

**MEMORANDUM**

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Public Hearing:** Bill 45-10, Personnel – Disability Retirement – Eligibility – Total and Partial Incapacity

Expedited Bill 45-10, Personnel – Disability Retirement – Eligibility – Total and Partial Incapacity, sponsored by Councilmembers Trachtenberg, Andrews, Berliner, and Council Vice President Ervin, was introduced on July 27, 2010. A joint Public Safety/Management and Fiscal Policy Committee worksession is tentatively scheduled for October 4 at 9:30 a.m.

**Background**

Bill 45-10 would create a two-tier service-connected disability retirement system for all County employees identical to the current system for fire and rescue employees. Employees eligible for a service-connected disability retirement benefit would receive either a partial incapacity benefit of at least 52 ½% of final earnings or a total incapacity benefit of at least 70% of final earnings. The current system for all employees, except fire and rescue employees, provides a service-connected disability retirement benefit of at least 66 ⅔% of final earnings for both partial and total incapacity.

An employee would be eligible for a total incapacity benefit if the employee was unable to perform any substantial gainful activity because of an impairment that is unlikely to resolve in the next 12 months and may be permanent. An employee would be eligible for a partial incapacity benefit if the impairment prevents the employee from performing one or more of the essential functions of the employee's position, but does not prevent the employee from performing any other substantial gainful activity.

The Council enacted amendments to the disability retirement system in Bill 37-08 on May 12, 2009. One of the amendments in the Bill as introduced, but not enacted, was to extend the two-tier system for service-connected disability benefits to all public safety employees. At the Council's request last year, the Office of Human Resources provided information on the County's experience with this two-tier system for fire and rescue employees. As of May 2009, only 10 of the 67 fire and rescue employees who received a service-connected disability retirement since the two-tier system began in 2000 were awarded the higher 70% benefit.

Therefore, 85% of the awards were at the lower 52 ½% level. The County's actuary, Mercer, estimated the annual savings to the County's retirement contribution for extending the two-tier system to Group F (Police) to be more than \$1.5 million based upon an assumption that 60% of the disability retirements would be at the lower level. A copy of Mercer's January 2009 letter is at ©17-21. If the Group G (Fire and Rescue) experience is carried over to all employees, the actuary estimated the annual savings would be more than \$2.7 million.

The Bill would also prohibit the award of a service-connected disability pension to an employee who "has committed an offense that would justify removal for cause." This provision was also included in Bill 37-08, as introduced, but not enacted in the final version of the Bill.

### Legal Issue

The Office of the County Attorney (OCA) provided a bill review memorandum dated September 17. See ©22-25. The OCA raises concern about the effective date of the Bill. The OCA believes that the Bill's creation of a partial disability benefit may be struck down as a substantial impairment of a contract in violation of the Contracts Clause of the United States Constitution. The OCA recommends avoiding this issue by amending the effective date of the Bill to apply to injuries sustained after the effective date of the Bill and after the terms of the current collective bargaining agreements with the FOP and MCGEO expire. The OCA opinion acknowledges that this question is unsettled and advises that delaying the effective date would be the most conservative approach.

Council staff disagrees with some of these conclusions. In *Robert T. Foley Co. v. W.S.S.C.*, 283 Md. 140, 151-152 (1978), the Maryland Court of Appeals set the framework to determine if government action unconstitutionally impairs contractual obligations:

Consideration of a claim that particular governmental action invalidly impairs contractual obligations involves several steps. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17-21, 97 S. Ct. 1505, 52 L.Ed.2d 92 (1977). First, it must be determined whether a contract existed. If that hurdle is successfully cleared by the claimant, a court next must decide whether an obligation under that contract was changed. Finally, if the second question is answered in the affirmative, the issue becomes whether the change unconstitutionally impairs the contract obligation, "[f]or it is not every modification of a contractual promise that impairs the obligation of contract under federal law . . . .

In *Bd. of Trustees. v. Mayor & City Council of Baltimore City*, 317 Md. 72, 100 (1989), the Maryland Court of Appeals held that "under Maryland law, pension plans create contractual duties toward persons with *vested* rights under the plans." (*emphasis added*) As to when an employee's right to a disability pension vests, the Maryland courts have held that a public employee's right to a disability pension does not vest until the employee satisfies the conditions necessary to receive the benefit. This would include the injury, a determination that the employee is no longer able to perform the duties of the position, and an application for benefits. See *Davis v. City of Annapolis*, 98 Md. App. 707 (1994); *Saxton v. Bd. of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore*, 266 Md. 690 (1972). As the

OCA opinion points out, the decisions in *Davis* and *Saxton* both rely on the date of injury as the time of vesting. However, neither case raised the issue of whether an employee must satisfy other conditions for a disability pension before vesting. It is, therefore, difficult to predict how a Court would rule on this issue.

Even if an employee's rights have vested at the time of injury, every modification of a contract does not result in an unconstitutional impairment. The legislative body always retains the right to make reasonable modifications to vested rights for an important public purpose. In this case, the sustainability of the retirement system is an important public purpose.<sup>1</sup> In addition, the Bill creates a lower partial incapacity benefit, but also raises the minimum benefit for total incapacity.

