

MEMORANDUM

TO: Public Safety/Management and Fiscal Policy Committees

FROM: Robert H. Drummer, Legislative Attorney 

SUBJECT: **Worksession 2: Expedited Bill 37-08, Personnel – Disability Retirement – Amendments**

Expedited Bill 37-08, Personnel – Disability Retirement –Amendments, sponsored by Council President Andrews and Councilmember Trachtenberg, was introduced on December 9, 2008. A public hearing was held on January 15, 2009. The Public Safety/Management and Fiscal Policy Joint Committee held a worksession on January 22, 2009.

Background/Summary

The County Inspector General recommended, in an interim report issued in September 2008, that the Council consider amending the laws governing disability retirement to strengthen controls and provide better oversight of the process.¹ The Executive also received an internal work group report from the County's Office of Human Resources, in conjunction with the County Fire & Rescue Service, Police, and County Attorney in August 2008, recommending changes to the disability retirement laws.² Representatives of the Office of Human Resources briefed the PS/MFP Committees on the current disability retirement process at a joint worksession on September 11, 2008. The Council then retained a consultant, Managed Care Advisors (MCA), to review the current process.

The PS/MFP Joint Committee held a second joint worksession on the disability retirement process on October 30, 2008. MCA briefed the Committee on their recommendations and the Office of Human Resources provided the Committees with additional information on applications and awards for disability retirement, members of the Disability Review Panel since 1995, and physicians that have completed independent medical exams over the last 10 years. MCA recommended a series of changes to the County disability laws to align the County's process with best practices elsewhere. The MCA report is attached at ©86-94. A chart showing the amount of both service connected and non-service connected disability retirements applied for and awarded from 2000 to 2007 is attached at ©95.

¹ The report is attached at ©49-81.

² The work group recommendations are attached at ©82-85.

Bill 37-08 would make changes to the County's disability laws recommended by MCA and the Executive's internal work group. Bill 37-08 would:

- (1) make disability retirement procedures consistent for all employees;
- (2) create a partial incapacity disability retirement benefit;
- (3) create a total incapacity disability retirement benefit;
- (4) create a Medical Review Panel;
- (5) create a Disability Review Board;
- (6) prohibit certain applications for service connected disability retirement due to an accident filed more than a certain time after separation from County service or the date of the accident;
- (7) prohibit an employee who commits certain offenses from retiring on a service connected disability;
- (8) require an independent medical examination for a disability retirement; and
- (9) modify the appeal procedures for disability retirement.

The Bill requires these amendments to the disability retirement law to take effect immediately, without further collective bargaining, including bargaining on the effects of making these changes. See §2 on ©38-39. However, this would not preclude the parties from negotiating further changes in the future under the normal bargaining processes.

Public Hearing

The Council held a spirited public hearing on this Bill on January 15, 2009, with 12 speakers. Two physicians specializing in occupational medicine, Patrick Joyce and Michael Sauri, testified in support of its substantive provisions. Dr. Joyce testified as President of the Maryland College of Occupational and Environmental Medicine (MCOEM). See ©96-98. MCOEM is a voluntary, professional association of 100 occupational medicine physicians and allied health personnel who practice in Maryland.

Mark Zifcak, President of FOP Lodge 35, John Sparks, President of IAFF Local 1664, and Gino Renne, President of MCGEO Local 1994, all opposed the Bill. Each County employee union head strongly objected to the Council potentially enacting this Bill without waiting for the results of collective bargaining between the Executive and the unions. See ©99-101.

Marvin Weinman testified in support of the Bill on behalf of the Montgomery County Taxpayers League. See ©105. Cathleen Lapsley opposed the Bill (©106-108) and Tom Wellington supported the Bill (©109-110) as individuals. Peggy Dennis read a resolution adopted by the County Civic Federation expressing general support of the Bill. Melanie Eberly, Robert Dyer, and Alan Gross also opposed the Bill.

January 22 Worksession

The Public Safety/Management and Fiscal Policy Joint Committee held a worksession on January 22, 2009 to discuss Bill 37-08. The Committee discussed the threshold issue of whether the Council should, as a matter of policy, enact reforms to the disability retirement laws outside of the collective bargaining process. Five Councilmembers sent a memorandum to the Executive on November 20, 2008 urging the Executive to negotiate an agreement with the County unions to

submit legislation to the Council that would reform the County's disability retirement system. A copy of this memorandum is at ©118-119. Although the parties have held negotiating sessions on this and other issues since October, no agreement has been reached to date. The Committee made no decisions on this policy issue or on any of the substantive issues raised by the provisions of Bill 37-08 at the January 22 worksession.

At this session, the Committee will have the opportunity to hear a presentation from OHR responding to the following questions:

1. What progress has OHR made in reviewing cases of employees who received service connected disability retirements to see if circumstances have changed since the September 11, 2008 worksession?
 - a. How many employees were re-examined?
 - b. What were the results?
 - c. What departments did these employees retire from?
2. How many employees have applied for service connected disability retirement since the Joint Committee held the first worksession on disability retirement on September 11?
 - a. How many employees applied in each department?
 - b. How does this compare to the applications received in the past several years for the same time period?
 - c. What is the status of the applications filed since September?
 - d. How many of the applications were filed by employees who were on full duty status?

Issues

1. Can the Council, without further collective bargaining, legally enact a Bill that would modify laws which resulted from collective bargaining agreements or involve issues that are within the scope of collective bargaining?

For the reasons discussed below, Council staff concludes that the Council has complete authority to enact legislation which affects a mandatory topic of collective bargaining or amends a law that was enacted to implement a collective bargaining agreement.

Delegation of legislative authority. The current County Charter was adopted by the voters in 1968, as authorized by Article XI-A of the Maryland Constitution. Article XI-A, §3 provides that:

Every charter so formed shall provide for an elective legislative body in which shall be vested the law-making power of said City or County. Such legislative body in the City of Baltimore shall be known as the City Council of the City of Baltimore, and in any county shall be known as the County Council of the County.

* * *

...the *County Council of said County*, subject to the Constitution and Public General Laws of this State, *shall have full power to enact local laws of said City or County including the power to repeal or amend local laws of said City or County enacted by the General Assembly*, upon all matters covered by the express powers granted as above provided, and, as expressly authorized by statute. *(Emphasis added)*

Charter §101 vests all of the County's legislative powers in the County Council:

All legislative powers which may be exercised by Montgomery County under the Constitution and laws of Maryland, including all law making powers heretofore exercised by the General Assembly of Maryland but transferred to the people of the County by virtue of the adoption of this Charter, and the legislative powers vested in the County Commissioners as a District Council for the Montgomery County Suburban District, shall be vested in the County Council.....

The Maryland Court of Appeals has consistently restricted the delegation to private individuals of the legislative power assigned to a county council in a home rule charter county. See *Mugford v. Baltimore*, 185 Md. 266 (1945) (agreement with union to deduct dues from employees was an unlawful delegation of governmental power); *MCEA v. Anderson*, 281 Md. 496, 508 (1977) (arbitration to determine public employees compensation was an unlawful delegation of legislative authority); *Baltimore v. AFSCME*, 281 Md. 463 (1977) (MOU between union and employer could not bind the employer to propose certain budget appropriations for employee salaries). In *Office & Professional Employees v. Mass Transit Administration*, 295 Md. 88, 97 (1982), the Court opined with regard to collective bargaining:

It is established in this State that, absent express legislative authority, a government agency cannot enter into binding arbitration or binding collective bargaining agreements establishing wages, hours, pension rights, or working conditions for public employees.

The express legislative authority for a County to enter into binding collective bargaining agreements must flow from either a public general law enacted by the General Assembly or the County Charter. In this County it derives from the Charter. Charter §510 authorizes the Council to enact a collective bargaining law with binding arbitration for police officers. §510A does the same for career fire fighters, and §511 authorizes the Council to enact a collective bargaining law for other County employees.

The legislative history of the first collective bargaining law for police officers in 1982 (Bill 71-81) indicates that the Council interpreted Charter §510 to require arbitration of collective bargaining impasses that binds the Executive, but not the Council. Both the Executive and the police union (Fraternal Order of Police Lodge 35) agreed that §510 required the new collective bargaining law to include interest arbitration of collective bargaining impasses, but disagreed on whether the Council must be bound by an arbitration award as well as the Executive. The FOP argued at the Council worksessions that interest arbitration which was not binding on the Council could not be considered classic interest arbitration. The Council

ultimately rejected this argument, and the interest arbitration included in the enacted Bill did not bind the Council.³

The Council enacted a separate collective bargaining law under each of these Charter amendments (Police: County Code §§33-75 through 33-85; County employees: County Code §§33-101 through 33-112; Fire and Rescue employees: County Code §§33-147 through 33-157). Each collective bargaining law provides that the Executive, as the employer, must bargain with the certified employee representative over certain mandatory topics of bargaining. Under each law the Council must approve -- and retains the authority to reject -- any term or condition of a collective bargaining agreement that requires an appropriation of funds or enactment, repeal, or modification of a County law or regulation. **In none of these laws did the Council delegate its legislative power to enact and amend County legislation.** The Executive has a duty under each collective bargaining law to bargain with a certified employee representative; the Council does not.

For example, the most recent collective bargaining agreement executed by the Executive and MCGEO provided that “*the parties shall submit legislation to the County Council that would establish a one-time irrevocable choice between the Retirement Savings Plan (RSP) and the Guaranteed Retirement Income Plan (GRIP) for non-public safety employees hired on or after July 1, 1994.*” (*emphasis added*) **The agreement did not bind, and could not have bound, the Council to enact the proposed legislation.** (The Executive submitted this proposed legislation and the Council enacted it as Bill 11-08.)

The Council’s exercise of its legislative power to implement this collective bargaining agreement necessarily includes the power to repeal or amend the same legislation at any point in the future. This legislative power exists without regard to whether the law involves a mandatory topic of bargaining under the collective bargaining laws or was enacted to implement a collective bargaining agreement executed by the Executive and an employee representative; nothing in the Charter or the collective bargaining laws limits it in those cases.

For example, the current collective bargaining contract with the FOP covers disability retirement provisions in Article 57. See ©44-48. One section of Article 57 provides that the parties (the Executive and the FOP) would submit legislation to the Council in 1997 to implement certain substantive and procedural provisions concerning disability retirement. The original agreement between the Executive and the FOP has been carried over to the current collective bargaining agreement without change. The parties implemented this agreement by submitting proposed legislation to the Council, and the Council enacted legislation in 1997 to implement this agreement. The enactment of this legislation was an exercise of legislative power that did not make the Council a party to the collective bargaining agreement and did not bind a future Council from exercising its same legislative power to amend the resulting laws.

Impairment of contracts. A closely related question is whether amendments to the County disability retirement laws of the kind contained in Bill 37-08 would impair a County employee’s contractual rights in violation of the Contract Clause of the United States Constitution (Art. I, §10). In *Robert T. Foley Co. v. W.S.S.C.*, 283 Md. 140, 151-152 (1978), the

³ This legislative history is described on pages 66-70 of Office of Legislative Oversight Report No. 2009-5, released December 2, 2008, written by Leslie Rubin of OLO.

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 consistently held that a public employee’s right to a disability pension does not vest until the occurrence or event – the injury -- that would qualify the employee for the pension occurs. 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). Even if an employee’s rights have vested, every modification of a contract does not result in an unconstitutional impairment. The legislature always retains the right to make reasonable modifications to vested rights for an important public purpose.

For these reasons, the substantive provisions of this Bill which modify eligibility for disability retirements do not raise an impairment of contract issue if they are applied to County employees who qualify for disability retirement after the effective date of the Bill. And, in our view, the procedural amendments can be applied to all County employees who fall within the scope of the disability retirement law because those procedural changes do not impair the employee’s contract – i.e. the procedural changes do not diminish an employee’s benefit and the employee has no vested right to a particular procedure. See *Bd. of Trustees.*, 317 Md. 72, 100 (1989).

2. Should the current Disability Review Panel be converted to an independent Medical Review Panel?

The current law creates a Disability Review Panel consisting of 3 physicians appointed jointly by the CAO and the employee unions. The law does not require any member to have a specific medical specialty. The Disability Review Panel recommends to the CAO whether an applicant is eligible for a disability retirement pension.

Bill 37-08 would replace this Panel with a Medical Review Panel consisting of 4 physicians, at least 2 of whom specialize in or have at least 10 years experience practicing occupational medicine. Occupational medicine is defined (see ©3, lines 37-43) as:

a medical specialty which focuses on the health of workers, including the ability to perform work; the physical, chemical, biological, and social environments of the workplace; and the health outcomes of environmental exposures. Practitioners

of occupational medicine address the promotion of health in the work place and the prevention and management of occupational and environmental injury, illness, and disability.

MCA, the Council's consultant, recommended that at least one physician with expertise in occupational medicine be on the panel. Both physicians who spoke at the public hearing, Patrick Joyce and Michael Sauri, specialize in occupational medicine. Both confirmed that doctors in this field routinely handle medical issues related to employment and are uniquely qualified to provide medical opinions necessary for disability retirement decisions. MCA also recommended that the Medical Review Panel be limited to making the medical decisions necessary for an administrative board to finally decide each application for disability retirement.

Bill 37-08 also requires the Disability Review Board (discussed below) to select the Panel members from a list of qualified applicants provided by an independent medical organization retained by the CAO. This selection process is likely to increase the independence of the Panel members. **Council staff recommendation:** approve the Medical Review Panel selection, composition, and role as proposed.

3. Should the Medical Review Panel sit with 3 members and allow a dissenting member to file a minority report?

The current Disability Review Panel has 3 members, and only 2 members can act on a case. Bill 37-08 would require a decision by a panel of 3 of the Medical Review Panel's 4 members. Although this will increase the cost of retaining Panel members⁴, it should allow a more thorough examination of the medical issues. A minority report, where filed, would give the administrative board making the ultimate decision both sides of the medical issues. The current law does not clearly allow minority reports. **Council staff recommendation:** approve the Medical Review Panel process as proposed.

4. Should an independent medical examination be required for each application?

The current law permits, but does not require, the Disability Review Panel to send an applicant for an independent medical examination. Bill 37-08 would require an independent medical examination of each applicant by a doctor selected by the Medical Review Panel. The Fiscal Impact Statement estimates that this would result in 40-50 additional medical examinations each year, at an estimated cost of \$675 per exam or a total of \$60,000-\$80,000. See ©111-112. MCA recommended mandatory independent medical examinations to give the Medical Panel an independent medical opinion in addition to the opinion of the applicant's treating physician. Drs. Sauri and Joyce both supported this recommendation at the public hearing. Although there may be cases where an independent exam is unnecessary, the estimated cost of conducting unnecessary exams is small in comparison to the overall cost of disability retirement benefits. **Council staff recommendation:** require an independent medical examination in each case.

5. Should an administrative board decide eligibility for a disability retirement pension? If so, how should this Board be selected and composed?

⁴ The OMB Fiscal Impact Statement estimates this annual cost to be \$75,000. See ©112.

The current law requires the CAO to determine eligibility for a disability retirement pension based on the recommendation of the Disability Review Panel. Bill 37-08 would limit the Medical Review Panel to recommendations on medical issues and direct an administrative board, the Disability Retirement Board, to decide if an applicant is eligible for a disability retirement pension. The Board would have 3 *ex officio* members (all County Department heads), one current employee jointly selected by the County employee unions, and one independent public member who is a County resident experienced in quasi-judicial administrative hearings. See ©4-5, lines 71-89. The union presidents who testified at the hearing objected to the Board's majority of County Department heads and their lack of medical expertise. As drafted, the Bill would not allow designees of the Department heads to sit on the Board.

The Board could review any evidence presented by the applicant or the County, including the applicant's personnel file, workers compensation file, and accidental injury reports. The Board could also send a case back to the Medical Review Panel for further consideration. The current law requires the physicians on the Disability Review Panel to review medical evidence and ultimately decide administrative issues, such as whether the active duty status of the applicant at the time of application should require a denial of an application. The creation of a separate administrative board was a fundamental recommendation of MCA. MCA did not make recommendations on the composition of the separate administrative board. **Council staff recommendation:** approve the Disability Retirement Board as proposed.

6. Should the separate Police Disability Arbitration Board be eliminated, and appeals be heard by a single independent arbitrator selected by the County and the employee unions?

The current law creates a Police Disability Arbitration Board and separate Disability Arbitration Boards for other employees. Each Board consists of 1 independent arbitrator, 1 member selected by the employee or the union, and 1 member selected by management. Bill 37-08 would reduce the Board to 1 independent arbitrator, pre-selected by the parties, to hear appeals from decisions of the Disability Retirement Board. See ©23-27, lines 566-690. This procedure would eliminate the inherent bias of the members selected by the parties and require the decision to be made exclusively by an independent arbitrator. **Council staff recommendation:** approve the Disability Arbitration provision as proposed.

7. Should an applicant who commits an offense that would justify dismissal be prohibited from receiving a service-connected disability retirement pension?

Current law does not bar an applicant from receiving a service-connected disability retirement pension after committing an offense that would otherwise justify dismissal. This recently happened when 3 police officers who committed criminal acts that would have justified dismissal received service-connected disability retirement pensions in lieu of dismissal.⁵ A local newspaper recently reported that a County firefighter applied for, and received, a service connected disability retirement 3 years ago after being convicted of sexually assaulting a female subordinate.⁶ Bill 37-08 would prohibit the award of a service-connected disability retirement

⁵ The IG described these cases in his report at ©4-9, ©70-75.

⁶ See the Examiner article at ©120-121.

pension if an applicant commits an offense that would justify dismissal. See ©13, lines 299-300. This provision was recommended by the Executive's internal work group. **Council staff recommendation:** prohibit an employee who commits an offense that would justify removal for cause from receiving disability retirement benefits.

8. Should service-connected disability payments be reduced when the recipient also receives disability retirement payments from another employer for the same impairment?

Current law does not contain this provision. Council staff has been informed of at least one case where a County disability retiree received a second disability retirement pension from a second employer for the same impairment. While this kind of double payment should be an unusual event, it is difficult to defend. Bill 37-08 would reduce the County pension by the amount of the outside payment. See ©20, lines 484-489. **Council staff recommendation:** reduce County disability payments on a one-for-one basis when a member receives a second disability retirement benefit for the same impairment.

9. Should an employee be required to apply for a service-connected disability retirement due to an accidental injury within 1 year after separation from service and within 5 years after the accident occurred, or a similar time period?

Current law does not restrict when an employee can file an application for disability retirement. Bill 37-08 would limit filing to 1 year after the employee leaves County service and 5 years after the claimed accident. The Disability Review Board can waive the latter requirement for good cause. See ©13, lines 301-308. The Executive's internal work group recommended that applicants should be prohibited from applying for a disability retirement due to an accidental injury after leaving County service. The 5 year limit assumes that the permanency of impairment due to an accidental injury should be known within this 5 year period. If a later injury exacerbates the impairment so that the applicant can no longer perform the essential functions of the position, the employee would still be able to file for disability within 5 years of the later injury.

FOP President Zifcak stressed at the public hearing that many police officers continue to work after an injury that would qualify them for disability because of a desire to keep working. He argued that the 5 year limit would force these productive officers to take disability pensions while they still could be productive employees. One option the Committees may want to consider (also discussed in the next issue) is to require the employee to notify OHR of an accident that has caused a disabling injury within 5 years, but not necessarily to apply for disability retirement. **Council staff recommendation:** restrict filing of disability applications as proposed.

10. Should an employee be required to report an accidental injury causing the incapacity that forms the basis of the disability at or closer to the time of the injury?

Current law does not require such an injury report. This requirement would give the County the opportunity to insure that the employee receives the proper medical care and avoid unnecessary complications. The requirement would also make it easier for the Medical Review Panel and the Disability Review Board to evaluate a SCDR application caused by an accidental

injury by providing a contemporaneous written report of the accident. **Council staff recommendation:** require employees to report serious injuries within a certain time.

11. Should the disability retirement system distinguish between partial and total disability?

Before 2001, County law allowed a disability benefit for partial incapacity of 6% of final earnings for each 10% of permanent disability, with a minimum benefit of 25%. Bill 25-01 eliminated this partial disability pension as part of collective bargaining agreements with the FOP and MCGEO. Bill 37-08 would create a new disability benefit for partial incapacity, similar to the partial benefit which currently applies to fire fighters. See definitions of partial and total incapacity on ©3, lines 44-48 and ©4, lines 68-70. The partial incapacity benefit for service connected injuries would be at least 52½ % of final earnings. The benefit for total incapacity would be raised to 70%, to match the benefit for fire fighters. See ©14, lines 327-335. The Retirement Plan actuary estimated the annual savings from this provision to be between \$1 million and \$2.8 million, depending on the assumptions used and the amortization rate. The actuary's report is at ©113-117.

This policy change was recommended by MCA, the Executive's internal work group, and both doctors who spoke at the public hearing. Partial incapacity would require a finding that the employee could not perform 1 or more essential functions of the position. Total incapacity would require a showing that the employee is unable to engage in substantial gainful activity. The well-recognized Social Security disability standards would be used to determine total incapacity, as the current law requires for fire fighters. Disability retirement pensions are currently treated as nontaxable income under the Internal Revenue Code as long as the benefit is based on the injury and not on years of service or age. Under both current law and Bill 37-08, the service connected disability benefit could be greater than the minimum benefit if the employee's normal retirement would be greater than the minimum. In this situation, only the part of the disability pension up to the minimum is considered nontaxable income.

Partial incapacity status assumes that the employee is capable of substantial gainful employment. Service connected disability retirement pensions are designed to be an income replacement for employees who can no longer work due to an on the job injury. 52½ % of final earnings in nontaxable income, plus the ability to earn outside income to make up the difference, would satisfy the income replacement goal. The savings from this change are substantial. **Council staff recommendation:** allow a partial incapacity disability retirement.

12. Should ERS disability retirement benefits be integrated with Social Security benefits?

The Executive's internal work group recommended integrating disability retirement pensions with Social Security benefits. Normal retirements under the ERS for most employees are integrated. In other words, when a retiree becomes eligible for Social Security benefits, the normal retirement pension is reduced. Bill 37-08, as introduced, would not require Social Security integration for disability retirement benefits.

Council staff believes that reducing disability benefits when a member reaches the age necessary to qualify for Social Security benefits could render the member's entire disability

pension taxable income. As already described, the Internal Revenue Code generally treats a disability pension based solely on the extent of disability as nontaxable income. However, a disability pension based on age or years of service would be taxable income. Although we should consult a tax law expert for a definitive opinion on this issue, Social Security integration clearly would raise an issue of whether the disability pension would become taxable income at Social Security retirement age. **Council staff recommendation:** do not require integration of disability retirement with Social Security benefits.

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Expedited Bill No. 37-08
Concerning: Personnel — Disability
Retirement - Amendments
Revised: 11/19/08 Draft No. 8
Introduced: December 9, 2008
Expires: June 9, 2010
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. , Laws of Mont. Co.

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President Andrews and Councilmember Trachtenberg

AN EXPEDITED ACT to:

- (1) make disability retirement procedures consistent for all employees;
- (2) create a partial incapacity disability retirement benefit;
- (3) create a total incapacity disability retirement benefit;
- (4) create a Medical Review Panel;
- (5) create a Disability Review Board;
- (6) prohibit certain applications for service connected disability retirement due to an accident filed more than a certain time after separation from County service or the date of the accident;
- (7) prohibit an employee who commits certain offenses from retiring on a service connected disability;
- (8) require an independent medical examination for a disability retirement;
- (9) modify the appeal procedures for disability retirement; and
- (10) generally amend the law regarding disability retirement.

By amending

Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-43, 33-128, 33-129, 33-135, and 33-138

Boldface	<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:

1 **Sec. 1. Section 33-43, 33-128, 33-129, 33-135, and 33-138 are amended**
 2 **as follows:**

3 **33-43 Disability retirement.**

4 (a) *Applicability.* This Section applies to[:(1)] an application for disability
 5 benefits filed [on or after March 1, 2000, by a member who is also a
 6 member of the Police Bargaining Unit; (2) an application for disability
 7 benefits after May 18, 1995,] by any [other] member[;] or [(3)] a
 8 medical reevaluation of a disability retiree under subsection (g)[,
 9 regardless of when an application for disability benefits was filed].

10 (b) *Definitions.* In this Section, the following words and phrases have the
 11 following meanings:

12 [(1)] *Applicant* means any member [defined in subsection (a)] who
 13 has filed an application for disability retirement under subsection
 14 (d)(1).

15 [(2)] *Certified representative* means an employee organization
 16 certified under Section 33-79, 33-106, or 33-151 to represent a
 17 bargaining unit.

18 [(3)] *Disability [Arbitration Board or Board] Arbitrator* means [the]
 19 one of [3 panels] the 4 neutral arbitrators designated under subsection
 20 (m)(1) to review an appeal of the Chief Administrative Officer's final
 21 decision regarding an application for disability benefits [filed by any
 22 member except a member of the Police Bargaining Unit].

23 [(4)] *Disability Review [Panel or Panel] Board* means the [3 medical
 24 doctors] the administrative board appointed [as Panel members] by
 25 the Chief Administrative Officer [in accordance with] under
 26 subsection (c).

27 Medical Review Panel or Panel means the 4 medical doctors

28 appointed as Panel members by the Disability Review Board under
29 subsection (d).

30 [(5)] *Medical doctor* means a doctor of medicine or osteopathy who
31 [has] graduated from a medical school accredited by the American
32 Medical Association and [who] is licensed to practice medicine in [the
33 State of] Maryland.

34 [(6)] *Medical specialty* means a field of medicine, such as orthopedic
35 surgery or neurology, which requires specialized training and
36 certification.

37 Occupational medicine means a medical specialty which focuses on
38 the health of workers, including the ability to perform work; the
39 physical, chemical, biological, and social environments of the
40 workplace; and the health outcomes of environmental exposures.
41 Practitioners of occupational medicine address the promotion of
42 health in the work place and the prevention and management of
43 occupational and environmental injury, illness, and disability.

44 Partial incapacity means a member's inability to perform one or more
45 essential functions of the position the member holds because of
46 impairment that is unlikely to resolve in the next 12 months and may
47 be permanent, while the member retains the ability to perform
48 substantial gainful activity.

49 [(7)] *Police Disability Arbitration Board* or *Police Board* means the 3
50 persons designated under subsection (m)(1) to review an appeal of a
51 decision by the Chief Administrative Officer affecting a member of
52 the Police Bargaining Unit's right to disability benefits.]

53 [(8)] *Residual functional capacity* means what the individual can still
54 do, despite the individual's impairment. The County must give the

55 term residual functional capacity the same meaning as the term is
56 given by the U.S. Social Security Administration.

57 [(9)] *Substantial gainful activity* means [the ability to perform a
58 substantial level of paid work that exists in significant numbers in the
59 national economy] a level of productive work that requires significant
60 physical or mental duties, or a combination of both, performed for pay
61 or profit on a full-time or part-time basis. An individual is able to
62 perform a substantial level of work if the individual is able to earn
63 more than the U.S. Social Security Administration's current monthly
64 earnings limit [that applies to the individual's impairment] for a
65 disabled person. The County must give the term substantial gainful
66 activity the same meaning as the term is given by the U.S. Social
67 Security Administration.

