

**Councilmembers and others should retain this packet for this afternoon's Government Operations Committee worksession.**

## MEMORANDUM

TO: County Council  
Government Operations Committee

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Public Hearing/Worksession:** Expedited Bill 57-10, Personnel – Collective Bargaining – Impasse Procedures

Expedited Bill 57-10, Collective Bargaining – Impasse Procedures, sponsored by Council Vice President Ervin, Council President Floreen, and Councilmembers Andrews, Berliner, Elrich, Knapp, Navarro, Trachtenberg, and Leventhal, was introduced on November 23, 2010. A Government Operations Committee worksession is scheduled for later this afternoon.

### Background

Interest arbitration is a method of resolving disputes over the terms and conditions of a new collective bargaining agreement. Grievance arbitration is a method of resolving disputes over the interpretation or application of an existing collective bargaining contract. County Charter §510 requires the Council to enact a collective bargaining law for police officers that includes interest arbitration. Charter §510A requires the same for fire fighters. Charter §511 authorizes, but does not require, the Council to enact a collective bargaining law for other County employees that may include interest arbitration or other impasse procedures. All of these Charter provisions require any collective bargaining law enacted by the Council to prohibit strikes or work stoppages by County employees. The Council has enacted comprehensive collective bargaining laws with interest arbitration for police (Chapter 33, Article V), fire fighters (Chapter 33, Article X), and other County employees (Chapter 33, Article VII).

All 3 County collective bargaining laws require final offer by package arbitration requiring the arbitrator to select the entire final offer covering all disputed issues submitted by

one of the parties.<sup>1</sup> The arbitrator is a private sector labor professional jointly selected by the Executive and the union. The arbitration award becomes the final agreement between the Executive and the union, but economic issues and provisions that would require the enactment of legislation or the adoption of a regulation remain subject to Council approval.

There have been 17 impasses with County employee unions resolved by interest arbitration since 1988. One involved fire fighters, 1 involved general County employees, and the other 15 involved police officers.<sup>2</sup> The arbitrator selected the final offer of the International Association of Fire Fighters (IAFF) in the one impasse with the fire fighters and selected the County offer in the one impasse with the Municipal and County Government Employees Organization (MCGEO). The arbitrator selected the Fraternal Order of Police (FOP) offer in 11 of the impasses with the police. The arbitrator selected the County offer over the FOP offer 3 times,<sup>3</sup> and the County agreed to the FOP offer after the arbitration hearing one time. A chart describing the issues resolved in each of the 17 arbitrations is at ©11-12. One explanation for these one-sided results is a lack of public accountability in the interest arbitration system used to resolve impasses with County unions.

Under current County law, the arbitrator makes an award after considering 6 factors, including the County's ability to pay as only one of the 6 factors. The law does not require the arbitrator to place greater weight on any one of the 6 factors and does not require the arbitrator to consider all 6 of the factors. For example, an arbitrator is free to value a union's comparison with higher wages and benefits paid by another public employer greater than the County's financial ability to match them. Bill 57-10 would require the arbitrator to evaluate and give the highest priority to the County's ability to pay for economic provisions before considering the other 5 factors. A copy of Council Vice President Ervin's memorandum explaining the need for this Bill is at ©10.

## **Issues**

### **1. Should the criteria for the arbitrator be changed?**

The County collective bargaining laws state that the arbitrator *may only* consider:

- a. Past collective bargaining contracts between the parties, including the past bargaining history that led to such contracts, or the pre-collective bargaining history of employee wages, hours, benefits and working conditions;
- b. Comparison of wages, hours, benefits and conditions of employment of similar employees of other public employers in the Washington Metropolitan Area and in Maryland;

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<sup>1</sup> Under standard arbitration, the arbitrator is free to create a final package based upon the evidence introduced by the parties at the hearing, including a compromise between the positions of the parties on each disputed issue. Final offer by issue arbitration requires the arbitrator to select the final offer of one party on each disputed issue.

<sup>2</sup> Arbitrator Richard Bloch, in his 1994 decision, called the unusually frequent arbitration hearings to resolve impasses with the FOP a "veritable conga line of impasse procedures."

<sup>3</sup> The FOP appealed 2 of the 3 decisions in favor of the County to the Circuit Court. The Circuit Court reversed a portion of the arbitrator's award in 2003 and affirmed the arbitrator's award for the County in 2008.