The OCA also raised a concern that the collective bargaining agreements may create a contractual bar to implementing the Bill during the terms of the existing agreements. The OCA argued that the Council's ratification of the collective bargaining agreements containing provisions where the union and the Executive agreed to submit legislation to the Council establishing the current disability retirement system created a contractual right that is subject to the Contracts Clause. Although the OCA agreed that a reviewing Court may find the reforms in the Bill to be reasonable and necessary, and therefore a permissible impairment of the collective bargaining contracts, they recommend avoiding the issue by amending the effective date of the Bill to coincide with the end of the current collective bargaining agreements. The MCGEO agreement expires in 2011 and the FOP agreement expires in 2012.

Council staff disagrees with this analysis because it misconstrues the role of the Council in the collective bargaining process. The Council did not generally ratify these collective bargaining agreements. Under each agreement, the union and the Executive agreed to submit proposed legislation to the Council, which was ultimately enacted. All disability rights are created by the law, not the collective bargaining agreement. The enactment of a disability law by the Council in the 1990's cannot prevent the current Council from exercising its plenary legislative authority to amend that law.

<u>This packet contains:</u>	<u>Circle #</u>
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<sup>1</sup> The OCA opinion does not predict whether a Court would find that the creation of a partial disability benefit is a reasonable modification to a vested right for an important public purpose.

Bill No. 45-10  
Concerning: Personnel — Disability  
Retirement - Eligibility - Total and  
Partial Incapacity  
Revised: July 28, 2010 Draft No. 6  
Introduced: July 27, 2010  
Expires: January 27, 2012  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch.     , Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Councilmembers Trachtenberg, Andrews, Berliner, and Council Vice President Ervin

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**AN ACT** to:

- (1) create a partial incapacity disability retirement benefit for certain employees;
- (2) create a total incapacity disability retirement benefit for certain employees;
- (3) prohibit an employee who commits certain offenses from receiving a service connected disability retirement benefit; and
- (4) generally amend County law regarding disability retirement.

By amending

Montgomery County Code  
Chapter 33, Personnel and Human Resources  
Sections 33-43, 33-128, 33-129, and 33-131

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

*The County Council for Montgomery County, Maryland approves the following Act:*



- 27 or an occupational disease incurred or condition  
 28 aggravated, while in the actual performance of duty;
- 29 (B) the incapacity is not due to the member's willful  
 30 negligence;
- 31 (C) the incapacity is likely to be permanent; [and]
- 32 (D) the member is unable to perform the duties of either:
- 33 (i) the occupational classification to which the  
 34 member was assigned [at the time] when the  
 35 disability occurred; or
- 36 (ii) a position of comparable status [within] in the  
 37 same department for which the member is  
 38 qualified; and[.]
- 39 (E) the member has not committed an offense that would  
 40 justify removal for cause.
- 41 (F) For an accidental injury that does not cause mental  
 42 impairment, the member must:
- 43 (i) [reports] report the claimed accidental injury as  
 44 soon as practicable, but no later than one year after  
 45 the applicant knew or should have known that the  
 46 injury is likely to be disabling; or
- 47 (ii) [submits] submit a claim for Workers'  
 48 Compensation benefits for the accidental injury  
 49 that is not dismissed as untimely.
- 50 [(F)] (G) The time periods for reporting in subparagraphs (i)  
 51 and (ii) do not begin while the member is unable to report  
 52 because of incapacitating injuries.



80 the County must pay a Group G member who retires on a  
81 service-connected disability retirement between June 26, 2002,  
82 and June 30, 2007, a pension based on the member's average  
83 final earnings if that member's average final earnings result in a  
84 greater benefit than final earnings.

85 (3) [The County must pay a Group G member who retires on a  
86 service-connected disability retirement an annual pension  
87 calculated under Section 33-42(b)(1), but the benefit must be at  
88 least 70 percent of final earnings if the Chief Administrative  
89 Officer finds, based on a recommendation from the Disability  
90 Review Panel, that] The Disability Review Panel must  
91 recommend a finding of total incapacity if the member's  
92 service-connected disability is severe enough to meet the Social  
93 Security Administration's requirements for disability, meaning  
94 that the member is unable to engage in any substantial gainful  
95 activity because of a medically determinable physical or mental  
96 impairment that can be expected to end in death or has lasted,  
97 or can be expected to last, for a continuous period of at least 12  
98 months. The member does not have to qualify for Social  
99 Security disability benefits to be eligible for benefits under this  
100 subsection.

101 (A) The Panel must base its determination of whether [or not]  
102 an individual is able to engage in any substantial gainful  
103 activity on an assessment from an independent vocational  
104 expert that considers the member's age, education, work  
105 experience, transferable skills, and residual functional  
106 capacity.