68 *Total Incapacity* means the member's inability to perform substantial
69 gainful activity because of an impairment that is unlikely to resolve in
70 the next 12 months and may be permanent.

71 (c) Disability Review Board.

72 (1) The Disability Review Board has 5 members.

73 (2) The Executive must appoint the following 3 voting, ex officio
74 members of the Board, subject to County Council confirmation:

75 (A) the Director of Finance;

76 (B) the Director of Human Resources; and

77 (C) the Director of the Office of Management and Budget.

78 Each member must serve indefinitely while that member holds
79 the respective office in either a permanent or acting capacity.

80 (3) The Executive must appoint for a 3 year term, subject to
81 Council confirmation, 1 voting member from a list of 6 active

82 members of the retirement systems nominated jointly by the
 83 certified representatives of all bargaining units.

84 (4) The Executive must appoint for a 3 year term, subject to
 85 Council confirmation, 1 voting member who:

86 (A) is a resident of the County;

87 (B) has never been a County employee; and

88 (C) has experience in quasi-judicial administrative
 89 proceedings.

90 (5) Vacancy. The Executive must appoint, subject to Council
 91 confirmation, a replacement to serve the unexpired term of any
 92 member appointed under subsections (c)(3) or (4) who resigns
 93 or is unable to serve due to incapacity, death, or any other
 94 reason.

95 (6) Compensation. Each member serves on the Board without
 96 additional compensation from the County and without
 97 compensation for that service from any other source.

98 (d) Selection of the [Disability] Medical Review Panel.

99 (1) The [Chief Administrative Officer] Disability Review Board
 100 must appoint [the 3] 4 members of the [Disability] Medical
 101 Review Panel from a list of 10 medical doctors [agreed upon by
 102 the certified representatives and the County] provided by an
 103 impartial medical organization retained by the Chief
 104 Administrative Officer.

105 (2) The [Chief Administrative Officer] Disability Review Board
 106 must [ensure that no 2 members of the Panel practice in the
 107 same medical specialty] appoint at least 2 members who are
 108 either:

- 109 (A) certified by the American Board of Preventive Medicine
 110 (or a successor organization) as a specialist in
 111 occupational medicine; or
- 112 (B) certified in a different medical specialty and have at least
 113 10 years of experience practicing occupational medicine.
- 114 (3) (A) The [Chief Administrative Officer] Disability Review
 115 Board must appoint members under subsection (c)(1) for
 116 staggered 3-year terms. To implement the staggered
 117 terms, the [Chief Administrative Officer] Board must
 118 appoint the first member to a 3-year term, the second
 119 member to a one-year term, and the third and fourth
 120 [member] members to a 2-year term. After these initial
 121 appointments, the [Chief Administrative Officer] Board
 122 must appoint all members to 3-year terms, except for any
 123 member appointed under subsection (c)(6) to fill a
 124 vacancy [created by a Panel member's death, disability,
 125 resignation, non-performance of duty or other cause].
- 126 (B) After the [Chief Administrative Officer] Disability
 127 Review Board appoints or reappoints a Panel member,
 128 the [Chief Administrative Officer] Board must promptly
 129 [provide] send each certified representative [with] a copy
 130 of the document confirming the appointment.
- 131 (4) [At the expiration of] When a Panel member's term expires, the
 132 Panel member [is eligible for reappointment] may be
 133 reappointed to a new 3-year term [unless, at any time within 30
 134 days to 60 days prior to the expiration of the term, a certified
 135 representative notifies the County and the other certified

136 representatives or the County notifies the certified
 137 representatives that it objects to the reappointment of the Panel
 138 member. If there is no objection, the Panel member is eligible
 139 to serve an additional term or terms].

140 (5) [In the event] If a Panel member declines to be reappointed to
 141 the Panel, [a new medical doctor must be appointed by] the
 142 [Chief Administrative Officer] Disability Review Board must
 143 appoint a new Panel member from a list of 5 medical doctors
 144 [agreed upon by the certified representatives and the County]
 145 provided by an impartial medical organization retained by the
 146 County.

147 (6) If a vacancy on the Panel is created by a Panel member's death,
 148 disability, resignation, non-performance of duty, or other cause,
 149 the [Chief Administrative Officer] Disability Review Board
 150 must appoint a medical doctor to complete the Panel member's
 151 term[. The Chief Administrative Officer must appoint the
 152 Panel member] from a list of 5 medical doctors [agreed upon by
 153 the certified representatives and the County] provided by an
 154 impartial medical organization retained by the County.

155 (7) The County must pay the impartial medical organization
 156 retained by the County and each Panel member reasonable
 157 compensation, as determined by the Chief Administrative
 158 Officer, for [his or her] services rendered.

159 [(d)] (e) *Disability retirement procedures.*

160 (1) An application for disability retirement may be filed with the
 161 Chief Administrative Officer by:

162 (A) a member;

- 163 (B) a certified representative on behalf of a represented
164 member; or
- 165 (C) the department, office, or agency head under subsection
166 (k).
- 167 (2) [The Disability] Three members of the Medical Review Panel
168 must consider [an] each application for disability retirement
169 benefits filed by a member or a certified representative. [The
170 Panel must determine if an applicant is eligible for non-service-
171 connected disability or service-connected disability in
172 accordance with subsections (e)(2) through (4) and subsection
173 (f).]
- 174 (3) Subject to the limitations in subsection (f)(4)(E), the Panel may
175 consider any information or material submitted by the
176 applicant, the certified representative, or the County.
- 177 (4) Before the Panel meets to review an application for a member
178 other than a member of the Firefighter/Rescuer Bargaining
179 Unit, the Panel must advise each party of the deadline [date for
180 submitting] to submit information to the Panel. The Panel must
181 [allow] give each party a reasonable amount of time [for the
182 parties] to submit additional information, and may extend the
183 deadline at the request of either party for good cause [shown].
- 184 (5) Except for information from a member of the
185 Firefighter/Rescuer Bargaining Unit, the Panel must not accept
186 or consider information from a member if the information is
187 received after the established deadline date unless the
188 information is related to:

189 (A) [the applicant's] a reinjury to the applicant that occurred
190 or was diagnosed after the deadline [date]; or

191 (B) a change in the applicant's medical condition that
192 occurred or was diagnosed after the deadline [date].

193 (6) The Panel must meet [as a body] in person and review and
194 consider all evidence submitted to it no later than 60 [calendar]
195 days after the application is filed. A majority vote [on a
196 decision] of 3 members is required to take any action [in
197 accordance with the provisions of] under this Section. [will
198 prevail. If only 2 Panel members participate in the decision-
199 making process, the vote on a decision to take any action must
200 be unanimous. No action may be taken upon a decision made
201 by one Panel member] A dissenting member must issue a
202 minority recommendation.

203 (7) [Within 30 calendar days after the Panel's last meeting at which
204 the application was considered, the] The Panel must issue a
205 written recommendation to the [Chief Administrative Officer]
206 Disability Review Board [regarding whether the applicant
207 meets the criteria for disability retirement benefits for non-
208 service-connected disability in accordance with subsections
209 (e)(2), (3) and (4) or service-connected disability in accordance
210 with subsection (f)] on the following medical issues:

211 (A) Is the applicant mentally or physically incapable of
212 performing one or more essential duties of the applicant's
213 job as described in the current job description?

214 (B) Is the applicant's medical condition likely to be
215 permanent?

- 216 (C) Did the applicant sustain the injury or undergo the hazard
 217 while performing his or her job duties?
- 218 (D) Does the applicant have the residual functional capacity
 219 to perform substantial gainful activity?
- 220 (8) (A) [If] Before making its recommendation, the Panel [is
 221 unable to make a determination based on the evidence
 222 presented to it, the Panel may] must:
- 223 (i) direct the applicant to undergo [a] an independent
 224 medical examination (including all relevant
 225 medical tests) by a medical doctor who is not a
 226 member of the [Disability Review] Panel; and
- 227 (ii) if required for the Panel to make a
 228 recommendation [under Section 33-43(i)(2)] as to
 229 residual functional capacity or substantial gainful
 230 capacity, request an independent vocational
 231 assessment.
- 232 (B) The County must pay the cost of the examination and
 233 assessment.
- 234 (C) The Panel must issue its written recommendation within
 235 30 [calendar] days after the Panel receives the later of:
- 236 (i) the full report from the medical doctor who
 237 conducted the examination; or
- 238 (ii) the full report of the results of the independent
 239 vocational assessment.
- 240 (9) Within [20 calendar] 45 days [following receipt of] after
 241 receiving the Panel's written recommendation, the [Chief
 242 Administrative Officer or designee] Disability Review Board

243 must issue a final decision regarding whether the applicant
 244 meets the criteria for disability retirement benefits for non-
 245 service-connected disability [in accordance with] under
 246 subsection (e) or service-connected disability [in accordance
 247 with] under subsection (f) and, if the applicant meets the
 248 requirements for service-connected disability, whether the
 249 applicant is eligible for total or partial incapacity. The Board
 250 may:

- 251 (A) consider any evidence presented by the applicant or the
 252 County;
- 253 (B) review the applicant's personal file;
- 254 (C) review the applicant's worker's compensation file;
- 255 (D) review any accidental injury reports; and
- 256 (E) remand the case to the Medical Review Panel for further
 257 consideration.

258 (10) A disability retirement [is effective] takes effect on the earlier
 259 of:

- 260 (A) the date a member exhausts all accrued sick leave and
 261 accrued compensatory leave [in excess of] over 80 hours,
 262 if any, or [on]
- 263 (B) the date [the application is approved by] the [Chief
 264 Administrative Officer] Board approves the application [,
 265 whichever comes first].

266 (11) [For a Group G member, the] The amount of any lump sum
 267 retroactive disability retirement benefit must be reduced by the
 268 total amount of any temporary total disability, temporary partial
 269 disability, or permanent partial disability payments that the

270 County [made] paid to the employee under the Workers
 271 Compensation laws after [the effective date of] the disability
 272 retirement took effect.

273 [(e)] (f) * * *

274 [(f)] (g) *Service-connected disability retirement.*

275 (1) A member may be retired on a service-connected disability
 276 retirement if:

277 (A) the member is totally incapacitated for duty or partially
 278 and permanently incapacitated for duty as the natural and
 279 proximate result of an accident occurring, or an
 280 occupational disease incurred or condition aggravated,
 281 while in the actual performance of duty; [the incapacity is
 282 not due to willful negligence, and the incapacity is likely
 283 to be permanent. In extenuating circumstances, the Chief
 284 Administrative Officer may waive the requirement that a
 285 member's incapacity is likely to be permanent and may
 286 approve a temporary disability retirement for one or more
 287 one-year periods until the incapacity is either removed or
 288 it becomes apparent that it is likely to be permanent; and]

289 (B) the incapacity is not due to the member's willful
 290 negligence;

291 (C) the incapacity is likely to be permanent; [and]

292 (D) the member is unable to perform the duties of either:

293 (i) the occupational classification to which the
 294 member was assigned [at the time] when the
 295 disability occurred; or

296 (ii) a position of comparable status [within] in the
 297 same department for which the member is
 298 qualified;

299 (E) the member has not committed an offense that would
 300 justify removal for cause;

301 (F) for an accidental injury, the member:

302 (i) reports the claimed accidental injury at the time of
 303 the event;

304 (ii) applies for disability retirement within 1 year after
 305 separation from County service; and

306 (iii) applies for disability retirement within 5 years
 307 after the date of the claimed accident, unless the
 308 Board waives this requirement for good cause.

309 * * *

310 [(g)] (h) *Medical reexamination of disability retiree.* The Chief
 311 Administrative Officer may require a member receiving disability
 312 pension payments to undergo a yearly physical examination during
 313 the [5-year period following] 5 years after retirement, and once in
 314 every [3-year period] 3 years thereafter, until age 55 [if] for a member
 315 of group B, E, F, or G, or age 60 [if] for a member of group A or H.
 316 The Chief Administrative Officer must review the findings of the
 317 physical examination and take appropriate action, which may include
 318 submitting the results of the evaluation to the [Disability] Medical
 319 Review Panel and the Disability Review Board for a redetermination
 320 [as to] whether the individual qualifies for disability benefits in
 321 accordance with subsection [(d)] (e). If a member [refuses to] does
 322 not submit to the examination, the Chief Administrative Officer may

323 reduce or discontinue any disability pension payments which the
 324 member receives.

325 * * *

326 [(i)] (j) *Amount of pension at service-connected disability retirement.*

327 (1) Total incapacity. The County must pay a member[, other than a
 328 Group G member,] who retires on service-connected disability
 329 retirement with total incapacity an annual pension calculated
 330 under Section 33-42(b)(1), [subject to the following exceptions]
 331 except that:

332 (A) the County must substitute final earnings for average
 333 final earnings; and

334 (B) the pension must be at least [66 2/3 percent] 70% of the
 335 member's final earnings.

336 (2) [The County must pay a Group G member who retires on a
 337 service-connected disability retirement an annual pension
 338 calculated under Section 33-42(b)(1), except that the County
 339 must substitute final earnings for average final earnings.]
 340 However, if [this] the benefit calculation under Section 33-
 341 42(b)(1) is greater than any other benefit under this subsection,
 342 the County must pay a Group G member who retires on a
 343 service-connected disability retirement between June 26, 2002,
 344 and June 30, 2007, a pension based on the member's average
 345 final earnings if that member's average final earnings result in a
 346 greater benefit than final earnings.

347 (3) [The County must pay a Group G member who retires on a
 348 service-connected disability retirement an annual pension
 349 calculated under Section 33-42(b)(1), but the benefit must be at

350 least 70 percent of final earnings if the Chief Administrative
351 Officer finds, based on a recommendation from the Disability
352 Review Panel, that] The Disability Review Board, based on a
353 recommendation from the Medical Review Panel, must find
354 total incapacity if the member's service-connected disability is
355 severe enough to meet the Social Security Administration's
356 requirements for disability, meaning that the member is unable
357 to engage in any substantial gainful activity because of a
358 medically determinable physical or mental impairment that can
359 be expected to end in death or has lasted, or can be expected to
360 last, for a continuous period of at least 12 months. The member
361 does not have to qualify for Social Security disability benefits
362 to be eligible for benefits under this subsection.

363 (A) The Panel must base its [determination] recommendation
364 of whether [or not] an individual is able to engage in any
365 substantial gainful activity on an assessment from an
366 independent vocational expert that considers the
367 member's age, education, work experience, transferable
368 skills, and residual functional capacity.

369 (B) The Panel must determine the member's residual
370 functional capacity and provide this information to the
371 independent vocational expert.

372 (C) A Panel determination that the member's service-
373 connected disability is severe enough to be considered a
374 disability by the Social Security Administration is not a
375 recommendation that the member is entitled to, or should

376 be granted, a disability benefit by the Social Security
377 Administration.

378 (D) If a member has already been granted disability benefits
379 by the [U.S.] Social Security Administration when the
380 member applies for a service-connected disability
381 pension, the County must pay the member a pension of at
382 least [70 percent] 70% if the Disability Review [Panel]
383 Board finds that the award of disability benefits from the
384 Social Security Administration was based primarily on
385 the same medically determinable physical or mental
386 impairment on which the [Disability Review Panel]
387 Board awards the member a service-connected disability
388 benefit.

389 (4) The County must pay a [Group G] member who retires with
390 partial incapacity on a service-connected disability retirement
391 an annual pension calculated under Section 33-42(b)(1), but the
392 benefit must be at least 52½ % [percent] of final earnings [if the
393 Chief Administrative Officer finds, based on a recommendation
394 from the Disability Review Panel, that:

395 (A) the member meets the standards to receive a service-
396 connected disability benefit under subsection (f); and

397 (B) the member is not eligible to receive a benefit under
398 subsection (i)(3)].

399 (5) (A) The County must increase the partial incapacity service-
400 connected disability pension benefit of a [Group G]
401 member calculated under Section 33-42(b)(1), from a
402 benefit of at least 52 ½ [percent] % to a benefit of at least

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70 [percent] %, if:

- (i) the [U.S.] Social Security Administration awards disability benefits to the member;
 - (ii) the member submits all relevant information about the award of disability benefits from the Social Security Administration to the [Disability] Medical Review Panel within 60 days after the member receives the award;
 - (iii) the Disability Review [Panel] Board, based on a recommendation from the Medical Review Panel, finds that the award of disability benefits from the Social Security Administration was based primarily on the same medically determinable physical or mental impairment on which the Disability Review [Panel] Board originally awarded the member a service-connected disability benefit; and
- [(a)] (iv) the member applies for disability benefits with the Social Security Administration within 90 days after the [date on which the Chief Administrative Officer] Board notified the member that the [amount of the] service-connected disability pension benefit would be calculated [under Section 33-42(b)(1)], but at least 52 ½ percent; or] as a partial incapacity.
- [(b) the Chief Administrative Officer awards a service-connected disability pension benefit

430 calculated under Section (b)(1), but at least
 431 52 ½ percent to the member between March
 432 1, 2000, and December 1, 2003, and the
 433 member applies for disability benefits with
 434 the Social Security Administration no later
 435 than February 29, 2004.]

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

441 * * *

442 (7) The County must pay a Group F member who retires on a
 443 service-connected disability retirement with total incapacity on
 444 or after June 26, 2002, an annual pension calculated under
 445 subsection [(i)] (j)(1). However, if [the] a greater benefit results
 446 from the calculation under Section 33-42(b)(1), the County
 447 must pay a Group F member a pension based on the member's
 448 average final earnings if that member's average final earnings
 449 result in a greater benefit than final earnings.

450 [(j)] (k) *Adjustment or cessation of disability pension payments.*

451 (1) If a member receiving service-connected disability pension
 452 payments reaches the first day of the month [following] after
 453 the member's normal retirement date, the amount of pension
 454 then payable must not be less than the amount that would have
 455 been payable under [the provisions of] Section 33-45(c)[,] if the
 456 member had terminated service [on] when the [date] disability

457 pension [commenced] began and had not elected a return of
458 member contributions with credited interest.

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

462 (i) has not reached the normal retirement date; and

463 (ii) is engaged in, or is able to engage in, an
464 occupation that pays more than the difference
465 between [the amount of] the disability pension
466 payments and the current maximum earnings of
467 the occupational classification from which the
468 [employee] member was disabled.

469 (B) [For] If a member other than a Group F member [who]
470 meets the criteria in subparagraph (A), the Chief
471 Administrative Officer may reduce the member's
472 disability [person] pension payments until [the amount
473 of] the disability pension payments plus the amount that
474 the employee earned or is able to earn equals the
475 maximum earnings of the occupational class from which
476 the member was disabled.

477 (C) [For] If a Group F member [who] receives a non-service
478 connected disability pension and [who] meets the criteria
479 in subparagraph (A), the Chief Administrative Officer
480 may reduce the member's disability pension payments
481 until [the amount of] the disability pension payments plus
482 the amount the employee earned or is able to earn equals
483 120 percent of the maximum earnings of the occupational

484 class from which the employee was disabled. If a
485 member receives a disability retirement pension from
486 another employer for the same impairment, the Chief
487 Administrative Officer may reduce the member's
488 disability pension payments by the amount of the other
489 disability retirement pension.

490 (3) If the earnings capacity of a disability retiree with a total
491 incapacity changes, the Chief Administrative Officer may
492 change the amount of the disability retirement pension. [For
493 the purpose of] In this subsection, "disability pension" is the
494 amount of pension payable without election of a pension
495 payment option.

496 (A) For a disability retiree other than a group F member, [the
497 Chief Administrative Officer must ensure that] the
498 amount of the revised pension [does] must not exceed:

499 (i) the original disability retirement pension plus all
500 applicable cost-of-living increases; or

501 (ii) an amount that, when added to the amount the
502 member earns or is able to earn, equals the
503 maximum earnings of the occupational
504 classification from which the member was
505 disabled.

506 (B) For a Group F member who receives a non-service
507 connected disability pension, [the Chief Administrative
508 Officer must ensure that] the amount of the revised
509 pension must not exceed:

- 510 (i) the original disability retirement pension plus all
 511 applicable cost-of-living increases; or
- 512 (ii) an amount that, when added to the amount [that]
 513 the member earns or is able to earn, equals 120
 514 percent of the maximum earnings of the
 515 occupational classification from which the member
 516 was disabled.
- 517 (4) A member who receives a disability retirement pension for a
 518 total incapacity must submit to the Chief Administrative Officer
 519 by May 30 of each year a copy of that portion of the member's
 520 federal income tax return which shows the member's earned
 521 income. If a member [receiving] who receives disability
 522 pension payments [fails or refuses to] does not supply the Chief
 523 Administrative Officer [whatever] any information [is
 524 determined necessary] the Chief Administrative Officer needs
 525 to [make a decision on] decide the amount of retirement pay
 526 legally due, the Chief Administrative Officer must suspend the
 527 member's pension payments [must be discontinued] until the
 528 member submits the [requested] needed information.
- 529 (5) If a member [receiving] who receives disability pension
 530 payments returns to [the service of the] County employment or
 531 is appointed or elected to any office, the salary or compensation
 532 of which is paid wholly or in part by the County, the Chief
 533 Administrative Officer must stop the member's pension
 534 payments [will cease,] and the [individual will again become a]
 535 member [of] must rejoin the retirement system and resume
 536 member contributions.

537 (6) For [those employees] any employee who enrolled or re-
 538 enrolled in the retirement system on or after July 1, 1978, the
 539 member's disability retirement benefit for any month must be
 540 integrated with the primary disability benefits received from
 541 Social Security, and the total benefits from both sources must
 542 not exceed 100% of the member's average final earnings, [of
 543 the member; provided, however, that this limitation] This limit
 544 does not apply to [the] cost-of-living adjustments [issued
 545 pursuant to] made under Section 33-44(c).

546 (7) The Chief Administrative Officer must not reduce the service-
 547 connected disability pension payments of a Group F or G
 548 member by earned income received from [sources] any source
 549 other than County Government employment.

550 [(k)] (l) *Administrative disability retirement.* [Whenever] If any member
 551 becomes disabled [or incapacitated] and is demonstrably not capable
 552 of performing the duties and responsibilities of the position to which
 553 the member is assigned at an acceptable level of competence [for
 554 medical reasons] because of the member's disability, the Department
 555 or Office Director must notify the member [must be notified by the
 556 head of the department, office or agency] that [in consideration]
 557 because of the member's [medical condition] disability, the member
 558 should apply for a disability retirement [application should be
 559 initiated]. If the member [fails or refuses to make an application] does
 560 not apply for disability retirement, the [department, office or agency
 561 head] Director may [initiate] apply for a disability retirement
 562 [application] on behalf of the member. [All] The Director must
 563 transmit all pertinent information, including the member's attendance

564 record, job performance record, and medical record, [must be
565 transmitted] to the [Disability] Medical Review Panel.

566 [(1)] (m) *Appeal procedures.*

567 (1) An applicant [who is a member of the Police Bargaining Unit]
568 or the certified representative on behalf of the [Police
569 Bargaining Unit] applicant may appeal a decision of the [Chief
570 Administrative Officer] Disability Review Board that affects
571 the member's right to disability benefits to the [Police]
572 appropriate Disability [Arbitration Board] Arbitrator. [An
573 applicant who is not a member of the Police Bargaining Unit, or
574 the certified representative on behalf of the applicant, may
575 appeal the written decision of the Chief Administrative Officer
576 to one of 3 Disability Arbitration Boards.] An applicant must
577 file an appeal within 20 [calendar] days [of] after [the date on
578 which] the applicant receives the [Chief Administrative
579 Officer's] Board's decision.

580 (2) The [Police] Disability [Arbitration Board] Arbitrator must
581 consider [appeals] each appeal filed by [members of the Police
582 Bargaining Unit. The 3 Disability Arbitration Boards must
583 consider all other appeals on a rotating basis in the order in
584 which the County receives the appeals] an applicant within a
585 reasonable time.

586 [(3)] After an applicant files an appeal, the appropriate Disability
587 Arbitration Board or Police Disability Arbitration Board with
588 whom the appeal is filed must convene within a reasonable time
589 and consider the appeal.]

590 [(4)] (3) The appeal and judicial review proceedings [are] must be
 591 governed by the Maryland Uniform Arbitration Act, except that
 592 [a Board] an Arbitrator's decision must not be vacated [on the
 593 ground that] because the applicant who filed the appeal is not a
 594 bargaining unit member and did not agree to arbitrate the
 595 appeal.

596 [(5)] (4) The [Chairpersons of the Disability Arbitration Boards and
 597 Police Disability Arbitration Board] Disability Arbitrator must[,
 598 for the appeals before them]:

599 (A) decide all issues on prehearing procedures, including any
 600 issue related to discovery; and

601 (B) rule on all issues of law that arise before the hearing[,]
 602 unless ruling on the issue would decide the appeal.

603 [(6)] (5) The Disability [Arbitration Boards and Police Disability
 604 Arbitration Board] Arbitrator must render decisions quickly.
 605 The Disability [Arbitration Boards and Police Disability
 606 Arbitration Board] Arbitrator should issue written decisions on
 607 appeals within 30 [calendar] days after the hearing or after
 608 receiving any post-hearing briefs.

609 [(m)] (n) *Disability [Arbitration Boards and Police Disability Arbitration*
 610 *Board] Arbitrators.*

611 (1) [(A) The County Executive must appoint a different
 612 neutral arbitrator to be the Chairperson of each Disability
 613 Arbitration Board.] The County Executive must [select
 614 the] appoint 4 neutral [arbitrators] Disability Arbitrators
 615 from a list of 6 arbitrators agreed [upon] on by the
 616 County and the certified representatives that represent all

617 bargaining units [except for the Police Bargaining Unit].
 618 To the extent possible, the 6 neutral arbitrators on the list
 619 should be experienced in law and occupational medicine.
 620 The County Council must confirm the appointment of
 621 [the Chairperson of each Disability Arbitration Board
 622 must be confirmed by the County Council] each
 623 Disability Arbitrator. The [County] Chief Administrative
 624 Officer must give each certified representative a copy of
 625 the Council resolution confirming the appointment or
 626 reappointment of each [Chairperson] Disability
 627 Arbitrator promptly after the Council's action.

628 [(B) The County Executive must appoint a neutral arbitrator
 629 to be Chairperson of the Police Disability Arbitration
 630 Board. The neutral arbitrator must be selected by the
 631 County and the certified representative of the Police
 632 Bargaining Unit either by agreement or through the
 633 processes of the American Arbitration Association. To
 634 the extent possible, the neutral arbitrator should be
 635 experienced in law and occupational medicine. The
 636 appointment of the Chairperson of the Police Disability
 637 Arbitration Board must be confirmed by the County
 638 Council.]