- c. Comparison of wages, hours, benefits and conditions of employment of other Montgomery County personnel;
- d. Wages, benefits, hours and other working conditions of similar employees of private employers in Montgomery County;
- e. The interest and welfare of the public;
- f. The ability of the employer to finance economic adjustments and the effect of the adjustments upon the normal standard of public services by the employer.

The problem with these criteria can be seen in the most recent arbitration awards under the County collective bargaining laws. For example, Arbitrator David Vaughn described his understanding of the statutory criteria as follows:

This provision does not require that any particular factor be considered or that all of them be considered. It simply identifies the factors that I *may* consider. Thus, I am free to determine whether any particular factor or factors weigh more heavily than others... (MCGEO Arbitration Decision of March 22, 2010)

In the 2010 Police Arbitration Decision, Arbitrator Herbert Fishgold, applying these criteria, found that the FOP last offer for a 3.5% step increase at a cost of \$1.2 million in FY11 and a reinstated tuition assistance program at a cost of \$455,000 was more reasonable than the County's offer of no pay increase or tuition assistance. Mr. Fishgold reasoned that the FOP had already given up a previously negotiated 4.5% cost-of-living increase each of the past 2 years and had, therefore, done enough to help balance the County's budget. The Council subsequently rejected both of these economic provisions and required all County employees to take furloughs, including police officers, in order to close an unprecedented budget deficit.

The arbitrator should consider the funds available to pay personnel costs before considering comparative salaries and past collective bargaining agreements. **Council staff recommendation:** require the arbitrator to evaluate and give the highest priority to the County's ability to pay before considering the other factors.

## **2. Should the Bill be amended to clarify the weight to be given to the ability to pay?**

The County Attorney, at the request of the Council Staff Director, provided several recommendations to clarify the guidance to an arbitrator that would further the purpose of the Bill in a December 3, 2010 memorandum at ©13-16. The County Attorney pointed out that the Bill would still permit an arbitrator to conclude that the Council could or should raise new or existing taxes, including overriding the property tax limit in Charter §305. The decision to raise taxes should be reserved to the elected County Council and not a private labor arbitrator. The County Attorney recommended amending the Bill to require the arbitrator to first determine the affordability of both final offers assuming no new or increased taxes before considering the other factors. Council staff drafted an amendment that would address the points made by the County

Attorney in Staff Amendment 1 at ©17-19. **Council staff recommendation:** amend the Bill with Staff Amendment 1.

<u>This packet contains:</u>	<u>Circle #</u>
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Legislative Request Report	9
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Expedited Bill No. 57-10  
Concerning: Personnel – Collective  
Bargaining – Impasse Procedures  
Revised: November 22, 2010  
Draft No. 9  
Introduced: November 23, 2010  
Expires: May 23, 2010  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Council Vice President Ervin, Council President Floreen, and Councilmembers Andrews, Berliner, Elrich, Knapp, Navarro, Trachtenberg, and Leventhal

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**AN EXPEDITED ACT to:**

- (1) modify the criteria for an impasse neutral and a mediator/arbitrator to evaluate before issuing an arbitration award; and
- (2) generally amend County collective bargaining laws.

By amending

Montgomery County Code  
Chapter 33, Personnel and Human Resources  
Sections 33-81, 33-108, and 33-153

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



28 [a.] (ii) [Past] past collective bargaining contracts between  
 29 the parties, including the [past] bargaining history  
 30 that led to [such contracts, or the pre-collective  
 31 bargaining history of employee wages, hours,  
 32 benefits and working conditions] each contract;

33 [b.] (iii) [Comparison] a comparison of wages, hours,  
 34 benefits, and conditions of employment of similar  
 35 employees of other public employers in the  
 36 Washington Metropolitan Area and in Maryland;

37 [c.] (iv) [Comparison] a comparison of wages, hours,  
 38 benefits, and conditions of employment of other  
 39 Montgomery County [personnel] employees; and

40 [d.] (v) [Wages] wages, benefits, hours and other working  
 41 conditions of similar employees of private  
 42 employers in Montgomery County[;]

43 [e. The interest and welfare of the public;]

44 [f. The ability of the employer to finance economic  
 45 adjustments and the effect of the adjustments upon the  
 46 normal standard of public services by the employer].

