was reclassified or reallocated downward, if the employee is promoted to a position at the same or a lower grade that the employee previously held, meets the job requirements for the position, passes any required physical examination, and applies for the promotion within five years of demotion, reclassification or reallocation. Further, the employee's noncompetitive promotion must be approved by the department director, is the prerogative of management, and denial of a noncompetitive promotion may not be appealed or grieved. In other words, an employee can only be noncompetitively promoted to a position for which the employee is qualified and which is comparable in grade to the position the employee originally achieved through competition and demonstrating merit and fitness.

Lastly, priority consideration through a priority eligible list under MCPR §§ 6-10(a)(1)-(3) is limited to current employees who already obtained their jobs through a competitive rating process but, through no fault of their own, are facing loss of their position. These employees receive priority consideration for positions at or below the grade level of their previous positions. This group is limited to employees who are unable to perform job functions because of disability, employees affected by reduction in force, and former employees no longer eligible for temporary disability retirement.

II. Alternatively, giving disabled individuals in the highest rating category a preference, similar to the veteran's credit, would require amendment of the Code and Personnel Regulations, but not the Charter.

Although the County cannot extend the noncompetitive rating process to persons based solely upon an immutable non-merit factor such as disability, it can place a person with a disability on a priority eligible list for job applicants, if that person is in the highest rating category after a competitive rating process. This approach is akin to the veteran's credit provided

by MCPR §§ 6-10(a)(4) & 6-12. However, the veteran's preference is mandated by state law. To provide for giving a disabled preference, this office believes that the Council would have to amend Code § 33-9, in addition to the personnel regulations.

The current Code prohibits the placement of a job applicant on a priority eligibility list based solely on the applicant's membership in a group with an immutable characteristic, e.g., race, sex, or disability.[16] Code § 33-9(a) provides in pertinent part:

> The county's policy shall be to take all personnel actions on the basis of merit and fitness without regard to political affiliation or non-merit factors, and without regard to other factors as may be provided for in chapter 27, "Human Relations and Civil Liberties," such as sex, marital status, race, religion, national origin, age or handicap.[17]

Thus, placement of a job applicant on a priority eligibility list solely on the basis of disability would violate the County's own equal employment opportunity statute. This section of the law must be amended to allow the personnel regulations to provide for priority based upon disability.[18]

No charter amendment is required to place persons with a disability on a priority eligible list because the personnel regulations would still require those persons with a disability to compete and demonstrate merit and fitness. Preference statutes such as veteran's acts usually contemplate a competitive process and do not deprive the appointing authority of the ability to judge the relative qualifications of the applicants.[19] As noted earlier, a department director is

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[16] The availability of priority consideration through a priority eligible list for current employees who are disabled satisfies the County's duty of reasonable accommodation under the ADA and therefore does not violate § 33-9(a). *See Scott v. Montgomery County*, 164 F. Supp. 2d 502, 508 (D. Md. 2001) (provision in collective bargaining agreement policy restricting priority consideration to positions at or below employee's current grade meets ADA requirement of reasonable accommodation).

[17] Code § 33-5(b)(6) similarly provides: "All applicants to and employees of the county merit system shall be assured fair treatment without regard to political affiliation or other non-merit factors in all aspects of personnel administration." *See also* MCPR § 5-2(b)(2), which provides that the County must "conduct all employment activities in a manner that ensures equal employment opportunity for all persons without regard to race, color, religion, national origin, ancestry, sex, marital status, age, disability, sexual orientation, or genetic status . . ."

[18] There is no need to amend the County's anti-discrimination law. Recent amendments to the ADA's rules of construction clarify that a non-disabled person may not make a claim of "reverse disability discrimination." "Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability." Pub. Law 110-325, to be codified at 42 U.S.C. § 12201(g) (eff. Jan 1, 2009).

[19] McQuillin, Mun. Corp. § 12.82 (3rd Ed.) (citations omitted); *Cassidy v. Municipal Civil Service Commission of the City of New Rochelle*, 37 N.Y.2d 526 (1975). Laws providing preference to veterans have been

allowed to select anyone in the highest rating category, pursuant to MCPR § 7-1(a). Where a priority eligibility list exists, the appointing authority must comply with the priority consideration provisions. MCPR § 7-1(b).

