

MEMORANDUM

TO: Public Safety/Government Operations and Fiscal Policy Committee

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Worksession 4:** Bill 45-10, Personnel – Disability Retirement – Eligibility – Total and Partial Incapacity

Expedited Bill 45-10, Personnel – Disability Retirement – Eligibility – Total and Partial Incapacity, sponsored by Councilmembers Trachtenberg, Andrews, Berliner, and Council Vice President Ervin, was introduced on July 27, 2010. A public hearing was held on September 28, 2010. The Joint Public Safety/Management and Fiscal Policy Committee held worksessions on October 4, October 25, and November 22, 2010.

At the October 25 worksession, the Committee agreed to send a written request to the Executive Branch, the FOP, and MCGEO to discuss a two-tier or multi-tier service-connected disability retirement system for their employees. The Committee requested a progress report from the parties in 30 days and agreed to review this Bill again. The written request to the parties is at ©50.

Background

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

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

The Council enacted amendments to the disability retirement system in Bill 37-08 on May 12, 2009. One of the amendments in the Bill as introduced, but not enacted, was to extend

the two-tier system for service-connected disability benefits to all public safety employees. At the Council's request last year, the Office of Human Resources provided information on the County's experience with this two-tier system for fire and rescue employees. As of May 2009, only 10 of the 67 fire and rescue employees who received a service-connected disability retirement since the two-tier system began in 2000 were awarded the higher 70% benefit. Therefore, 85% of the awards were at the lower 52½% level. The County's actuary, Mercer, estimated the annual savings to the County's retirement contribution for extending the two-tier system to Group F (Police) to be more than \$1.5 million based upon an assumption that 60% of the disability retirements would be at the lower level. A copy of Mercer's January 2009 letter is at ©17-21. If the Group G (Fire and Rescue) experience is carried over to all employees, the actuary estimated the annual savings would be more than \$2.7 million.

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

Chronology of the Disability Retirement Legislation

Here is a chronology of significant events for the Council's consideration of changes to the disability retirement system.

1. September 2008 – Inspector General Interim Report
2. October 30, 2008 – MFP/PS Committee worksession on Report
3. December 9, 2008 – Bill 37-08 introduced
4. January 15, 2009 – Public Hearing on Bill 37-08
5. MFP/PS Committee worksessions on Bill 37-08
 - February 19, 2009
 - April 2, 2009
 - May 1, 2009
 - May 4, 2009
6. May 12, 2009 – Bill 37-08 enacted with amendments
7. July 27, 2010 - Bill 45-10 introduced
8. September 28, 2010 – Public Hearing on Bill 45-10
9. PS/GO Committee worksessions on Bill 45-10
 - October 4, 2010
 - October 25, 2010
 - November 22, 2010

Public Hearing

Eleven witnesses testified at the September 28 public hearing. Mark Zifcak, President of the Fraternal Order of Police, Montgomery County Lodge 35 (FOP), opposed the Bill. See ©26-30. Mr. Zifcak argued that the disability retirement system for police officers is fair and that any changes should be made through collective bargaining. Trang Nguyen (©32), Kristina Venable, Doug Soskin (©38), and Doug Gross (©40) testified as individuals opposed to the Bill.

Peggy Dennis, on behalf of the Montgomery County Civic Federation, and Joan Fidler (©33), on behalf of the Montgomery County Taxpayers League, supported the Bill as a fiscally responsible, yet fair, change to the County's disability retirement system. Dr. Marc Leffer, a board certified occupational medicine physician, (©34-37) supported the Bill as a step in the right direction to establishing a best practice system. Dr. Leffer testified that a one-tier disability retirement system does not accurately deal with the varying nature of disability. Dr. Leffer suggested that the County add a wellness program to prevent injuries similar to the program he helped set up for Howard County in order to reduce disability retirements. Tom Wellington (©31), Dwight Cramer (©39), and Robin Ficker testified as individuals supporting the Bill.

October 4 Worksession

Ed Lattner and Amy Moskowitz of the County Attorney's Office answered questions about the Bill. John Sparks, President of the IAFF, answered questions about the service-connected disability retirement provisions for IAFF members.

The Committee requested Council staff to draft alternative amendments that would require a two-tier service-connected disability retirement system, but require the Executive and the unions to negotiate the details. The Committee did not make any recommendations on the Bill and agreed to review this Bill again after receiving alternative amendments from Council staff.

October 25 Worksession

Ed Lattner of the County Attorney's Office, OHR Director Joseph Adler, and FOP President Marc Zifcak answered questions about the Bill. The Committee discussed the two draft alternative amendments prepared by Council staff at the Committee's direction that would require a two-tier service-connected disability retirement system. The Committee did not make any recommendations on the Bill. The Committee agreed to send a written request to the Executive Branch, the FOP, and MCGEO to discuss a two-tier or multi-tier service-connected disability retirement system for their employees. The Committee requested a progress report from the parties in 30 days and agreed to review this Bill again.

November 22 Worksession

OHR Labor Relations Specialist Stuart Weisberg and IAFF President John Sparks answered questions about negotiations between the Executive and the unions. OHR told the Committee that the Executive has discussed service connected disability retirement with both MCGEO and the FOP and that negotiations are ongoing.

The Committee agreed to delay action on the Bill to permit the parties to continue negotiations.

Issues

1. Does the effective date of the Bill create a substantial impairment of contract benefits in violation of the Contracts Clause of the United States Constitution?

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

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

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

In *Bd. of Trustees. v. Mayor & City Council of Baltimore City*, 317 Md. 72, 100 (1989), the Maryland Court of Appeals held that "under Maryland law, pension plans create contractual duties toward persons with *vested* rights under the plans." (*emphasis added*) As to when an employee's right to a disability pension vests, the Maryland courts have held that a public employee's right to a disability pension does not vest until the employee satisfies the conditions necessary to receive the benefit. This would include the injury, a determination that the employee is no longer able to perform the duties of the position, and an application for benefits. See *Davis v. City of Annapolis*, 98 Md. App. 707 (1994); *Saxton v. Bd. of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore*, 266 Md. 690 (1972). As the OCA opinion points out, the decisions in *Davis* and *Saxton* both rely on the date of injury as the time of vesting. However, neither case raised the issue of whether an employee must satisfy other conditions for a disability pension before vesting. It is, therefore, difficult to predict how a Court would rule on this issue.

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

The OCA also raised a concern that the collective bargaining agreements may create a contractual bar to implementing the Bill during the terms of the existing agreements. The OCA argued that the Council's ratification of the collective bargaining agreements containing provisions where the union and the Executive agreed to submit legislation to the Council establishing the current disability retirement system created a contractual right that is subject to the Contracts Clause. Although the OCA agreed that a reviewing Court may find the reforms in the Bill to be reasonable and necessary, and therefore a permissible impairment of the collective bargaining contracts, they recommend avoiding the issue by amending the effective date of the Bill to coincide with the end of the current collective bargaining agreements. The current agreements with MCGEO and the FOP both expire on June 30, 2012.

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

Amend lines 369-371 as follows:

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

2. Should the law bar an applicant from receiving a service-connected disability retirement pension if the applicant commits an offense that would justify dismissal?

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.² 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

¹ The OCA opinion does not predict whether a Court would find that the creation of a partial disability benefit is a reasonable modification to a vested right for an important public purpose.