47 (6) The impasse neutral [shall] must:

48 (A) not compromise or alter the final offer that he or she  
 49 selects; [. Selection of]

50 (B) select an offer [shall be] based on the contents of that offer;  
 51 [. No consideration shall be given to, nor]

52 (C) not consider or receive [shall] any evidence or argument  
 53 [be received] concerning the history of collective  
 54 bargaining in this immediate dispute, including offers of

55 settlement not contained in the offers submitted to the  
56 impasse neutral; and [. However, the impasse neutral  
57 shall]

58 (D) consider all previously agreed [upon] on items integrated  
59 with the specific disputed items to determine the single  
60 most reasonable offer.

61 \* \* \*

62 **33-108. Bargaining, impasse, and legislative procedures.**

63 \* \* \*

64 (f) (1) If binding arbitration is invoked, the mediator/arbitrator must  
65 require each party to submit a final offer, which must consist  
66 either of a complete draft of a proposed collective bargaining  
67 agreement or a complete package proposal, as the  
68 mediator/arbitrator directs. If only complete package proposals  
69 are required, the mediator/arbitrator must require the parties to  
70 submit jointly a memorandum of all items previously agreed  
71 on.

72 \* \* \*

73 (4) In making a determination under this subsection, the  
74 mediator/arbitrator [may consider only the following factors]  
75 must first evaluate and give the highest priority to the ability of  
76 the County to pay for additional short-term and long-term  
77 expenditures by considering:

78 (A) the limits on the County's ability to raise taxes under State  
79 law and the County Charter;

- 80 (B) the added burden on County taxpayers, if any, resulting  
 81 from increases in revenues needed to fund a final offer;  
 82 and
- 83 (C) the County's ability to continue to provide the current  
 84 standard of all public services.
- 85 (5) After evaluating the ability of the County to pay under paragraph  
 86 (4), the mediator/arbitrator may only consider:
- 87 (A) the interest and welfare of County taxpayers and service  
 88 recipients;
- 89 [(A)] (B) [Past] past collective bargaining agreements between  
 90 the parties, including the past bargaining history that led  
 91 to [the agreements, or the pre-collective bargaining  
 92 history of employee wages, hours, benefits, and working  
 93 conditions] each agreement[.];
- 94 [(B)] (C) [Comparison] a comparison of wages, hours, benefits,  
 95 and conditions of employment of similar employees of  
 96 other public employers in the Washington Metropolitan  
 97 Area and in Maryland[.]
- 98 [(C)] (D) [Comparison] a comparison of wages, hours, benefits,  
 99 and conditions of employment of other Montgomery  
 100 County [personnel] employees[.] ; and
- 101 [(D)] (E) [Wages] wages, benefits, hours, and other working  
 102 conditions of similar employees of private employers in  
 103 Montgomery County.
- 104 [(E)] The interest and welfare of the public.
- 105 (F) The ability of the employer to finance economic  
 106 adjustments, and the effect of the adjustments upon the

107 normal standard of public services provided by the  
 108 employer.]

109 (6) The offer selected by the mediator/arbitrator, integrated with all  
 110 previously agreed on items, is the final agreement between the  
 111 employer and the certified representative, need not be ratified  
 112 by any party, and has the effect of a contract ratified by the  
 113 parties under subsection (c). The parties must execute the  
 114 agreement, and any provision which requires action in the  
 115 County budget must be included in the budget which the  
 116 employer submits to the County Council.

117 \* \* \*

118 **33-153. Bargaining, impasse, and legislative procedures.**

119 \* \* \*

120 (i) On or before February 1, unless that date is extended by written  
 121 agreement of the parties, the impasse neutral must select the final  
 122 offer that, as a whole, the impasse neutral judges to be the more  
 123 reasonable.