639 (2) Each neutral arbitrator [appointed by the County Executive
 640 under paragraph (1)] must serve for a term of 3 years. [At the
 641 expiration of the] When an arbitrator's term expires, the
 642 Executive may reappoint the arbitrator [is eligible for
 643 reappointment] to a new 3-year term unless, at any time within

644 30 to 60 days [prior to the expiration of] before the [3-year]
 645 term is scheduled to expire, either a certified representative
 646 [gives written notice to] notifies the [County] Chief
 647 Administrative Officer or the [County gives written notice to]
 648 Chief Administrative Officer notifies the certified
 649 representatives that [it] the party objects to the [neutral]
 650 arbitrator serving another term. If no objection is filed, the
 651 Executive may appoint the arbitrator [is eligible for
 652 appointment] to [an additional] another term.

653 (3) If the neutral arbitrator declines to be reappointed, dies, resigns,
 654 or for other cause is unable or ineligible to serve [on one of the]
 655 as a Disability [Arbitration Boards or the Police Disability
 656 Arbitration Board] Arbitrator, [a new arbitrator must be
 657 appointed by] the [County] Executive must appoint a new
 658 arbitrator under paragraph (1).

659 (4) The County must pay all reasonable fees and expenses of [the
 660 arbitrators] each arbitrator, as determined by the Chief
 661 Administrative Officer, except that a certified representative
 662 representing an applicant who is a member of the Office,
 663 Professional or Technical or Service, Labor and Trades
 664 Bargaining Unit must pay any fee resulting from the
 665 cancellation of a scheduled hearing if the certified
 666 representative:

667 (A) causes a hearing to be canceled and the application
 668 remanded to the Disability Review [Panel] Board; or

669 (B) causes a hearing to be canceled and rescheduled on a
 670 later date.

671 (5) [The applicant, or the certified representative on behalf of the
 672 applicant, must designate an individual to serve as a member of
 673 the Disability Arbitration Board that will consider and decide
 674 the applicant's appeal. The applicant must designate an
 675 individual to serve as a member of the Police Disability
 676 Arbitration Board. The Chief Administrative Officer must
 677 designate an individual to serve on the Disability Arbitration
 678 Board or Police Disability Arbitration Board that will consider
 679 and decide the applicant's appeal. The applicant, or the
 680 certified representative on behalf of the applicant, and the
 681 County, respectively, may designate Board members on a case-
 682 by-case basis according to each party's chosen procedure.
 683 There must be no restriction on who may serve as the designee
 684 of the applicant or the County, except that no member of the
 685 Board that will consider and decide an appeal may be involved
 686 in, or be a witness to, any matter that is before that Board.]

687 [(6) Each party, including participating agencies, must be
 688 responsible for the fees and expenses of its respective
 689 members.] Each party, including participating agencies, must
 690 [also be responsible for] pay its own witness fees and expenses.

691 **33-128. Definitions.**

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

693 [(a)] *Administrator* means either the Chief Administrative Officer or the
 694 entity that contracts with the County to administer this disability plan.

695 [(b)] *Applicant* means an employee who has filed an application for
 696 benefits under Division 2 of Article VIII, or for whom the Chief
 697 Administrative Officer has filed an application.

698 [(c)] *Certified representative* means an employee organization certified
699 under Sections 33-79, 33-106, or 33-151 to represent a bargaining unit.

700 [(d)] *Continued non-service-connected disability* means a condition of the
701 employee that:

- 702 (1) continues after [the close of] the period of initial non-service-
703 connected disability closes;
- 704 (2) makes the employee unable to engage in any available
705 employment commensurate with the employee's training or
706 retraining, education, and experience [of the employee]; and
- 707 (3) is likely to be permanent.

708 [(e)] *Continued service-connected disability for a non-public safety*
709 *employee* means a condition of a non-public safety employee that:

- 710 (1) continues after [the close of] the period of initial service-
711 connected disability closes;
- 712 (2) makes the employee unable to engage in available employment
713 commensurate with the employee's training or retraining,
714 education, and experience [of the employee]; and
- 715 (3) is likely to be permanent.

716 [(f)] *Continued service-connected disability for a public safety employee*
717 means a condition of a public safety employee that:

- 718 (1) continues after [the close of] the period of initial service-
719 connected disability closes;
- 720 (2) makes the employee unable to:
 - 721 (A) engage in available employment commensurate with the
722 employee's training or retraining, education, and
723 experience [of the employee]; and
 - 724 (B) earn substantially similar final earnings; and

725 (3) is likely to be permanent.

726 [(g)] *County* means Montgomery County Government and, when
727 applicable, any agency that adopts this plan under an adoption agreement
728 approved by the Chief Administrative Officer.

729 [(h)] *Disability [Arbitration Board or Board] Arbitrator* means 1 of the 3
730 persons designated under Section [33-43A(m)] 33-43(m) to review an appeal
731 of the final decision of the Administrator regarding an application for
732 disability benefits.

733 [(i)] *Disability Review [Panel or Panel] Board or Board* means the [3
734 medical doctors appointed as Panel members by the Chief Administrative
735 Officer under Section 33-43A(c)] administrative board established under
736 Section 33-43(c).

737 [(j)] *Employee* means [an] a County employee [of the County] who:

- 738 (1) participates in the retirement savings plan under this Article;
739 and
740 (2) is regularly scheduled to work 20 hours or more per week.

741 [(k)] *Final earnings* means the annual average of the regular salary of an
742 employee less any shift pay differential for the 18-month period immediately
743 before the disability or any period of 18 consecutive months, whichever is
744 greater.

745 [(l)] *Initial non-service-connected disability* means a condition of an
746 employee that:

- 747 (1) is the natural and proximate result of an accident, illness, or
748 injury;
749 (2) is not due to the employee's willful misconduct or willful
750 negligence [of the employee];

751 (3) makes the employee incapable of performing the job that the
 752 employee performed immediately before the accident, illness,
 753 or injury; and

754 (4) is not an initial service-connected disability.

755 [(m)] *Initial service-connected disability* means a condition of an employee
 756 that:

757 (1) is the natural and proximate result of an accident, illness, or
 758 injury occurring, an occupational disease incurred, or a
 759 condition aggravated while in the performance of duty as an
 760 employee;

761 (2) is not due to the employee's willful misconduct or willful
 762 negligence [of the employee]; and

763 (3) makes the employee incapable of performing the job that the
 764 employee performed immediately before the accident, illness,
 765 or injury.

766 [(n)] *Medical doctor* means a doctor of medicine or osteopathy who [has]
 767 graduated from a medical school accredited by the American Medical
 768 Association and [who] is licensed to practice medicine in [the State of]
 769 Maryland.

770 Medical Review Panel or Panel means the 4 medical doctors appointed by
 771 the Disability Review Board under Section 33-43(d).

772 [(o)] *Non-public safety employee* means any employee who is not a public
 773 safety employee.

774 [(p)] *Plan* means the disability benefits plan established under this
 775 Division.

776 [(q)] *Public safety employee* means any employee who is a:

- 777 (1) sworn, ranking officer of the [Montgomery County] Police
778 Department;
- 779 (2) paid firefighter, paid fire officer, or paid rescue service
780 employee of the [Montgomery County Department of] Fire and
781 Rescue [Services] Service;
- 782 (3) sworn deputy sheriff;
- 783 (4) [Montgomery County] correctional officer; or
- 784 (5) correctional staff member, if designated as a public safety
785 employee by the Chief Administrative Officer.

786 **33-129. Disability benefits.**

787 (a) *Initial non-service-connected disability benefits.*

- 788 (1) An employee is entitled to receive disability benefits if the
789 [administrator determines] Disability Review Board finds that
790 the employee has:
- 791 (A) incurred an initial non-service-connected disability; and
- 792 (B) worked for the County for the 6 months immediately
793 [preceding] before the disability.
- 794 (2) The employee [is entitled to] may receive disability benefits
795 subject to this plan for [a period of]:
- 796 (A) 12 consecutive months for a public safety employee; and
- 797 (B) 36 consecutive months for a non-public safety employee.

- 798 (b) *Continued non-service-connected disability benefits.* Before the end
799 of the distribution period for initial non-service-connected disability
800 benefits, the [administrator] Disability Retirement Board must re-
801 evaluate the employee to determine if the employee satisfies the
802 requirements for a continued non-service-connected disability. If the
803 employee does not meet the requirements for a continued non-service

804 connected disability, the payment of disability benefits must stop. If
 805 [a participant] the employee meets the requirements for a continued
 806 non-service connected disability, the payment of disability benefits
 807 must continue, subject to this plan.

808 (c) *Temporary disability.* In extenuating circumstances, the
 809 [administrator] Disability Retirement Board may:

810 (1) waive the requirement that an employee's disability is likely to
 811 be permanent for continued service-connected or non-service-
 812 connected disability benefits; and

813 (2) approve temporary disability benefits for one or more one-year
 814 periods until the [administrator determines] Board finds that the
 815 disability:

816 (A) has ended; or

817 (B) qualifies as a continued disability.

818 (d) *Initial service-connected disability benefits.* [If the administrator
 819 determines that an employee has incurred an initial service-connected
 820 disability, the] An employee [is entitled to] may receive disability
 821 benefits for a period of 36 consecutive months, subject to this plan, if
 822 the Disability Review Board finds that:

823 (A) the employee has incurred an initial service-connected
 824 disability;

825 (B) the employee has not committed an offense that would
 826 justify removal for cause;

827 (C) for an accidental injury, the employee:

828 (i) reports the claimed accidental injury at the time of
 829 the event;

- 830 (ii) applies for disability retirement within 1 year after
 831 separation from County service; and
 832 (iii) applies for disability retirement within 5 years
 833 after the date of the claimed accident, unless the
 834 Board waives this requirement for good cause.

835 (e) *Continued service-connected disability benefits.*

- 836 (1) Before the end of the distribution period for initial service-
 837 connected disability benefits, the [administrator] Disability
 838 Review Board must re-evaluate the employee to determine if
 839 the employee satisfies the requirements for a continued service-
 840 connected disability. If the employee does not meet the
 841 requirement for a continued service-connected disability, the
 842 payment of disability benefits must stop. If the employee meets
 843 the requirements for a continued service-connected disability,
 844 the payment of disability benefits must continue, subject to this
 845 plan.
- 846 (2) The Chief Administrative Officer may offer a 5-percent salary
 847 increase to an employee who:
- 848 (A) is eligible to receive continued service-connected
 849 disability benefits; and
- 850 (B) accepts an alternative position [within the] in County
 851 government for which the employee is qualified.
- 852 (3) The employee's salary in the alternative position must not
 853 exceed the maximum salary of the pay grade assigned to the
 854 position.
- 855 (4) A member of the Office, Professional and Technical Bargaining
 856 Unit or the Service, Labor and Trades Bargaining Unit who

857 accepts an alternative placement [incentive is not eligible to]
 858 must not receive continued service connected disability benefits
 859 based on the disability for which the alternative placement was
 860 made.

861 (5) If a member applies for continued service-connected disability
 862 benefits instead of accepting an alternative placement
 863 [incentive], the member's [failure] decision not to accept the
 864 [incentive] placement must not:

865 (A) be included in the information [considered by] given to
 866 the [Disability] Medical Review Panel, Disability Review
 867 Board, [Chief Administrative Officer,] or Disability
 868 [Arbitration Board] Arbitrator;

869 (B) be considered at any time by the [Disability] Medical
 870 Review Panel, Disability Review Board, [Chief
 871 Administrative Officer,] or Disability [Arbitration Board]
 872 Arbitrator; or

873 (C) affect the member's eligibility for continued service-
 874 connected disability benefits or the amount of [the
 875 continued service-connected disability] those benefits.

876 (f) *Role of the [Disability] Medical Review Panel and the Disability*
 877 *Review Board.*

878 (1) The [Disability] Medical Review Panel must [consider an
 879 application for disability benefits] decide the medical issues
 880 necessary to determine if the applicant is eligible for disability
 881 benefits under subsection (a), (b), (c), (d), or (e). The Panel
 882 may consider any information or material submitted by the
 883 applicant, the certified representative, or the County. Within 60

884 days after the application is filed, the Panel must meet [as a
 885 body] in person to [consider] review all evidence submitted to
 886 the Panel. An action by the Panel under this Section requires [2
 887 votes] a majority vote of 3 members. A dissenting member
 888 may issue a minority recommendation.

889 (2) Before the Panel meets to review [the] an application, the Panel
 890 must advise each party of the deadline [date for submitting] to
 891 submit information to the Panel. The Panel must allow a
 892 reasonable amount of time for the parties to submit additional
 893 information, and may extend the deadline at the request of the
 894 applicant for good cause [shown].

895 (3) The Panel must not accept or consider information from a
 896 certified representative representing an applicant if the
 897 information is received after the [established] deadline, [date]
 898 unless the information is related to:

899 (A) [the applicant's] a reinjury to the applicant that occurred
 900 or was diagnosed after the deadline [date]; or

901 (B) a change in the applicant's medical condition that
 902 occurred or was diagnosed after the deadline [date].

903 (4) Within 30 days after the Panel's last meeting to consider the
 904 application, the Panel must issue a written recommendation to
 905 the [Administrator on whether the applicant qualifies for
 906 disability benefits] Disability Review Board on the following
 907 medical issues:

908 (A) Is the applicant mentally or physically incapable of
 909 performing one or more essential duties of the applicant's
 910 job as described in the current job description?

- 911 (B) Is the applicant's medical condition likely to be
 912 permanent?
- 913 (C) Did the applicant sustain the injury, or undergo the
 914 hazard, while performing his or her job duties?
- 915 (D) Does the applicant have the residual functional capacity
 916 to perform substantial gainful activity?
- 917 (5) [If] Before making its recommendation, the Panel [cannot
 918 determine the applicant's eligibility for disability benefits based
 919 on the evidence presented, the Panel may] must require the
 920 applicant to complete a medical examination, including relevant
 921 medical tests, by a medical doctor who is not a member of the
 922 [Disability] Medical Review Panel. The County must pay the
 923 cost of the examination. The Panel must issue its written
 924 recommendation within 30 days after the medical doctor reports
 925 to the Panel.
- 926 (6) Within [20] 45 days after [the Administrator receives] receiving
 927 the Panel's recommendation, the [Administrator] Disability
 928 Review Board must issue a final decision [on] whether the
 929 applicant is eligible for disability benefits under this Section.
 930 The Board may:
- 931 (A) consider any evidence presented by the applicant or the
 932 County;
- 933 (B) review the applicant's personal file;
- 934 (C) review the applicant's worker's compensation file;
- 935 (D) review any accidental injury reports; and
- 936 (E) remand the case to the Medical Review Panel for further
 937 consideration.

938 **33-133. Termination of benefits.**

939 (a) *Non-public safety employee.* The Administrator must terminate initial
940 or continued disability benefits to a non-public safety employee if the
941 employee:

942 (1) recovers from the disability, as determined by the
943 [administrator] Disability Retirement Board;

944 (2) does not provide the Administrator with information that the
945 Administrator requires; or

946 (3) attains age 65, or a later age if required under Federal law.

947 (b) *Public safety employee.* The Administrator must terminate initial or
948 continued disability benefits to a public safety employee if the
949 employee:

950 (1) recovers from the disability, as determined by the
951 [administrator] Disability Review Board;

952 (2) does not provide the Administrator with information that the
953 Administrator requires; or

954 (3) attains age 65, or a later age if required under Federal law, if the
955 benefit is for a non-service connected disability.

956 **33-135. Medical examination.**

957 (a) The Administrator may require any employee receiving continued
958 disability payments to undergo annual or less frequent medical
959 examinations. The Administrator must submit the findings of [the]
960 any medical examination to the [Disability] Medical Review Panel.

961 (b) The Panel must consider the findings of the physical examination and
962 any other information submitted by the employee or the County and
963 recommend in writing to the [Administrator] Disability Review Board
964 whether the employee still qualifies for disability benefits.

965 (c) The [Administrator] Board must issue a final decision within 20 days
 966 after receiving the Panel's recommendation. An employee may
 967 appeal the [Administrator's] Board's decision under Section 33-138.

968 **33-138. Appeals of decisions.**

969 (a) The applicant, or the certified representative on behalf of the
 970 applicant, may appeal [the] a written decision of the [Administrator]
 971 Disability Review Board on eligibility for disability benefits within 20
 972 days after the applicant receives the [Administrator's] Board's
 973 decision.

974 (b) The Disability [Arbitration Board] Arbitrator must [convene to
 975 consider] consider an appeal within a reasonable time [after the appeal
 976 is filed]. The appeal and judicial review proceedings [are] must be
 977 governed by Sections 3-201 through 3-234 of the Maryland
 978 Arbitration Act.

979 (c) The Disability [Arbitration Board] Arbitrator [must issue the decision
 980 quickly. The Board] should issue the decision within 30 days after the
 981 hearing or receiving any post-hearing brief, whichever is later.

982 (d) The County must pay all reasonable fees and expenses of the
 983 Arbitrator, as determined by the Chief Administrative Officer, except
 984 that a certified representative must pay any fee resulting from the
 985 cancellation of a scheduled hearing if the certified representative:

986 (1) causes a hearing to be canceled and the application remanded to
 987 the [Disability] Medical Review Panel; or

988 (2) causes a hearing to be canceled and rescheduled on a later date.

989 **Sec. 2. Implementation.** Notwithstanding any other provision of law,
 990 including §33-80(a)(7), the implementation of any amendment to County Code
 991 Chapter 33 in Section 1 of this Act concerning disability retirement is not subject

992 to collective bargaining with a certified representative of employees in any
 993 bargaining unit.

994 **Sec. 3. Transition.** The Executive must appoint and the Council must
 995 confirm the members of the Medical Review Panel and the Disability Review
 996 Board within 90 days after this Act takes effect. The existing Disability Review
 997 Panel must review applications for a disability retirement filed during this
 998 transition period and make recommendations to the Chief Administrative Officer
 999 on the medical issues that the Medical Review Panel must decide under this law.
 1000 The Chief Administrative Officer must review any recommendations of the
 1001 Disability Review Panel made during this transition period and determine
 1002 eligibility for a disability retirement until the members of the Disability Review
 1003 Board are appointed and confirmed.

1004 **Sec. 4. Expedited Effective Date.** The Council declares that this Act is
 1005 necessary for the immediate protection of the public interest. This Act takes effect
 1006 on the date when it becomes law and applies to all applications for disability
 1007 retirement filed on or after that date.

1008 *Approved:*

1009

1010

Philip M. Andrews, President, County Council

Date

1011 *Approved:*

1012

1013

Isiah Leggett, County Executive

Date

LEGISLATIVE REQUEST REPORT

Bill 37-08

Personnel – Disability Retirement – Amendments

DESCRIPTION: The Bill would modify the procedures for determining eligibility for a disability retirement pension by establishing a new Disability Retirement Board to make decisions based upon recommendations as to medical issues from a new Medical Review Panel. The Bill would also create a partial incapacity disability and a total incapacity disability for ERS members.

PROBLEM: The Inspector General recommended, in an interim report issued in September, that the Council consider amending the laws governing disability retirement to strengthen controls and provide better oversight of the process. The Council retained a consultant, Managed Care Advisors (MCA), to review the current process. MCA recommended a series of changes to the disability laws to align the County's process with industry best practices.

GOALS AND OBJECTIVES: To improve the County's disability retirement standards and procedures.

COORDINATION: Inspector General, Human Resources

FISCAL IMPACT: Office of Management and Budget

ECONOMIC IMPACT: Office of Management and Budget

EVALUATION: N/A

EXPERIENCE ELSEWHERE: MCA reviewed disability laws in other jurisdictions and recommended best industry practices.

SOURCE OF INFORMATION: Inspector General
Joseph Adler, Office of Human Resources

APPLICATION WITHIN MUNICIPALITIES: N/A

PENALTIES: N/A

**Bill 37-08, Personnel– Disability Retirement
Summary of Key Provisions**

1. The Bill would modify the procedures for determining eligibility for a disability retirement pension to make them consistent for all employees as follows:

- Creates a **Medical Review Panel** consisting of 4 physicians, 2 of whom must be board certified in occupational medicine or have at least 10 years of experience in occupational medicine. The Medical Review Panel would replace the current Disability Review Panel and make recommendations on medical issues only. The current Disability Review Panel is responsible for making recommendations to the CAO on both medical and administrative decisions.
- The Executive would appoint the members of the Medical Review Panel, subject to Council confirmation, from a list of qualified physicians prepared by an impartial medical organization retained by the County to solicit and provide qualified applicants. The current Disability Review Panel is appointed jointly by the CAO and the employee unions.
- The Medical Review Panel must act with 3 members on each case. If only 2 members agree, the 3d member must write a minority recommendation. The current Disability Review Panel can act with 2 members and no minority recommendation is required. A minority recommendation would give the new Disability Review Board a more complete picture of the medical issues when there is a split vote by the Medical Review Panel.
- The Medical Review Panel must require an independent medical examination. Currently, the Disability Review Panel can, but often does not, require an independent medical examination.

- Creates a **Disability Review Board** to make decisions on disability retirements based upon the recommendations of the Medical Review Panel. The Board consists of 3 *ex officio* members (Dir. of Finance, Dir. of Management & Budget, and Dir. of HR), 1 current employee nominated by the employee unions, and 1 public member. The members are appointed by the Executive, subject to Council confirmation.
- The CAO no longer makes the disability decision. This would require an administrative board consisting of representatives of management, labor, and the public to make administrative decisions related to an employee's eligibility for disability.
- Changes the current Disability Arbitration Board to a single independent **Disability Arbitrator** to hear appeals of decisions made by the Disability Review Board. There would be 4 Disability Arbitrators pre-selected jointly by the County and the employee unions. Current law provides for a neutral arbitrator to chair a 3 person board with 1 member appointed by the CAO and 1 member appointed by

the employee unions. Current law also creates a separate Police Arbitration Board for appeals from members of the Police Department.

2. The Bill would make the following changes in the benefits for ERS members, including police and fire employees:

- Creates a service-connected disability with *total incapacity* with a minimum payment of **70%** of final earnings.
- Total incapacity requires an inability to perform substantial gainful activity based on the Social Security disability standard.
- Creates a service-connected disability with *partial incapacity* with a minimum payment of **52½%** of final earnings.
- Partial incapacity requires an inability to perform the essential functions of the current position while retaining the ability to perform substantial gainful activity. Current law provides for a minimum 66 2/3 % benefit for both total and partial disability for all employees other than members of Group G (Fire and Rescue). The Bill would extend the current Group G partial/total split benefit to all ERS members.
- Requires a one-for-one reduction in service-connected disability payments for any disability retirement payments received from another employer for the same impairment. Current law does not contain this provision.
- Prohibits an award of a service-connected disability pension to an employee who commits an offense that would justify removal for cause. Current law permits an employee who commits such an offense to receive a service-connected disability retirement.
- Requires a member to apply for a service-connected disability retirement due to an accidental injury within 1 year after separation from service and within 5 years after the accident occurred. There are no current restrictions on when applications for disability can be filed.
- Requires a member to report an accidental injury causing the incapacity that forms the basis of the disability at the time of the injury. Current law does not require such a report.

3. Other Points

- Disability benefits for Retirement Savings Plan (RSP) employees remain unchanged, although the procedures used to determine eligibility and appeals are modified to be consistent with the procedures for ERS employees. The RSP consists of non-public safety employees hired after October 1, 1994.
- The current RSP *continued service-connected disability pension* is **66 2/3%** until age 65 with dollar for dollar deductions for other group income maintenance insurance, Social Security disability benefits, any government disability plan, and the amount received from RSP. There is also a deduction of 1 dollar for every 3 dollars in earned income. Disability benefits for RSP members end at age 65.

- The Bill expressly provides that the amendments in the Bill are not subject to collective bargaining.
- This is an expedited Bill. The amendments would apply to any application for disability benefits filed after it becomes law.
- The Bill has a 90 day transition period for the Executive and Council to appoint members of the Medical Review Panel and the Disability Review Board. During this transition, applications would continue to be reviewed and decided by the existing Disability Review Panel serving in the role of the Medical Review Panel and the CAO serving as the Disability Review Board.

Article 57 Retirement

The Employer shall submit proposed legislation to the County Council that would amend Montgomery County Code Chapter 33, Article III to provide for the revisions in Sections B, I, J, K, and L affecting bargaining unit employees. [Bill 19-01 vetoed for reasons unrelated to this article. Emergency Bill 25-01 enacted.]

Section A. Preservation of Benefits. Except as provided in this Agreement, all unit members retain all the retirement benefits and conditions previously in effect between the parties. [See Side Letter.]

Section B. Pension Formula. Subject to section I, a Group F member who retires on a normal or disability retirement, subject to sections D and G the annual pension must equal 2.4 percent of average final earnings multiplied by years of credited service, up to a maximum of 30 years, plus sick leave credits. Years of credited service of less than one full year must be prorated. Sick leave credits used for years in excess of 30 years must be credited at 2% of average final earnings. The maximum benefit with sick leave credits must not exceed 76% of average final earnings.

Section C. Military Credit. It is recognized that legislation enabling County employees to purchase pension credit for military service is pending before the Council. If such legislation is duly enacted, members of the bargaining unit shall not be precluded from exercising rights afforded by that statute.

Section D. Disability Benefit. It is agreed that police officers eligible for a service connected disability pension shall continue to receive a minimum benefit of 66 2/3% of final earnings.

Section E. Disability Procedures. The parties previously agreed that upon implementation of Section D, they would meet to negotiate changes to Bill No.36-94 to achieve certain objectives in establishing disability procedures applicable to unit members. Those objectives have been modified and the following is agreed and legislation shall be submitted to accomplish the following changes to the Retirement Law, in effect as of October 27, 1997:

1. Members of the bargaining unit shall have a right to appeal the final determination of the CAO to a tripartite panel, as provided under §33-43A of the Retirement Law, except that the neutral shall be selected by Lodge 35 and the County pursuant to the procedure used to select an impasse neutral under §33-81 of the Police Labor Relations Act.
2. The Disability Panel that rules upon applications for disability benefits of members of the bargaining unit shall be selected in accordance with the procedures set out in §33-43A of the Retirement Law, in effect as of October 27, 1997.
 - a. The applicant and the County shall submit all medical information pertaining to the medical condition of the applicant to the Disability Review Panel, consistent with procedure and requirements as may be agreed by Lodge 35 and the County. The Panel will inform the parties that the record is complete and of its intent to initiate its review. In the event that either party wishes to supplement the record upon notice from the Panel that it is prepared to begin its review, the Panel shall set a final date, allowing a reasonable amount of time, to submit additional medical documentation.
 - b. After the final date for supplementation of the medical record, additional medical information will be considered by the Panel or Disability Arbitration Board only if it pertains to reinjury or modification of the medical condition occurring or diagnosed subsequent to the date the Panel's medical record was closed.
3. The right of appeal shall extend to "any decision" of the CAO affecting a member's right

to benefits, rather than only to “the written decision” of the CAO.

4. The certified representative of police officers shall not be obliged to designate an individual to serve as a member of the Disability Arbitration Panel.
5. Section 33-43A (1)(1) of the Retirement Law, in effect as of October 27, 1997, is inapplicable to Lodge 35.