² The Inspector General described one of these cases in his report at pages 4-5. The report is available at <http://www.montgomerycountymd.gov/content/inspector/disabfinalinterim090908.pdf>.

subordinate.³ Bill 45-10 would prohibit the award of a service-connected disability retirement pension if an applicant commits an offense that would justify dismissal. This provision was recommended by the Executive's internal work group in 2008.

The County Attorney's Bill review memorandum questions how this provision could be applied under the current system. The decision would be made by the Disability Review Panel and ultimately the Chief Administrative Officer (CAO) under the current system. The County would have to produce evidence sufficient to prove that the employee had committed an offense that would have justified dismissal. An employee could appeal the CAO's decision to the appropriate arbitration panel.

A service-connected disability retirement pension is a substitute for an employee's future earnings that are no longer possible due to disability. It makes little sense to pay an employee for future lost earnings that the employee would not have received due to a disciplinary termination for misconduct on the job. **Council staff recommendation:** approve the provision in the Bill as drafted.

3. 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 45-10 would create a new disability benefit for partial incapacity, similar to the partial benefit which currently applies to fire fighters. See the definitions of partial and total incapacity on lines 255-261 at ©11 and lines 275-278 at ©12. 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. 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 ©17-21.

This policy change was recommended by the Council's consultant, Managed Care Advisors, the Executive's internal work group, and the doctor who spoke at the public hearing, Marc Leffer. 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 already requires for fire fighters.

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. The income replacement goal would be satisfied by a combination of 52½% of final earnings in nontaxable income plus the ability to earn outside income to make up the difference. The annual savings from this change could approach \$3 million. See the Mercer Actuary Letter at ©17-21. Is

³ See the *Examiner* article at ©41-42.

paying all disabled employees for a total incapacity a reasonable allocation of the County's scarce resources?

Disability retirement benefits are subject to collective bargaining. The FOP President, Marc Zifcak, argued strongly at the public hearing that the Council should wait for the parties to bargain changes to the system. In 2009, the Executive and the FOP were in the process of bargaining over changes to the disability retirement system. The Council amended Bill 37-08 to make only the changes in the system that had already been agreed to by both the Executive and the FOP. The Executive sought a two-tier system during bargaining in 2009 and 2010, but no agreement was reached. Since that time, the Executive and the FOP negotiated an amended agreement submitted to the Council in May 2010, an out-of-cycle agreement submitted in July 2010, and an amendment to the current agreement submitted to the Council in April 2011.⁴ None of these agreements contained changes to the disability retirement system. In the give-and-take world of collective bargaining, it is unlikely that the parties will negotiate a reasonable two-tier disability retirement system during the County's current economic downturn. **Council staff recommendation:** approve the creation of a partial incapacity disability retirement and a total incapacity disability retirement as proposed in the Bill.

4. Are there other local jurisdictions with a two-tier disability retirement system for public safety workers?

a. Fairfax County. Fairfax County police disability is covered by Fairfax Municipal Code §§ 3-7-26 to 3-7-38. Service-connected total disability retirement is 66 2/3 % of final salary until the employee's service credit reaches 25 years when it is reduced to 60% of final salary. Fairfax defines partial disability as the inability to perform some of the duties of the position. Employees on partial disability receive the same benefit, but only if the department does not have a position that they can perform.

b. Howard County. Police and Fire receive 66 2/3 % of final salary for a catastrophic injury and 50% of final salary for a non-catastrophic injury. The catastrophic injury follows the Social Security disability standards.

c. Baltimore County. Police and Fire receive 75% of average final earnings for dismemberment, paralysis, or anatomical loss of use of certain body parts. All lesser disabilities receive 50% of average final earnings.

5. The alternative amendments requested by the Committee at the October 4 worksession.

The 2 alternative amendments for Bill 45-10 requested by the PS/MFP Committee at the October 4 worksession are at ©45-47 and ©48-49.

Alternative 1, at ©45-47, would delay the effective date of the Bill until the current FOP agreement expires on July 1, 2012 and encourage, but not require, the Executive to negotiate a two-tier service connected disability system with the FOP and MCGEO through collective bargaining in the interim. If the parties agree to negotiate and are unable to resolve the issue, it

⁴ This agreement resulted from an arbitration award selecting the FOP proposal on a limited reopener.

may be submitted to the statutory impasse resolution procedure, including arbitration, as a separate issue. The amendment would also modify the factors to be considered by the arbitrator to make them relevant to service-connected disability as a separate issue. If the parties reach agreement or submit it to arbitration, the Council must indicate its intent to approve or reject the agreement or arbitration award. If the Council indicates its intent to reject it, the parties would have a statutory 9-day period to re-negotiate the issue and re-submit it to the Council for approval. The Council would retain ultimate responsibility for enacting a law creating a two-tier system. The Bill, as introduced, would be the default resolution unless the Council enacts a law based upon a negotiated or arbitrated resolution.

Alternative 2, at ©48-49, would replace the entire Bill with an uncodified section that requires the Executive to negotiate a two-tier system with the FOP and MCGEO this year as a separate issue. Again, an impasse would be resolved through arbitration as a separate matter with the factors to be considered by the arbitrator modified to be relevant to resolving this issue as a separate matter. The parties would be required to submit the results of the arbitration to the Council as proposed legislation for consideration by April 1, 2011. The Council must indicate its intent to approve or reject the agreement or arbitration award. If the Council indicates its intent to reject it, the parties would have the statutory 9-day period to re-negotiate the issue and re-submit it to the Council for approval. The Council would retain ultimate responsibility for enacting a law creating a two-tier system.

6. What progress have the parties made in negotiations since November 22?

The Committee, in a memorandum dated October 25, asked OHR to discuss the creation of a two-tier or multi-tier service connected disability retirement system with the FOP and MCGEO. See ©50. OHR and the FOP agreed to engage in good faith negotiations over this issue, but they did not reach an agreement. A joint letter from OHR and the FOP is at ©51. OHR also discussed this issue during term bargaining with MCGEO after October 25, but they did not reach an agreement. Collective bargaining agreements for FY12 with both MCGEO and the FOP were resolved through last offer by package impasse arbitration awards in favor of the union. None of the final offers submitted to the arbitrator by the Executive or the unions included changes to the disability retirement system. Collective bargaining negotiations for a new agreement beginning in FY13 with both MCGEO and the FOP are scheduled to begin this fall.

7. Annual report on disability retirement.

County Code §33-51(a)(5) requires the CAO to provide an annual report on the status of the disability retirement system for the preceding calendar year. The report for calendar year 2010 is at ©52-53.

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

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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

AN ACT to:

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

By amending

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

| | |
|------------------------------|--|
| 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:

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

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

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

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

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

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

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

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

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

175 * * *

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

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

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

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

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

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

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

210 * * *

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

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

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

220 (i) the original disability retirement pension plus cost-
221 of-living increases; or

222 (ii) an amount that, when added to the amount the
223 member earns or is able to earn, equals the
224 maximum earnings of the occupational
225 classification from which the member was
226 disabled.

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

231 (i) the original disability retirement pension plus cost-
232 of-living increases; or

233 (ii) an amount that, when added to the amount that the
234 member earns or is able to earn, equals 120 percent
235 of the maximum earnings of the occupational
236 classification from which the member was
237 disabled.

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

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

250 * * *

251 **33-128. Definitions.**

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

254 * * *

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

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

262 * * *

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

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

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

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

277 (1) is unlikely to resolve in the next 12 months; and

278 (2) may be permanent.