124 (1) In determining which final offer is the more reasonable, the  
 125 impasse neutral [may consider only the following factors] must  
 126 first evaluate and give the highest priority to the ability of the  
 127 County to pay for additional short-term and long-term  
 128 expenditures by considering:

129 (A) the limits on the County's ability to raise taxes under State  
 130 law and the County Charter;

131 (B) the added burden on County taxpayers, if any, resulting  
 132 from increases in revenues needed to fund a final offer;  
 133 and

- 134                   (C) the County's ability to continue to provide the current  
 135                               standard of all public services.
- 136           (2) After evaluating the ability of the County to pay under paragraph  
 137                   (1), the impasse neutral may only consider:
- 138                   (A) the interest and welfare of County taxpayers and service  
 139                               recipients;
- 140                   [(1)] (B) past collective bargaining agreements between the  
 141                               parties, including the past bargaining history that led to  
 142                               [the agreements, or the pre-collective bargaining history  
 143                               of employee wages, hours, benefits, and working  
 144                               conditions] each agreement;
- 145                   [(2)] (C) wages, hours, benefits and conditions of employment  
 146                               of similar employees of other public employers in the  
 147                               Washington Metropolitan Area and in Maryland;
- 148                   [(3)] (D) wages, hours, benefits, and conditions of employment  
 149                               of other Montgomery County employees; and
- 150                   [(4)] (E) wages, benefits, hours, and other working conditions  
 151                               of similar employees of private employers in  
 152                               Montgomery County[;
- 153                   (5) the interest and welfare of the public; and
- 154                   (6) the ability of the employer to finance economic adjustments, and  
 155                               the effect of those adjustments upon the normal standard of  
 156                               public services provided by the employer].

157                               \*                   \*                   \*

158           **Sec. 2. Effective Date.**

159           The Council declares that this legislation is necessary for the immediate  
 160           protection of the public interest. This Act takes effect on the date on which it

161 becomes law.

162

163 *Approved:*

164

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Nancy Floreen, President, County Council Date

165 *Approved:*

166

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Isiah Leggett, County Executive Date

167 *This is a correct copy of Council action.*

168

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Linda M. Lauer, Clerk of the Council Date

## LEGISLATIVE REQUEST REPORT

Expedited Bill 57-10

*Personnel – Collective Bargaining – Impasse Procedures*

**DESCRIPTION:** The Bill would modify the criteria that must be evaluated by the impasse neutral or mediator/arbitrator before issuing an award resolving a collective bargaining impasse.

**PROBLEM:** Current law lists 6 factors for the impasse neutral to consider without giving greater weight to any of them. The County's ability to pay is not given enough emphasis in these factors.

**GOALS AND OBJECTIVES:** To clarify that an impasse neutral or mediator/arbitrator should give the highest priority to the County's ability to pay for economic provisions in a collective bargaining agreement when issuing an arbitration award. The goal is to encourage the parties to resolve impasses through negotiation rather than arbitration.

**COORDINATION:** Office of Human Resources

**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, 240-777-7895

**APPLICATION WITHIN MUNICIPALITIES:** Not applicable.

**PENALTIES:** None.



MONTGOMERY COUNTY COUNCIL  
ROCKVILLE, MARYLAND

VALERIE ERVIN  
COUNCILMEMBER  
DISTRICT 5

MEMORANDUM

November 19, 2010

TO: Councilmembers

FROM: Valerie Ervin, Council Vice President *ve*

SUBJECT: Bill to Prioritize Collective Bargaining Impasse Factors

There are three separate laws that govern the County's collective bargaining with the unions representing police, firefighters, and general government employees. All resolve an impasse through arbitration where the arbitrator selects the entire final offer submitted by either the County or the union.

Under current law, the arbitrator makes an award after considering six factors. These include: past contracts and bargaining history; the wages, hours, benefits, and conditions of employment of other County employees, public employees in the region and the State, and the County's private sector; and the County's ability to pay for any changes. The current law gives none of these factors greater weight than any other.

The FY11 budget we approved in May, and the six-year balanced fiscal plan we approved in June, are stark reminders of the severe short-term and long-term budget pressures the County faces. An arbitrator's assessment of final competing offers should be grounded in this reality. I will introduce the attached bill to require an arbitrator to give the highest priority to the County's ability to pay. The arbitrator then must evaluate other factors such as the interest and welfare of County taxpayers and service recipients.

As one with more than a quarter century on the front lines of the labor movement, I am deeply committed to fairness for County employees. But fairness also requires that the County can afford to honor its labor contracts. It also requires equitable treatment for taxpayers and service recipients. This bill will help achieve these goals. I welcome all my colleagues as co-sponsors.