As previously discussed, the County has permitted the use of a noncompetitive rating process where a competitive process would not be practical so long as the applicant meets the minimum qualifications for the job.[20] For example, an eligible list may be created to fill a position that requires unskilled manual labor without using the competitive rating process; or a noncompetitive eligible list may be created for employees who have lost a County job due to circumstances beyond the employee's control—*e.g.* a reduction-in-force. In those situations where a noncompetitive process would otherwise be permitted, an individual with a disability could be accorded a priority placement preference without having undergone a competitive rating process.

A disability preference similar to the veteran's preference triggers an Equal Protection analysis because people with disabilities would be treated differently than other persons.

III. Since no suspect class is involved, the County need only have a rationale basis for a law which treats individuals with a disability differently.

If the Council chooses to pursue a priority eligible list based upon disability preference, the resulting legislation would create statutory classifications as to County job applicants and employees seeking promotion: those who have a disability and those who do not. The question, then, is whether such a statutory distinction violates the right to equal protection, as guaranteed by the federal and state constitutions.[21]

In reviewing classifications challenged under equal protection guarantees, the court considers the three standards: (1) strict scrutiny, (2) intermediate scrutiny (also been referred to as "heightened scrutiny"), and (3) rational basis. *Jackson v. Dackman*, 181 Md. App. 546, 569, 956 A.2d 861, 874-75 (2008).

First, equal protection analysis requires strict scrutiny of a legislative

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sustained as constitutional. *See Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979), *Keim v. United States*, 177 U.S. 290 (1900).

[20] *See* Subsection I. B., above.

[21] Although the Maryland Constitution lacks an express Equal Protection Clause, Maryland courts have long held that the state's Due Process Clause embodies the concept of equal protection to the same extent as the federal Equal Protection Clause. Because of this, Maryland courts regard federal court equal protection decisions as "practically direct authorities" with regard to the state. *Jackson v. Dackman*, 181 Md. App. 546, 569, 956 A.2d 861, 874-75 (2008).

classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Laws which are subject to this demanding review violate the *equal protection clause* unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.

Second, classifications which have been subjected to a higher degree of scrutiny than the traditional and deferential rational basis test, but which have not been deemed to involve suspect classes or fundamental rights and thus have not been subjected to the strict scrutiny test, are reviewed under intermediate scrutiny. In order to be sustained, this type of classification must serve important governmental objectives and must be substantially related to achievement of those objectives. There is no brightline diagnostic, enunciated by either the Court of Appeals or the U.S. Supreme Court, by which a suspect or quasi-suspect class may be recognized readily. The Court of Appeals, however, has adopted criteria used by the Supreme Court in assessing claims of a new suspect or quasi-suspect classification. They are as follows:

> (1) whether the group of people disadvantaged by a statute display a readily-recognizable, obvious, immutable, or distinguishing characteristics that define the group as a discrete and insular minority;
>
> (2) whether the impacted group is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process; and
>
> (3) whether the class of people singled out is subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities to contribute meaningfully to society.

Third, in most instances when a governmental classification is attacked on equal protection grounds, the classification is reviewed under the rational basis test. Generally under that test, a court will not overturn the classification unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the governmental actions were irrational. The Supreme Court, in applying this test, has been willing to uphold the constitutionality of an enactment

when 'any state of facts reasonably maybe conceived to justify it.

Jackson v. Dackman, 181 Md. App. at 570-71, 956 A.2d at 875-76 (internal citations and quotations omitted; emphasis in original).

In this case, the two classifications are individuals with a disability seeking appointment or promotion with the County and individuals without a disability seeking appointment or promotion. The Supreme Court has held that the disabled are not a suspect or quasi-suspect class entitled to special protection under the Equal Protection Clause. See *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 442-47, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (concluding that mentally disabled individuals are not a suspect or quasi-suspect class); *Brown v. N.C. Div. of Motor Vehicles*, 166 F. 3d 698, 706 (4th Cir. 1999) (extending *Cleburne* to all disabled individuals). In any event, the legislation to either provide a special hiring authority or a disabled preference benefits rather than burdens people with disabilities.