- 107 (B) The Panel must determine the member's residual  
108 functional capacity and provide this information to the  
109 independent vocational expert.
- 110 (C) A Panel determination that the member's service-  
111 connected disability is severe enough to be considered a  
112 disability by the Social Security Administration is not a  
113 recommendation that the member is entitled to, or should  
114 be granted, a disability benefit by the Social Security  
115 Administration.
- 116 (D) If a member has already been granted disability benefits  
117 by the [U.S.] Social Security Administration when the  
118 member applies for a service-connected disability  
119 pension, the County must pay the member a pension of at  
120 least 70% [percent] if the Disability Review Panel finds  
121 that the award of disability benefits from the Social  
122 Security Administration was based primarily on the same  
123 medically determinable physical or mental impairment  
124 on which the Disability Review Panel awards the  
125 member a service-connected disability benefit.
- 126 (4) The County must pay a [Group G] member who retires with  
127 partial incapacity on a service-connected disability retirement  
128 an annual pension calculated under Section 33-42(b)(1), but the  
129 benefit must be at least 52½ % [percent] of final earnings if the  
130 Chief Administrative Officer finds, based on a recommendation  
131 from the Disability Review Panel, that:
- 132 (A) the member meets the standards to receive a service-  
133 connected disability benefit under subsection (f); and

- 134 (B) the member is not eligible to receive a benefit for total  
135 incapacity under subsection (i)(3).
- 136 (5) (A) The County must increase the partial incapacity service-  
137 connected disability pension benefit of a [Group G]  
138 member calculated under Section 33-42(b)(1), from a  
139 benefit of at least 52 ½ % [percent] to a benefit of at least  
140 70 % [percent], if:
- 141 (i) the [U.S.] Social Security Administration awards  
142 disability benefits to the member;
- 143 (ii) the member submits all relevant information about  
144 the award of disability benefits from the Social  
145 Security Administration to the Disability Review  
146 Panel within 60 days after the member receives the  
147 award;
- 148 (iii) the Disability Review Panel finds that the award of  
149 disability benefits from the Social Security  
150 Administration was based primarily on the same  
151 medically determinable physical or mental  
152 impairment on which the Disability Review Panel  
153 originally awarded the member a service-  
154 connected disability benefit; and
- 155 [(a)] (iv) the member applies for disability benefits with  
156 the Social Security Administration within 90 days  
157 after the [date on which the] Chief Administrative  
158 Officer notified the member that the [amount of  
159 the] service-connected disability pension benefit  
160 would be calculated [under Section 33-42(b)(1),

161 but at least 52 ½ percent; or] as a partial  
 162 incapacity.

163 [(b) the Chief Administrative Officer awards a service-  
 164 connected disability pension benefit calculated  
 165 under Section (b)(1), but at least 52 ½ percent to  
 166 the member between March 1, 2000, and  
 167 December 1, 2003, and the member applies for  
 168 disability benefits with the Social Security  
 169 Administration no later than February 29, 2004.]

170 (B) [For] If a member [who] qualifies for an increased  
 171 pension benefit under [subsection (5)] subparagraph (A)  
 172 [above], the County must increase the member's service-  
 173 connected pension retroactively to the date [on which]  
 174 when the pension began.

175 \* \* \*

176 (7) The County must pay a Group F member who retires on a  
 177 service-connected disability retirement on or after June 26,  
 178 2002, an annual pension calculated under subsection (i) (1) or  
 179 subsection (i) (4). However, if [the] a greater benefit results  
 180 from the calculation under Section 33-42(b)(1), the County  
 181 must pay a Group F member a pension based on the member's  
 182 average final earnings if that member's average final earnings  
 183 result in a greater benefit than final earnings.

184 (j) *Adjustment or cessation of disability pension payments.*

185 (1) If a member receiving service-connected disability pension  
 186 payments reaches the first day of the month [following] after  
 187 the member's normal retirement date, the amount of pension

188 then payable must not be less than the amount that would have  
 189 been payable under [the provisions of] Section 33-45(c)[,] if the  
 190 member had terminated service [on] when the [date] disability  
 191 pension [commenced] began and had not elected a return of  
 192 member contributions with credited interest.

193 (2) (A) The Chief Administrative Officer may reduce the amount  
 194 of the disability pension payments of a member retired  
 195 with total incapacity who:

- 196 (i) has not reached the normal retirement date; and  
 197 (ii) is engaged in, or is able to engage in, an  
 198 occupation that pays more than the difference  
 199 between the disability pension payments and the  
 200 current maximum earnings of the occupational  
 201 classification from which the member was  
 202 disabled.

203 (B) If a member other than a Group F member meets the  
 204 criteria in subparagraph (A), the Chief Administrative  
 205 Officer may reduce the member's disability pension  
 206 payments until the disability pension payments plus the  
 207 amount that the employee earned or is able to earn equals  
 208 the maximum earnings of the occupational class from  
 209 which the member was disabled.

210 \* \* \*

211 (3) If the earnings capacity of a disability retiree with a total  
 212 incapacity changes, the Chief Administrative Officer may  
 213 change the amount of the disability retirement pension. [For  
 214 the purpose of] In this subsection, "disability pension" is the

215 amount of pension payable without election of a pension  
 216 payment option.