Section F. Amendments. During January 1996, the Employer submitted to the Montgomery County Council the below described amendments to the Employees’ Retirement System.

1. *Section 33-35. Definitions.* A definition of “picked-up contributions” is added, references to picked-up contributions are added to the definitions of “accumulated contributions” and “member contributions”, and the definition of “regular earnings” is amended by adding a paragraph which states that the maximum compensation which can be used as regular earnings for the determination of benefits is limited by §401(a)(17) of the Internal Revenue Code, and beginning on July 1, 1996, the limitation is \$150,000.
2. *Section 33-37(e) Retirement plans.* In subsection (3)(A), the statement is added that any additional contributions that an employee in the integrated plan must make to reenter the optional plan cannot be treated as picked-up contributions. Subsection (3)(B) is added to state that a member of the integrated plan who is not a member of social security will be treated as if he is a member of the optional plan and will have to pay any additional contributions required under the optional plan.
3. *Section 33-37(g) Transfer from one group to another.* A sentence is added to state that, if a Group D member transfers to Group F, any additional contributions which the employee must make to transfer to Group F may not be treated as picked-up contributions.
4. *Section 33-39 (c) Return of member contributions.* In subsection (3), a statement is added that picked-up contributions will not be refunded to an employee who elects to switch from the optional plan to the integrated plan.
5. *Section 33-41. Credited service.* Subsection (a)(7) is added which states that employee contributions to buy past service cannot receive the tax treatment given to picked-up contributions. Subsection (c) is amended to state that an employee must be given credit for any military service (previously only compulsory service was covered), and states the conditions under which service credit will be given. In subsection (h), language is added to state that the chief administrative officer [“CAO”] may provide regulations to ensure the favorable income tax treatment of picked-up contributions from other State retirement systems. Subsection (i) is changed to reflect that only a vested member may purchase prior service credits. In subsection (j), a reference to §33-45(a) is added, which allows a member to transfer service credit from the State of Maryland and to use it for vesting purposes. Subsection (o) is added to preclude a member from purchasing credited service from a defined contribution plan.
6. *Section 33-42(i) Maximum annual benefit.* Language is added to subsections (1), (5), and (8) to state that the maximum annual benefit must be determined in accordance with §415 of the Internal Revenue Code.
7. *Section 33-43(d) Non-service connected disability retirement.* Previously, a member was not eligible for a non-service connected disability retirement if the individual was eligible for a normal retirement. In subsection (1)(c), this requirement is removed for applications

filed after October 15, 1992, because of amendments to the Age Discrimination in Employment Act.

8. *Section 33-44(o) Direct rollover distributions.* This subsection is added to provide for the direct rollover of certain refunds from this retirement system to any other eligible retirement plan.
9. *Section 33-45(a) Eligibility for vesting.* This section is amended to allow a member to use service credit transferred from the State of Maryland for vesting purposes.
10. *Section 33-46(e) Spouse's and children's benefits in the event of the death of an active member after eligible for vesting or retirement.* Language is added to state that the contributions that the payee is to receive will include picked-up contributions.
11. *Section 33-47(e) Payment of expenses and contributions.* Language is added to this section to clarify the role of the CAO.
12. *Section 33-54. Exemption from execution, garnishment, or attachment.* A new last paragraph is added to comply with Maryland law which regards retirement benefits as marital property that may be divided or assigned upon a separation or divorce. The amendment also provides that these distributions will be made in accordance with the Internal Revenue Code, and requires the CAO to establish forms and procedures to accomplish such distributions.

Section G. Non-Service Connected Disability. The minimum benefit for non-service connected disability shall be 33.33% of final earnings.

Section H. Cost of Living Adjustment for employees who became members of the Employees' Retirement System on or after July 1, 1978.

1. The annual cost-of-living adjustment for employees who enrolled in the Employees' Retirement System on or after July 1, 1978 shall be 100% of the change in the consumer price index up to three (3%) percent and 60% of any change in the consumer price index that is in excess of three percent (3%). However, except as provided in Section H.2 *infra*, the CPI adjustment shall not be more than 7.5%.
2. The existing portion of Retirement Law section 33-44(c)(3): "retired members who are disabled shall not be subject to this maximum and pensioners age sixty-five (65) or older shall also not be subject to this maximum with respect to [the] fiscal year beginning after the date of attainment of age sixty-five (65)" shall remain in effect, except that the maximum shall be "7.5%" as referenced in subsection H.1 above.

Section I. Benefit upon social security retirement age. Upon attainment of the social security normal retirement age, members enrolled in the integrated retirement plans shall receive, 1.65 percent of average final earnings up to the maximum of 30 years and 1.25 percent for credited years in excess of 30, up to the Social Security maximum compensation level in effect on the date of retirement. All other integration provisions shall remain in effect.

Section J. Amount of contributions. For employees in the Optional Retirement Plan, the contribution is 8.5% and for employees in the Integrated Plans, the contribution is 4.75% up to the maximum Social Security Wage Base and 8.5% of regular earnings in excess of the Wage Base.

Section K. Domestic Partner Benefits. Subject to IRS qualification rules and requirements, a domestic partner of a unit member eligible to receive domestic partner (including opposite sex domestic partners)

benefits under Article 24 of this agreement shall be eligible to receive retirement benefits, subject to the adoption of legislation submitted by the parties to amend appropriate sections of Chapter 33 of the Montgomery County Code to the same extent as a "spouse" under the Employees' Retirement System, provided all eligibility requirements are met. This provision shall be renegotiated in the event the IRS determines that the provision violates any rule or requirement.

Section L. Pension Payment Option. At retirement, a member may elect a "pop-up" variation of a Joint and Survivor option with an appropriate actuarial reduction.

Section M. Other Retirement Changes

1. *Disability Retirement - Offset of Earnings.* The Employer will submit legislation to amend Section 33-43(j) of the Code to provide for the following:
 - a. A Group F member must not have the member's service-connected disability pension payments reduced by other income received from sources other than County Government employment.
 - b. Whenever the chief administrative officer determines that a Group F member, who has not yet reached normal retirement date, receiving non-service connected disability pension payments is engaged in or is able to engage in a gainful occupation paying more than the difference between the amount of disability pension payments and 20% above the current maximum earnings of the occupational classification from which disabled, the amount of the member's disability pension payments may be reduced to the point at which the amount of disability pension payments plus the amount earnable equals 20% above such maximum earnings.

Whenever a Group F disability retiree's earnings capacity is changed, the amount of non-service connected disability retirement pension may be further modified by the chief administrative officer. The amount of the revised pension must not exceed the original disability retirement pension plus cost-of-living increases or an amount which, when added to the amount earnable by the member, equals 20% above the maximum earnings of the occupational classification from which disabled. For the purpose of this subsection, "disability pension" is the amount of pension payable without the election of a pension payment option.

The parties further agree that these provisions shall remain a part of the contract.

- c. The parties agree that the Code Section 33-43(h) and (i) shall be interpreted and applied as meaning that an integrated employee who retires on disability shall receive the benefit s/he would have received if there were no integration provisions.
2. *Social Security.* The parties agree to jointly study the effect of Social Security integration on benefits received at Social Security age. The study shall be completed by November 15, 2003.
3. *Spouse's or Domestic Partner's and children's benefits of a member whose death is service-connected.* The Employer will submit legislation to amend Section 33-46(b) of the Code to provide for the following:

If a Group F member dies while in the service of the County or a participating agency and satisfactory proof that death was the result of injuries sustained in the line of duty or was directly attributable to the inherent hazards of the duties performed by the member is submitted and the death was not due to willful negligence, payments to the spouse, or domestic partner, and children of the member shall equal the benefit that such

beneficiaries would have received under subsection (c) of this section had the employee been service-connected disability retired on the date of death. For purposes of this section, the form of retirement shall be a 100-percent joint and survivor pension option. The parties further agree that these provisions shall remain a part of the contract.

[Note: This reflects new language for Group F. Members. Job Sharers receive full disability benefits. This section is intended to retain that level of benefit in the event of death.]

4. *Trial Retirement.* The Employer shall submit proposed legislation to the County Council that would amend Section 33-38(f) of the County Code to provide for the following, effective July 1, 2005:
 - a. to permit bargaining unit employees to participate in the trial retirement option;
 - b. to amend Section 33-38(f)(6) to provide that the Chief Administrative Officer must return the member to the position the bargaining unit employee held before retirement if it is still available or to a position with an equivalent salary and grade in the Police Department when such a funded position becomes available; and
 - c. to delete Section 33-38(f)(6)(B), which provides that, if the same or an equivalent position is not immediately available, the Chief Administrative Officer must temporarily assign the employee to a special projects office in the Office of Personnel.
5. *Retirement Savings Plan.* The Employer shall submit proposed legislation to the County Council that would amend Section 33-115 of the County Code to permit bargaining unit employees in Group F who have reached the maximum service credits under the provisions of the Employees' Retirement System to transfer from the Employees' Retirement System to the Retirement Savings Plan.
6. For service-connected disabilities effective June 26, 2002 under this subsection, "final earnings" for a Group F member will not be less than average final earnings used in determining the annual pension calculated under Section 33-42(b)(1), except in the case where average final earnings is greater than final earnings due to solely a temporary promotion.

Interim Evaluation Report

Office of Inspector General

Montgomery County Government Disability Retirement Program

September 2008



Office of Inspector General
Montgomery County, Maryland



September 9, 2008

Hon. Mike Knapp, President, County Council
Hon. Isiah Leggett, County Executive

We are conducting a review of County government's disability retirement program that includes evaluating: policies and procedures relied upon to meet the needs of employees and protect financial resources; internal controls used to safeguard against potential abuse; and case file documentation used to support disability claims.

Recognizing that a service-connected disability retirement (SCDR) is an important benefit for employees who receive incapacitating injuries during County employment, our initial plan included focusing on SCDRs throughout County government. However, based on allegations of fraud, waste, and abuse received by the Office of Inspector General (OIG) and our preliminary analysis of County retirement data, our review to date has focused on police officers who represented approximately forty-nine percent (58 of 119) of all County employees approved by the Chief Administrative Officer (CAO) for SCDR benefits between July 1, 2004 and March 1, 2008. Our review disclosed that approximately sixty-two percent (58 of 93) of police officers who retired during this period were approved for SCDR benefits.

This interim report contains two findings and recommendations that have been discussed with the CAO. By formally communicating these matters now, corrective action can be taken, as deemed warranted, before all OIG work is completed and our final report is issued. The findings relate to the need for the Office of Human Resources (OHR) to improve internal controls and management oversight to ensure SCDR benefits are protected against abuse, and for the Department of Police to ensure compliance with medical examination program requirements and related standards regarding the health status and functional capabilities of police officers.

Our decision to issue an interim report is based, in part, on the receipt of additional allegations of fraud, waste, and abuse that appear to have been reported as a result of the Executive's August 11 press release and related media coverage regarding recommendations for reform to the County's SCDR process by an OHR work group started in late 2007. The OIG will apply additional procedures to determine if the allegations are significant to our objectives. An updated (September 8, 2008) CAO response is included as Appendix B of this report.

Respectfully submitted,

**Office of Inspector General
Interim Evaluation Report
MCG Disability Retirement Program
September 2008**

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Background Information

Primary goals of the Office of Inspector General (OIG) include: reviewing the effectiveness and efficiency of County government; preventing and detecting fraud, waste and abuse; and ensuring legal, fiscal, and ethical accountability by those responsible for managing resources and programs funded by Council appropriations. In this regard, our review of County government's disability retirement program was based on the receipt of fraud, waste, and abuse allegations as well as our preliminary review of program information provided to us by the Office of Human Resources (OHR). Our review did not evaluate medical information which normally falls outside the scope of OIG authority when performing audits and other formal reviews of County programs and activities.

County government's disability retirement program is managed by OHR and provides important and necessary benefits to County employees. The framework of the program, outlined in Montgomery County Code, Chapter 33, Section 33-43, Disability Retirement, distinguishes between a service-connected disability retirement (SCDR) and non-service connected disability retirement (NSCDR).

During the planning phase and initial field work of this review, we determined that a potential high risk area was management's process to approve SCDRs for County employees. Our initial plan included field work needed to review SCDRs for former employees of several County government departments. However, based on allegations received, preliminary analysis of OHR disability retirement data, and our interest to provide meaningful timely information to County officials regarding a program with no audit history, this report addresses our evaluation of County policies, procedures, and internal controls related to the County's handling of SCDR applications by police officers, as well as related activities regarding the Department of Police periodic medical examination program.

Generally, SCDRs are approved for individuals who are totally incapacitated or partially or permanently incapacitated for duty as a result of an accident while in the actual performance of duty. The key questionable practices identified during this review involve police officers who were in a full-duty work status with no work restrictions when they applied for a SCDR.

In fiscal year 2008, there were approximately 837 former County employees who received tax-exempt SCDR benefits totaling approximately \$32 million. There were approximately 573 former County employees (not in a police officer position) receiving SCDR benefits totaling approximately \$19 million and approximately 264 former police officers receiving SCDR benefits totaling approximately \$13 million.

Conclusions

MCG management is responsible for establishing and maintaining effective internal controls for the disability retirement program and related County activities. The results of our review to date include two findings and recommendations that address deficiencies in internal controls and management oversight as they relate to the disability retirement program and the Department of

Police periodic medical examination program. In this regard, our review of certain SCDRs approved by the Chief Administrative Officer (CAO) over approximately the past three years for police officers in a full-duty work status disclosed patterns, trends and behavior that we believe a prudent person would consider abusive.

In addition to the corrective action needed by management to address internal controls and oversight deficiencies identified in this report, we believe certain SCDRs approved over the past three years need to be re-examined under the existing authority granted to County officials. Such a re-examination is needed to determine if the status of any permanent SCDRs has changed. Management's corrective action will help protect the integrity of the disability retirement program for all County employees as well as the longer-term financial resources needed to provide the program's important benefits.

Corrective action by the Council, including possible amendments to the County's disability retirement law, may be needed to strengthen controls and provide effective oversight.

With regard to assessing the risk of possible fraud involving County government's disability retirement program, this is an ongoing process for the OIG. As stated in this report's transmittal letter, additional procedures will be applied during this review to address various allegations received before and during our field work.

Prior Audit or Review Activity

During the planning and field work phases of our review, we were advised by County management that to their knowledge the policies, procedures and internal controls related to the disability retirement program have never been audited.

On August 11, 2008, the County Executive publicly reported specific concerns and corrective actions needed to improve the disability retirement program, including methods used to determine an employee's eligibility to receive a SCDR. The Executive's report followed receipt of a seven-point program of recommendations made by a management work group. In this regard, the Executive and Council have the opportunity to consider the analysis and recommendations of the work group as well as the OIG to make needed improvements.

Management Comments

The CAO's response to this section of the report can be found on page 1 of Appendix B.

Findings and Recommendations

Finding 1

Internal controls and management oversight by the Office of Human Resources (OHR) are not sufficient to ensure service-connected disability retirements (SCDRs) approved for police officers in a full-duty work status are protected against abuse.

Analysis

A SCDR is an important and necessary benefit for police officers who receive incapacitating injuries during the course of County employment. However, our analysis of SCDRs recommended by OHR, reviewed by the Office of the County Attorney, and approved by the Chief Administrative Officer (CAO) for police officers over approximately the past three years disclosed individual cases and patterns that we believe a prudent person would consider abusive.

According to records provided by OHR, from July 1, 2004 through March 1, 2008, 58 police officers (approximately 49 percent of the 119 total SCDRs approved for all County employees) retired with a SCDR (either permanent or temporary) and 35 police officers retired under the County's normal retirement program (no disability benefits).

According to Police Department records, 11 of the 58 police officers were in a full-duty work status¹ when they applied for a SCDR. The CAO approved nine of the SCDR requests - six received a permanent SCDR and three received a temporary SCDR (temporary SCDRs are generally reassessed by management after 12 months and may be converted to a permanent SCDR). The two officers denied a SCDR have appealed the CAO's decision to the Disability Arbitration Board. We were advised by OHR and Police Department officials that the formal process used by OHR to make a recommendation to the CAO does not require the use of any information from the Police Department concerning an officer's current work status.

Appendix A is an overview of the nine police officers in a full-duty work status when they applied for a SCDR and the two officers (also in a full-duty work status at the time of application) who have been denied a SCDR, with their appeals pending. Of the nine officers approved, three had their police powers suspended and were under investigation for improper or illegal conduct when they applied for the SCDR. In addition, two of the nine officers (both in senior management level positions) were finalists or had already been selected for a second career position when the SCDR application was filed.

For the three officers who had their police powers suspended, and the two officers who were competing for jobs outside County government, the CAO's approval of the SCDR is questionable because the timing of each SCDR application appears to coincide with factors unrelated to incapacitation, such as pending criminal/disciplinary charges involving work-related misconduct or the imminent selection for another position upon retirement. For example, a police officer included in our testing (Officer J, Appendix A) was performing in a full-duty work status prior to having his police powers suspended on May 9, 2007. On October 4, 2007, his plea

¹ According to the Employee Health and Wellness Division, Police Department, a police officer in a full-duty work status has no work restrictions and can work the assignment without limitations.

agreement to a theft scheme over \$500 was filed in Circuit Court and on the following day, October 5, the officer submitted a SCDR application. The officer was notified by OHR on March 31, 2008 that the CAO approved a one-year temporary SCDR retroactive to November 2, 2007. This former officer's tax-exempt pension for part of FY 2008 (ending June 30, 2008) was approximately \$36,000. The temporary SCDR is subject to re-examination after one year.

We found that OHR procedures used to process SCDR applications frequently did not consider other relevant official County information. For example, the following two police officers, who are not included in Appendix A, were approved for SCDRs after they had been released by a doctor to return to full-duty work status following a workers' compensation injury:

- On October 16, 2007, an officer applied for a SCDR. On January 11, 2008, with the SCDR application pending, the claim's administrator for the County's worker's compensation program (administered by the Department of Finance) initiated an independent medical examination (IME) for this officer's workers' compensation claim. The same day, the doctor who performed the IME authorized the officer to return to a full-duty work status. The officer did not return to work after the IME. On January 28, 2008, the officer was notified by OHR that the County approved a temporary SCDR. This officer's tax-exempt SCDR pension for part of FY 2008 was approximately \$26,000. Our review of the disability retirement file disclosed that the results of the officer's IME related to the workers' compensation claim were not part of the information considered by the OHR Disability Review Panel that recommended the temporary SCDR.
- On October 23, 2007, an officer applied for a SCDR. On January 8, 2008, the claim's administrator initiated an IME for this officer's workers' compensation claim. The doctor who performed the IME released the officer for return to work on light duty the same day. On February 5, 2008, the doctor who conducted the IME reviewed additional information provided by the claim's administrator and reported that the officer could return to a full-duty work status about February 19, 2008. On March 17, 2008, OHR notified the officer that the County approved a temporary SCDR retroactive to February 29, 2008. This officer's tax-exempt SCDR pension for part of FY 2008 was approximately \$12,000. A review of the disability file disclosed the results of the IMEs were not part of the information considered by the OHR Disability Review Panel that recommended the temporary SCDR.

We were advised by the Office of Medical Services (OMS), the office in OHR that administers the disability retirement process, that recommendations by the Disability Review Panel are based on medical information. Our review found there is additional information maintained by OHR, Finance, or other County offices that is relevant in the SCDR decision-making process². For example, the department head for an applicant's current work unit can be required to provide information related to the employee's work status at the time of the application. Also, official records maintained by Finance's Office of Risk Management, the office responsible for

² According to Montgomery County Code Section 33-43, Disability Retirement, subsection (d),(3), "Subject to limitations in subsection (f),(4),(E), the Panel may consider any information or material submitted by the applicant, the certified representative or the County."

administering the County's workers' compensation program, can be included in the SCDR decision-making process. We believe policies and procedures used by OHR to make SCDR recommendations to the CAO should ensure the use of all appropriate information.

The authority of the CAO to approve a SCDR is outlined in Montgomery County Code Chapter 33, Section 33-43, Disability Retirement. In general terms, police officers and other employees submit an application for a SCDR with pertinent medical information. A Disability Review Panel, composed of three medical doctors under contract with OHR, reviews medical information compiled by OMS and makes a recommendation to approve or disapprove the application based on an analysis of the information provided and compared with the officer's job description (there are approximately nine police class specifications/job descriptions that range from Police Officer Candidate to Assistant Chief of Police). The Disability Review Panel has the option to request an IME prior to making a recommendation.

Prior to the CAO's decision, the Panel's recommendation is reviewed by the Director of OHR and County Attorney (or designee). County Code authorizes the CAO to grant a permanent SCDR when the Panel determines incapacitation is permanent or, in extenuating circumstances, a temporary SCDR for one or more one-year periods until the incapacitation is either removed or determined likely to be permanent. Both types of SCDR provide a tax-exempt pension of 66 2/3 percent of the employee's final earnings. A permanent SCDR provides a lifetime tax-exempt pension. SCDR pensions are adjusted annually based on changes in the consumer price index.

Under Montgomery County Code, Chapter 33, the CAO has the authority to require police officers and other employees receiving SCDR benefits to undergo a yearly physical examination during the five-year period following retirement and once every three-year period thereafter until age 55. The purpose of this provision is to protect the financial resources of the County by ensuring an individual's incapacitation has not changed. We were advised by OHR management that County leadership made the decision several years ago not to re-examine any former employees after they have been approved for a SCDR.

We believe the County's current decision-making process contributes to the potential for SCDR abuse. To illustrate our concern, we reviewed the SCDR application of a former police officer (Officer H, Appendix A) performing in a senior management level position when he left County employment under normal retirement on August 1, 2006 incident to his selection for another job. On October 19, 2006, the former officer was approved for a permanent SCDR retroactive to August 1, 2006. On September 22, 2007, according to public information, this individual competed in a physical fitness challenge associated with his new employer, finishing second place in his age group. The public information states this individual was able to complete a series of rigorous exercises that included push-ups, sit-ups, pull-ups, vertical jump, and a 1.5 mile run. Under current County practices used to administer the disability retirement program, the information relied upon by the CAO to approve this SCDR has not been updated or re-examined, even though County Code permits such a follow-up and there may be reason to believe the former employee's status has changed. The SCDR tax-exempt pension for this officer in FY 2008 was approximately \$95,000.

On March 1, 2004, an amendment to the County Code prohibited the CAO from reducing tax-exempt SCDR payments received by police officers by the amount of income received from sources other than County employment. However, although the effective date of this change appears to be more than four years old, according to the current collective bargaining agreement between the County and the Fraternal Order of Police, Lodge #35, the County agreed to submit (future) legislation to amend Section 33-43 (j) of the Code with the following language, "A Group F (police) member must not have the member's service-connected disability pension payments reduced by other income received from sources other than County Government employment." We were unable to determine the reason(s) for the current collective bargaining agreement language.

We were advised by OHR personnel that the County does not enforce earnings limitations for any former County employee approved for a SCDR, even though the County has the authority (except for former police officers) under County Code, Section 33-43 (j), Adjustment or Cessation of Disability Pension Payments. This includes approximately 573 former County employees with FY 2008 SCDR pensions totaling approximately \$19 million.

Recommendation

We recommend the Chief Administrative Officer revise the policies and procedures relied upon by the CAO's office, Office of Human Resources, and their contractors to approve service-connected disability retirement applications to ensure internal controls and management oversight practices protect County government against abuse. We also recommend the CAO ensure that specific SCDR cases identified in this report and a sample of other cases from the estimated 119 SCDRs approved over the past three years are re-examined to determine whether the status of any permanent SCDRs has changed.

Management's Response

The Chief Administrative Officer's response to this finding and recommendation can be found beginning on page 5 in Appendix B of this report.

Finding 2

Policies and procedures used to implement the Police Department's periodic medical examination program do not effectively assess the health status and functional capabilities of all police officers.

Analysis

The Police Department directive, Medical Examinations, dated March 18, 2001, outlines the policies and procedures used to administer the periodic medical examination program for employees. According to the directive, the purpose of the program is to ensure "each employee is physically able to perform the duties and responsibilities of the position assigned with the least possible risk to safety. As a preventive program, it is designed to detect early medical problems at no cost to the employee and provide management with a medical opinion when it appears an employee's medical condition is adversely affecting job performance." The directive states that for any questions about policy, the County's collective bargaining agreement with the Fraternal Order of Police (FOP) Lodge #35, Inc. supersedes the directive.

The Department's medical examination program is based, in part, on recommended national standards by the Commission on Accreditation for Law Enforcement Agencies (CALEA). CALEA is a professional law enforcement association that recertified the Department of Police in 2007 for three years after determining the Department continued to comply with approximately 500 specific standards that cover all aspects of police service.

Periodic medical examinations³ of County police officers are conducted by the Employee Medical Examiner (EME), a physician under contract with the Office of Medical Services (OMS), Office of Human Resources (OHR). According to the collective bargaining agreement between the County and FOP, covering the period July 1, 2007 through June 30, 2010, OMS is responsible for sending the Department of Police a list of employees due for a periodic physical examination according to the age of the police officer (i.e. officers age 40 and over receive not less than one complete OMS physical every year; age 31-39 not less than one physical every two years; age 30 and under not less than one every three years)⁴. The Department is responsible for scheduling each examination with OMS, and notifying the employee of the scheduled appointment at least three weeks in advance, even if the appointment will occur during an employee's published work schedule.

From our field work during this review, we identified inconsistencies between the purpose of the periodic medical examination program and the manner in which the program is implemented. For example, our review of OMS medical examination reports disclosed that approximately 254 police officers were due for a periodic medical examination during the January to June 2008 period. During that period, 55 (22 percent) officers reported to OMS for the scheduled physical, four cancelled the appointment, 10 did not report for the physical, four rescheduled their physical, and 181 (71 percent) were not scheduled by the Department for the required medical examination.

In addition to the impact of these inconsistencies on the program's effectiveness, we believe they have the potential to adversely affect the ability of management to properly document and assess conditions related to an officer's work status and/or potential SCDR (see Finding 1). According to OMS records, in June 2008 there were 84 police officers who were due to have a periodic medical examination. For 22 of the 84, the date of their last OMS examination ranged from two to ten years. In addition, our review of OMS records identified a current officer that has not had an OMS periodic medical examination since November 1994, even though the officer continues to perform in a Police Department position classified in the Core I medical group.

A review of the Department of Police directive and the current collective bargaining agreement disclosed that neither document adequately addresses employee and management accountability

³ Montgomery County Personnel Regulation, Chapter 8, Medical Examinations and Reasonable Accommodation, Section 8-4, Medical standards and guidelines for medical examinations and pre-employment inquiries, subsection (a), (2) states, "Medical standards and guidelines for medical examinations and pre-employment inquiries must be: (A) job-related and used to determine if the applicant or employee can perform essential functions of the job with or without accommodations; and (B) applied uniformly and consistently to all applicants and employees who are offered employment or employed in the same job class or occupational class."

⁴ According to the Medical Examinations directive and current collective bargaining agreement, police officers are classified as a Core I medical group that requires an extraordinary degree of physical fitness and mental health and continued fitness for duty in a high risk occupation.

to ensure compliance with the periodic medical examination program and standards related to health standards and functional capabilities.