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

280 * * *

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

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

296 (2) The Panel must determine the member's residual functional
 297 capacity and provide this information to the independent
 298 vocational expert.

299 (3) A Panel determination that the member's service-connected
 300 disability is severe enough to be considered a disability by the
 301 Social Security Administration is not a recommendation that
 302 the member is entitled to, or should be granted, a disability
 303 benefit by the Social Security Administration.

304 (4) If a member has already been granted disability benefits by the
 305 Social Security Administration when the member applies for a
 306 service-connected disability pension, the County must give the
 307 member a total incapacity benefit if the Disability Review Panel
 308 finds that the award of disability benefits from the Social
 309 Security Administration was based primarily on the same
 310 medically determinable physical or mental impairment on
 311 which the Disability Review Panel awards the member a
 312 service-connected disability benefit.

313 (g) The Disability Review Panel must recommend a finding of partial
 314 incapacity if:

315 (1) the member meets the standards to receive a service-connected
 316 disability benefit; and

317 (2) the member is not eligible to receive a benefit for total
 318 incapacity under subsection (f).

319 (h) The County must increase the partial incapacity service-connected
 320 disability pension benefit of a member to a total incapacity benefit if:

321 (1) the Social Security Administration awards disability benefits to
 322 the member;

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

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

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

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

355 * * *

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

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

363 * * *

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

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

372 *Approved:*

373

374

Nancy Floreen, President, County Council

Date

LEGISLATIVE REQUEST REPORT

Bill 45-10

Personnel - Disability Retirement – Eligibility - Total and Partial Incapacity

| | |
|---|--|
| DESCRIPTION: | The Bill would create a two-tier service-connected disability retirement system for most employees consisting of a partial incapacity disability retirement benefit and a total incapacity disability retirement benefit. The Bill would also prohibit an employee who commits certain offenses from receiving a service connected disability retirement benefit, and generally amend County law regarding disability retirement. |
| PROBLEM: | The current system provides the same service-connected disability retirement benefit for both partial and total incapacity for all employees except fire and rescue employees. This Bill would create the same two-tier system that fire employees have for all others. The Bill would also eliminate the right to a service-connected disability benefit for an employee who has committed an offense that would justify removal for cause. |
| GOALS AND OBJECTIVES: | To provide a two-tier service-connected disability retirement system for all employees and to prevent an employee from avoiding a termination for cause by applying for a service-connected disability retirement benefit. |
| COORDINATION: | Office of Human Resources, County Attorney |
| FISCAL IMPACT: | To be requested. |
| ECONOMIC IMPACT: | To be requested. |
| EVALUATION: | To be requested. |
| EXPERIENCE ELSEWHERE: | To be researched. |
| SOURCE OF INFORMATION: | Robert H. Drummer, Senior Legislative Attorney |
| APPLICATION WITHIN MUNICIPALITIES: | NA |
| PENALTIES: | NA |

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January 9, 2009

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

Via Electronic Mail

Subject: New Legislation Proposal on Disability Provisions for ERS

Dear Belinda:

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

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

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

Description of Proposed Plan Provision Changes

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

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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.



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc P. Hansen
Acting County Attorney

MEMORANDUM

TO: Kathleen Boucher

CC: Robert Drummer
Wes Girling

THRU: Marc Hansen

FROM: Edward Lattner
Amy Moskowitz

DATE: September 17, 2010

RE: Disability Retirement Legislation

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

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

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

Contract Clause Analysis

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

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

The contract clause prohibits retroactive impairment

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

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

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

The collective bargaining agreements

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

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

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

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

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

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

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

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

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



Montgomery County Lodge 35, Inc.

18512 Office Park Drive
Montgomery Village, MD 20886

10/1

Phone: (301) 948-4286

Fax: (301) 590-0317

Statement of Fraternal Order of Police, Montgomery County Lodge 35, in opposition to bill 45-10

September 28, 2010

Once again over eleven hundred police officers find their certified representative with just 180 seconds in a political forum to address the merits of legislation that could place them and their children in financial jeopardy. That's 0.16 seconds per officer -- an impossible task.

I remind you that we are not some "special interest" seeking something from the government. We are Montgomery County police officers, county government employees. We work for you. We have an employee-employer relationship with you, not all that different than the one you have with your own well-compensated staff. Do you consider the CAO a "special interest"? Your council staff director? The OHR director? We are an important part of government function and mission.

Police officer disability benefits are critically important to police officers, their families, and the community that relies on them in life and death situations 365 days a year, 24/7 -- while you sleep and in all sorts of weather and on family holidays.

We do not have time here to give this matter the justice both it and your police officers deserve. The playing field here is not level. For instance, a 52.5% benefit is proposed by this legislation, but the origins of the 52.5% figure are not revealed other than to say that Group G fire employees have that level benefit. Similarly, maybe someone should ask why Group F police employees are not seeking a 70% benefit.

There has been no discussion of the different criteria that apply to a Group G service-connected disability versus a Group F service-connected disability.

There has been little interest in changing the disability benefit for police management who do not have collective bargaining rights, yet the poster boys for the issue are former well-compensated management assistant police chiefs who went on to other law enforcement positions before applying for disability benefits.

The bargaining table is where this matter belongs at the appropriate time and where it can be given due attention by the parties. That is where facts trump politics and distortions, and biased media hype. (This anti-Collective Bargaining bill is an unconstitutional attempt to impair a valid, just executed contract.)

By way of quick example, we repeat what has been ignored by the media and detractors: **We already have a two-tier system of disability.** The absolute, unadulterated truth is that all eligible disabled officers get at least tier 1 – 66 2/3 percent. More severely disabled officers receive the tier 1 benefit **plus** the integrated retirement pension system’s tier 2 benefit provided by Social Security.

Only through Collective Bargaining can this critically important issue receive the attention it deserves and can unintended consequences be avoided. (The issue was indeed raised by the Executive this year and dropped by the Executive who made the decision to not take it to arbitration, as was his right.)

For twenty-eight years, FOP Lodge 35 has abided by the spirit and intent of the collective bargaining law. It served us well until the process was violated by the County. We want to 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, but this legislation is a short-sighted attempt to turn back the clock.

It was through collective bargaining that we voluntarily gave up 4.25% General wage Adjustments two years in a row.

However, no police officer should ever be forced to hesitate before taking action.

This bill heads in the wrong direction. Our position has been consistent since the early 1980s. We do not want the County to retire disabled police officers. We want the County to keep as many service-connected disabled officers as possible productively employed with dignity and respect in meaningful police officer positions. That is the intent of our Contract Article 11. We do not want officers forced out through assignment of degrading work, disrespect, and harassment.

The County cannot have it both ways by forcing officers out then complaining that they have received a benefit

There is no emergency here. Just last year we agreed to new reporting timeframes and a five-year disability application deadline. (Bill 37-08.) These new time frames have not been given a chance to achieve their intended purposes.

Our normal retirement benefit is lower than area jurisdictions. For example, the normal retirement in Fairfax County is better than the disability benefit for a Montgomery County officer. The disability benefit for a Fairfax County police officer forced from his/her position is 66 2/3 percent.