217 (A) For a disability retiree other than a group F member, the  
 218 Chief Administrative Officer must ensure that the amount  
 219 of the revised pension does not exceed:

- 220 (i) the original disability retirement pension plus cost-  
 221 of-living increases; or
- 222 (ii) an amount that, when added to the amount the  
 223 member earns or is able to earn, equals the  
 224 maximum earnings of the occupational  
 225 classification from which the member was  
 226 disabled.

227 (B) For a Group F member who receives a non-service  
 228 connected disability pension, the Chief Administrative  
 229 Officer must ensure that the amount of the revised  
 230 pension must not exceed:

- 231 (i) the original disability retirement pension plus cost-  
 232 of-living increases; or
- 233 (ii) an amount that, when added to the amount that the  
 234 member earns or is able to earn, equals 120 percent  
 235 of the maximum earnings of the occupational  
 236 classification from which the member was  
 237 disabled.

238 (4) A member who receives a disability retirement pension for a  
 239 total incapacity must submit to the Chief Administrative Officer  
 240 by May 30 of each year a copy of that portion of the member's  
 241 federal income tax return which shows the member's income.

242 If a member [receiving] who receives disability pension  
 243 payments [fails or refuses to] does not supply the Chief  
 244 Administrative Officer [whatever] any information [is  
 245 determined necessary] the Chief Administrative Officer needs  
 246 to [make a decision on] decide the amount of retirement pay  
 247 legally due, the Chief Administrative Officer must suspend the  
 248 member's pension payments [must be discontinued] until the  
 249 member submits the [requested] needed information.

250 \* \* \*

251 **33-128. Definitions.**

252 In this Division, the following words and phrases have the following  
 253 meanings:

254 \* \* \*

255 Partial incapacity means a member's inability to perform one or more  
 256 essential functions of the position the member holds because of  
 257 impairment that;

- 258 (1) is unlikely to resolve in the next 12 months;
- 259 (2) may be permanent; and
- 260 (3) does not prevent the member from performing any other  
 261 substantial gainful activity.

262 \* \* \*

263 Residual functional capacity means what the individual can still do,  
 264 despite the individual's impairment. The County must give the term  
 265 residual functional capacity the same meaning as the term is given by  
 266 the Social Security Administration.

267 Substantial gainful activity means a level of productive work that  
 268 requires significant physical or mental duties, or a combination of

269 both, performed for pay or profit on a full- time or part-time basis. An  
 270 individual is able to perform a substantial level of work if the  
 271 individual is able to earn more than the Social Security  
 272 Administration’s current monthly earnings limit for a disabled person.  
 273 The County must give the term substantial gainful activity the same  
 274 meaning as the term is given by the Social Security Administration.

275 Total Incapacity means the member’s inability to perform substantial  
 276 gainful activity because of an impairment that;

- 277 (1) is unlikely to resolve in the next 12 months; and
- 278 (2) may be permanent.

279 **33-129. Disability benefits.**

280 \* \* \*

281 (f) The Disability Review Panel must recommend a finding of total  
 282 incapacity if the member's service-connected disability is severe  
 283 enough to meet the Social Security Administration's requirements for  
 284 disability, meaning that the member is unable to engage in any  
 285 substantial gainful activity because of a medically determinable  
 286 physical or mental impairment that can be expected to end in death or  
 287 has lasted, or can be expected to last, for a continuous period of at  
 288 least 12 months. The member does not have to qualify for Social  
 289 Security disability benefits to be eligible for benefits under this  
 290 subsection.

- 291 (1) The Panel must base its determination of whether an individual  
 292 is able to engage in any substantial gainful activity on an  
 293 assessment from an independent vocational expert that  
 294 considers the member's age, education, work experience,  
 295 transferable skills, and residual functional capacity.

- 296           (2) The Panel must determine the member's residual functional  
 297           capacity and provide this information to the independent  
 298           vocational expert.
- 299           (3) A Panel determination that the member's service-connected  
 300           disability is severe enough to be considered a disability by the  
 301           Social Security Administration is not a recommendation that  
 302           the member is entitled to, or should be granted, a disability  
 303           benefit by the Social Security Administration.
- 304           (4) If a member has already been granted disability benefits by the  
 305           Social Security Administration when the member applies for a  
 306           service-connected disability pension, the County must give the  
 307           member a total incapacity benefit if the Disability Review Panel  
 308           finds that the award of disability benefits from the Social  
 309           Security Administration was based primarily on the same  
 310           medically determinable physical or mental impairment on  
 311           which the Disability Review Panel awards the member a  
 312           service-connected disability benefit.
- 313           (g) The Disability Review Panel must recommend a finding of partial  
 314           incapacity if:
- 315               (1) the member meets the standards to receive a service-connected  
 316               disability benefit; and
- 317               (2) the member is not eligible to receive a benefit for total  
 318               incapacity under subsection (f).
- 319           (h) The County must increase the partial incapacity service-connected  
 320           disability pension benefit of a member to a total incapacity benefit if:
- 321               (1) the Social Security Administration awards disability benefits to  
 322               the member;

- 323           (2) the member submits all relevant information about the award of  
 324           disability benefits from the Social Security Administration to  
 325           the Disability Review Panel within 60 days after the member  
 326           receives the award;
- 327           (3) the Disability Review Panel finds that the award of disability  
 328           benefits from the Social Security Administration was based  
 329           primarily on the same medically determinable physical or  
 330           mental impairment on which the Disability Review Panel  
 331           originally awarded the member a service-connected disability  
 332           benefit; and
- 333           (4) the member applies for disability benefits with the Social  
 334           Security Administration within 90 days after the Chief  
 335           Administrative Officer notified the member that the service-  
 336           connected disability pension benefit would be calculated as a  
 337           partial incapacity.
- 338           (5) If a member qualifies for an increased pension benefit under  
 339           subsection (h), the County must increase the member's service-  
 340           connected pension retroactively to the date when the pension  
 341           began.