Our testing of SCDR cases identified at least two situations in the last two years in which a police officer rated fit for duty with no work restrictions as a result of a periodic medical examination by OMS⁵ applied for a SCDR several weeks later and was approved. In both cases described below, our review found that the full-duty work status of the officer did not change between the date of the OMS medical examination and the date of the SCDR application:

- On November 14, 2006, an officer (Officer B, Appendix A) performing in a full-duty work status completed a periodic medical exam at OMS and received a fit for duty rating with no work restrictions. On December 7, 2006, the officer applied for a SCDR and on April 4, 2007 was notified by OHR that the SCDR application was approved with an effective date of January 1, 2007. The FY 2008 tax-exempt pension for this officer was more than \$88,000.
- On July 26, 2007, an officer (Officer F, Appendix A) performing in a full-duty work status completed a periodic medical exam at OMS and received a fit for duty rating with no work restrictions. On August 22, 2007, the officer applied for a SCDR and on December 26, 2007 received notice that the SCDR was approved with an effective date of October 1, 2007. The tax-exempt pension for part of FY 2008 was approximately \$33,000.

Recommendation

We recommend the Police Chief, in consultation with the Chief Administrative Officer and Director, Office of Human Resources, revise and implement policies and procedures that ensure compliance with periodic medical examination program requirements and other police standards regarding the health status and functional capabilities of all police officers and other employees in the Core I medical group.

Management's Response

The Chief Administrative Officer's response to this finding and recommendation can be found beginning on page 9 in Appendix B of this report.

⁵ Montgomery County Personnel Regulations, Chapter 8, Medical Examinations and Reasonable Accommodation, Section 8-4, Medical standards and guidelines for medical examinations and pre-employment inquiries, subsection (a) (3) states, 'When performing medical examinations or inquiries, the EME must conduct an individualized assessment of an individual's current health status and functional capabilities: (A) in relation to the essential functions, physical and psychological demands, working conditions, and workplace hazards of a particular occupation or position; ...'

Ideas to Explore

As part of our benchmarking for best practices, we reviewed police officer disability retirement programs in other local governments. In this regard, a best practice that appears consistent across many local governments is the implementation of a disability retirement board whose members often represent a cross-section of backgrounds and skills to approve disability retirements for police officers. Montgomery County does not have a similar decision-making body; rather, the County's long-standing practice has been to rely on the recommendation of three medical doctors who perform their duties as the County's Disability Review Panel.

For Fairfax County, Virginia, we were advised the government uses a Police Officers' Board of Trustees that includes representatives from the public, active County employees, and elected representatives of County employees and retired employees. The Board makes a ruling based upon medical evidence whether the applicant is totally or partially disabled, and whether the injury or illness is job-related.

At the request of a County official, we researched King County, Washington, where there is a Disability Retirement Board for the State of Washington Law Enforcement Officers' and Fire Fighters' (LEOFF) Retirement System that consists of five members. The Board reviews and rules on claims for reimbursement of medical expenses and applications for disability leave and retirement benefits mandated under Washington State LEOFF retirement Plan 1. As part of the decision-making process, the Board uses medical, mental health, and legal consultants.

We recommend the Council and Executive review the best practices of disability retirement programs of Fairfax County, Virginia, Kings County, Washington, and other comparable local governments to identify best practices capable of assisting Montgomery County leaders with the corrective action needed to ensure disability retirement benefits are provided in a fair manner within the context of the legal boundaries of the County's program.

Scope, Objectives, and Methodology

Under the authority of Montgomery County Code §2-151, we conducted a review of the MCG disability retirement program for the period July 1, 2004 through March 1, 2008. We performed the review in accordance with the principles and standards for offices of inspectors general published by the Association of Inspectors General, and other professional organizations.

The objectives of our review were to: (1) determine if disability retirement policies and procedures are effectively managed to support the needs of County employees and protect the financial resources of the County; (2) evaluate the internal controls associated with the disability retirement program to safeguard against the potential for abuse; and (3) review case file documentation to determine if there is adequate justification to support disability claims.

To accomplish our objectives, we met with representatives of the Chief Administrative Officer (CAO), Office of Human Resources (OHR), Police Department, and Office of the County Attorney. Our methodology included: (1) review of policies and procedures applicable to the disability retirement program; (2) analysis of disability retirement management reports and costs; (3) evaluation of management reports used to document periodic employee medical examinations, workers' compensation claims, and other relevant County information; (4) interviews with personnel in MCG departments including program staff and the Employee Medical Examiner in the Office of Medical Services, Council staff, and other key stakeholders; and (5) benchmarking with other comparable governments. We also tested disability retirement applications and related County records for selected employees in the Police Department. In addition, we reviewed applicable collective bargaining agreements and sections of the County Code for practices and procedures regarding disability retirement benefits.

At the conclusion of our initial field work, we discussed preliminary findings and recommendations with appropriate County officials including Assistant Chief Administrative Officers, Department Directors, Chief of Police, and the County Attorney. Preliminary findings and recommendations were presented in writing on July 31, 2008 to the CAO, prior to issuing our draft report on August 21, 2008 to the CAO for review and a formal management response. Upon completion of all review work, a final report will be issued.

The data used to conduct our review were provided by the Executive Branch and are deemed reasonable but not independently verified.

Field Work and Management Response

We conducted our fieldwork from March to July 2008. The Chief Administrative Officer's September 8, 2008 response appears as Appendix B of this report.

**Police Officers who Applied for a Service-Connected Disability Retirement (SCDR)
While in a Full-Duty Work Status**

Files Reviewed	Date	Description of Events
Officer A	<ul style="list-style-type: none"> ▪ December 29, 2002 ▪ January 18, 2007 ▪ May 8, 2007 ▪ September 27, 2007 ▪ October 4, 2007 ▪ November 2, 2007 ▪ November 7, 2007 ▪ February 8, 2008 ▪ FY 2008 estimated tax-exempt pension 	<ul style="list-style-type: none"> ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Last periodic exam by OHR's Office of Medical Services (OMS) with a fit for duty rating and no work restrictions ▪ In a full-duty work status when placed on administrative leave with police powers suspended pending a criminal investigation related to conduct in office ▪ Applied for SCDR ▪ Entered a plea of guilty to misconduct in office (misdemeanor) in Circuit Court ▪ Resigned from County employment; effective date of temporary SCDR ▪ Sentenced to unsupervised probation for two years ▪ Notified CAO approved a temporary SCDR effective November 2, 2007 ▪ \$31,000
Officer B	<ul style="list-style-type: none"> ▪ November 21, 1987 ▪ October 2, 2002 ▪ November 14, 2006 ▪ December 7, 2006 ▪ April 4, 2007 ▪ FY 2008 estimated tax-exempt pension 	<ul style="list-style-type: none"> ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Last periodic exam by OMS with a fit for duty rating and no work restrictions ▪ Applied for SCDR while in a full-duty work status with no work restrictions ▪ Notified CAO approved a permanent SCDR effective January 1, 2007 ▪ \$88,000
Officer C	<ul style="list-style-type: none"> ▪ January 24, 2001 ▪ October 3, 2002 ▪ December 3, 2002 ▪ January 9, 2006 ▪ April 25, 2006 ▪ May 8, 2007 ▪ October 2, 2007 ▪ October 4, 2007 ▪ November 21, 2007 ▪ November 21, 2007 ▪ December 26, 2007 ▪ February 21, 2008 	<ul style="list-style-type: none"> ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Last periodic exam by OMS with an incomplete rating ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ In a full-duty work status when placed on administrative leave with police powers suspended pending a criminal investigation related to conduct in office ▪ Applied for SCDR ▪ Plea agreement to misconduct in office filed in Circuit Court ▪ Entered a plea of guilty to misconduct in office (misdemeanor) in Circuit Court ▪ Resigned from County employment ▪ Notified by OHR not recommended for disability retirement; decision appealed to Disability Arbitration Board ▪ Sentenced to 18 months unsupervised probation

Files Reviewed	Date	Description of Events
Officer D	<ul style="list-style-type: none"> ▪ July 15, 1999 ▪ February 1, 2005 ▪ October 10, 2005 ▪ February 1, 2006 ▪ FY 2008 estimated tax-exempt pension 	<ul style="list-style-type: none"> ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Last periodic exam by OMS with a fit for duty rating and no work restrictions ▪ Applied for SCDR while in a full duty work status with no work restrictions ▪ Notified CAO approved a permanent SCDR effective February 1, 2006 ▪ \$68,000
Officer E	<ul style="list-style-type: none"> ▪ March 3, 1994 ▪ November 11, 1996 ▪ May 1, 2007 ▪ December 7, 2007 ▪ June 13, 2008 ▪ FY 2008 estimated tax-exempt pension 	<ul style="list-style-type: none"> ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Last periodic exam by OMS with a fit for duty rating and no work restrictions ▪ Applied for SCDR while in a full-duty work status with no work restrictions ▪ CAO approved a permanent SCDR ▪ 66 2/3 percent based on final earnings of \$87,609 - final pension option not selected as of July 7, 2008
Officer F	<ul style="list-style-type: none"> ▪ February 1, 2006 ▪ July 26, 2007 ▪ August 22, 2007 ▪ December 26, 2007 ▪ FY 2008 estimated tax-exempt pension 	<ul style="list-style-type: none"> ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Last periodic exam by OMS with a fit for duty rating and no work restrictions ▪ Applied for SCDR while in a full duty work status with no work restrictions ▪ Notified CAO approved a permanent SCDR effective October 1, 2007 ▪ \$33,000
Officer G	<ul style="list-style-type: none"> ▪ September 16, 1991 – June 1, 2005 ▪ November 4, 2005 ▪ March 30, 2007 ▪ April 25, 2007 ▪ May 9, 2007 ▪ June 1, 2007 ▪ January 9, 2008 ▪ FY 2008 estimated tax-exempt pension 	<ul style="list-style-type: none"> ▪ Multiple Workers' Compensation claims filed for various injuries sustained while employed as a police officer ▪ Last periodic exam by OMS with a fit for duty rating and no work restrictions ▪ Reported as one of six finalists for the position Chief of Police for a municipality in Maryland (source: Gazette.Net, March 30, 2007) ▪ Announced as Chief of Police for a municipality in Maryland (source: washingtonpost.com, April 25, 2007) ▪ Applied for SCDR while in a full-duty work status with no work restrictions ▪ Effective date of normal retirement from Montgomery County ▪ Notified CAO approved a permanent SCDR effective June 1, 2007 ▪ \$88,000

Files Reviewed	Date	Description of Events
Officer H	<ul style="list-style-type: none"> ▪ March 6, 1992 ▪ March 8, 1994 ▪ August 5, 2005 ▪ September 30, 2005 ▪ May 23-24, 2006 ▪ June 12, 2006 ▪ July 2006 (entire month) ▪ July 3, 2006 ▪ August 1, 2006 ▪ October 19, 2006 ▪ FY 2008 estimated tax-exempt pension 	<ul style="list-style-type: none"> ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Last periodic exam by OMS with a fit for duty rating and no work restrictions ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Finalists interviewed for executive position with outside law enforcement agency (source: law enforcement agency web site) ▪ Applied for SCDR while in a full-duty work status with no work restrictions ▪ In a paid leave status with Montgomery County ▪ Started new executive position (source: law enforcement agency web site) ▪ Retired under normal retirement from Montgomery County ▪ Notified CAO approved a permanent SCDR effective August 1, 2006 ▪ \$95,000
Officer I	<ul style="list-style-type: none"> ▪ November 7, 2003 ▪ October 31, 2004 ▪ November 22, 2005 ▪ June 16, 2006 ▪ February 1, 2007 ▪ May 8, 2007 ▪ August 23, 2007 ▪ October 4, 2007 ▪ October 12, 2007 ▪ December 26, 2007 ▪ May 29, 2008 ▪ June 10, 2008 ▪ FY 2008 estimated tax-exempt pension 	<ul style="list-style-type: none"> ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Last periodic exam by OMS with a fit for duty rating and no work restrictions ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ In a full-duty work status when placed on administrative leave with police powers suspended pending a criminal investigation related to conduct in office ▪ Applied for SCDR ▪ Indicted on one felony count and four misdemeanor counts related to conduct as a police officer ▪ Suspended without pay; effective date of SCDR ▪ Notified CAO approved a temporary SCDR effective October 12, 2007; decision appealed to Disability Arbitration Board ▪ Pled guilty to failure to obtain approval for other employment and misconduct in office (misdemeanors) ▪ Sentenced to three years unsupervised probation ▪ \$27,000

Files Reviewed	Date	Description of Events
Officer J	<ul style="list-style-type: none"> ▪ August 31, 1991 ▪ September 5, 1993 ▪ April 16, 1995 ▪ April 4, 1996 ▪ May 24, 1998 ▪ February 28, 2001 ▪ June 10, 2001 ▪ September 24, 2002 ▪ October 1, 2004 ▪ May 9, 2007 ▪ October 4, 2007 ▪ October 5, 2007 ▪ October 31, 2007 ▪ November 2, 2007 ▪ March 26, 2008 ▪ March 31, 2008 ▪ FY 2008 estimated tax-exempt pension 	<ul style="list-style-type: none"> ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Last periodic exam by OMS with a fit for duty rating and no work restrictions ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Worker' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ In full-duty work status when placed on administrative leave with police powers suspended pending a criminal investigation related to conduct in office ▪ Plea agreement to theft scheme over \$500 filed in Circuit Court ▪ Applied for SCDR ▪ Entered plea agreement to theft scheme over \$500 (felony) ▪ Resigned from County employment; effective date of temporary SCDR ▪ Sentenced to 18 months unsupervised probation ▪ Notified CAO approved a temporary SCDR effective November 2, 2007; decision appealed to Disability Arbitration Panel ▪ \$36,000
Officer K	<ul style="list-style-type: none"> ▪ December 30, 1996 ▪ May 21, 2005 ▪ August 1, 2005 ▪ May 31, 2006 ▪ March 20, 2007 ▪ June 13, 2007 	<ul style="list-style-type: none"> ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Workers' Compensation claim filed due to injury sustained while employed as a police officer ▪ Last periodic exam by OMS with a fit for duty rating and no work restrictions ▪ Applied for SCDR ▪ Notified by OHR not recommended for disability retirement; decision appealed to Disability Arbitration Panel



OFFICES OF THE COUNTY EXECUTIVE

Isiah Leggett
County Executive

Timothy L. Firestine
Chief Administrative Officer

MEMORANDUM

September 8, 2008

TO: Thomas J. Dagley, Inspector General

FROM:  Timothy L. Firestine, Chief Administrative Officer

SUBJECT: Draft Report Regarding the County's Disability Retirement Program

This memorandum is a response to the draft report prepared by the Office of Inspector General (OIG) regarding the County's disability retirement program. Please include this memorandum as an Appendix in your final report.

As a preliminary comment, I note that the OIG's review parallels a portion of the work conducted by Executive staff during the past year, which was initiated because the Executive recognized that there are aspects of the disability retirement program that result in benefit payments that go above and beyond what a competitive disability retirement program should provide. In particular, the Executive was concerned about data that showed a greater frequency of service-connected disability retirements (SCDRs) granted to employees in the public safety ranks. While this is not an uncommon occurrence among public safety plans, the Executive directed that we evaluate how the County's program could be improved.

To address that issue, the Director of the Office of Human Resources (OHR) established a Work Group in late 2007 that included representatives of the Police Department, Fire Department, OHR, and the Office of the County Attorney. The Executive charged the Work Group with reviewing the disability retirement program and making recommendations to improve administration of the program, while preserving an appropriate disability benefit for employees injured in the line of duty. The Work Group met on multiple occasions and issued a series of recommendations on June 30, 2008.

On August 11, 2008, the Executive announced receipt of the Work Group's seven-point plan (a copy of the Press Release is attached as Appendix 1) to address issues relating to the disability retirement program. That plan recommends significant changes to the current disability retirement program. The OIG's draft report mainly supports the conclusions and recommendations of the Work Group. Nevertheless, we are concerned that the draft report does not adequately reflect the legal and collective bargaining components of the disability retirement program, and overlooks some important challenges and difficulties associated with administering the program.

BACKGROUND INFORMATION

1. Conclusion Regarding "Abuse"

OIG Draft Report

The draft report (page 2) states that "The key questionable practices identified during this review involve police officers who were in full-duty work status with no work restrictions when they applied for a SCDR." The draft report (page 3) also notes that the OIG focused on "certain SCDRs approved by the Office of the Chief Administrative Officer (CAO) over approximately the past three years for police officers in full-duty status" and that the OIG's review "disclosed patterns, trends or behavior that we believe a prudent person would consider abusive."

Executive Staff Comments

We are very troubled by the number of simplistic conclusory statements that appear in the draft report and the report's ambiguous use of the term "abuse". We also believe that the value of the draft report is questionable because the OIG did not discuss its findings and recommendations with the Disability Review Panel (DRP) or adequately explain the extent to which much, if not most, of the SCDR decision-making process is governed by County law.

The County's disability retirement program, including the service-connected disability component, is a complex program established and governed by County law. The following individuals and entities participate in administering the program: the Office of Human Resources (OHR), the County Attorney's Office, the CAO, the DRP, the Disability Arbitration Board, the Police Disability Arbitration Board, the Finance Department's Division of Risk Management (Risk Management), employees and retirees, physicians hired by employees and retirees, and physicians hired by the County. The roles and responsibilities of all these individuals and entities (except Risk Management), as well as SCDR eligibility criteria, are established by County law. We believe the draft report fails to adequately explore those roles, responsibilities, and eligibility criteria.

The draft report fixates on the duty status of 11 police officers who applied for SCDRs. Of those 11 officers, the draft report noted that 6 received permanent SCDRs, 3 received temporary SCDRs, and 2 were denied SCDR benefits. We are puzzled as to why the OIG chose not to explore: (1) whether the DRP, the panel of physicians that is responsible under County law for determining eligibility for SCDR benefits, knew about the duty status of those 11 police officers; and (2) the relevance of duty status to the DRP when it evaluated eligibility for SCDR benefits based on the legal criteria set out in County law. We believe the draft report is fundamentally flawed because the OIG chose not to explore those questions.

The same flaw is evident in the parts of the draft report that discuss the existence of criminal/disciplinary charges filed against SCDR applicants and post-retirement job plans of SCDR applicants. We do not understand why the OIG chose not to explore: (1) whether the DRP knew about the specified criminal/disciplinary charges or post-retirement job plans; and (2) the relevance of that information to the DRP when it evaluated eligibility for SCDR benefits based on the legal criteria set out in County law.

As required by County law, the DRP is a panel of three physicians appointed by the CAO from a list of physicians agreed on by union and County representatives. The DRP is charged with evaluating disability applications and making recommendations to the CAO. The DRP evaluates medical data and other relevant information and makes a recommendation which is then reviewed for legal sufficiency by the County Attorney's Office and for procedural consistency by OHR. The CAO does not grant disability applications until established protocols are followed, within the limits imposed by County law.

We note that the chart that is included as Appendix A to the draft report purports to show a timeline for relevant steps in the SCDR application process for the 11 police officers that were the focus of the OIG's review. Inexplicably, that chart does not even list the DRP's recommendation as one step in the process.

The issue of whether an individual is eligible for a SCDR is, in essence, a medical decision. The draft report repeatedly notes that the CAO approved certain SCDRs but fails to note that in all of those cases: (1) the DRP recommended that the CAO approve the SCDRs; and (2) the County Attorney's Office reviewed the DRP's findings and recommendations for legal sufficiency. By repeatedly focusing on the CAO's final decision without acknowledging the role of the DRP or the County Attorney's Office, the draft report suggests that the CAO has authority to disregard the DRP's findings and recommendations. We are very troubled by that suggestion. We believe the CAO must have a sound legal basis for any decision regarding SCDR benefits and is prohibited from making arbitrary and capricious decisions.

2. Medical Records and the Role of the Disability Review Panel

OIG Draft Report

The draft report (page 2) states that “Our review did not evaluate medical information which normally falls outside the scope of OIG authority when performing audits and other formal reviews of County programs and activities.”

Executive Staff Comments

As discussed above, we believe the draft report is fundamentally flawed because the OIG did not explore its findings and conclusions with members of the DRP. The OIG’s hesitancy to “evaluate medical records” is not an acceptable justification for not talking to the members of the DRP about how they evaluated particular medical records.

3. Executive Staff’s Prior Review Activities

OIG Draft Report

The draft report (page 3) states that on August 11, 2008 “the County Executive publicly reported specific concerns and corrective actions needed to improve the disability retirement program, including methods used to determine an employee’s eligibility to receive a SCDR. The Executive’s report followed receipt of a seven-point program of recommendations made by a management work group.”

Executive Staff Comments

The draft report omits any acknowledgement that Executive staff began their own review of the disability retirement program before your office began its review of the same program. Executive staff expressly advised the OIG that, in the fall of 2007, the Executive directed OHR to establish a Work Group to review the disability retirement program. The workgroup’s initial recommendations were shared with the OIG during the course of its review.

FINDING 1

1. Duty Status of SCDR applicants

OIG Draft Report

The draft report (page 4) states that “[i]nternal controls and management oversight by the Office of Human Resources (OHR) are not sufficient to ensure service-connected disability retirement (SCDRs) approved for police officers in full-duty status are protected against abuse.” It notes that “58 police officers received SCDRs between July 1, 2004 and March 1, 2008” and that “11 of those 58 police officers were in a full-duty work status when they applied for a SCDR.”

Executive Staff Comments

We are puzzled by the draft report’s findings regarding the duty status of SCDR applicants. There is no prohibition in current law against approving a SCDR for an employee who is in full-duty status at the time the employee applies for a SCDR. Moreover, as discussed above, we believe that the OIG’s analysis of the duty status of SCDR applicants is flawed because the OIG chose not to explore the following questions: (1) whether the DRP knew about the duty status of specified SCDR applicants; and (2) the extent to which knowledge of an applicant’s duty status affected, or would have affected, the DRP’s findings that specified SCDR applicants met the legal eligibility criteria.

If the OIG had spoken with the DRP, we believe you would have learned that the DRP knew the duty status of 6 of the SCDR applicants referenced in your draft report (Officer A, Officer C, Officer F, Officer G, Officer I, and Officer J) because the Police Department provided that information directly to the DRP. After reviewing those 6 SCDR applications, the DRP granted 2 permanent SCDRs and 3 temporary SCDRs, and denied 1 application. We also believe that the DRP likely knew the duty status of 4 other SCDR applicants because that information was evident from the applications (Officer D, Officer E, and Officer H) and medical records (Officer B) submitted to the DRP. After reviewing those 4 SCDR applications, the DRP granted 4 permanent SCDRs. The DRP denied the SCDR application for the 11th applicant referenced in the draft report.

2. Pending Criminal/Disciplinary Charges

OIG Draft Report

The draft report (pages 4-5) states that approval of 3 SCDR applications is “questionable” because the timing of those applications “appears to coincide with . . . pending criminal/disciplinary charges involving work-related misconduct”.

Executive Staff Comments

When implementing County law governing SCDRs, the DRP, OHR, the County Attorney's Office, and the CAO are required to follow applicable provisions of the County Code. Except in one limited circumstance, which is inapplicable to the cases discussed in the draft report, there is no legal authority to adjudicate a disability claim differently when there is evidence of wrongdoing. One of the Work Group's recommendations was to change County law to allow denial of SCDR benefits if an employee is terminated as a result of intentional wrongdoing, such as felony, fraud, or recklessness. However, until County law is changed, there is no authority to deny benefits for those reasons.

If the OIG had spoken with the DRP, we believe you would have learned that the DRP knew that the police powers of the 3 applicants to which the draft report refers (Officer A, Officer C, and Officer I) had been suspended because of pending charges. Despite having that information, the DRP recommended that 2 applicants (Officer A and Officer I) receive temporary SCDR benefits and, for reasons not related to the pending charges, that 1 applicant (Officer C) be denied SCDR benefits.

3. Post-retirement Employment

OIG Draft Report

The draft report (page 1) states that approval of some SCDR applications is "questionable" because the timing of the applications "appears to coincide with . . . an officer's imminent selection for another position outside County government".

Executive Staff Comments

When implementing County law governing SCDRs, the DRP, OHR, the County Attorney's Office, and the CAO are required to follow applicable provisions of the County Code. Current law does not require an employee to disclose any information about post-retirement activities. Moreover, the fact that an employee is incapacitated for duty in their County job does not necessarily mean that the employee is incapacitated for another non-County job. Under Section 33-43(f) of the County Code an employee is eligible for a SCDR if the employee is unable to perform the duties of either: (1) the employee's present job; or (2) any other comparable job in the employee's department or office.

If the OIG had spoken with the DRP, we believe you would have learned that the DRP knew of at least one applicant's (Officer G) imminent selection for another position outside County government but still recommended that the employee receive a SCDR.

4. Independent Medical Examinations conducted for Worker's Compensation Cases

OIG Draft Report

The draft report (page 5) states that OHR "frequently" did not consider "relevant official County information" when processing SCDR applications. The draft report gives 2 examples of SCDR applications (neither of which were among the 11 SCDR applications on which the draft report focused) in which an Independent Medical Examination (IME) report prepared for a worker's compensation case was not included in the medical information reviewed by the DRP.

Executive Staff Comments

We agree that internal control and management oversight regarding sharing of information between Risk Management, which administers the workers compensation program, and OHR's Division of Occupational Medical Services (OMS), which administers the disability retirement program, need improvement, and we have already instituted changes to improve data sharing. The improvements include requiring OMS staff to contact Risk Management staff and the third party administrator to obtain last minute information prior to the DRP's deliberations.

We do not know whether the DRP would have reached different conclusions in the 2 cases cited in the draft report had the DRP reviewed the results of the 2 specified IMEs, but we believe that question should have been posed to the DRP. This is especially important because the standard for determining the existence of a disability under the State workers' compensation law is different from the existence of a disability under the County's disability retirement program.

5. Current Law and Collective Bargaining Agreements

OIG Draft Report

The draft report (page 6) states that the "County's current decision making process contributes to the potential for SCDR abuse."

Executive Staff Comments

We agree that the standards and procedures governing SCDRs need to be revised, and the Work Group's recommendations seek to address that need. However, we believe that the draft report does not adequately explain the extent to which much, if not most, of the SCDR

decision-making process is governed by County law. That law, in turn, is largely a product of collective bargaining agreements. For the legislative history of the County law governing disability retirements and its relationship to collective bargaining agreements, see the memorandum from Associate County Attorney David Stevenson attached as Appendix 2 to this memorandum.

6. Re-examination Authorized by Section 33-43(g)

OIG Draft Report

The draft report (page 6) states that current law authorizes the County to require employees who receive SCDR benefits to undergo a yearly physical examination during the 5-year period following retirement and once every 3 years thereafter until age 55, and notes that the County does not currently exercise that authority. The draft report (page 6) also states that the OIG was “advised by OHR management that County leadership made the decision several years ago not to re-examine any former employees after they have been approved for a SCDR.”

Executive Staff Comments

As recommended by the Work Group, the OHR Director is developing a plan to conduct re-examinations of retirees receiving disability benefits. We will also fast track this process so that we can review the maximum number of SCDR recipients before they reach the threshold where such examinations are no longer required. While the medical reviews are not complicated, establishing a manageable process for returning a retiree to work in the event the employee is found to be no longer disabled may require further deliberations.

We question the accuracy of the draft report’s statement that “County leadership made the decision several years ago not to re-examine any former employees after they have been approved for a SCDR.” We are unaware of any such decision. It is our understanding that the County stopped conducting re-examinations when the County began administering the disability retirement program “in-house” in the mid-1990s. We are unaware of the rationale for that decision.

7. Earnings Limitations

OIG Draft Report

The draft report (page 7) states that “the County does not enforce earnings limitations for any former County employee approved for a SCDR even though the County has

the authority (except for police) under the County Code". The draft report notes that 573 former County employees (non-police personnel) received SCDR benefits totaling approximately \$19 million in FY08.

The report notes that police personnel are currently exempt from the earnings limitation in County law. The draft report also notes that the current collective bargaining agreement with the Fraternal Order of the Police (FOP) includes a provision indicating that the County will submit legislation to amend County law to exempt police personnel from the earnings limitation. The draft report (page 7) states that the OIG is "unable to determine the reason(s) for the current collective bargaining agreement language."

Executive Staff Comments

We agree that the authority to enforce earnings limitations has not been exercised, and the Executive has directed OHR to explore the policy implications of conducting earnings reviews in the future. However, the draft report mischaracterizes County law because the County does not have authority to limit earnings for either police or fire personnel, who account for the majority of SCDR payments during the past eight years. Of the 573 former County employees (non-police personnel) who received SCDR benefits in FY08, 157 were former fire personnel who are exempt from the earnings limitation. Those retirees received approximately \$6.4 million of the total \$19 million that the County paid for SCDR benefits (non-police personnel) in FY08.

We note that the current collective bargaining agreement between the County and the FOP includes an obsolete provision calling for a change to County law to exempt police personnel from the earnings limitation. That provision remains in the collective bargaining agreement, as do many other obsolete provisions that have already been implemented, to reflect the history of the agreement. From time to time, the County and FOP agree to delete obsolete provisions. The County will seek to delete the provision referenced in the draft report from the next collective bargaining agreement.

FINDING 2

Periodic Medical Examinations

OIG Draft Report

The draft report (page 7) states that "Policies and procedures used to implement the Police Department's periodic examination program do not effectively assess the health status and functional capabilities of all police officers." The draft report (page 8) also states that only

Thomas J. Dagley
September 8, 2008
Page 10

22% of the 254 police officers who were due for periodic medical examinations between January 2008 and June 2008 reported to OMS for the examination.

Executive Staff Comments

We agree that there is a need for a comprehensive review of policies and procedures relating to the periodic medical examinations for Police Department employees and we are in the process of initiating that review. However, we question the value of analyzing the number of police officers who reported for examinations in one 6-month period. Statistics from other periods are significantly different. For example, in calendar year 2007, 561 of the 759 officers (74%) who were due for periodic medical examinations reported to OMS for the examination.

TLF:jgs

Enclosures: Appendix 1
Appendix 2

cc: Joseph Adler, Director, Office of Human Resources
Jennifer Barrett, Director, Department of Finance
Leon Rodriguez, County Attorney
Kathleen Boucher, Assistant Chief Administrative Officer



MONTGOMERY COUNTY, MARYLAND News Release

For Immediate Release: 8/11/2008

County Executive Receives Recommendations for Reforms to County Service-Connected Disability Retirements

County Executive Isiah Leggett today received a seven-point program of recommendations designed to clarify procedures and amend certain requirements with respect to determining an employee's eligibility to receive service-connected disability retirement benefits under the Montgomery County Employees Retirement System.

The recommendations are the product of a nine-month-long examination of the Disability Retirement Program by the County's Office of Human Resources, in conjunction with Montgomery County Fire & Rescue Service, the Montgomery County Police, and the County Attorney.

"I said from the start that I wanted to keep what's working and fix what isn't," said County Executive Isiah Leggett. "I'm concerned that our system for dealing with claims for service-connected disability retirements isn't working the way it should -- and hasn't for some time.

"That's why I established a work group in December 2007 headed by our Director of the Office of Human Resources, Joe Adler."

"Of our seven recommendations for change, in some cases, the County Executive can simply change procedures," said Adler. "In others, the County Council would need to change the law. For still others, changes would be made through the collective bargaining process."

Over the past eight years, 2,141 County employees retired. Two hundred ninety-two of those received service connected disability benefits (13.5 percent). A total of 226 -- or 77.4 percent -- of those receiving service-connected disability retirement benefits were Public Safety employees (Fire & Rescue, Police, Sheriff, and Corrections), which represents 38.5 percent of the 587 Public Safety retirements over this time period.

By way of comparison, service-connected disability retirements for Public Safety as a percentage of retirements over the same eight years in Prince George's County were 25 percent (Police and Fire & Rescue), Howard County 4 percent (Police & Fire), Anne Arundel 23 percent (Police & Fire), and Fairfax County 3 percent (Police, Fire & Rescue, and Sheriff).

"We need to make sure that our Disability Retirement Program works in an objective and equitable manner, consistent with a wise use of public tax dollars," said Leggett.

"One of the reasons why I established this work group was to explore the differences that exist between Montgomery County and some of our neighboring jurisdictions."

A service-connected disability retiree receives a greater benefit than an employee retiring under normal retirement circumstances. Service-connected retirements can 1) occur before retirement age, allowing retirees to receive benefits earlier, 2) do not reduce when a

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participant becomes eligible for Social Security benefits, and 3) are not subject to Federal Income Tax, consistent with an Internal Revenue Service Private Letter Ruling. Service-connected disability retirees receive two-thirds of their previous income.

The changes recommended by the Task Force include:

1. Change the Montgomery County Code to allow a denial of benefits if an employee is being terminated as a result of intentional wrongdoing, such as a felony, fraud, or recklessness.
2. Consider changing the current broad "disabled" qualification into two – "fully disabled" and "partially disabled" – each with their own criteria and different benefits (late recommendation from the Police Chief, who was represented on the work group).
3. Require a disability retiree to undergo a periodic physical examination during the five year period following retirement and periodically thereafter until age 55 and/or 60 to determine if the individual can return to work or continues to meet the criteria for disability retirement benefits.
4. Consider as a factor in deciding whether to award or reduce service connected disability retirement whether job-related injuries are not reported or not reported in a timely fashion.
5. Restrict retirees from being able to file for disability retirement after they retire, excepting claims for occupational disease such as those for heart and lung disease relating to police or fire-fighting activities.
6. Change the law to require that non-service connected disability beneficiaries and service-connected disability beneficiaries' benefits integrate with Social Security at normal retirement age – as is the case with normal retirement benefits.
7. Require that required periodic physical examinations be performed by the Office of Human Resources' Office of Medical Services.

"We value all of our employees – including our Public Safety employees who put their lives on the line to protect our families and our property," said County Executive Leggett. "We know that many of them continue to 'work hurt' because they are committed to serving the citizens of Montgomery County.

"I want to work closely with the County Council and with our employee organizations to take a hard look at this issue. We have to help those employees disabled to some degree in service to this County while ensuring that any such designation is just and proper and makes sense to County taxpayers."

###

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Isiah Leggett
County Executive

OFFICE OF THE COUNTY ATTORNEY

Leon Rodriguez
County Attorney

MEMORANDUM

TO: Ed Lattner

FROM: Dave Stevenson

DATE: September 2, 2008

RE: **Legislative History of Section 33-43 of the County Code (Disability Retirement)**

Section 33-43 of the County Code is the law that governs the process under which service-connected disability retirement applications by police officers are considered by the Disability Review Panel (“DRP”) and the CAO. The key provisions of Section 33-43 are: subsection (c), which directs the manner in which the three members of the DRP are selected; subsection (d), which describes the procedures followed by the DRP and the CAO when considering applications for disability retirement; subsection (g), which provides a framework for the medical reexamination of disability retirees, subsection (j), which allows for the adjustment of disability retirement benefits to account for post-retirement earnings; and subsection (l), which allows employees to appeal disability retirement decisions of the CAO with which they don’t agree.

The substantive content of the relevant provisions of all of these pertinent subsections of Section 33-43 of the County Code have remained essentially unchanged since Section 33-43 was originally enacted on February 7, 1995, as 1995 L.M.C., chapter 3 (Emergency Bill No. 36-94). Current Section 33-43 was originally enacted as Section 33-43A of the County Code, effective May 18, 1995. Section 33-43A of the County Code was renumbered Section 33-43 by 1999 L.M.C., chapter 26, § 1.

All of the pertinent provisions of current Section 33-43 (as originally enacted in 1995 as Section 33-43A) were new and different provisions for the processing of disability retirement applications that resulted from collective bargaining, with the exception of subsection (g), the medical reevaluation provision. The essential content of Section 33-43, subsection (g), dates back to subsection (d) of Section 33-43 of the 1972 County Code. The first Charter provision (Section 510) authorizing legislation to provide for collective bargaining (for the police officers

unit) did not become effective until 1982.

Except for subsection (g), all of the basic substantive provisions of the pertinent provisions of Section 33-43 (subsections (c), (d), and (l)) are the product of a collective bargaining agreement reached between then County Executive Potter and MCGEO, Local 400, during collective bargaining to arrive at a new term contract which was conducted during the winter of 1992-93. All of the basic substantive provisions of the pertinent provisions of current Section 33-43 (except for subsection (g)) are presented in Article 41 of the Collective Bargaining Agreement between MCGEO, Local 400, and the Montgomery County Government for the years July 1, 1993, through June 30, 1994. In Article 41, the parties agreed to submit proposed legislation to the County Council by July 15, 1993, to amend Section 33-43 of the County Code to provide for a new set of disability retirement procedures. The legislation that embodied the terms of Article 41 of the 1993 MCGEO Collective Bargaining Agreement was presented as Emergency Bill No. 36-94 (discussed above).

By the time that Emergency Bill No. 36-94 was submitted to the Council, the certified representative of the Firefighters' bargaining unit (the Montgomery County Career Firefighters Association, IAFF, Local 1664) had also agreed to the substantive provisions (for the new disability retirement procedures) that had been developed in bargaining between MCGEO and the County. Therefore, when Section 33-43A (current Section 33-43) of the County Code became effective on May 18, 1995, it applied to all applications for disability retirement submitted by County employees after that date, except for applications filed by members of the Police Bargaining Unit.

During collective bargaining conducted between the County and FOP, Lodge 35, Inc. during the winter of 1995-96, the bargaining representatives of the FOP and the County Executive agreed to Section E. of Article 57 of the FOP Contract for the years July 1, 1996, through June 30, 1998. In Section E. Of Article 57 of the FOP Contract, the parties agreed to meet to negotiate changes to Emergency Bill No. 36-94 (Section 33-43A of the County Code, as enacted in 1995), so that the new disability retirement procedures of Section 33-43A could be extended to cover FOP unit members. The substantive framework for negotiating the extension of the new disability retirement procedures to cover police officers, as presented in Article 57, Section E. of the 1996 FOP Contract indicated that most of the existing provisions of Section 33-43A of the County Code would apply to members of the FOP bargaining unit.

After several years of negotiations between representatives of the FOP and the Executive, the parties agreed to submit Bill No. 18-99 to the Council, which included provisions to renumber Section 33-43A to Section 33-43, to repeal Section number 33-43A, and to bring employees in the Police bargaining unit within the coverage of Section 33-43 of the County Code. Bill No. 18-99 was introduced on June 22, 1999, and was enacted on November 16, 1999. Bill No. 18-99 became effective on March 1, 2000. Therefore, all applications for disability

retirement filed by Police bargaining unit members on and after March 1, 2000, became subject to the general provisions of Section 33-43 of the County Code.

Section 33-43 (j) of the County Code allows the County to adjust the service-connected retirement benefits of a disability retiree, where the retiree's post-retirement earnings, when coupled with the retiree's disability retirement payments, exceed the current maximum earnings of the job class from which the person retired. The basic substantive provisions of current Section 33-43 (j) were included in the original version of Section 33-43A, subsection (j), as enacted in 1995. As originally enacted, subsection (j) applied to all service-connected disability retirees. When Section 33-43 became applicable to Police bargaining unit members in March, 2000, the original provision of subsection (j) applied to Police bargaining unit members receiving service-connected disability retirements. But Bill No. 18-99 included a provision exempting IAFF members from subsection (j).

When the representatives of County Executive Duncan and the representatives of the FOP bargained a new term collective bargaining agreement in the winter of 2002-03, the parties agreed to new Section M. of Article 57 of the FOP Contract for the years July 1, 2003, to June 30, 2004. Section M. of Article 57 included the parties' agreement that the Executive would submit legislation to the County Council to amend Section 33-43 (j) of the County Code so that members of the Police bargaining unit would be exempted from the provisions of subsection (j) which authorize the CAO to adjust the service-connected disability retirement benefits of retirees whose post-retirement earnings, when coupled with their retirement benefits, exceed the current maximum earnings of the job class from which the persons retired. Section M. of Article 57 also included the parties' agreement to allow Police bargaining unit members to join Firefighters' bargaining unit members as employees covered by subsection (j)(7) of Section 33-43. Under subsection (j)(7), which was enacted through 1999 L.M.C., chapter 26 (Bill No. 18-99), and which flowed from a Collective Bargaining Agreement reaches between the County and the Firefighters' Union in Article 51, Section A. 6. (d) of the Contract for the years July 1, 1999, through June 30, 2002, the service-connected disability retirement benefits of members of the Firefighters' bargaining unit could not be reduced because of any income received outside of County Government service.

As a result of Section M. of Article 57 of the 2003 FOP Contract, Bill No. 32-03 was submitted to the Council. Bill No. 32-03 was introduced on September 9, 2003, and enacted (as 2003 L.M.C., chapter 30) on November 18, 2003. This law, which became effective on March 1, 2004, amended Section 33-43 (j) as that subsection applied to members of the Police bargaining unit who received service-connected disability retirements.

DES

**Thomas J. Dagley
Inspector General
Office of Inspector General
Montgomery County, Maryland
51 Monroe Street, Suite 802
Rockville, Maryland 20850
240-777-8240**

Confidential OIG Fraud Hotline: 1-800-971-6059

Website: <http://www.montgomerycountymd.gov/> (Departments/Inspector General)



OFFICE OF HUMAN RESOURCES

Isiah Leggett
County Executive

Joseph Adler
Director

MEMORANDUM
Confidential, Pre-Decisional

June 30, 2008

TO: Timothy Firestine
Chief Administrative Officer

FROM: Joseph Adler, Director
Office of Human Resources

SUBJECT: Recommendations of the Committee to Review Disability Retirement

Background

The Committee reviewing the disability retirement program included:

Joseph Adler, Director, Office of Human Resources
Dorothy Miller, Manager, Occupational Medical Services
Richard Bowers, Assistant Chief, Montgomery County Fire and Rescue Services
Diane McCarthy, Captain, Montgomery County Police Department
George C. Lacy, Manager, Police Labor Relations, Office of Human Resources
Belinda Fulco, Manager Employment Benefits, Office of Human Resources
Edward B. Lattner, Chief Division of Human Resources & Appeals, Montgomery County Attorney's Office

The Committee considered a number of issues which had been raised about the overall operation of the Disability Retirement Program over the years. After careful deliberations, the Committee has seven recommendations regarding the areas of greatest concern. The areas considered include, in part, timely reporting of job related injuries, appropriate utilization of current resources in the identification and reporting of job related injuries; the limitation of disability retirement benefits to "lawful" job related injuries and benefit coordination to avoid duplication in payments/benefits where appropriate. None of the recommendations are intended to single out any particular individual case but rather to focus on insuring that the overall goals of the Disability Retirement Program are achieved in an objective and equitable manner.

Recommendations of the Committee to Review Disability Retirement
Page two

Recommendations

1. Consideration should be given to changing the language in the Montgomery County Code to include the option of a denial and or benefit reduction of a disability retirement benefit if there is job related intentional wrongdoing such as a felony, fraud and negligence. This consideration should include the following categories of job related conduct: (a) unlawful conduct relating to the disabling condition as a factor for disqualification and or benefit reduction; (b) unlawful job related conduct not directly related to the disabling condition as a factor for disqualification and or benefit reduction. Similar consideration should also be given to non-job related unlawful conduct which has a nexus to the job.
2. The Office of Human Resources (OHR) should review the resources required to establish a process for reviewing disability retirement cases according to Montgomery County Code Section 3343 et. seq. This section of the Code provides that the CAO may require a member receiving disability retirement payments to undergo a yearly physical examination during the five year period following retirement, and once in every three years thereafter until age 55 and/or 60, depending on group assignment to determine if the retiree can return to work or continues to meet the criteria for disability retirement benefits.
3. Managers should be provided training on working with Occupational Medical Services (OMS) on the utilization of appropriate medical evaluations as tools to insure that employees are physically and mentally able to perform the jobs assigned. The training would insure cooperation and consistency from all managers in the application of County resources addressing job related injuries. MCPR 8-7 (d) (1) Return-to-work clearance and (e) (2) and (3) Fitness-for-duty evaluation are medical evaluation tools to determine if an employee can perform the essential functions of the job. The utilization of these tools, as provided for in the regulations, are left to the discretion of the department director who will have to rely on the reports of managers as to whether the circumstances warrant the use of these tools. Employees have alleged that these tools were often used as punitive measures unrelated to their ability to perform. The regulations provide that the Fitness-for-duty evaluation should only be done in unusual circumstances and after consulting with the OHR Director. The language "unusual circumstances" was probably introduced to address employee concerns about misuse and would seem to suggest that the test for utilizing these tools involves more than a legitimate suspicion or reason that an employee is physically or mentally able to perform. Clarification of the standard and training regarding use of these tools, given their discretionary nature, would further guard against inappropriate use and facilitate consistent application.
4. When an employee has been out of work for an injury or illness, which may raise concern about the ability to meet the requirements for the position, the employee should be required to have a return visit through OMS to determine continued fitness for duty. This may require a change in collective bargaining agreements. For example, in the collective bargaining agreement with the Fraternal Order of Police, Article 23 Section A 3, an employee out for 15 or more days or who has been out for a work related injury, must have a "Return to Work" form completed by their private physician or the Workers' compensation physician which is presented to the employee's supervisor. If fitness for duty issues arises as a result, the employee may be required to see the county medical examiner for a further fitness of duty

Recommendations of the Committee to Review Disability Retirement
Page four

- The benefit payment option chosen by the member would remain the same when they started receiving their normal retirement benefit.
- The benefit payment would integrate at their Social Security Normal Retirement Age (SSNRA).
- If the member qualifies within 36 months from date of disability award for Social Security Disability insurance (SSDI) for the same reason they were awarded a disability retirement, their payment would not integrate at their SSNRA.
- If the member does not qualify for SSDI for the same reason they were awarded a disability retirement or within the 36 months from date of the disability award, they would remain at the regular benefit until reaching their normal retirement date.
- If the member chooses a joint and survivor benefit, the joint annuitant would receive the normal retirement benefit payment calculated under the normal retirement formula if the retiree dies prior to their normal retirement date.
- If the member receives a SCD on or after their normal retirement date, they would receive their normal benefit, including integration at SSNRA. The benefit would still remain tax-free based on the Private Letter Ruling the County received from the IRS.
- An employee would be prohibited from applying/receiving a non-service connected disability on or after their normal retirement date.
- Require that the disability pension amounts be offset by all other earnings (including SSDI payments).
- If the employee is participating in DROP or DRSP and subsequently is awarded a NSCD or SCD, they cannot receive both their DROP/DRSP account and disability. They must choose one or the other so they are not receiving two retirement options. Currently, for a non-service-connected disability, the member receives the NSCD pension benefit as well as their DROP or DRSP account.

Please contact me if you wish to pursue any of these options.

cc: Dorothy Miller, Manager, Occupational Medical Services, OHR
Richard Bowers, Assistant Chief, MCFRS
Diane McCarthy, Captain, MCPD
George C. Lacy, Manager, Police Labor Relations, OHR
Belinda Fulco, Manager Employment Benefits, Office of Human Resources
Edward B. Lattner, Chief Division of Human Resources & Appeals, Montgomery
County Attorney's Office
Patrick Lacefield, PIO
Fariba Kassiri, ACO

Recommendations of the Committee to Review Disability Retirement
Page three

- determination. The language of the agreement leaves it to the discretion of the department as to whether a fitness of duty exam should be scheduled with the county medical examiner. Such follow up exams should not be left to the discretion of the department. Likewise, under MCPR8-7 (d)(1), a return to work clearance exam for other county employees is left to the discretion of the department director and the recommendation is to eliminate the discretion as provided. Discretion in this instance has often led to inconsistencies regarding who is required to have a follow up exam. More importantly, the County should use its own medical resources when possible to eliminate the possibility of relying on medical evaluations from private physicians who are unfamiliar with the physical and/or mental requirements of the position.
5. Job related injuries which are not reported (and/or timely reported) when occurred should be considered a factor in determining whether to award and or reduce a job related disability benefit directly related to the unreported injury. Similar treatment should also be given to timely reporting any job related disabling condition. The Committee felt that timely notice and medical evaluation of job related injuries and disabling conditions was important in insuring that the medical information necessary in establishing a claim was as current as possible. There have been several cases involving public safety in which employees had retired on disability based on a job related injury which had occurred many years prior. These same employees had completed their careers with the County in full work status never claiming a job related disability until retirement. In this instance timely reporting of the disabling injury and or condition and a timely medical evaluation may permit preventive measures that could possibly reduce the number claims, and, at the same time, may lead to a course of action to improve the well being of the injured employee.
 6. Retirees should no longer be allowed to file for disability retirement after they retire. The Committee was of the opinion that when an employee retires, any information related to job related injuries which would warrant disability retirement consideration should be disclosed and considered when the employee elects to retire. This recommendation was not intended to eliminate claims for legitimate occupational disease directly related to County employment such as those for heart and lung disease related to police or fire fighting activities.
 7. For members of the optional integrated and mandatory integrated plans who receive either a service-connected disability (SCD) or non-service connected disability (NSCD) retirement, disability retirement payments would change when the normal retirement date is reached. At that time, they would receive their normal retirement benefit. The application of this recommendation may require additional consideration of any one of the following factors depending on the particular retirement group the employee is a member of and/or the retirement options for which they qualify. Under current law, members of the optional integrated and mandatory integrated plans who receive either a SCD or NSCD receive a lifetime benefit which does not integrate with Social Security. The benefit also provides for an additional unreduced lifetime benefit if the member elects a Joint and Survivor payment option and their spouse survives them.
 - Credited service for calculating normal retirement payment would include the time the member was receiving either a SCD or NSCD disability benefit.



October 20, 2008

Steve Farber
Council Staff Director
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

Dear Mr. Farber,

Managed Care Advisors, Inc. (MCA) has been retained by the Montgomery County Council to assist in evaluating the County's Service Related Disability Retirement Program. Specifically, MCA has been asked to provide feedback and recommendations based upon our experience and expertise pertaining to disability management programs. For your convenience, we have organized our comments to address each of the points outlined in the Letter Agreement between MCA and the Council dated October 3, 2008.

- 1. Identify Industry Best Practices for evaluation standards for the determination of eligibility for "Service Related Disability Retirement Benefits," including both partial and total incapacity. Specifically comment on whether the standards used by the Social Security Administration are considered industry standard. For the standards cited, provide examples where they are used in state or local government.**

The term "best practice" normally refers to those practices that have produced good results in one situation and/or environment that could reasonably be adopted in another environment. In our limited research MCA did not find a dominant best practice to point to for evaluating determination of eligibility for Service Related Disability Retirement Benefits. However, we do agree, as discussed in detail below, that the Social Security Disability Evaluation Guidelines are a well recognized standard that could serve to add consistency to the decision making process across the County.

Although guidelines can be useful in promoting consistency in medical decision making, the processes used for evaluating the applications and ultimately making a determination regarding eligibility will have a greater overall impact on program performance. We have identified several process related best practices for you to consider; these are discussed in more detail below and referenced in Attachment 1 (Comparison of Disability System Current Practices).

We were unable to confirm that the use of disability evaluation standards is typical among the systems that we investigated; however, for those organizations that have adopted the use of disability standards, Social Security appears to be the criterion of choice.

The Social Security Disability Evaluation Guidelines are a set of descriptions of conditions, designed to determine whether the condition in question is totally disabling. According to the Social Security Administration, "For each of the major body systems, we maintain a list of medical conditions that are so severe they automatically mean that you are disabled. If your condition is not on the list, we have to

decide if it is of equal severity to a medical condition that is on the list...The Listing of Impairments describes, for each major body system, impairments that are considered severe enough to prevent a person from doing any gainful activity...Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months. The criteria in the Listing of Impairments are applicable to evaluation of claims for disability benefits or payments under both the Social Security disability insurance and SSI programs.”

As a point of clarification, there are also guidelines that are routinely used to determine “degree of impairment” such as those published by the American Medical Association (AMA). These guidelines are used to determine how an injury or illness has impaired the function of a given body part, and whether this condition has affected an individual’s the overall ability to function, and to what degree. For example, the inability to move the wrist due to permanent complications of a wrist fracture would likely result in a certain percentage of impairment, which would typically lead to a specific monetary award. This inability to move the wrist may or may not impact a person’s ability to do his/her job (depending on the job), but would unlikely be considered totally disabling.

Currently there is a 2-tier system in place for Group G members (Fire and Rescue) that retire on a service-connected disability retirement providing one level of compensation for members who are unable to return to their job, but would not be considered totally disabled according to Social Security and another for those who are determined to be totally disabled. Although we recommend adopting the Social Security Disability Evaluation Guidelines for ALL County employees, there is a caveat, and that is a further recommendation that the County consider adopting a 2-tier system similar to that in place for fire and rescue in concert with the guidelines. Based on the limited historical information provided to us for this review, we would anticipate a significant number of applications that have been accepted in the past would be denied any compensation using the stricter Social Security disability criteria because the applicant would not meet the definition of totally disabled.

In addition to those best practices described above specific to evaluation standards, we identified several best practices related to limits for condition eligibility and timelines, re-evaluation and re-employment for the Council to consider.

Best Practice – Requirements for Service Connected Disability Claims

There is national precedent in many jurisdictions for having separate disability retirement plans for public servants (especially police and fire and rescue personnel) with service-connected disability. Most of these plans, based on our limited review, do not require that there be a history of an accepted workers’ compensation claim in the case of disability due to a specific accident date; however, many of the systems we researched have specific requirements for filing deadlines and limitations on the conditions covered. These include:

- A statute of limitations for filing any (service-connected or not) disability retirement claim (within one year of separation from service except for presumption-related occupational illnesses);
- Requirement that disability related to an accident at work is reported at the time of the event and has medical documentation establishing work causation and injury diagnosis;

- The ability to permit consideration of disability resulting from any condition accepted by the workers' compensation system; and
- Exclusions for any occupational illness conditions (e.g. cumulative trauma) unless covered by presumption or related to previously accepted workers' compensation claim.

Best Practice – The Relative Nature of Permanency in Disability Determinations

For most conditions, a doctor's determination that a disability is permanent is an educated guess. Many factors can influence whether a claimant recovers from a disability, including attitude, new medical treatments, vocational rehabilitation (providing training and arranging for accommodations), and employment opportunities that arise. Given the inexactitude of most permanency determinations, many systems require periodic review of medical documentation to determine whether a condition remains active and disabling. Some systems require re-examination following initial award. At some point, periodic re-examination is no longer cost-effective, if findings remain stable and confirm ongoing disability. Some systems convert disability retirement benefits to regular retirement and Social Security Retirement at the age of retirement.

The Office of Workers' Compensation Programs of the Department of Labor, which administers federal employee workers' compensation claims, requires annual submission of updated medical reports to review for evidence of ongoing disability. In cases determined by the claims examiner to have no wage-earning capacity (comparable to permanent total disability), medical documentation must be submitted every three years. The claims examiner may require a second opinion exam at any point if there is a question about return to work potential.

The Montgomery County system permits re-evaluation with an annual physical examination during the first 5 years after award, and once in every 3-year period thereafter, until retirement age; however, this option is not routinely utilized. Other practices in place include:

- The requirement that the retiree undergo an IME (Independent Medical Evaluation) by a different doctor in the same specialty as the one that performed the initial disability evaluation at one year after total disability award. The report of findings is submitted to the Medical Review Panel for review.
- Requiring the retiree provide updated medical documentation for review by the Medical Review Panel annually for the first five years after total or partial disability award, and every three years thereafter.
- If disability is determined to be resolved, the claimant may be offered re-employment (if eligible) or conversion to regular retirement if eligible.

Best Practice – Re-Employment and Vocational Rehabilitation

The Office of Personnel Management requires that a job be held open for one year for a federal employee who is disabled due to work-related or personal medical conditions. If the employee recovers within that one year, he or she is eligible for re-employment.

The Department of Labor Office of Workers' Compensation Programs requires any claimant found to have some wage-earning capacity to cooperate with vocational rehabilitation if a permanent limited duty assignment is not available at the original employing agency. If the claimant does not cooperate with vocational rehabilitation, the claims examiner may discontinue wage replacement benefits.

The police and fire and rescue personnel disability retirement systems of Massachusetts, Alaska, Ohio and Oregon all require participation in vocational rehabilitation programs. Many systems also discontinue or reduce disability retirement awards for claimants who take subsequent jobs.

2. Identify Industry Best Practices for an efficient and cost-effective configuration for a disability review panel or board. Provide examples where these practices are used in federal, state or local government.

Most disability retirement systems have two levels of review, first by a medical doctor or panel, and the second by a board that may include a doctor but is primarily administrative in nature (Maryland, Massachusetts, Arkansas, Washington, Ohio, Oregon, Connecticut, New Jersey, and the Veterans Administration); this is currently not the case for Montgomery County (see Attachment 1 –Comparison of Disability System Current Practices).

Montgomery County currently uses a panel of physicians in determining eligibility for disability retirement, with the County's Chief Administrative Officer having the final decision making authority. As stated above, our research found that several other state and local systems employ a 2-tiered panel process using both medical and administrative boards in making recommendations related to service-related disability benefits.

The rationale for having both a medical and an administrative board is to limit each board's authority to their professional credentials and qualifications. Currently the County's physician panel is required to make recommendations related to benefit eligibility rather than limiting their decision making authority to clinical issues (degree, duration and work-relatedness of disabling condition), thus requiring them to make decisions that are outside the realm of their expertise. Given currently established practices, we strongly recommend that the County Council consider establishing two levels of review, one medical and one administrative. The latter would take into consideration service record and any administrative issues affecting eligibility, which are not medical in nature.

Recommendations

Institute a two-level system of review: a Medical Review Panel whose responsibility would be to determine degree, duration and work-relatedness of disabling condition(s), followed by a Disability Review Board, which would consider the Medical Review Panel conclusions in the



context of service record and other eligibility requirements to make a recommendation to the Chief Administrative Officer for a final decision.

Disability Review Board

A Disability Review Board would normally be composed of a cross-section of stakeholders and technical experts including but not limited to representatives from Human Resources, Risk Management, Labor, and Occupational Health. The Disability Review Board would review the report(s) of the Medical Review Panel, as well as any administrative information relevant to the claimant's service record, and work status, and make the final recommendation about disability retirement benefit eligibility to the County Chief Administrative Officer.

The Disability Review Board would have the opportunity to review facts that may not have been considered within the medical documentation reviewed by the Medical Review Panel, such as facts demonstrating a different level of fitness than reflected in the medical reports. If the Disability Review Board disagrees with the Medical Review Panel about its findings, based on additional data not considered by the Medical Review Panel, the case could be referred back to the Medical Review Panel for consideration of the new information. It is anticipated that disagreement between the Disability Review Board and the Medical Review Panel would be a rare event, but in cases of persistent disagreement, the Disability Review Board should present its argument in a written report to the County Chief Administrative Officer, along with a minority report, for final decision. Another function of the Disability Review Board could be to decide disposition in cases of retirees, which, upon reevaluation at a later date (e.g. annual review of medical records), are found to be no longer disabled; the Disability Review Board could identify eligibility for other retirement benefits or re-employment. The Disability Review Board would also select the physicians to serve on the Medical Review Panel; Labor representation on the Disability Review Board would ensure their continued participation in the process.

Medical Review Panel

Using a panel of physicians to provide clinical guidance in determining medical eligibility for disability benefits is a best practice which is already in place in the County. Although the County has a Medical Panel structure in place, the information that we gathered does suggest that there are some practices in place elsewhere that if implemented could improve the panel's overall effectiveness.

Recommendation

Revise the composition of the Medical Review Panel to ensure appropriate expertise and knowledge of the disability evaluation process and procedures.

Recommended Panel Composition:

- *Include either a Board Certified Occupational Medicine physician, or a physician Board Certified in another specialty who has at least 10 years experience practicing Occupational Medicine on the Medical Review Panel. We further recommend that the County require ALL panel members be trained in disability evaluation.*
- *Appoint an alternate Medical Review Panel member to attend meetings if a third panel member is unavailable. Require that all decisions be made by a group of 3. (An alternative approach is to have a larger pool of physicians from which to choose, providing a wider range of expertise;*

Connecticut uses a panel of seven physicians, who rotate, and requires a quorum of three. The critical expertise required by Connecticut is Internal Medicine, Occupational Medicine and Psychiatry.)

Recommended Medical Panel Process Improvements

- *Require a minority report in cases in which there is not consensus of all 3 reviewers, which permits an additional perspective for the Disability Review Board to consider. (Massachusetts and Connecticut).*
- *Require an independent medical examination be performed and report submitted to the Medical Review Panel prior to their review of any new application for service-connected disability retirement benefits, in order to balance the sometimes biased opinion of the treating physician, and to ensure that a physician with appropriate specialty expertise evaluates the claimant. (Ohio, Oregon, Washington.) Permit the Medical Review Panel to order additional examinations, for example, vocational rehabilitation evaluation as necessary.*
- *Require the Medical Review Panel to reference the Social Security Administration Disability Evaluation Guidelines in rendering their opinions (Washington).*
- *Develop a format or template for the Medical Review Panel to follow that provides a logical organization of medical record review and decision.*

3. Review and comment on the current disability retirement law and process used by Montgomery County for Group G (fire and rescue personnel) and whether it includes provisions or standards that are considered best practices.

The most compelling difference in the regulations guiding disability retirement for Group G and other County employees is also the best practice that we have highlighted throughout this report. It is one that we have recommended the Council consider adopting across the board: the use of two levels of disability compensation based on Social Security Guidelines.

In addition to the information provided above and in the Attachments to this report, there were other occupational health practices identified that are in place for some County employees that would likely enhance the efficiency and effectiveness of the overall disability management program. Respecting the scope of this document, we chose not to include this information but we would be happy to discuss this information at a later date.

As you review the contents of this report, please feel free to contact myself or Lisa Firestone with any questions you may have.

Regards,



Marianne Cloeren, MD, MPH
Medical Director

Attachment 1 – Comparison of Disability System Current Practices

Practice	Mont. County	MD Local Police & Fire	MA Public Safety	OR Public Safety	AK Public Safety	WA Public Safety	OH Public Safety	CT State	NJ Police & Fire	Vet. Admin	SSDI	OPM	OWCP
Medical Review Process													
Use two levels of review: Medical followed by a Disability Retirement Board/Administrative review	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes*	Yes	Yes	No	No	No
Use a panel of physicians to perform medical review	Yes	Yes	Yes	No	No	No	Yes	Yes	Yes	No	No	No	No
Include appropriate expertise and specialty variety on the Medical Disability Review Panel	Yes	Not Stated	Yes				Yes	Yes*	Not Stated				
In cases with a dissenting Medical reviewer, require a minority report.	No	Not Stated	Yes				Not Stated	Yes*	Not Stated				
Medical review panel is appointed by Disability Retirement Board	No	Yes	Yes				Yes	Yes*	Not Stated				
Require an Occupational Medicine physician on the medical review panel	No	Not Stated	Not Stated				Not Stated	Yes*	Not Stated				
Use appropriate medical specialists to conduct IMEs in cases not accompanied by clear causation timeline and medical rationale.	Yes	Yes	Yes	Yes - Exam required by board selected physician	Not Stated	Yes - Exam required	Yes - Exam required using AMA guidelines	No*	Yes	Yes	Yes	No	Yes
Eligibility and Amounts													
Grant disability retirement only to employees unable to perform substantive gainful work due to disability (total disability)	No	Yes	Yes	Yes	Yes	No	No	No	Yes	No	Yes	No	No
Reduced benefits for partial disability.	Fire - yes Other - No					Yes	Yes	No		Yes		No	Yes
Use SSA definitions of disability	Fire - yes	Not Stated	Not Stated	Not Stated	Not Stated	Yes	Not Stated	Not Stated	Not Stated	No	Yes	No	No

Attachment 1 – Comparison of Disability System Current Practices

Practice	Mont. County	MD Local Police & Fire	MA Public Safety	OR Public Safety	AK Public Safety	WA Public Safety	OH Public Safety	CT State	NJ Police & Fire	Vet. Admin	SSDI	OPM	OWCP
For permanent disability, require participation in vocational rehabilitation process.	No	Not Stated	Yes	Yes	Yes	Not Stated	Yes	Not Stated	Not Stated	No	No	No	Yes
Impose statute of limitations for claiming disability retirement.	No	Yes - 5 years	Not Stated	Yes - 5 years if ongoing condition; 6 months from separation if new	Yes - 90 days for service connected	Yes	Yes - 1 year	Not Stated	Yes, for accidental disability only (5 years)	No	N/A	Yes - 1 yr from separation	Yes
Limit service connected disability to reported injuries, and illnesses covered by presumption.	No	Yes – does not include occupational illness	Yes	Not Stated	Not Stated	Not Stated	No	Not Stated	Not Stated	No	N/A	N/A	Yes - Only Service Connected (Workers' Comp)
Require periodic review of medical documentation or examination to determine ongoing disability.	No	Not Stated	Yes	Not Stated	Yes - Re-exam	Yes	Yes	Yes, when disability non-service connected	Not Stated	Yes	Yes	Yes	Yes
Reduce disability retirement amount by earnings or other disability payments	No, unless County earnings	Only NSC	Yes - If receive workers comp for same injury	Yes	Yes	Yes	Yes	Yes	No	No	Earnings cap	May earn up to 80% previous salary; offset by SSDI	Yes

* Information learned through discussion with recent past member of Retirement Medical Examining Board; not in referenced source

References:

Social Security Administration:

<http://www.ssa.gov/disability/professionals/bluebook/listing-impairments.htm>

<http://www.ssa.gov/dibplan/index.htm>

State of Maryland Retirement and Pension System: http://www.sra.state.md.us/active_benefits.htm

State of Massachusetts Public Employee Retirement Administration Commission:

<http://www.mass.gov/perac/disguide/disabilityguide8.htm>

State of Oregon: Public Employees Retirement System: <http://oregon.gov/PERS/>

Alaska Division of Retirement and Benefits: <http://www.state.ak.us/dr/b/pers/police-fire.shtml>

State of Washington Department of Retirement Systems - LEOFF Plan 1 and Plan 2 Disability Benefits:

<http://www.drs.wa.gov/Member/Publications/LEOFF/leoff1disability.htm>

<http://www.drs.wa.gov/Member/Publications/LEOFF/leoff2disability.htm>

Ohio Police and Fire Pension Fund: http://www.opf.org/downloads/booklets/Members_Guide_to_Disability_Benefits.pdf

Connecticut State Employees Retirement System:

<http://www.osc.state.ct.us/empret/tier1summ/tier1summ.htm#MEDICAL>

New Jersey Police and Fireman's Retirement System Application for Disability Retirement:

<http://www.state.nj.us/treasury/pensions/epbam/exhibits/pdf/bd0108a.pdf>

Veteran's Affairs and Department of Defense (Vet. Admin.):

<http://www.gao.gov/new.items/d07906r.pdf>

<http://veterans.senate.gov/documents/ihcdfinal.pdf>

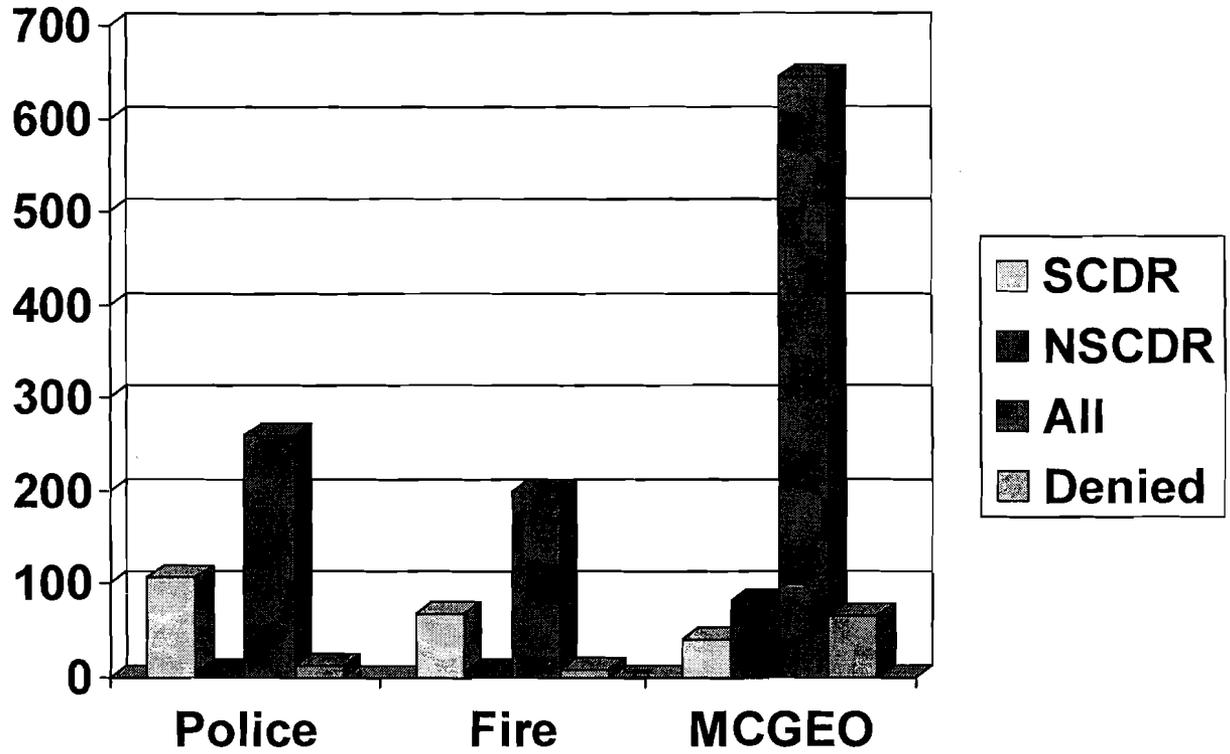
http://www.defenselink.mil/prhome/docs/rand_disability_1005.pdf

Office of Personnel Management (OPM): <http://www.opm.gov/retire/html/library/fers.asp>

Office of Workers' Compensation Programs (OWCP):

<http://www.dol.gov/esa/owcp/dfec/regs/compliance/DFECfolio/agencyhb.pdf>

Disability Retirement Statistics
January 1, 2000 to December 31, 2007



MARYLAND COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL
MEDICINE A COMPONENT SOCIETY OF



AMERICAN COLLEGE OF
OCCUPATIONAL AND
ENVIRONMENTAL MEDICINE

January 14, 2009

The Honorable Phil Andrews
President
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Dear Mr. Andrews:

The Maryland College of Occupational & Environmental Medicine
is pleased to submit these comments to assist the Council in its deliberations on revisions
to the county code on disability retirement.

Respectfully submitted,

Craig Thorne, MD, MPH, FACOEM
President

MARYLAND COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL
MEDICINE A COMPONENT SOCIETY OF



AMERICAN COLLEGE OF
OCCUPATIONAL AND
ENVIRONMENTAL MEDICINE

Mr. Andrews and Distinguished Council Members:

The Maryland College of Occupational and Environmental Medicine (MCOEM) is pleased to have this opportunity to offer comments as the Montgomery County Council deliberates changes to its disability policy.

MCOEM is a voluntary, non-profit, professional association of one hundred occupational medicine physicians and allied health personnel who practice in Maryland and care for hundreds of thousands of Maryland workers from the farms on the Eastern Shore to the factories in the Western Maryland, from the hospitals in Baltimore to the thousands of places of employment in Montgomery County. Our physicians care for those who care for us including police, fire, and health care workers. On a daily basis our members wrestle with the important distinctions between impairment and disability.

We applaud the Council efforts to address the well-publicized problems identified in the 2008 County Inspector General's reports, which suggested possible abuse in the determination of levels of disability and resulting compensation. We applaud these efforts not as fiscal stewards of the county's taxes but as concerned advocates for our patients injured or disabled as a result of workplace events. Our members see injured workers every day and we want the best for them in terms of medical care, insurance benefits, and rehabilitation efforts so they may return to the dignity and status of the American worker making a contribution to society and earning wages and benefits to care for families.

We do not ignore the nature of the work involved that attracted the attention of your Inspector General. Law enforcement can be dangerous, even life threatening work. More than 56,000 law enforcement officers are assaulted each year and the Law Enforcement Memorial lists the names of 263 deceased Maryland law officers killed in the line of duty. These officers deserve our respect and we are privileged to count police officers, correctional officers, firefighters and other public safety personnel in the files of our patients.

Your Inspector General's report of September 9, 2008 provides interim data that between July 1, 2004 and March 1, 2008 sixty-two percent (58 of 93) police officers who retired during the period were approved for service-connected disability retirement (SCDR). We, like your Inspector General, were surprised to read the media reports surrounding these findings.

As physicians, we are scientifically inclined to gather facts before rushing to judgment thus we applaud the Council's decision to enlist the services of one or more occupational medicine specialists to review the process by which SCDR is awarded in Montgomery County. The men and women disabled in the course of their employment protecting county citizens are deserving of no less respect when their benefits are determined. The process should be fair, medically sound, and, above all, respectful of the service given by the employees and the citizens who employ them.

We commend the recognition of partial incapacity and the acceptance of the concept of substantial gainful activity and residual functional capacity. The clear focus on the essential duties of the job and the employee's medical condition are the prime issues. These areas are exactly those where our members have expertise and can contribute to the achievement of a fair disability system.

We consider the optional re-examination of disability retirees an important step in assuring the public that once retired on disability does not equate to a permanent disability check without mention of present day impairment. Requiring a former employee who receives a disability retirement pension to keep the Administrative Officer informed as to medical, employment, and income status serves only to preserve the dignity of all those receiving disability benefits.

We endorse the recommendation for a minority report. Evaluating disability is not an exact science and final determinations can have consequences for all parties involved. Given the scope of impact of a disability determination, we believe that it is important to accurately reflect areas of medical uncertainty through a minority report. This will help ensure that all parties can proceed through the disability process with the maximum amount of information.

Public safety employees in Montgomery County should be applauded when appointed, when the occasion permits, and most importantly on their retirement if due to disability. By assuring a fair disability system the Council can preserve the applause for those officers and shield them from the allegations in the recent reports.

Thank you for the opportunity to present our views.



Montgomery County Lodge 35, Inc.

18512 Office Park Drive
Montgomery Village, MD 20886

Phone: (301) 948-4286

Fax: (301) 590-0317

STATEMENT OF FRATERNAL ORDER OF POLICE, MONTGOMERY COUNTY LODGE 35, IN OPPOSITION OF BILL 37-08

January 15, 2009

We have a mere three minutes in a political forum to address the complex issue of police officer disability benefits. If we were bargaining, where good faith and fair process compel facts, truth, and the burden of proof on a level playing field, this critically important issue would get the attention it deserves.

For twenty-six years, Montgomery County Fraternal Order of Police, Lodge 35, has lived by the spirit and intent of the collective bargaining law. (See PLRA Section 33-75, attached.) Section 33-75 is the product of a failed meet and confer process. We now bargain in an orderly manner according to process, so our member police officers can serve the community without distraction or disruption. We do not end run the process. This legislation turns back the clock and from now on invites employees and unions to compromise process in search of six votes right here. It is a slippery slope.

We should not have to call our members off their beats to fight in the political arena for their families' financial security in the event of injury, or for that matter, any other interest. That's what was done before 1982, and that is where this legislation leads us.

No police officer should ever be forced to hesitate taking action.

Let's highlight some facts:

1. We are willing to negotiate over real or perceived problems with the disability process. We have proposals on the table at this time. This bill is an attempt to erode employee benefits.
2. Collective Bargaining is the honest, honorable way to deal with all retirement and disability matters. Bargaining involves give and take. The two-tier fire fighter benefit was bargained and resulted in other retirement improvements for fire fighters.

3. There is no emergency. The true cost of police disability is a fraction of what is being stated by the media and others who have no expertise in pension costing. The \$32 million is the cumulative total for all disabilities of all county employees since the 1960s, and does not discount the cost of the normal pension benefit.
4. In raw numbers, we are discussing about eleven officers per year over twenty-three years. The highest number was in 1991, but generally the numbers haven't changed. The actual number of disabilities is less than the actuaries expected, and all data and financials have annually been transmitted to the county council. The current benefit and process was publicly legislated by the County Council. (See attached.)
5. The old insurance company administered process was replaced with a panel for police officers less than a decade ago, yet the numbers stayed the same. There is no problem with the panel, and we are unaware of any allegations of impropriety involving the tripartite police disability arbitration board this legislation seeks to alter.
6. It has been found that management did not follow the process, but that does not make the process bad. Why are police officer disability benefits being demonized? Senator John McCain is on a full tax-free military disability pension and we find no basis for outrage. Many County residents receive property tax breaks on account of military disabilities in addition to tax free pensions. Outside of Montgomery County, it would be unconscionable to politicize injuries incurred by police officers who risk their lives and well-being in service to fellow citizens, often under trying and dangerous conditions.
7. It is management, not union members, who are the poster people for leaving jobs as assistant police chiefs and taking management jobs elsewhere.
8. Our normal retirement benefit is lower than in other area jurisdictions. For instance, the normal benefit in Fairfax County is better than the disability benefit for a Montgomery County officer.
9. This is a political and media attack against employees and collective bargaining. There have been attempts to demonize employees, deceive the public, and blame police officers for fiscal woes. This is, of course, a lie; just like no police officer ever failed to obey any law relating to the payment of speed camera tickets, and just like the total wages of police officers last year increased by less than the CPI, not 8% as stated over and over. In fact, Federal

worker pay increases for those getting increments was about the same percentage as police officers who received increments.

10. The police officers and fire fighters killed and injured in New York on 9-11 were union members working under contracts that provided disability benefits. Maryland's highest court has noted that the community bears the obligation to compensate police officers and firefighters for injuries caused by the negligence of individuals.
11. FOP Lodge 35 is a local, Montgomery County based, non-profit organization. We are proud to be police officers representing police officers in unity, as a union. We abide by process and have acted lawfully. In twenty-six years, there has not been a single prohibited labor practice pursued against FOP 35. (One was filed in 1987 and withdrawn.)
12. We are currently working through process to forego some pay for the next fiscal year, but what might happen to disability and retirement benefits is a major consideration.

It is fair, right and honorable to defer to the collective bargaining process.

Thank you.



LOCAL 1664

Montgomery County Career Fire Fighters Ass'n., Inc.

11

January 15, 2009

Before The County Council for Montgomery County, Maryland
Amendments to Disability Retirement Law

Expedited Bill No. 37-08

John J. Sparks, President

Montgomery County Career Fire Fighters Association, IAFF Local 1664

Good evening. I am speaking tonight as President of the Montgomery County Career Fire Fighters Association, IAFF Local 1664 with respect to Expedited Bill No. 37-08. That Bill proposes a drastic, dramatic and expensive overhaul to the current provisions of the Montgomery County Code dealing with disability retirements. If enacted, the legislation will alter the negotiated disability retirement system governing bargaining unit employees of the Montgomery County Fire and Rescue Service. Accordingly, the Local demands that the County negotiate these issues prior to taking action on this legislation.

The Montgomery County Fire and Rescue Law, Section 33-152(a)(2) provides that the County must negotiate over "pension and other retirement benefits for active employees." This provision is mandatory and contains no exceptions for subsequent actions by the Montgomery County Council. Additionally, pursuant to Section 33-152(a)(2), Article 51 of the Collective Bargaining Agreement between the County and the Local governs pensions, which include disability retirement benefits. The Collective Bargaining Agreement has been signed by all parties in good faith and is a final document. We request and expect that Montgomery County, including the County Council, abide by its terms.

As all of you are aware, the Council has already had the opportunity to review the Collective Bargaining Agreement with the Local, including the disability retirement provisions therein. Under law, the Council could have, but did not, reject the parties' disability retirement agreement. The deadline for any such Council action expired on May 1, 2008.

Expedited Bill 37-08 represents an unfair and ill conceived effort to make an end-run around the good faith bargaining agreement which is currently in place.

Simply stated, the County Council is not authorized to alter the disability retirement system absent a negotiated agreement between the Local and the County. Accordingly, no action should be taken on Expedited Bill No. 37-08.

Your favorable consideration of these remarks is appreciated.

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GINO RENNE PRESIDENT
YVETTE CUFFIE SECRETARY-TREASURER
NELVIN RANSOME RECORDER
WWW.MCGEO.ORG

TESTIMONY OF UFCW LOCAL 1994 MCGEO
ON THE DISABILITY BILL
SUBMITTED TO MONTGOMERY COUNCIL
JANUARY 15, 2009

UNITED FOOD & COMMERCIAL WORKERS LOCAL 1994
600 SOUTH FREDERICK AVENUE SUITE 200
GAITHERSBURG, MD 20877 301-977-2447 800-948-0651 FAX 301-977-6752

Good evening, my name is Gino Renne, President of UFCW Local 1994 MCGEO.