The provision that an employee who “has committed an offense that would justify removal for cause” has not been bargained and has not been given the consideration it demands. Who decides “would justify”? What if an officer is severely injured saving

demands. Who decides “would justify”? What if an officer is severely injured saving lives and is in great pain and, as a direct result of the pain caused by the injury, s/he abuses drugs and alcohol that leads to other problems that arguably “would justify removal for cause,” is it the position of this Council that this officer isn’t injured? That s/he did not perform admirably resulting in a job-related injury? Or simply that we need to punish injured officers for not handling their pain the way the County Council in an election year thought they should?

There is a lot more to say. I am out of time.

9 Disabled Officers May Be Forced Out

By **KENNETH WEISS**

Journal Staff Writer

Police officers who can no longer work on the street because of disabilities should be forced to retire early to save the department money, a top police administrator has recommended.

The recommendation, in an internal memorandum from Major Frederick Chaney to Chief Bernard D. Crooke, proposes that nine disabled officers be forced to seek disability retirement because they are holding desk jobs that "could be absorbed by civilian personnel at a much lower cost."

Chaney said no one has been targeted for early retirement and no decisions have been made because the memo is still only a recommendation.

But news of the recommendation — and the list of names — has leaked out to the nine officers, who are now worried about losing their careers. And the police union is taking their side.

"They are deciding to clean house lacking any compassion for any officers involved," said one eight-year police officer, who was in
Please see **DISABLED, A7**

Disabled: Nine Officers May Be Forced to Retire

From Page A1

jured in an automobile accident while on duty.

"They make me feel like dead wood," said the officer, who asked to remain anonymous. "They make me feel like I'm of no value."

Seven of the nine officers work in desk jobs or hold other "sedentary positions" that do not demand the responsibilities of a full-sworn officer, including having arrest powers, wearing a uniform, handling a gun and driving a police car, Chaney said.

"These officers are at a dead end for any possible upward mobility and they are functioning in positions that could be absorbed by civilian personnel at a much lower cost," his memo says.

The memo includes a draft of a letter to be sent to the disabled officers urging them to retire.

"If you do not apply for disability retirement within thirty days from the date of this letter, the department will institute the necessary proceedings," the letter says.

A disability panel, comprised of the three police department majors, is responsible for reviewing each case and deciding the fate of injured or disabled officers.

The memo was sent to Crooke as a recommended change in policy following a panel meeting May 20.

Chief Crooke said through a spokesman that he has sent the memo back to his staff for additional information.

According to the memo, the department's disability policy signed by Crooke in 1980 "has a very liberal approach in dealing with officers. The police disability panel supports a more strict interpretation in the assignment of police officers who are medically certified as having a permanent disabling injury."

As it is now, disabled officers are found comparable jobs within the department which they can perform with their disability. Or, at their option, the officers may be transferred to a comparable job somewhere else in the county government.

The proposed "strict approach" makes a distinction between disabled officers who can perform most of the duties of a sworn officer, such as being physically prepared to arrest someone or shoot a gun, and more seriously disabled officers who can't.

Chaney said there are 12 officers who — although they have some disability — continue to perform all the duties of a sworn officer.

These officers, the memo suggests, should be placed in a position of comparable rank within the department, or elsewhere in the county government. If neither type of job is available, then the officer should be referred for retirement, the memo proposes.

Police who cannot perform all the duties of a

sworn officer, including the nine listed, should be given jobs of comparable pay elsewhere in the county government or referred to the retirement board, the memo says.

Ofc. Walter Bader, president of the Fraternal Order of Police, said it isn't fair to ask a career officer to give up his career or take a substantial reduction in pay by going on disability.

Bader, who said he has talked to several of the targeted officers, said they fear for their jobs. "To go from \$28,000 a year to \$7000 a year (on disability retirement) is quite a shock," he said.

"It is a difficult issue, with no easy answers," Major Chaney said. "The whole issue of disability is very sensitive.

"It is difficult to place someone who cannot perform the functions of a sworn police officer," Chaney said.

But he said he felt it is profitable for the county government to keep long-time officers — even if they are disabled — because of their valuable experience.

"There are a number of officers who have been in the department for a number of years. I don't think it would be fair to them or to the county government to push them out," he said.

Chaney said the disability panel relies on doctors' suggestions as to what kind of job each injured officer is capable of handling.

John H. Conrad, a Rockville attorney who has handled many disability cases for county employees, said it is not unusual for the government to try to force employees to retire early on disability to save money.

He said the county government is self-insured and has to bear the full brunt of workmen's compensation claims while an employee is recuperating.

Conrad said his experience has been that the county government will try to force the employee to retire on permanent disability because it holds a permanent disability retirement policy with AET-NA Insurance Co.

Since the county has paid its premiums for the disability retirement plan, it costs the county nothing for a person to retire.

But if a disabled worker doesn't immediately return to work, it costs the county money in workmen's compensation.

"What they are doing is legal but grossly unfair," Conrad said. "If you work for IBM, and were hurt on the job, you'd get both (long and short-term disability). But working for the county, you may not get both.

"What really galls me is when they move in early, and not give enough time to the injured man or woman who hasn't gone through the treatment to see if they can be cured and come back to work," he said.

10/5

September 28, 2010
13512 Bonnie Dale Drive
North Potomac, MD 20878

Reference: **Bill 45-10**, Personnel - Disability Retirement - Eligibility - Total and Partial Incapacity

Good afternoon, President Floreen and members of the council.

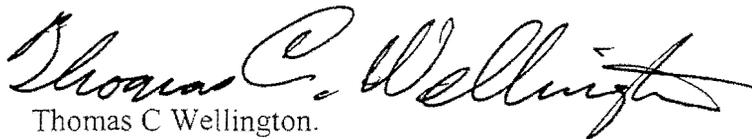
I am Tom Wellington, a resident of the North Potomac Area and speaking for myself today.

I would like to repeat my support for Bill 45-10 as presented in earlier testimony. I am in favor of modification to the present provisions of Montgomery County for police disability. As presented in earlier testimony, there is an urgent need for "middle ground" in the definition of disability available to our public servants. Bill 45-10 will allow the county to make a determination of less than total disability in the cases of retirement provisions for our police officers. Having an option for determining partial disability will allow a more fair and equitable determination of disability benefits in these cases. This option will also provide a consistent definition of partial disability for all Montgomery County Public Safety employees.

In addition, I ask that the Council request the Office of the County Executive to continue review of the existing cases on the disability rolls to determine whether these benefits should be continued.

Both measures will have a positive effect on reducing the future revenue requirements to be placed on Montgomery County taxpayers while providing a fair method of compensation for our dedicated police officers who may be injured in the line of duty.

Thank you for the opportunity to appear today.



Thomas C Wellington.

Tom.wellington@verizon.net

301-351-0311

10/6

Testimony of Trang Nguyen

Opposition of Council Bill No. 45-10 to Reduce Disability Payments for MCPD Officers

Date: September 28, 2010

I am here to today to oppose Council Bill No. 45-10 to reduce disability benefits for the police officers who patrol our streets and keep us safe. You have denied them extra manpower and funding for new equipment. You have denied them their increments and cost of living increases. And now you are going after their disability - to what end? To save another penny so favored pet projects can be funded for specialty groups that are currently politically favored?

However, what is almost always forgotten and rarely acknowledged in a positive light is that police officers are the people you expect to instantly respond to your 911 calls for help. They are the ones that you expect should deal with the criminal element of society. They are the ones you expect to put their lives on the line to "protect and serve" because they swore an oath when they accepted the badge and gun.

What is the value of someone who chooses this profession over a private sector job with great benefits, physical, and financial security? Should consideration be taken for their sacrifices in exchange for their selfless services? For life of service to our community, what benefits should they receive if they were to get injured in the line of duty? Yes- consideration should be taken for a group of people who opted for a life of community service over taking a fat salary and a corner office.

As a tax paying, law abiding citizen of Montgomery County I would rather have my taxes be used for our police officers then used for the over bloated salaries of County managers and wasteful projects like funding wooden decks for HUD homes or a nice bathroom for day laborers.

You should not be looking to cut disability payments to any police officer who has been injured in service to this community and is therefore unable to continue in his/her chosen profession.

You should not be looking to cut disability benefits of the late Officer Hector Ayala who died while responding to a call in his district leaving a young wife and four small children under the age of 4 behind. With such small children, she needs all the financial help to raise them.

You should not be looking to cut the disability payments of former MCPD Officer Don Cox who nearly died when his cruiser got t boned while he was on patrol and now has to live in constant pain for the rest of his life.

And why do you care you ask me? My husband is County officer. I worry about his safety and well being every single time he walks out the front door, and now you are asking me to worry about his long term welfare and the well being of our family should he get disabled while performing his duty..

10 | 7

**Testimony before the County Council
on Bill 45-10, Personnel-Disability Retirement- Eligibility-Total and Partial Incapacity
September 28, 2010**

Thank you for the opportunity to testify in support of Bill 45-10 related to disability retirement. I am Joan Fidler, President of the Montgomery County Taxpayers League and I am here today to commend Council members Trachtenberg, Andrews and Berliner for sponsoring this bill. You have shown considerable courage in devising this new two-tier system for disability retirements, one that I'm sure will not gain you many kudos from the unions. As taxpayers we thank you for recognizing the fiscal unsustainability of the current system and its drain on the greatly diminished revenues of Montgomery County.

Let me state, at this juncture, that the problem lies not with County employees (though there have been several egregious examples of abuse by County public safety personnel), the problem lies with the current system that invites abuse. Thus from 1985 - 2008, 40 percent of retiring police officers retired on disability pay. The current system, not the people, needs strengthening. This new, two-tiered system is a more fair approach to dealing with disabilities incurred by employees in the discharge of their duties and is an important step in the right direction. It distinguishes between employees suffering total incapacity and thus unable to engage in gainful employment and those who suffer a temporary incapacity for 12 months. A clearer definition of the two might be more useful in the implementation of the Bill. The devil, in implementation, will lie, as usual, in the details.

Many, if not all, of the surrounding jurisdictions, employ a two-tier system for disability retirements and none of them appear to have lost the ability to either recruit or retain highly qualified personnel. Fairfax County, yes in a right-to-work state, has a handful of disability retirements. Howard County has had no disability retirements of its public safety personnel in the last 12 months. Both Fairfax and Howard counties exercise substantial follow through.

There are many positives in Bill 45-10. To name two: (1) retirees receiving disability-related pensions must, on an annual basis, send a copy of their federal tax return to the Chief Administrative Officer in the absence of which the pension payments are suspended. (2) the Disability Review Panel must rely on the assessment of an independent vocational expert to base a determination regarding "substantial gainful activity".

A few recommendations from the Taxpayers League: (1) the definitions of total and partial incapacity should be more sharply delineated, and (2) annual reviews of the status of those receiving disability pensions should be conducted by medical personnel independent of both management and labor.

The Taxpayers League supports Bill 45-10.

Thank you.

10/9

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EDUCATION

University of Pennsylvania, Philadelphia PA

Fellowship in Occupational Medicine for Working Professionals
August 2007-June 2008

Selected as one of eight fellows from a large pool of working professionals. Coursework included comprehensive review of cutting edge theory in all aspects of occupational medicine by leaders of the business community (including nanotechnology, focus on the healthy worker and the economics of the workplace, the worker environment, toxic exposure in the workplace, epidemiology, worker outcomes research). Also included hands-on media training in front of television cameras focusing on how to stay on message and use bridging to accentuate the positives of a company's response to a public health issue.

Johns Hopkins Bloomberg School of Public Health, Baltimore MD

NIH Post-Doctoral Fellowship, 1990-1992
Fellow in Health Service Research

Johns Hopkins Bloomberg School of Public Health, Baltimore MD

Master of Public Health, 1990-1991

Polyclinic Medical Center, Harrisburg PA

Chief Resident, Family Practice, 1988-1990

Medical University of South Carolina, Charleston SC

Family Practice Residency, 1985-1987

Mount Sinai School of Medicine, New York NY

M.D., 1981-1985

**UNDERGRADUATE
EDUCATION**

University of Pennsylvania, Philadelphia PA

B.A., Genetics/Minor Psychology, 1977-1981 (Phi Beta Kappa)

University of Edinburgh, Edinburgh Scotland

Exchange Program, 1979-1980

PROFESSIONAL EXPERIENCE

Senior Occupational Medicine Consultant, Federal Occupational Health

STG International, Inc.
November 2009 - Present

Employed by STG International, Inc. under contract to Federal Occupational Health within the U.S. Department of Health and Human Services. Consult with multiple federal agencies concerning occupational health policies, including U.S. Food and Drug Administration (FDA), Federal Emergency

Management Administration (FEMA); Transportation Security Administration (TSA), Federal Aviation Administration (FAA), and the Equal Employment Opportunity Commission (EEOC).

**Medical Director for Injury Care and Wellness, Division of Government Contracts,
Lockheed Martin Corporation
August – November 2009**

Provide administrative services as well as patient care for multiple federal and local government agencies, including U.S. Drug Enforcement Agency, Defense Intelligence Agency, the Federal Bureau of Investigation, and Montgomery County, MD fire department.

**Medical Director, Bureau of Engraving and Printing, U.S. Department of the Treasury
STG International, Inc.
March – August 2009**

Employed by STG International, Inc. under contract to the U.S. Department of the Treasury, Bureau of Engraving and Printing. Serve as medical director of the Bureau of Engraving and Printing (BEP) on-site occupational health clinic. Provide and supervise occupational health and wellness services to all BEP employees and contractors, including: yearly medical monitoring examinations of employees; injury care; supervision of occupational health nurses and other on-site staff; administrative support to BEP, including assistance in adjudication of workers' compensation claims and arrangement for independent medical evaluations (IMEs) as necessary, including identification of outside physicians for consultations.

**Occupational Medical Director, Concentra Medical Centers
2005-March 2009**

**Columbia MD (2007-present)
Baltimore, MD (2005-2007)**

Provide medical direction and clinical services for over 150 corporate clients representing thousands of employees. Provide clinical toxicologic expertise for multiple workplace exposures. I have performed yearly toxicological screens for hundreds of employees, including evaluation of lead, zinc, protoporphyrin, arsenic, cadmium, RBC cholinesterase- for organophosphate exposure and mercury. I have performed numerous walkthroughs in various facilities, encouraging engineering innovations as the ideal way to minimize toxicological exposures in the work place. Other occupational medical services that I provide include: the evaluation and treatment of occupational injuries; emergencies; pre-placement physicals; stress testing; immigration physicals; surveillance for blood borne pathogen exposures; travel consults; dive physicals; respiratory physicals, including evaluation of pulmonary function tests; fitness for duty evaluations; workplace walkthroughs; workplace evaluations; Department of Transportation exams for commercial drivers licenses. Supervise a staff of 16 employees, including a physician assistant, numerous part time physicians, an occupational therapist, a radiology technologist, a center administrator, multiple medical assistants, multiple front office staff and sales personnel. Thorough working knowledge of National Fire Protection Association regulations. Obtained FBI clearance to perform medical evaluations on FBI employees. Consulted with multiple employers for toxic exposure issues and other public health issues. Significant achievements:

- Strong professional commitment to concept that healthy employees operating in a culture of workplace wellness is the key to workplace cost containment, while striving for a safe work environment with objective of zero hazard risks.
- Demonstrated ability to bridge differences and align incentives across diverse constituencies in a cardiac fitness intervention that I initiated and am in the process of carrying out with the Howard County Fire Department. Successfully brokered a win-win arrangement among the Howard County firefighters, their union, the Howard County municipality and corporate Concentra management.
- Personally developed and carried out a workplace wellness initiative at the Columbia, MD clinic focused on fast food cessation, paying employees not to eat fast food and documenting a 200 calorie decrease in daily calorie intake among participating employees.
- Personally developed and carried out a workplace pedometer study in two Concentra medical centers documenting a 0.9mile per day difference in distance walked over the course of the

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The Disability Debate Redefined

By Marc Leffer
Owings Mills, Md.

As an occupational medicine physician in the Washington area, I have been following the debate over how to reform Montgomery County's disability retirement system.

The diagnosis of disability varies from worker to worker and over time. Any disability "rule" that lumps all injured workers into one category permanently makes no sense.

Yet a more important question in this debate remains unanswered. The uproar in Montgomery started because data surfaced showing that 60 percent of police officers who retired between 2004 and 2008 were collecting disability payments. The question that should have been asked (and answered) in the first place is: "Is it acceptable to any of the stakeholder groups in Montgomery County to have 60 percent of police officers retire as disabled?" I think that the obvious answer is no.

So what needs to be done to reduce this rate of disability?

Over the past two years, I have been working with the Howard County Fire Department and the FBI office in Baltimore. With the Howard fire department, I have been involved in a two-year health initiative to implement the National Fire Protection Association (NFPA) health standard. The NFPA devised this standard because roughly half of all firefighter deaths nationwide were the result of heart attacks. The NFPA set out to change these statistics.

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Because work-related injuries are linked to disability rates, Montgomery County should try to curtail its disability rate among police officers by putting a similar health initiative in place. In the Howard County program, firefighters are responsible for keeping themselves in good cardiovascular shape and passing a yearly cardiovascular endurance test. However, the fire department helps by funding a gym in the firehouse, allowing exercise time during the workday, and providing all age-based preventive health services free of charge to firefighters.

In this system, all the stakeholder groups have incentives to keep firefighters healthy. As a result, the Howard County Fire Department recorded a 40 percent reduction in work-related injuries in the first year after the initiative was implemented and a 60 percent reduction in work-related injuries after the second year. In addition, for every dollar spent on this program, \$4.50 was saved on injury care.

Although a national standard has not yet been completed for police officers, the FBI's Baltimore field office has applied a similar health program for its agents. It requires a cardiovascular endurance test and provides a great workplace gym, as well as work time for exercise.

The stakeholders in Montgomery County -- including police officers, their union, the county executive and political representatives -- could agree on a sensible policy to keep police officers healthy. They could also agree on rules for handling the reduced number of officers with disabilities on an individual basis. Money could be saved on the disability retirement program as well as on police department medical costs. The stakeholders could then focus on what to do with all their vibrant, active retired police officers.

By Marisa Katz | May 24, 2009; 12:00 AM ET
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10/10

To: Montgomery County Council
From: Doug Soskin
Date: 9/28/10
Re: Bill 45-10

Message:

Good Afternoon: My name is Doug Soskin and I am a resident of Poolesville Maryland. I am here in support of the Men and Women of the Montgomery County Police department and I oppose this bill.

We ask our police force to protect and serve. They do so while accepting their role as police officers has inherent risks that many other professions do not share. These risks can put our officers in harm's way to ensure our children and neighborhoods remain a safe place. As a community our goal should be to attract and retain the very best officers. We can accomplish this with a benefits package that ensures in the event they are injured protecting our community the community will in turn do our best to protect them.

We put a lot of trust in our officers. We trust them to keep our children safe, our homes secure and our communities' crime free. We also trust that they respect their fellow officers and the community for which they work and do not misuse their roles or their benefits. It is this trust that makes our community unique and one of the nation's best places to live and work.

My concern with this bill is it may cause officers to question if they should take some of the risks we ask of them, or that we lack the trust and respect for the role our police officers have within our community. For this reason I oppose this bill.

10/11

MONTGOMERY COUNTY COUNCIL

Testimony on Bill 45-10

Dwight Cramer
September 28, 2010

I am a long time resident of this county, since 1965, and have testified before this Council before, as well as before various Maryland legislative committees.

In this period of fiscal trauma, it is reasonable that the County Council should be looking for ways to save money. There is one way now under consideration, Bill 45-10, that would do that. At the same time, the bill would achieve its primary purpose of providing a fairer system of disability compensation for county employees.

Under bill 45-10, it would be possible to provide the more rational system of disability benefits to county employees that is eminently fair. The change, to provide a two tier system of benefits, would hurt no one.

As well defined in the bill, those qualified for partial disability would receive 52 ½% of final earnings. As the system now works, such employees receive the maximum amount of 70%, regardless of degree of severity of the disability. This is obviously an unjustified charge against the county budget as the employee would be able to continue to earn a salary in certain other capacities. The two tier system used for the fire and rescue employees shows the way for the enactment of this bill. It is only fair that all the county employees receive comparable disability compensation. Some should not benefit more than others. At the same time the county could save about \$2.7 million. What can be wrong with that??

Once again, I stress that no one will be hurt if this bill is passed, disabled employees will receive a fair amount for partial disability, the same as the Fire and Rescue employees, and the county could save \$2.7 million, not an insignificant amount in these difficult times.

10/12

Good Afternoon, my name is Douglas Gross and I would like to thank you for this opportunity to speak to you on this very important topic.

I am speaking as a private citizen but I come with a unique perspective of having represented law enforcement officers in this community for greater than 20 years with regard to personal injuries, workers' compensation benefits and more recently with disability retirement benefits. I am concerned regarding the proposed bill § 45-10 and the rush to which it is sought to be implemented.

As an attorney, I am troubled by the bill's language and use of the phrases "disability," "impairment," and "incapacity" seemingly interchangeably as well as the reporting time for psychological and occupational disease claims which by definition are slow and insidious in nature. These are terms of art and have independent meanings.

But the bigger issue for me as a citizen and an outsider to the process, concerns the manner in which this is being sought to be implemented. The current SCDR system was arrived at through arms-length bargaining with a quid pro quo.

The police, through their union, sought to give emphasis to a solid disability retirement program that would ensure that those law enforcement officers injured in the line of duty would be financially taken care of and would be able to provide for their families and loved ones should they no longer be able to work as an officer due to the inherent hazards of their profession. However, those same officers gave up other important benefits to achieve this. This Council now seeks to unilaterally void the agreement without the quid pro quo.

What are the unintended consequences of such actions? I know from my experience that the vast majority of all officers want to continue working and continue to serve the department and this community. When this bill was raised last year, however, a panic was created so that anyone who might have been eligible for SCDR was put in fear of their benefits changing, further skewing the numbers of those officers applying. What are the other unintended consequences.