Attachment

### Interest Arbitration Decisions Since 1988

#	Date	Union	Arbitrator	Issues	Award
1	2/19/1988	FOP	Fishgold	<ol style="list-style-type: none"> <li>1. Indemnification of County for dues checkoff.</li> <li>2. 1 day of leave for occupational stress.</li> <li>3. County - narrow non-discrimination clause.</li> <li>4. FOP - add traffic officers to PPV program.</li> <li>5. FOP - reopener for disability retirement.</li> <li>6. Differential pay for specialized officers.</li> <li>7. Clothing allowance.</li> <li>8. Shift differential pay.</li> <li>9. COLA (5.5% v. 3%)</li> </ol>	FOP
2	2/25/1991	FOP	Bloch	<ol style="list-style-type: none"> <li>1. Maintenance of standards provision.</li> <li>2. Alcohol/drug policy.</li> <li>3. COLA (6.2% v. 0%)</li> <li>4. Retirement Incentive Program (RIP)</li> </ol>	County
3	2/12/1992	FOP	Kennelly	<ol style="list-style-type: none"> <li>1. FOP - add 1 additional step</li> <li>2. COLA (me-too up to 2% v. 0%)</li> </ol>	FOP
4	2/19/1992	FOP	Bloch	<ol style="list-style-type: none"> <li>1. Furlough procedures.</li> <li>2. FOP - 4 days of compensatory leave for furlough.</li> <li>3. Reduce pay, 32 hours of annual leave to be used in 2 years.</li> </ol>	FOP
5	2/23/1993	FOP	Porter	<ol style="list-style-type: none"> <li>1. COLA (3% v. 1.5%)</li> <li>2. FOP - RIP.</li> <li>3. Increase clothing allowance.</li> <li>4. Increase pay differential.</li> </ol>	FOP
6	3/23/1994	FOP	Bloch	<ol style="list-style-type: none"> <li>1. Health insurance policy.</li> <li>2. COLA (2.7% v. 2.5%).</li> <li>3. Disability leave - donations of sick leave.</li> </ol>	FOP
7	4/25/1994	FOP	Fasser	<ol style="list-style-type: none"> <li>1. Eligibility for RIP enacted by Council.</li> </ol>	FOP
8	2/14/1995	FOP	S. Strongin	<ol style="list-style-type: none"> <li>1. COLA (2.9% v. 1.5%).</li> <li>2. Partial SCDR (66 2/3% v. variable).</li> </ol>	FOP
9	6/12/1998	FOP	Oldham	<ol style="list-style-type: none"> <li>1. FOP - change disability procedures.</li> <li>2. FOP - County option - DROP.</li> <li>3. FOP - increase COLA for retirees.</li> <li>4. FOP - increase multiplier for over 65.</li> <li>5. FOP - increase employee retirement contribution.</li> </ol>	FOP

10	2/26/2001	FOP	S. Strongin	1. COLA (\$2800 + \$600 v. \$2500). 2. FOP - shift differential re-opener.	FOP
11	2/24/2003	FOP	Sharnoff	1. FOP – 1 additional personal leave day. 2. FOP – compressed schedule for special assignment. 3. FOP – increase PPV for canine officers. 4. COLA (3.5% v. 2%). 5. Selection of attorneys for criminal offense. 6. County – single issue arbitration for changes to directives.	County <sup>1</sup>
12	3/19/2004	IAFF	La Rue	1. IAFF – Increase the multiplier for calculating pension for integrated plan after reaching Social Security age.	IAFF
13	3/15/2007	FOP	Bloch	1. FOP - Police Hearing Board decision to bind Chief on discipline.	FOP
14	11/29/2007	FOP	Bloch	County agreed to FOP offer.	Settled
15	5/8/2008	FOP	Bloch	1. Implementation of mobile video system.	County <sup>2</sup>
16	3/2010	FOP	Fishgold	1. FY11 service and longevity increments (3.5% v. 0%). 2. Reinstigate tuition assistance for FY11.	FOP <sup>3</sup>
17	3/22/2010	MCGEO	Vaughn	1. RIF procedures and limits. 2. RIP savings to reduce RIFs in bargaining unit.	County

<sup>1</sup> The FOP appealed decision and Circuit Court held that item 6 was invalid under Police Collective Bargaining Law.

<sup>2</sup> The FOP appealed the decision and Circuit Court upheld the arbitrator's decision.

<sup>3</sup> The Council rejected the arbitrator's award.