342           (i) *Role of the Disability Review Panel.*

- 343           (1) The Disability Review Panel must consider an application for  
 344           disability benefits to determine if the applicant is eligible for  
 345           disability benefits under subsection (a), (b), (c), (d), [or] (e), (f),  
 346           (g), or (h). The Panel may consider any information or material  
 347           submitted by the applicant, the certified representative, or the  
 348           County. Within 60 days after the application is filed, the Panel  
 349           must meet in person, by telephone conference, or by video

350 conference, to review all evidence submitted to the Panel. [An  
351 action by the Panel under this Section requires a majority vote of  
352 3] A Panel must include either 2 or 3 members. At least 2  
353 members must vote in favor of a decision to take any action  
354 under this Section.

355 \* \* \*

356 **33-131. Amount of benefits.**

357 (a) *Service-connected disability.* The annual amount of service-connected  
358 disability payments payable for total incapacity equals [66 2/3  
359 percent] 70% of the employee's final earnings, less any reductions  
360 provided in section 33-134. The annual amount of service-connected  
361 disability payments payable for partial incapacity equals 52½ % of the  
362 employee's final earnings.

363 \* \* \*

364 **Sec. 2. Implementation.** Notwithstanding any other provision of law,  
365 including §33-80(a)(7) and §33-107(a)(7), the implementation of any amendment  
366 to County Code Chapter 33 in Section 1 of this Act concerning disability  
367 retirement is not subject to collective bargaining with a certified representative of  
368 employees in any bargaining unit.

369 **Sec. 3. Effective Date.** The amendments to County Code Chapter 33  
370 made in Section 1 of this Act apply to any application for disability retirement filed  
371 on or after the date this Act takes effect.

372 *Approved:*

373

374

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Nancy Floreen, President, County Council

Date

## LEGISLATIVE REQUEST REPORT

Bill 45-10

Personnel - Disability Retirement – Eligibility - Total and Partial Incapacity

**DESCRIPTION:** The Bill would create a two-tier service-connected disability retirement system for most employees consisting of a partial incapacity disability retirement benefit and a total incapacity disability retirement benefit. The Bill would also prohibit an employee who commits certain offenses from receiving a service connected disability retirement benefit, and generally amend County law regarding disability retirement.

**PROBLEM:** The current system provides the same service-connected disability retirement benefit for both partial and total incapacity for all employees except fire and rescue employees. This Bill would create the same two-tier system that fire employees have for all others. The Bill would also eliminate the right to a service-connected disability benefit for an employee who has committed an offense that would justify removal for cause.

**GOALS AND OBJECTIVES:** To provide a two-tier service-connected disability retirement system for all employees and to prevent an employee from avoiding a termination for cause by applying for a service-connected disability retirement benefit.

**COORDINATION:** Office of Human Resources, County Attorney

**FISCAL IMPACT:** To be requested.

**ECONOMIC IMPACT:** To be requested.

**EVALUATION:** To be requested.

**EXPERIENCE ELSEWHERE:** To be researched.

**SOURCE OF INFORMATION:** Robert H. Drummer, Senior Legislative Attorney

**APPLICATION WITHIN MUNICIPALITIES:** NA

**PENALTIES:** NA

# MERCER



MARSH MERCER KROLL  
GUY CARPENTER OLIVER WYMAN

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Washington, DC 20037  
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January 9, 2009

Ms. Belinda Fulco  
Office of Human Resources  
Montgomery County Government  
101 Monroe Street, Seventh Floor  
Rockville, MD 20850-2589

## **Via Electronic Mail**

**Subject:** New Legislation Proposal on Disability Provisions for ERS

Dear Belinda:

This letter summarizes cost estimates for proposed disability provisions affecting group A, E, F, G and H of the Montgomery County Employees' Retirement System (ERS).

The estimates are based on the July 1, 2008 actuarial valuation data. The actuarial assumptions and methods are the same as those used in our July 1, 2008 actuarial valuation report unless otherwise noted. Actual costs will depend on the actual data and experience of the plan. The benefit changes are assumed to apply only to active ERS members, not to retirees or terminated vested members. We have projected all costs from the July 1, 2008 valuation date to an assumed effective date of July 1, 2009 using standard actuarial approximation techniques. By cost, we mean the increase in Normal Cost and an amortization of any changes in unfunded liability. Cost will change over time as experience develops.

Any pay increases due to an increase in covered positions that result in 2009 valuation pay exceeding the 2008 valuation pay by more than 4% will result in the County's FY2010 or FY2011 costs exceeding those implied by the figures shown below.