Looking to the other classification, non-disabled individuals, strict scrutiny would not be proper because legislation providing either a special hiring authority or a disabled preference would neither interfere with a fundamental right nor does it operate to the peculiar disadvantage of a suspect class. First, the Supreme Court's decisions give no support to the proposition that governmental employment is per se a fundamental right. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S. Ct. 2562, 2566-67, 49 L. Ed. 2d 520 (1976). Further, suspect classifications are those based on race or national origin. United States v. Virginia, 518 U.S. 515, 532-35, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Such is not the case here.

Intermediate or heightened scrutiny would also not be appropriate because non-disabled individuals seeking appointment or promotion in the County are also not a quasi-suspect class. The class of non-disabled individuals seeking appointment or promotion using the criteria used by the Supreme Court and adopted by the Maryland Court of Appeals in assessing claims of a new suspect or quasi-suspect classification, described *supra*, fails to show that this classification is quasi-suspect. First, this class does not display "readily-recognizable, obvious, immutable, or distinguishing characteristics that define the group as a discrete and insular minority. In fact, this class is very diverse as to age, sex, race, national origin and other characteristics. Second, this class has been saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection. Finally, this class is not subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities to contribute meaningfully to society. Non-disabled individuals seeking appointment or promotion in the County are neither a suspect class, warranting strict scrutiny, nor a quasi-suspect class, warranting intermediate or heightened scrutiny.

Because strict and intermediate scrutiny are not appropriate in this case, we apply the

rational basis standard of review.

Several Supreme Court cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently, and have applied the rational basis test in each case. *See*, e.g., *New York City Transit Authority v. Beazer*, 440 U.S. 568, 593, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979) (upholding city's exclusion of methadone users from employment under rational-basis review); *Harrah Independent School District v. Martin*, 440 U.S. 194, 199-201, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979) (classification between teachers who had complied with a continuing-education requirement and those who had not is rational and does not violate the Equal Protection Clause); *Massachusetts Board of Retirement v.Murgia*, 427 U.S. 307, 314-317, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976)(upholding a mandatory retirement age--a classification based on age--under rational-basis review).

"Legislative classifications are valid unless they bear no rational relationship to the State's objectives." *Murgia*, 427 U.S. 307, 314, 96 S. Ct. 2562, 49 L. Ed. 2d 520. '[W]here rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' Id. (citation omitted). "The School Board's rule is endowed with a presumption of legislative validity, and the burden is on respondent to show that there is no rational connection between the Board's action and its conceded interest in providing its students with competent, well-trained teachers." *Martin*, 440 U.S. at198, 99 S. Ct. 1062, 59 L. Ed. 2d 248.

Under the rational basis standard, legislation either creating a special hiring authority for the disabled or providing for a disabled preference would not be overturned unless the varying treatment of the two groups, disabled and non-disabled, is so unrelated to legitimate governmental purposes as to be irrational. In this case, the rational basis for a statute permitting different treatment of the two groups is Montgomery County's interest in fostering a more diverse work force by encouraging employment of people with disabilities. Therefore, it is this office's opinion that such legislation would not violate equal protection.

CONCLUSON

The Charter, Code, and personnel regulations require that the County engage in a competitive rating process to determine an individual's merit and fitness for a merit system position. Although these laws countenance a noncompetitive rating process in certain limited circumstances—specific hard-to-fill job classes or current employees (who already obtained their jobs through a competitive rating process) demoted through no fault of their own—those circumstances are dissimilar from the program proposed presented here—noncompetitive hiring of an applicant based solely upon the applicant's disability status. But the County could amend the Code and personnel regulations to provide for placement on a priority eligible list for a

person with a disability, if that person is in the highest rating category after a competitive rating process (or meets minimum job qualifications if a noncompetitive process is otherwise authorized).

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noncompetitive hiring of disabled person (MPH, EBL2)
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