Our union has been bargaining with the County over its members' disability benefits for decades. Indeed, as far back as 1993 we successfully negotiated with the County to create a medical review panel which replaced the Disability Retirement Administrator. Our bargaining history reflects the fact that it has always been a right of the Union to bargain over disability benefits and the procedures for obtaining them.

But you don't have to take just my word for it: in November 2007, County Labor Relations Administrator Andrew Strongin found the same thing when he stated in a decision that the County and the Union "historically have negotiated matters relating to the administration of retirement benefits," including disability retirement benefits. He pointed out that the County Collective Bargaining Law is clear on this, unequivocally stating that "pension and other retirement benefits" are mandatory subjects of bargaining.

And Labor Administrator Strongin's decision is one in a long line of cases in which courts, arbitrators, and regulators have found that the negotiation of retirement benefits and disability benefits and procedures is a right of the Union and one of the hallmarks of a healthy bargaining relationship between employers and unions.

Disability retirement benefits are clearly a part of the broader category of "retirement benefits," which are bargainable subjects under not only existing Montgomery County Labor Law but also the national labor law. Disability benefits and the procedures for obtaining those benefits are an important component of any employee's overall compensation. As the cases and history show, it would violate the

letter, spirit, and underlying public policy of the collective bargaining law to remove disability retirement benefits from the scope of subjects about which the Union and County are required to bargain.

We have always been sensitive to the concerns of the County regarding the procedures and amount of disability benefits and we will continue to do so in the future. We believe only those who are truly disabled should be entitled to disability benefits. But Local 1994 urges the Council to reject this bill because it undermines an established legal right of the union to bargain over subjects that affect our members and will do little or nothing to address the issues the council has with disability retirement.

Montgomery County Taxpayers League
Testimony by Marvin Weinman
on
Expedited Bill 37- 08
Personnel – Disability Retirement – Amendment

The report provided by the Office of the Inspector General (OIG) and the excellent documentation provided by Bob Drummer for Bill 37 – 8 shows a refreshing focus on accountability by the Legislative Branch of Montgomery County government and should be a model for future legislative documentation.

The bills initial page clearly and simply identifies the ten key goals of the legislation with a further summary of key bill positions provided in the last three pages of the document. By reviewing just four pages the Council and the public can come to understand the serious issues involved and the proposed need for the recommended changes.

It would be hard to find anyone who has read the OIG reported field work cases who would disagree that there is a need for significant changes to the current legislation. The stated goals will protect the deserved retirement compensation awards for county employees who have incurred service connected disabilities and reduce the opportunities for past system abuses.

A federally used national criteria checklist will be recommended that will clearly identify the criteria guideline for approval of any personnel service connected disability decisions.

I believe the action of the Council on this leading accountability issue will signify to the general public that the Council is serious about addressing other outstanding accountability issues that could provide much needed savings to help fund the FY 2010 budget. Savings are obviously a better option for managing the budget than continuing to raise taxes and fees.

The Taxpayers League is looking forward to the scheduled public hearing on January 27th which has been identified as a public opportunity to help identify program savings. Areas of greater need for accountability along with actions in areas of productivity improvements will be identified as they present the best opportunities for cost savings.

The efforts on Bill 37 - 8 are a very good start by the Council in having the Legislative Branch become more focused on the critical area of county accountability. I look forward to the committee hearings and the prospect of a timely Council approval of Bill 37 – 8, which would be a significant accomplishment.

My name is Cathleen Lapsley and I am a resident of Montgomery County, MD. **Expedited Bill 37-08, Ms. Trachtenberg**: your newsletter included an article titled **“Restoring Fairness and Clarity to Disability Retirement”**

In it, you describe disability as a benefit for public safety workers. You state, “Work-related injuries and health problems are **sacrifices** that those who serve us should not face alone. Employee access to best medical practices must be protected” You also want varying degrees of disability. You state you want the “Executive branch and the labor community to embrace the long term **commitments** you are proposing.”

You also stated you were “astonished to hear that no appropriate evaluation standards are utilized in the disability process. “

Utilized and **existing** are two different things. The existing disability panel under the current system already has the ability to send employees to an Independent Medical Exam when deemed appropriate. Why reinvent the wheel? Some cases are self-evident so why spend the extra money the county does not have requiring all applicants attend an IME?

You suggest **two** panels: **Medical Review and Disability Review**. An agreed upon medical panel is sufficient and **exists** already. I cannot see the Director of Finance, the Director of Human Resources and the Director of Office of Management and Budget need to review the panels decision to determine if the individual meets the criteria for disability retirement. **That is the qualified panel’s decision**. How many people are truly qualified to review a doctor’s report and Medical Files? Does each of these directors possess a Medical License? If it was you, would you want your medical records reviewed by three additional individuals who do not possess medical certification?

You also suggest a **partial** and **total incapacity** retirement benefit: **Total is ~~60%~~^{76%}** of the person’s salary if they would qualify for the standards set by the Social Security Administration. Everyone knows you have to be on your deathbed to qualify for Social

Security and rarely, if ever does anyone qualify the first few times they apply. That is impractical

You suggest **Partial disability at 52 ½%** with a cap on any future monies the disabled employee can earn. That is unreasonable.

Imagine being a young employee seriously injured and forced to retire. At some point this employee takes a job at home over the internet to give them something to do that does not require them to leave their home but gives them a reason to wake up everyday.

They do not qualify for total incapacity according to your new proposed standards. You want to cap their money and reduce their benefit if they do make money. Isn't it enough they did their job and suffered for it? Now you want them to lead a life of poverty. You never know when they will be able to work and for how long in a different field. They were good enough to serve and protect the citizens of Montgomery County until they were injured. As prices increase and the cost of living does not catch up, eventually, these individuals will cost the county more money. Since they would be unable to make any decent amount of money according to the proposed changes, they will be in poverty status and need even more county assistance through food stamps, government housing, other county resources and maybe even welfare.

You also propose a time limit on applications for disability retirement of five years from the date of injury. That is ridiculous. Police Officers are injured everyday yet continue to work because in their mind it is the right thing to do. They are good enough to protect you when an armed burglar is in your house, when a drug crazed individual on PCP is attacking you with incredible strength, when a domestic gets so violent that the attacker has beaten you unconscious and pulled all of the hair out of your head, when a mentally unstable individual has taken you hostage, when you have been in an accident and your car is on fire, when you have been raped repeatedly and tied up unable to protect yourself, when you see someone with a gun and are scared, when someone tries to kidnap your child and turns out to be a serial rapist, or just simply

making a traffic stop on a drunk driver wanted for murder with nothing to lose but to fight the police because he does not want to return to jail. What you don't seem to understand is that officers put their lives on the line and unfortunately get injured along the way. Some of these injuries take years to affect them where they cannot safely do their job. Repeated injuries cause arthritis which affects the officers over the years. Officers are tougher than the average citizen and are sworn to protect and serve the public. How many of you are willing and able to be a police officer? Isn't it only fair to protect them after they have given their bodies up to protect the fine citizens of Montgomery County? Fortunately, few officers are unlucky enough to have to face these challenges.

I am worried individuals will think twice before joining the Montgomery County Police Department. **I am worried** that officers and other county employees may hesitate to take action to help people. Do you really expect an individual to sign up for the dangerous job of becoming a police officer, knowing that if they get injured, **they will not be able** to provide for their families with these new proposed changes and that they would be exposed to a life of future poverty when all they wanted to do was serve. I think not.

It appears the proposed changes are a heightened response to the mistakes of a few. I implore you not to punish the masses for their mistakes.

You say, "Employees' access to best medical practices must be protected." If so, instead, why not look inside at the worker's compensation, companies the county hires. If only they did provide the best medical care in a timely fashion, employees would heal faster, suffer less and return to work sooner, thus costing the county less money in the long run.

Thank you.

**Testimony before the Montgomery County Council on Council Bill 37-08,
Personnel—Disability Retirement**

January 15, 2009

Thomas C. Wellington
13512 Bonnie Dale Drive
North Potomac, MD 20878
301-351-0311, tom.wellingotn@verizon.net

1 As a private citizen of Montgomery County MD since 1966, we want to commend the services provided
2 by MCPD, MC FRS, and all public service employees to our residents. These employees, sometimes at
3 great personal risk, make our county a safer and better place to live, work, and raise our families. Fair
4 compensation to them in cases of disability is their due, and it is a very complex matter. However,
5 recent reports of some irregularities and lack of attention to “best practices” in the administration of
6 disability and retirement benefits have led to the need for the county bill under consideration tonight.

7 We have reviewed the draft bill (as of November 19, 2008, draft No. 8) and the staff memorandum and
8 enclosures containing the Inspector General’s report and the Managed Care Advisors, Inc. (MCA) report
9 of October 28, 2008. Council Staff, Ms. McMillan, and Mr. Drummer made these available to us. We
10 thank them for their assistance. References to the staff memorandum include chart references as
11 “@xx” indicating the numbered pages attached to the report. We have included for your use one copy
12 of our markup of that report and the draft bill, not as testimony but for the assistance of staff.

13 We are pleased to say that we endorse the general provisions of Bill 37-08. This bill addresses many of
14 the concerns our neighbors and I had about the Disability Retirement System and strongly recommends
15 some best practices and other changes for the existing Montgomery County Code Chapter 33. The
16 analysis and materials provided by MCA have provided a good guideline to Council in amending the
17 provisions of Chapter 33. A more efficient, equitable, and accountable Disability Retirement System
18 should result. The reassignment of responsibility for final determinations from the CAO to a Disability
19 Review Board should facilitate and improve the focus, timeliness, and quality of decision-making in this
20 very complex area.

21 We do have several specific areas of concern that we would like to bring to the attention of Council.
22 These are mainly focused on the areas of review and accountability for Disability Retirement cases after
23 initial determination.

24 Cumulative Trauma (@12, 37) and Statutory Presumptions (@33) were not addressed in the draft bill.
25 These topics are found in several other plans reviewed by MCA and do not seem to be included in our
26 thinking here. Council should decide on inclusion or exclusion of these provisions before final
27 consideration of Bill 37-08.

28 Scheduled Independent Medical Exam (IME) and case reviews: In the present draft, the IME is optional
29 at the discretion of the DRB. It should be mandatory for the initial application. A scheduled IME and
30 MRB/DRB case review, including the recommended IRS data provisions, should be mandatory for every
31 five years after disability retirement until age 72. This is recommended due to the great rate of advance
32 in occupational and rehabilitation medicine. The MRP and DRB may recommend therapies and/or
33 status changes based on these advances. While expensive, the cost will be small compared to the
34 recurring costs of total and permanent disability retirements without mandatory periodic review.

35 Use of Social Security Administrations (SSA) definitions of disability: The bill should include a process for
36 review of pertinent cases if the SSA changes this definition.

37 Definition of "Reporting at the time of the event": The draft bill does not specify an actual allowable
38 time for reporting a work-related injury. We suggest "within 30 days of the event". This occurs in
39 multiple locations in the text of the bill.

40 Definition of "Service Connected Injury": Is this definition possible? Are there definitions that SSA,
41 OSHA, or MCA can suggest? ©43-46 define some of this in the Maryland State materials.

42 Definition of "Willful Negligence" (Draft bill, p. 12, L. 289, and other places): Is there a more precise
43 definition that can be included? Some areas of consideration may include failure to control smoking,
44 obesity, failure to take prescribed medications or therapies, etc., which are beginning to be recognized
45 by insurance companies as contributory risk factors.

46 Public Input: there are provisions for the sources of information the DRB and MRP "must" consider in
47 any application or review. There is not any explicit provision for including input from the public or from
48 private citizens. We recommend that the draft bill provide explicitly for input from the public to the DRB
49 and MRP.

50 Finally, the draft bill should require a report, perhaps annually, from the DRB to the County Council and
51 County Executive. Any "Best Practice" includes a reporting and assessment process that allows for
52 analysis of progress as well as basic statistics describing activity. An annual report will provide that input
53 to the Council and Executive.

54 We thank you for the opportunity to offer our input about this important matter.



OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

January 12, 2009

TO: Phil Andrews, County Council President

FROM: Joseph F. Beach, Director, Office of Management and Budget

SUBJECT: Expedited Bill 37-08, Personnel – Disability Retirement - Amendments

The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

This legislation amends various sections of Chapter 33, Personnel and Human Resources, of the Montgomery County Code to:

- (1) make disability retirement procedures consistent for all employees;
- (2) create a partial incapacity disability retirement benefit;
- (3) create a total incapacity disability retirement benefit;
- (4) create a Medical Review Panel;
- (5) create a Disability Review Board;
- (6) prohibit certain applications for service connected disability retirement due to an accident filed more than a certain time after separation from County service or the date of the accident;
- (7) prohibit an employee who commits certain offenses from retiring on a service connected disability;
- (8) require an independent medical examination for a disability retirement;
- (9) modify the appeal procedures for disability retirement; and
- (10) generally amend the law regarding disability retirement.

FISCAL SUMMARY

The legislation would extend the current Group G two-tiered benefit formula to all members of the Employees' Retirement System. The proposed benefit for service connected disability would be 70% of the final earnings for those who meet the Social Security disability standard for total incapacity or a minimum benefit of 52.5% of final earnings for all other disabilities. The fiscal impact of this change cannot be precisely determined since it depends on how many disability retirees fall into each category. If more applicants receive the lower benefit, the savings would be greater; if more applicants

Office of the Director

receive the higher benefit, the savings would be less. The plan actuary has estimated a range of savings from \$1.0 million to \$2.6 million, depending on the number of disability retirees in each category.

The legislation also modifies the disability determination process for all employees. The proposed changes would result in increased costs and are summarized in the table below:

<u>Other Proposed Changes</u>	<u>Annual Cost</u>
Between 50 and 75 independent medical examinations (IME) for disability applicants and 40 to 50 medical reviews of existing retirees at an average cost of \$675 each.	\$60,000 to \$85,000
Impartial medical organization retained by the Chief Administrative Officer to develop a list of ten medical doctors from which a four-member Medical Review Panel will be chosen.	\$50,000
Addition of a fourth doctor to the Medical Review Panel.	\$75,000
Additional OHR staffing needs:	
1.0 (WY) Human Resources Specialist. Examples of responsibilities for one full-time specialist include overseeing communications, counseling, tracking and reporting, and evaluation of tax and earnings information.	\$80,000
1.5 (WYs) Office Services Coordinators (OSC). Examples of responsibilities for one full-time and one part-time OSC include additional recordkeeping, scheduling of appointments and hearings, and coordinating communications between the Office of Human Resources, the Medical Review Panel, IME doctors, and Aetna Insurance Company.	\$120,000
Total	\$385,000 to \$410,000

Total net annual savings from the change in the benefit level and the administration/staffing changes range from \$0.6 million to \$2.2 million.

The following contributed to and concurred with this analysis: Wes Girling and Belinda Fulco, Office of Human Resources, and Lori O'Brien, Office of Management and Budget.

jfb:lob

- c: Kathleen Boucher, Assistant Chief Administrative Officer
- Rebecca Domaruk, Office of the County Executive
- Joseph Adler, Director, Office of Human Resources
- Wes Girling, Office of Human Resources
- Belinda Fulco, Office of Human Resources
- Brady Goldsmith, Office of Management and Budget

MERCER



MARSH MERCER KROLL
GUY CARPENTER OLIVER WYMAN

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.

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- 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
40-yr amortization		
Group E	\$(840,000)	\$(758,000)
Group F	\$(1,493,000)	\$(1,437,000)
All groups	\$(2,615,000)	\$(2,380,000)
30-yr amortization		
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
40-yr amortization		
Group E	\$(290,000)	\$(266,000)
Group F	\$(485,000)	\$(473,000)
All groups	\$(1,057,000)	\$(923,000)
30-yr amortization		
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
Scenario 1	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)
Scenario 2	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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MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

MEMORANDUM

TO: Isiah Leggett, County Executive
FROM: Councilmembers
DATE: November 20, 2008
RE: Disability Pensions

We understand that you have had ongoing discussions on police disability pensions with union representatives since early September. A majority of Council believes conclusions we have reached through our consideration of this issue may be relevant to those conversations.

We want to express our support for moving forward on an expedited basis to address the issues raised by our Inspector General back in August and align our disability retirement process with the best practices in other jurisdictions.

To ensure a thorough briefing on our disability program as MFP and Public Safety committees reviewed the IG report, Council commissioned its own study on the matter. Managed Care Advisers, an independent expert on disability retirement issues, also reported our current process falls short of industry best practices in many important areas. While all involved parties may not agree with everything in each report, taken together, the reports indicate a need to take strong and swift action to address disability retirement shortcomings.

As Montgomery County officials prepare to engage in more difficult conversations over the budget and employee benefits, this issue is straightforward and sensible. Disability retirement is a critical benefit that must be preserved; employee access to best medical practices must be protected; coverage for workers with varying degrees of disability must be broadened; and disability retirement procedures must reflect the best practices in the field.

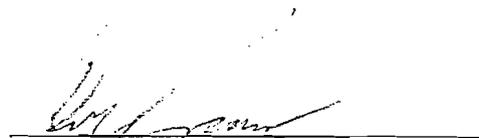
While issues such as disability retirement are commonly addressed through the collective bargaining process, Council will be forced to act through legislation if bargaining cannot produce an acceptable result in a timely manner.

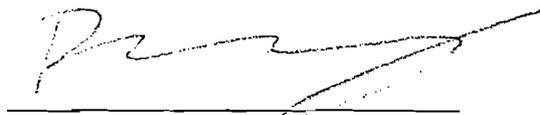
As County Executive, we look to your leadership and urge you and FOP representatives to reach an effective agreement that produces the much-needed reforms. This is an issue that county residents expect to see resolved without delay so we all can work together to address the severe budget deficit facing the county in the coming fiscal year.


Phil Andrews


Roger Berliner


Marc Elrich


Don Praisner


Duchy Trachtenberg

CC: Tim Firestine, CAO

Joe Adler, OHR Director

Steve Farber, Council Staff Director



Local News

[\[Print\]](#) [\[Email\]](#)

Firefighter who quit after sex assault conviction draws disability payments

By Alan Suderman

Examiner Staff Writer 2/16/09

A Montgomery County firefighter who quit the force three years ago after he was convicted of sexually assaulting a female subordinate is currently receiving tax-free disability payments from the county.

To some county officials, it's another example of a broken disability pension system that needs to stop approving payments for county workers if they've committed a crime or some other act that would get them fired.

Public safety unions have opposed those efforts. Union officials say that any of their members who are hurt on the job ought to be compensated, regardless of future or past transgressions they are accused of committing.

In August 2005, Aaron Weitzman was a lieutenant in the Montgomery County Fire and Rescue Service when he locked himself in a bathroom with a female co-worker, lifted up her shirt and started kissing parts of her body against her will, according to court records. A jury convicted Weitzman in December 2006 of assault. He was sentenced to a year of unsupervised probation.

A month after his conviction, Weitzman quit the fire department with an application pending for service-related disability pay. In June 2006, he was notified that he had qualified and would receive payment going back to Jan. 20, 2006, his last day on the job.

Reached by phone, Weitzman confirmed that he was a former Montgomery County firefighter who was receiving pay for neck and arm injuries, but declined further comment.

Montgomery County Career Fire Fighters Association President John Sparks declined to comment specifically about Weitzman's case but added: "I don't see a connection between a job status and the disability retirement process. ... They're not intertwined."

A county spokeswoman said Weitzman's final salary when he left county employment was \$61,558 a year, but added the county could not release information about Weitzman's disability pay, including how much the county is paying him a year and whether he applied for disability payments before or after he was charged.

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In a report last September, Montgomery County Inspector General Thomas Dagley highlighted four former Montgomery County police officers who applied for disability pay either shortly before or directly after pleading guilty to various crimes, including theft and misconduct in office. The three officers who received disability pay averaged more than \$30,000 each in tax-exempt pensions last year.

Two members of the County Council and County Executive Ike Leggett have said they were working to change the way the county determined disability benefits to be able to exclude former county workers who've been fired for intentional wrongdoing. Union officials have promised to oppose those efforts.

Find this article at:

http://www.dcxaminer.com/local/Firefighter-who-quit-after-sex-assault-conviction-draws-disability-payments_02_17-39688397.html

Check the box to include the list of links referenced in the article.

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S U P P L E M E N T A L M E M O R A N D U M

TO: Public Safety/Management and Fiscal Policy Committees

FROM: Robert H. Drummer, Legislative Attorney 

SUBJECT: **Worksession 2: Expedited Bill 37-08, Personnel – Disability Retirement – Amendments**

At this session, the Committee will have the opportunity to hear a presentation from OHR responding to the following questions:

1. What progress has OHR made in reviewing cases of employees who received service connected disability retirements to see if circumstances have changed since the September 11, 2008 worksession?
 - a. How many employees were re-examined?
 - b. What were the results?
 - c. What departments did these employees retire from?

2. How many employees have applied for service connected disability retirement since the Joint Committee held the first worksession on disability retirement on September 11?
 - a. How many employees applied in each department?
 - b. How does this compare to the applications received in the past several years for the same time period?
 - c. What is the status of the applications filed since September?
 - d. How many of the applications were filed by employees who were on full duty status?

Council staff received the attached written responses to these questions from the Office of Human Resources after the publication of the original memorandum.

This packet contains	Circle
Memorandum response from OHR	1
Sample letter	3
Spreadsheet of applications for disability retirement	4

Thank you for to opportunity to provide the MFP/PS Committees with an update on disability initiatives underway in the Office of Human Resources (OHR).

As I mentioned during the joint MFP/PS work session on January 22, 2009, OHR was on schedule to begin reviewing existing disability retirement applications starting in January. We plan to review approximately 230 disabled retirees over the next 12 months, and the first wave of review notification letters was mailed to 31 retirees on January 30, 2009. A copy of the letter is attached for your information.

Review Process

- Initial documentation will be reviewed by Occupational Medical Services (OMS) and, where necessary Independent Medical Examinations (IME) will be scheduled. The results of the IME and OMS review will be forwarded to the CAO with one of two recommendations – to either continue disability payments in instances where it is clear the retiree has not recovered, or to refer the retiree to the Disability Review Panel (DRP).
- If the matter is referred to the DRP the DRP will conduct a review of all medical documentation and make a determination as required by the County Code.
- If the DRP determines the retiree continues to be disabled, and the CAO agrees, disability benefits will be continued and the retiree will be so notified, and advised of the projected timeline for the next medical review.
- If the DRP determines the retiree is no longer disabled, and the CAO agrees, the retiree will be notified of the CAO decision, and any appeal rights. In addition, the following will occur:
 - Retirement benefits will cease 30 days following the CAO decision, or the first of the month following 30 days from the CAO decision, whichever is later.
 - The individual will be notified of their future retirement and group insurance rights (vested, refund of contributions, etc). Those who are eligible to an immediate (normal, early, vested) benefit will be advised of their eligibility to receive those benefits.
 - Individuals who are not eligible for an immediate alternative retirement benefit will no longer be eligible for subsidized health insurance coverage. Coverage will be discontinued (for retirees and dependents) and they will be notified of their rights to continue coverage under the pursuant to the provisions of the federal Consolidated Omnibus Budget Reconciliation Act (COBRA). Under COBRA, the retiree will be

responsible for paying the full cost of coverage plus an additional 2 percent administrative fee.

- The County is under no obligation to return a retiree who is no longer disabled to County employment. However, they will be allowed to compete for available County positions with priority placement rights.

Status of Reviews

Notices were sent certified mail, return receipt requested, to 31 retirees (18 police officers, 5 firefighters and 8 other county employees). They were given twenty days from the date of receipt of the notice to provide requested medical documentation.

Although the 20 day timeframe has not yet elapsed, two have submitted the requested documentation as of Wednesday, February 19 and OMS is reviewing the documentation provided. Two other were returned because a current mailing address was not on file with OHR. New letters were mailed to the current address last week. Several retirees requested, and were granted an extension beyond the 20 day timeframe.

Recent Applications for Service Connected Disability Retirement

Council staff requested data on the number of Disability Retirement Applications since October 30, 2009. Note that applicants do not always specify whether they are applying for a service connected or non-service connected disability retirement. The Disability Review Panel makes the determination as to whether or not a disability is service connected.

<u>Application count</u>	<u>Department</u>	<u>Status</u>
2	Corrections	Pending
3	DPWT	Pending
3	Fire Rescue Svc	Pending
1	HHS	Pending
15	Police	Pending

The attached spreadsheet and line graph reflects the change in the number of disability applications by department from October 30 to February 15, over the last three years.

We do not have data on how many disability applicants were in full duty status at the time the application was submitted.

CERTIFIED MAIL

Date

XXXXXXXXXXXX
XXXXXXXXXXXX
XXXXXXXXXXXX

Dear :

Section 33-43(g) *Medical reexamination of disability retiree*, of the Montgomery County Employees Retirement System provides that:

"The Chief Administrative Officer may require a member receiving disability pension payments to undergo a yearly physical examination during the 5-year period following retirement, and once in every 3-year period thereafter, until age 55 if a member of group B, E, F, or G, or age 60 if a member of group A or H. The Chief Administrative Officer must review the findings of the physical examination and take appropriate action, which may include submitting the results of the evaluation to the Disability Review Panel for a redetermination as to whether the individual qualifies for disability benefits in accordance with subsection (d). If a member refuses to submit to the examination, the Chief Administrative Officer may reduce or discontinue pension payments."

Our records reflect that you retired on a Service Connected Disability Retirement effective xxxxxx, and pursuant to Section 33-43(g), we are requesting that you or your doctor submit all current medical information you wish to provide to the Office Human Resources Occupational Medical Services (OMS) so that we may begin the process of evaluating your disability status. Please provide this information to the OMS at 255 Rockville Pike Suite 125, Rockville, MD 20850 within 20 days of receipt of this letter.

Once OMS receives the requested information, you will be contacted to schedule a physical examination, if necessary, to determine your continued eligibility for disability benefits. If a medical examination indicates that you are no longer disabled, the matter will be forwarded to the Chief Administrative Officer who may request that the Disability Review Panel conduct a more thorough review and make a recommendation for final determination.

If you need additional time, or if you have questions about this process, you may contact OMS at 240-777-5118. You may also contact the Office of Human Resources Benefits Team at 240-777-5120 or via e-mail at Benefits@montgomerycountymd.gov.

Sincerely,

G. Wesley Girling
Benefits Manager

cc: OMS

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DR New Cases Between 10/30-2/15 for 3-Year Period

Years	06-07	07-08	08-09
Dept	10/30-2/15	10/30-2/15	10/30-2/15
DED	0	1	0
DLC	2	0	0
DOCR	3	1	2
DPWT	6	3	3
FRS	1	2	3
HHS	1	0	1
HOC	1	0	0
LIB	1	2	0
POL	6	5	15
SHER	1	0	0
STRHALL	1	0	0
Total	23	14	24