## **Description of Proposed Plan Provision Changes**

- The service-connected disability retirement benefit amount for groups A, E, F, G and H is:
  1. For total incapacity: The greater of the accrued benefit or 70% of final earnings.
  2. For all other disability, the greater of the accrued benefit or 52.5% of final earnings. If the member meets the definition of Social Security disability, the minimum benefit is 70% of final earnings.
- A new approval board will be created by the County to review all disability claims.

# MERCER



MARSH MERCER KROLL  
GUY CARPENTER OLIVER WYMAN

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Montgomery County Government

- The non-service-connected disability retirement benefit amount and other plan provisions are the same as described in our July 1, 2008 valuation.

## **Actuarial Assumptions**

Assumption used are as follows:

- The disability rates described in the July 1, 2008 valuation report have decreased by 2% to reflect the anticipated change in disability rates due to the new disability approval process.
- For groups E and F, 90% of disabilities are still assumed to be service-connected. However 63% of disabilities are assumed to collect the 52.5% benefit, and 27% are assumed to take the 70% benefit.
- For groups A and H, 45% of disabilities are still assumed to be service-connected. However 22.5% of disabilities are assumed to collect the 52.5% benefit, and 22.5% are assumed to take the 70% benefit.
- For group G, 93% of disabilities are still assumed to be service-connected. And 62% of disabilities are assumed to collect the 52.5% benefit, 26% are assumed to take the 70% benefit and 5% are assumed to take another job (valued by reducing the disability decrement by 5%).
- All other assumptions are the same as those used in the July 1, 2008 valuation.
- Per your request, we also estimated the impact on groups E and F based on the following assumptions:
  - Scenario 1- 60% of disabilities would receive the 52.5% benefit and 30% would receive the 70% benefit.
  - Scenario 2- 30% of disabilities would receive the 52.5% benefit and 60% would receive the 70% benefit.

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## Estimated Costs of Proposed Changes

### Annual Savings using 40-year amortization

	For represented and non-represented members	For represented members only
Group A	\$(98,000)	\$0
Group E	\$(895,000)	\$(808,000)
Group F	\$(1,594,000)	\$(1,534,000)
Group G	\$(58,000)	\$(57,000)
Group H	\$(126,000)	\$(126,000)
All groups	\$(2,771,000)	\$(2,526,000)

*Numbers may not add up due to rounding.*

### Annual Savings using 30-year amortization

	For represented and non-represented members	For represented members only
Group A	\$(102,000)	\$0
Group E	\$(928,000)	\$(838,000)
Group F	\$(1,652,000)	\$(1,590,000)
Group G	\$(61,000)	\$(60,000)
Group H	\$(132,000)	\$(132,000)
All groups	\$(2,875,000)	\$(2,619,000)

*Numbers may not add up due to rounding.*

### Decrease in Actuarial Accrued Liability

	For represented and non-represented members	For represented members only
Group A	\$(877,000)	\$(3,000)
Group E	\$(7,315,000)	\$(6,543,000)
Group F	\$(12,646,000)	\$(12,085,000)
Group G	\$(613,000)	\$(598,000)
Group H	\$(1,123,000)	\$(1,122,000)
All groups	\$(22,573,000)	\$(20,351,000)

*Numbers may not add up due to rounding.*

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## Scenario 1 - 60% of disabilities receive the 52.5% benefit and 30% of disabilities receive the 70% benefit

### Annual savings based on 40-year or 30-year amortization

	For represented and non-represented members	For represented members only
<b>40-yr amortization</b>		
Group E	\$(840,000)	\$(758,000)
Group F	\$(1,493,000)	\$(1,437,000)
All groups	\$(2,615,000)	\$(2,380,000)
<b>30-yr amortization</b>		
Group E	\$(871,000)	\$(787,000)
Group F	\$(1,548,000)	\$(1,490,000)
All groups	\$(2,713,000)	\$(2,468,000)

## Scenario 2 - 30% of disabilities receive the 52.5% benefit and 60% of disabilities receive the 70% benefit

### Annual savings based on 40-year or 30-year amortization

	For represented and non-represented members	For represented members only
<b>40-yr amortization</b>		
Group E	\$(290,000)	\$(266,000)
Group F	\$(485,000)	\$(473,000)
All groups	\$(1,057,000)	\$(923,000)
<b>30-yr amortization</b>		
Group E	\$(301,000)	\$(276,000)
Group F	\$(503,000)	\$(491,000)
All groups	\$(1,099,000)	\$(959,000)

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## Scenario 1 and 2- Decrease in Actuarial Accrued Liability

	For represented and non-represented members	For represented members only
<b>Scenario 1</b>	60% of disabilities receive the 52.5% benefit and 30% of disabilities receive the 70% benefit	
Group E	\$(6,874,000)	\$(6,152,000)
Group F	\$(11,857,000)	\$(11,336,000)
All groups	\$(21,342,000)	\$(19,210,000)
<b>Scenario 2</b>	30% of disabilities receive the 52.5% benefit and 60% of disabilities receive the 70% benefit	
Group E	\$(2,460,000)	\$(2,235,000)
Group F	\$(3,967,000)	\$(3,849,000)
All groups	\$(9,039,000)	\$(7,807,000)

## Other Considerations

Please let me know if you have any questions or need any further information. I can be reached at 202 331 5211. I meet the Qualification Standards of the American Academy of Actuaries to render the actuarial opinion contained in this letter. I am not aware of any direct or material indirect financial interest or relationship, including investments or other services that could create a conflict of interest that would impair the objectivity of our work.