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett  
County Executive

Marc P. Hansen  
Acting County Attorney

MEMORANDUM

TO: Steve Farber  
Council Staff Director

VIA: Marc P. Hansen *MAH*  
Acting County Attorney

FROM: Edward B. Lattner, Chief *EBL*  
Division of Human Resources & Appeals

DATE: December 3, 2010

RE: Bill 57-10E (Personnel - Collective Bargaining - Impasse Procedures)

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You have asked us to determine if Bill 57-10E provides sufficient guidance to an arbitrator in light of its stated goal—requiring the arbitrator to consider, first and foremost, the County’s ability to pay for a labor contract in light “of the severe short-term and long-term budget pressures the County faces.” You have also asked us to suggest amendments that would help the legislation achieve that goal.

**Background**

All three collective bargaining laws provide that an arbitrator<sup>1</sup> resolves an impasse during collective bargaining by selecting either the union’s or the Executive’s final offer covering all of the disputed issues. The arbitrator is a private sector labor professional jointly selected by the Executive and the union. Bill 57-10 would modify the criteria used by the arbitrator to evaluate the parties’ proposals before issuing an award by requiring him or her to give highest priority to the County’s ability to pay when deciding between the union’s and the Executive’s final offers. Council Vice President Ervin’s November 19, 2010, memorandum makes clear that the bill is designed to ensure that the arbitrator’s assessment of final competing offers is grounded in the reality “of the severe short-term and long-term budget pressures the County faces.”

Mr. Drummer’s November 23, 2010, memorandum to the Council correctly states the

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<sup>1</sup> The FOP and IAFF collective bargaining laws refer to an “impasse neutral” while the MCGEO law refers to a “mediator/arbitrator.” By whatever designation, the person’s role is the same.

present state of the law and the effect of the proposed amendment.

Under current law, the arbitrator makes an award after considering 6 factors, including the County's ability to pay as only one of the 6 factors. The law does not require the arbitrator to place greater weight on anyone of the 6 factors and does not require the arbitrator to consider all 6 of the factors. For example, an arbitrator is free to value a union's comparison with higher wages and benefits paid by another public employer greater than the County's financial ability to match them. Bill 57-10 would require the arbitrator to evaluate and give the highest priority to the County's ability to pay for economic provisions before considering the other 5 factors.

#### **The Bill**

Bill 57-10E combines two of the six factors currently considered by the arbitrator ((1) the interest and welfare of the public and (2) the ability of the employer to finance economic adjustments and the effect of the adjustments upon the normal standard of public services by the employer) into the following predominant factor:

The impasse neutral must first evaluate and give the highest priority to the ability of the County to pay for additional short-term and long-term expenditures by considering:

- (i) the limits on the County's ability to raise taxes under State law and the County Charter;
- (ii) the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a final offer; and
- (iii) the County's ability to continue to provide the current standard of all public services.

While this language is legally sufficient, alternative language would strengthen the bill's stated goal of requiring the arbitrator to consider, first and foremost, the County's ability to pay for a labor contract in light "of the severe short-term and long-term budget pressures the County faces."

First, as a standard to be applied by the arbitrator, "the limits on the County's ability to raise taxes under State law and the County Charter" is somewhat mercurial. While State law does impose an absolute cap on the County's ability to tax residents' income, and the County Charter requires that all nine Councilmembers approve certain increases in the property tax, the County enjoys extraordinarily broad authority to impose other taxes under § 52-17 of the County Code. In construing the scope of § 52-17, the Court of Appeals has held that if the State had the power to impose a tax, the County has the same power. *Waters Landing Limited Partnership v.*

*Montgomery County*, 337 Md. 15, 25, 650 A.2d 712 (1994).<sup>2</sup> Presently, County taxes include fuel energy, carbon emissions, cell phone usage, and hotel/motel usage. The language in the bill leaves ample room for the arbitrator to conclude that the Council could or should increase those taxes (or impose new taxes). The language in the bill also permits the arbitrator to conclude that all nine Council members could or should increase the property tax beyond the Charter-imposed tax limitation. Accordingly, we recommend that this provision be amended to require that the arbitrator evaluate the County's ability to pay for short-term and long-term expenditures by assuming no increase in the then-current tax rates. The setting of tax rates should be the exclusive province of the County's elected officials, not a private sector labor professional.