This is a complex issue on multiple levels and must be considered in relation to the entire retirement structure. Modifications to the system should be made through collective bargaining and done so with a scalpel, not a sword.



Local News

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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.

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.



OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

September 24, 2010

TO: Nancy Floreen, President, County Council

FROM: Joseph F. Beach, Director 

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

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

LEGISLATION SUMMARY

This legislation creates for all eligible County employees a two-tiered service connected disability retirement system identical to the system now in place for uniformed Fire and Rescue Department employees. It also prohibits employees who commit certain offenses from receiving a service connected disability retirement benefit, defines partial and total incapacity, and makes other changes.

FISCAL AND ECONOMIC SUMMARY

This legislation provides either a partial incapacity benefit of at least 52½% of final earnings or a total incapacity benefit of at least 70% of final earnings. The current system provides a service-connected disability retirement benefit of at least 66⅔% of final earnings for partial and for total incapacity for all except uniformed fire and rescue employees.

The fiscal impact of this legislation cannot be precisely estimated since it depends on how many disability retirees fall into each of the two tiers. Mercer, the plan actuary, has provided estimates ranging from 60% of disabled retirees receiving a benefit for partial incapacity and 30% receiving a benefit for total incapacity to 30% receiving partial and 60% receiving the total incapacity benefit¹, resulting in annual savings ranging from \$1.0 million to \$2.6 million. The decrease in the actuarial accrued liability ranges from \$9.0 million to \$21.3 million. If more applicants receive the lower benefit, the savings will be greater; if more applicants receive the higher benefit, the savings will be less. In addition, actual plan savings will change over time as experience develops.

¹ Mercer assumed in its valuation that for Groups E and F, 90% of disabilities are assumed to be service connected and covered by this legislation; for Groups A and H, 45% are assumed to be service connected, and for Group G, 93% are assumed to be service-connected.

Office of the Director

Nancy Floreen, President, County Council
September 24, 2010
Page 2

The legislation has no significant economic impact; it affects very few people and the benefit payments are small relative to the Montgomery County economy as a whole.

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

JFB: lob

c: Kathleen Boucher, Assistant Chief Administrative Officer
Dee Gonzalez, Offices of the County Executive
Joseph Adler, Director, Office of Human Resources
Jennifer Barrett, Director, Department of Finance
Wesley Girling, Office of Human Resources
Belinda Fulco, Office of Human Resources
David Platt, Department of Finance
Michael Coveyou, Department of Finance
Lori O'Brien, Office of Management and Budget
John Cuff, Office of Management and Budget

Staff Alternative Amendment 1

Bill 45-10

Amend lines 369 to 371 as follows:

Sec. 3. Effective Date. This Act, other than Section 4, takes effect on July 1, 2012. Section 4 takes effect 91 days after the Act becomes law. The amendments to County Code Chapter 33 made in Section 1 of this Act apply to any [[application for]] disability [[retirement filed]] occurring on or after the date this Act takes effect.

Sec. 4. Collective bargaining.

- (a) It is the policy of Montgomery County that all County employees should have a two-tier service-connected disability retirement system which includes a:
- (1) partial incapacity service-connected disability retirement benefit for any injury or illness that prevents an employee from continuing in the employee's current position but does not prevent the employee from engaging in other substantial gainful employment; and
 - (2) total incapacity service-connected disability retirement benefit for any injury or illness that prevents an employee from engaging in any other substantial gainful employment.
- (b) It is also the policy of the County that disability benefits are a mandatory subject of collective bargaining with each appropriate certified employee representative.

(c) Notwithstanding any County law to the contrary, the County Executive may separately negotiate the terms of an appropriate two-tier service-connected disability retirement system with the certified employee representative for the police bargaining unit and the certified representative for the OPT and SLT bargaining units, in each case not later than March 1, 2012. If in either case the parties are unable to reach agreement on an appropriate two-tier system, the parties may submit this issue for resolution through the applicable impasse procedures under the County's police labor relations law and the County collective bargaining law as a separate matter, not part of or linked to any other collective bargaining procedure. The impasse neutral for the police bargaining unit and the mediator/arbitrator for the OPT and SLT bargaining units must choose the final offer of either party after considering equally the following factors:

- (1) service-connected disability retirement systems for similar employees of other public employers in the Washington Metropolitan Area and in Maryland;
- (2) best practices for service-connected disability retirement systems for similar employees in the United States;
- (3) the interest and welfare of the public; and
- (4) the long-term ability of the employer to finance a disability retirement system, and the effect of the cost of the system on the normal standard of public services provided by the employer.

- (d) The Executive must submit the results of any collective bargaining process regarding this issue to the Council for legislative action not later than April 1, 2012.

Staff Alternative Amendment 2

To Bill 45-10

Replace Sections 1, 2, and 3 with the following:

1 **Sec. 1. Service-connected disability retirement.**

2 (a) It is the policy of Montgomery County that all County
3 employees should have a two-tier service-connected disability
4 retirement system which includes a:

5 (1) partial incapacity service-connected disability retirement
6 benefit for any injury or illness that prevents an employee
7 from continuing in the employee's current position but
8 does not prevent the employee from engaging in other
9 substantial gainful employment; and

10 (2) total incapacity service-connected disability retirement
11 benefit for any injury or illness that prevents an employee
12 from engaging in any other substantial gainful
13 employment.

14 (b) It is also the policy of the County that disability benefits are a
15 mandatory subject of collective bargaining with each
16 appropriate certified employee representative.

17 (c) Notwithstanding any County law to the contrary, the County
18 Executive must separately negotiate the terms of an appropriate
19 two-tier service-connected disability retirement system with the
20 certified employee representative for the police bargaining unit
21 and the certified representative for the OPT and SLT bargaining
22 units, in each case not later than March 1, 2011. If in either

23 case the parties are unable to reach agreement on an appropriate
24 two-tier system, the parties must submit this issue for resolution
25 through the applicable impasse procedures under the County's
26 police labor relations law and the County collective bargaining
27 law as a separate matter, not part of or linked to any other
28 collective bargaining procedure. The impasse neutral for the
29 police bargaining unit and the mediator/arbitrator for the OPT
30 and SLT bargaining units must choose the final offer of either
31 party after considering equally the following factors:

32 (1) service-connected disability retirement systems for
33 similar employees of other public employers in the
34 Washington Metropolitan Area and in Maryland;

35 (2) best practices for service-connected disability retirement
36 systems for similar employees in the United States;

37 (3) the interest and welfare of the public; and

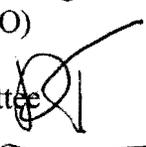
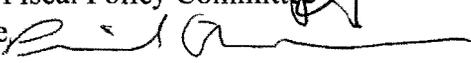
38 (4) the long-term ability of the employer to finance a
39 disability retirement system, and the effect of the cost of
40 the system on the normal standard of public services
41 provided by the employer.

42 (d) The Executive must submit the results of each collective
43 bargaining process regarding this issue to the Council for
44 legislative action not later than April 1, 2011.

MEMORANDUM

October 25, 2010

TO: Joseph Adler, Director, Office of Human Resources
Marc Zifcak, President, Fraternal Order of Police Montgomery County Lodge 35
(FOP)
Gino Renne, President, Municipal & County Government Employees Organization,
United Food and Commercial Workers, Local 1994 (MCGEO)

FROM: Duchy Trachtenberg, Chair, Management and Fiscal Policy Committee 
Phil Andrews, Chair, Public Safety Committee 

SUBJECT: Service-connected disability retirement working group

The Joint MFP and Public Safety Committee is currently considering Bill 45-10, Personnel – Disability Retirement – Eligibility – Total and Partial Incapacity, which would establish the same two-tier system for all employees that was enacted for the Fire and Rescue Bargaining Unit. The Committee requests the Executive Branch meet with representatives of the FOP and MCGEO to discuss a two-tier or multi-tier service-connected disability retirement system as a substitute for the system that would be created by Bill 45-10. These discussions should be in addition to, and not a substitute for, the normal collective bargaining process. The Committee requests that the parties report on their progress in 30 days.

Please contact us or our staffs if you have any questions about this request.

c: Valerie Ervin
Nancy Navarro
Roger Berliner
Marc Elrich
Joseph Beach
Ed Lattner
John Sparks
Steve Farber
Bob Drummer



Montgomery County Lodge 35, Inc.

18512 Office Park Drive
Montgomery Village, MD 20886



Office of Human Resources

Phone: (301) 948-4286

Isiah Leggett
County Executive

Joseph Adler
Director

Fax: (301) 590-0317

November 17, 2010

Duchy Trachtenberg, Chair
Management and Fiscal Policy Committee
Philip Andrews, Chair
Public Safety Committee
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Dear Councilmembers Trachtenberg and Andrews:

We are responding to your memorandum of October 25, 2010 wherein you ask, on behalf of the joint MFP and Public Safety Committee, the Executive Branch and representatives of the FOP to meet and, "... discuss a two-tier or multi-tier service-connected disability retirement system as a substitute for the system that would be created by Bill 45-10".

Lodge 35 of the Fraternal Order of Police and the County Executive have met and agreed to engage in good faith discussions to address the complex subject of disability, including the cost of disability retirement and benefit levels.

Sincerely,

Walter E. Bader
FOP Lodge 35

Joseph Adler
Office of Human
Resources

cc: Council President Floreen
Council Vice-President Ervin
Councilmember Berliner
Councilmember Elrich
Councilmember Knapp
Councilmember Leventhal
Councilmember Navarro



OFFICE OF HUMAN RESOURCES
MEMORANDUM

Isiah Leggett
County Executive

Joseph Adler
Director

June 16, 2011

TO: Robert H. Drummer
Senior Legislative Attorney

FROM: G. Wesley Girling, Benefits Manager
Office of Human Resources

SUBJECT: Disability Retirement Update

A handwritten signature in black ink, appearing to be "G. Wesley Girling", written over the "FROM:" line of the memorandum.

Thank you for the opportunity to brief the Council and Council staff on the status of disability retirement related initiatives.

In March 2010, the Office of Human Resources (OHR) met with the County Council's Management and Fiscal Policy Committee to discuss the need to amend the Montgomery County Code to address unanticipated problems related to the implementation of Expedited Bill 37-08, especially the requirements for selecting doctors to serve on the Disability Review Panel (DRP).

On June 22, 2010, the County Council enacted Expedited Bill 35-10, Personnel-Disability Retirement – Imputed Compensation, which amended the Code to provide that at least one member of the DRP be Board Certified in Occupational Medicine, and that others be Board Certified in either Occupational Medicine or another specialty area.

Bill 35-10 also revised the Code to allow for operational efficiencies with management and oversight of the disability retirement plans.

On September 2, 2010 the County contracted with Managed Care Advisors, Inc. to recruit and vet the qualifications of medical professionals willing to service on the DRP. On November 23, 2010 Managed Care Advisors presented their final report to include resumes from 14 qualified doctors. The internal vetting process set forth in the County Code required that labor and management review the applications and follow a striking procedure to reduce two lists of candidates (one list of doctors Board Certified in Occupational Medicine, the second list for doctors Board Certified in another medical discipline) to three finalists for consideration by the Chief Administrative Officer.

On May 25, 2011 final agreement was reached with Doctor Tee Guidotti, Board Certified in Occupational Medicine, and Doctor Daniel Gabbay, Board Certified in Emergency Medicine, to serve on the panel. Dr. Guidotti was appointed for a three year term, and Dr. Gabbay was appointed to a two year term. The addition of these DRP members brings the panel to its full compliment as required by the Code. The DRP and staff are meeting regularly to address a backlog of applications, map process flows and introduce efficiencies.

I will be available to discuss the process used to select the DRP doctors and to further elaborate on OHR's efforts to address disability retirement issues at the Government Operations Committee meeting on June 21, 2011.

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www.montgomerycountymd.gov

On-going Initiatives:

- Revise processes to streamline data management and to allow timely assessment of file status
- Develop standardized reports of applications and status
- Conversion to electronic records to replace current paper intensive process.
- Create a Satisfaction Survey to gather feedback from all stakeholders to assure communication and that processes are working optimally

Recent Plan Experience

For calendar year 2010, OHR received 96 applications for disability benefits. The status of those applications summarized by department is reflected in the chart below.

| DEPT | PENDING | SCD | NSCD | DENIED | TOTAL |
|--------------|-----------|-----------|-----------|----------|-----------|
| DEP | 1 | 0 | 2 | 0 | 3 |
| DGS | 0 | 0 | 0 | 1 | 1 |
| DHCA | 0 | 0 | 0 | 1 | 1 |
| DLC | 0 | 3 | 0 | 1 | 4 |
| DOCR | 0 | 1 | 0 | 2 | 3 |
| DOT | 4 | 2 | 3 | 0 | 9 |
| DPS | 0 | 0 | 1 | 0 | 1 |
| FRS | 9 | 25 | 0 | 2 | 36 |
| HCA | 0 | 0 | 1 | 0 | 1 |
| HHS | 2 | 2 | 2 | 1 | 7 |
| LIB | 0 | 1 | 1 | 0 | 2 |
| MCEFCU | 0 | 0 | 1 | 0 | 1 |
| POL | 16 | 9 | 0 | 0 | 25 |
| REC | 1 | 0 | 0 | 0 | 1 |
| SHERIFF | 0 | 1 | 0 | 0 | 1 |
| TOTAL | 33 | 44 | 11 | 8 | 96 |

In addition, 56 re-evaluation letters were sent to retirees currently receiving disability benefits. The status of those re-evaluations summarized by plan code is reflected in the chart below.

| PLAN CODE | PENDING | APPROVED | DENIED | NO RESPONSE | TOTAL |
|----------------|----------|-----------|----------|-------------|-----------|
| Group A | | | | | |
| SCD | 3 | 6 | 0 | 1 | 10 |
| NSCD | 0 | 6 | 0 | 1 | 7 |
| Group E | | | | | |
| SCD | 0 | 6 | 0 | 1 | 7 |
| NSCD | 0 | 0 | 0 | 0 | 0 |
| Group F | | | | | |
| SCD | 4 | 12 | 0 | 0 | 16 |
| NSCD | 0 | 0 | 0 | 0 | 0 |
| Group G | | | | | |
| SCD | 1 | 5 | 0 | 4 | 10 |
| NSCD | 0 | 0 | 0 | 0 | 0 |
| Group H | | | | | |
| SCD | 0 | 4 | 0 | 2 | 6 |
| NSCD | 0 | 0 | 0 | 0 | 0 |
| TOTAL | 8 | 39 | 0 | 9 | 56 |