Sincerely,

Aquil Ahmed, ASA, EA, MAAA  
Worldwide Partner

Copy:  
Wes Girling, Montgomery County Government  
Doug Rowe, Mercer

The information contained in this document (including any attachments) is not intended by Mercer to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code that may be imposed on the taxpayer.

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OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett  
*County Executive*

Marc P. Hansen  
*Acting County Attorney*

**MEMORANDUM**

TO: Kathleen Boucher

CC: Robert Drummer  
Wes Girling

THRU: Marc Hansen

FROM: Edward Lattner  
Amy Moskowitz

DATE: September 17, 2010

RE: Disability Retirement Legislation

You asked our office to review Bill 45-10. Similar to our review of Bill 37-08, our office has concerns whether the proposed disability retirement legislation violates the contract clause of the United States Constitution. Although uncertain, we believe that valid arguments can be made that the effective date of the legislation substantially impairs the rights participants have under collective bargaining contracts and under the Montgomery County Code in violation of the contract clause. A Contract Clause violation can be avoided if the legislation applies to injuries after the effective date of the legislation and after the expiration of the current collective bargaining agreements (i.e., July 1, 2011 for MCGEO and July 1, 2012 for FOP). Because IAFF already has partial disability benefits, the changes do not affect IAFF. A more detailed analysis of the contract clause largely taken from our January 21, 2009 memorandum on similar changes to the disability retirement law is set forth below. We also note that the Council's attorneys disagreed with the January 21, 2009 memorandum.

Another concern regarding the legislation is that a participant will forfeit the right to a service connected disability if "the member has committed an offense that **would justify removal** for cause." We are unsure what this phrase means and how it would be implemented and/or determined. Presumably as the administrator of the retirement system the CAO would make the

determination but the legislation does not specify who makes the decision and how the determination is made. In other words, who supplies the proof that the offense committed would justify removal for cause? The supervisor? A contract arbitrator? The Merit System Protection Board? A court? The legislation should specify a determinable standard (e.g., conviction by court; plea or admission of guilt (including probation before judgment); determination by Merit System Protection Board).

### Contract Clause Analysis

Article I, §10, clause 1 of the United States Constitution provides that “No State shall...pass any Law impairing the Obligations of Contracts...”. Courts have held that this clause does not prohibit governments from impairing contracts but limits a government’s right to do so. A contract violation occurs only if the government substantially impairs a party’s right under the contract. Legitimate expectations of the parties determine whether the impairment was substantial. However, a government may substantially impair a contract if reasonable and necessary to serve a legitimate public purpose. Courts generally defer to the government in determining the reasonableness and necessity of a particular measure, unless a government seeks to impair its own contracts. Even where the government acts to impair its own contracts some degree of deference is appropriate. Reasonableness is determined in light of whether the contract had “effects that were unforeseen and unintended by the legislature”. Necessity means that the government did not have a less drastic modification available and the government could not achieve its goals without altering the contractual terms. United States Trust of New York v. New Jersey, 431 U.S. 1 (1977); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234.

Maryland courts have held that pension plans statutes contain contractual rights between employees and the government. Although the pension plans constitute contractual benefits, under certain circumstances governments can modify the terms as long as the changes do not adversely affect the benefits, or if adversely affected, are replaced with comparable benefits. City of Frederick v. Quinn, 371 A.2d 724 (1977). In Baltimore Teachers Union v. Mayor and city Council, 6 F.3d 1012 (4<sup>th</sup> Cir. 1993) the Court noted that Supreme Court provided little guidance as to what constitutes substantial impairment, but assumes that a substantial impairment occurs where the right abridged was one that induced the parties to contract in the first place...”. In the employment context, the right to a specific pay is a key inducement.

### The contract clause prohibits retroactive impairment

Generally a contract clause issue only exists if the legislation operates retroactively to change existing law and not prospectively. Maryland State Teachers Association, Inc. v. Hughes, 594 F. Supp. (1984). In addition, reasonable modifications may be made before the occurrence of the defined contingencies. Davis v. City of Annapolis, 635 A.2d 36 (1994). In Davis, the City changed its disability law after the appellant’s injury occurred. The Court held that the appellant became vested in the benefit after the occurrence of condition necessary for benefits. The Court did not discuss contract impairment because the appellant’s rights to disability benefits vested under prior to adoption of the new law. Similarly, Howell v. Anne Arundel County, 14 F. Supp. 2d 752 (D. Md. 1998) recognizes that the contract clause only protects against retroactive

diminution of vested benefits and no contract clause violation occurs when legislation applies prospectively to non vested plan benefits.

In order for a contract clause violation to occur for a pension plan statute, the legislation must operate retroactively. The County Code contains the retirement plan which includes disability retirement provisions and forms a contract. The legislation appears to operate prospectively because it applies to disabilities filed after the legislation becomes effective. However, as indicated in Davis and Howell, a right becomes vested after a party satisfies all conditions necessary to receive the benefits. Therefore, this legislation may have a retroactive effect because a party may have incurred an injury before the effective date and may file the application after the legislation's effective date. While Council attorneys note that filing the application is a condition necessary to receive the benefit, the Maryland courts have clearly stated that it is the occurrence of the event which is a condition of becoming entitled to the disability benefit. But a Contract Clause violation can be avoided if the legislation applies to injuries incurred, rather than applications filed, after the effective date of the legislation.

#### The collective bargaining agreements

The County Code provides that unions and the County Executive negotiate certain rights, including retirement and benefits, which includes disability retirement benefits. After a union and the County Executive reach an agreement, the County Council can reject provisions requiring legislation and provisions requiring funding. The current collective bargaining agreements, which are also contracts, provide the right to specific disability retirement benefits or provide that the parties will submit legislation regarding disability retirement. The agreements detail what terms the legislation will include. Even after the parties submit the legislation and the legislation becomes incorporated into the County Code, these disability retirement provisions remain in the agreements. For example, even though the agreement states that the parties will submit legislation by July 1, 1999 providing a certain level of benefits, by incorporating the language into the current contracts, the parties intend that the benefits remain for the terms of the contracts. By agreeing to the existing legislation, the County Council agrees to these terms with the collective bargaining agreements becoming contracts of the County.

The collective bargaining agreements have terms lasting until 2011 and 2012, therefore the legislation alters the terms of the existing contracts. Even though the legislation alters the contracts, the County Council may do so if the changes do not substantially impair the existing contract and the reason for the change is necessary and reasonable for the public good. The change must be due to "effects that were unforeseen and unintended by the legislature" with no other less drastic modification available and the County Council cannot achieve its goals without altering the contractual terms.

One can argue that the legislation does not substantially impair the contract because the legislation provides for an additional benefit, a partial disability. Therefore, more participants may become entitled to a disability benefit whereas they may not have qualified for a complete disability. In addition, the legislation does not remove disability retirements, and only alters the benefits in certain cases. More importantly, the disability retirement benefit differs from a retirement benefit because a participant only receives a disability benefit upon disability which is

an uncertainty and no participant can rely on the existence of a certain or specific disability retirement benefit which he/she may never become entitled to receive.

One can also argue that the legislation does substantially impair the contracts. First, the unions specifically bargained these benefits and presumably gave up other rights and benefits. Although the legislation contains a partial disability, the legislation imposes a stricter standard in order to receive a permanent disability and therefore becomes likely that a participant may receive a lesser benefit. The January 2009 letter from the actuary assumes a cost savings because participants will no longer qualify for a full disability and only qualify for a partial disability. Data supplied by the Office of Human Resources in May 2009 supported this finding. For inducement into taking certain jobs (e.g., police officers) participants will argue that they want to ensure adequate financial protection in case of a disability and relied on the existence of these benefits.

Because arguments may be made that the effective date of the legislation substantially impairs the rights participants have under collective bargaining contracts, the next inquiry is whether any impairment is permissible as a legitimate exercise of power. This turns upon the necessity and reasonableness of the legislative act.

The necessity and reasonableness of a particular legislative act is a factual inquiry, making comparison with other cases somewhat problematic. In Baltimore Teachers Union v. Baltimore, 6 F.3d 1012 (4<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 1141 (1994), the Fourth Circuit reversed the district court and held that a city salary reduction plan adopted to meet immediate budgetary shortfalls did not violate the Contract Clause. While the court found that the plan was a substantial impairment, it concluded that the city's action was reasonable and necessary. The city's financial integrity was a significant public purpose justifying city action.

It is not enough to reason, as did the district court, that “the City **could have** shifted the burden from another governmental program,” or that “it **could have** raised taxes.” *Id.* (emphases added). Were these the proper criteria, no impairment of a governmental contract could ever survive constitutional scrutiny, for these courses are always open, no matter how unwise they may be. Our task is rather to ensure through the “necessity and reasonableness” inquiry that states neither “consider impairing the obligations of [their] own contracts on a par with other policy alternatives” or “impose a drastic impairment when an evident and more moderate course would serve its purposes equally well,” United States Trust, 431 U.S. at 30-31, 97 S. Ct. at 1522, nor act unreasonably “in light of the surrounding circumstances,” *id.* at 31, 97 S. Ct. at 1522. Andrews v. Anne Arundel County, 931 F. Supp. 1255, 1262-63 (D. Md. 1996) 931 F. Supp. 1255, 1262-63.

The integrity of the disability retirement system, fiscal or otherwise, is a significant public purpose justifying governmental action. But, as with significant impairment, it is difficult to predict whether a court would conclude that this proposed bill is a legitimate exercise of power under the Contract Clause. The most conservative course of action would be to make the legislation effective after the term of the current collective bargaining agreements.