Second, although the bill is borne of the current fiscal shortfall, it could have the effect of requiring the arbitrator to select a proposal requiring significant spending increases in times of fiscal largess because consideration of "the ability of the County to pay" is not limited to fallow economic times. Thus, if and when (hopefully when) the County's coffers are full, consideration of "the ability of the County to pay" would militate in favor of the proposal calling for a corresponding increase in spending on a labor contract. If the purpose of the bill is to require the arbitrator to consider the County's ability to pay when times are tough, then the bill should provide some objective trigger for mandatory consideration of that factor (e.g., this factor applies only when revenues drop by X%).

Third, the bill requires the arbitrator to consider the County's ability to pay "for **additional** short-term and long-term expenditures" (emphasis added). Presumably, consideration of the County's fiscal health is therefore limited to those final offers that propose expenditures above and beyond those previously provided to bargaining unit members.<sup>3</sup> Thus, the arbitrator would not consider the County's fiscal health at all if the union's proposal held costs constant and the Executive's proposal reduced those costs. If the purpose of this bill is to make affordability the arbitrator's predominant factor, then it should not be limited to those proposals that would increase spending; it should be the predominant factor in reviewing every proposal. The word "additional" should be stricken.

Finally, although the bill gives predominance to affordability, it does not preclude an arbitrator from determining that the other factors overcome that predominance. We suggest an amendment that would limit the arbitrator's ability to consider the other factors to situations where the arbitrator finds that both proposals are affordable.

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<sup>2</sup> Some items are beyond the County's taxing power (e.g., alcoholic beverages, gasoline).

<sup>3</sup> It is unclear whether this would be limited to expenditures provided for in the prior labor agreement or expenditures actually authorized by the Council in the most recent annual operating budget.

Steve Farber  
December 3, 2010  
Page 4

cc: Kathleen Boucher, Assistant Chief Administrative Officer  
Joseph Adler, Director, OHR  
Stuart Weisberg, Office of Human Resources  
Robert H. Drummer, Senior Legislative Attorney

A10-02083  
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## Staff Amendment 1

*Amend lines 13-25 as follows:*

- (A) The impasse neutral [may take into account only the following factors] must first [[evaluate and give the highest priority to]] determine the ability of the County to [[pay for additional]] afford any short-term and long-term expenditures required by the final offers [[by considering]]:
- (i) [[the limits on the County's ability to raise taxes under State law and the County Charter]] assuming no increase in any existing tax rate or the adoption of any new tax;
  - (ii) [[the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a final offer]] assuming no increase in revenue from an ad valorem tax on real property above the limit in County Charter Section 305; and
  - (iii) considering the County's ability to continue to provide the current [[standard]] level of all public services.
- (B) [[After evaluating the ability of the County to pay]] If the impasse neutral finds under subparagraph (A) that the County can afford both final offers, the impasse neutral [[may only]] must consider:

*Amend lines 73-86 as follows:*

- (4) In making a determination under this subsection, the mediator/arbitrator [may consider only the following factors] must first [[evaluate and give the highest priority to]] determine the ability of the County to [[pay for additional]] afford any short-term and long-term expenditures required by the final offers [[by considering]]:

- (A) [[the limits on the County's ability to raise taxes under State law and the County Charter]] assuming no increase in any existing tax rate or the adoption of any new tax;
  - (B) [[the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a final offer]] assuming no increase in revenue from an ad valorem tax on real property above the limit in County Charter Section 305; and
  - (C) considering the County's ability to continue to provide the current [[standard]] level of all public services.
- (5) [[After evaluating the ability of the County to pay]] If the mediator/arbitrator finds that under paragraph (4) the County can afford both final offers, the mediator/arbitrator [[may only]] must consider:

*Amend lines 124-137 as follows:*

- (1) In determining which final offer is the more reasonable, the impasse neutral [may consider only the following factors] must first [[evaluate and give the highest priority to]] determine the ability of the County to [[pay for additional]] afford any short-term and long-term expenditures required by the final offers [[by considering]]:
- (A) [[the limits on the County's ability to raise taxes under State law and the County Charter]] assuming no increase in any existing tax rate or the adoption of any new tax;
  - (B) [[the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a final offer]] assuming no increase in revenue from an ad valorem tax on real property above the limit in County Charter Section 305; and
  - (C) considering the County's ability to continue to provide the current [[standard]] level of all public services.

- (2) [[After evaluating the ability of the County to pay]] If the impasse neutral finds under paragraph (1) that the County can afford both final offers, the impasse neutral [[may only]] must consider: