

GO Item 1
September 22, 2016
Worksession

M E M O R A N D U M

September 20, 2016

TO: Government Operations and Fiscal Policy Committee

FROM: Robert H. Drummer, Senior Legislative Attorney *RD*

SUBJECT: **Worksession:** Expedited Bill 36-16, Employees' Retirement System – Disability Retirement – Redetermination of Eligibility - Amendments

Expedited Bill 36-16, Employees' Retirement System – Disability Retirement – Redetermination of Eligibility – Amendments, sponsored by Lead Sponsor Council President Floreen at the request of the County Executive, was introduced on August 2, 2016. A public hearing was held on September 13.

County Code §33-43(g) requires the periodic medical reexamination of a disability retiree. The Chief Administrative Officer (CAO) is authorized to reduce or discontinue disability retirement benefits if the retiree is no longer medically qualified. Although a disability retiree whose benefits are discontinued due to a medical reexamination can apply for an open County position, there is currently no provision permitting the CAO to non-competitively appoint the person to a merit position.

Bill 36-16 would permit the County to non-competitively re-appoint a former County employee to the same position or a position of comparable status in the same Department if the individual's disability retirement benefits are discontinued due to a medical reexamination. The Bill would also permit the former disability retiree to become a member of the retirement plan in which the individual was enrolled when the individual left County service if the individual was vested at the time the individual left County service. These 2 new provisions would only apply to a member who became disabled on or before July 1, 2016.

Finally, the Bill would add a definition for a position of comparable status. The term "position of comparable status" is currently used in Section 33-43(f)(1) as part of the test to determine an employee's eligibility for service-connected disability retirement. However, there is no definition for the term in the Code. Bill 36-16 would add the following definition:

Position of comparable status means a position;

- (1) with a grade and salary range resulting in the same pay as the position the member was assigned before receiving disability retirement benefits;
- (2) in the same department; and
- (3) for which the member is qualified.

Public Hearing

Linda Herman, Executive Director of the Board of Investment Trustees for the Employees' Retirement System, speaking on behalf of the Executive, supported the Bill. See ©23. Ms. Herman explained that the Bill would give the County additional authority to non-competitively re-appoint a former employee whose disability retirement pension is discontinued after a medical re-evaluation to a position of comparable status and permit the employee to re-join the same retirement plan the employee was a member of before the employee became disabled. Jeffrey Buddle, President of IAFF Local 1664 (©24-25) and Torrie Cooke, President of FOP Lodge 35 (©26-28) each opposed the Bill. Both Mr. Buddle and Mr. Cooke argued that the Executive should be required to resolve these issues with their respective unions exclusively through the collective bargaining process. Mr. Buddle did not take a position on the Bill on its merits. Mr. Cooke opposed the Bill on its merits as well as the failure to bargain over these issues.

Issues

1. Can the Council act on Bill 36-16 if the Executive did not negotiate these issues with each County employee union?

Both Mr. Buddle and Mr. Cooke argued that the Executive committed a prohibited practice under the County collective bargaining laws when he sent Bill 36-16 to the Council for introduction. Both the IAFF Local 1664 and the FOP Lodge 35 filed a prohibited practice charge against the Executive with the appropriate Labor Relations Administrator (LRA) alleging that the Executive failed to bargain in good faith with the union concerning these proposed changes to the disability retirement law. A copy of the IAFF charge filed with LRA Homer C. LaRue is at ©29-34.¹ The County Attorney's Office filed a similar response to both charges on behalf of the Executive. A copy of the County's response to the IAFF charge is at ©35-37. No hearing has been set yet on either charge.

The dispute between the Executive and these unions² centers around whether or not the proposed amendments to the disability retirement law in Bill 36-16 is a mandatory topic of bargaining. The unions argue that any changes to the disability retirement law affect their members and must be bargained. The Executive argues that the amendments authorizing the Executive to non-competitively re-appoint a retired member to a non-sworn position of comparable status is limited to a member who became disabled on or before July 1, 2016. Therefore, these provisions only apply to members who are currently retired and does not apply to any current employees

¹ The FOP filed a similar charge with the Permanent Umpire for the Police Labor Relations Law, Ira Jaffe. The separate LRA's governing each of these collective bargaining laws act independently of each other and can arrive at different legal conclusions based upon the same facts.

² MCGEO has not filed a similar prohibited practice charge.

represented by the union.³ The Executive argues that the union only represents current employees and therefore does not have to bargain over changes to the disability retirement law affecting only current retirees.

Bill 36-16 also contains a definition for a “position of comparable status.” This phrase is currently used in the Code without a definition and would be applicable to the new provisions authorizing a non-competitive re-appointment of a disability retiree whose pension is discontinued due to a medical re-evaluation.

The LRA (or Permanent Umpire) has the authority to decide if the Executive’s actions constitute a prohibited practice. If the LRA finds that the Executive committed a prohibited practice by refusing to bargain over these amendments, he can order the Executive to bargain over these issues. *However, the LRA does not have the authority to prevent the Council from considering Bill 36-16 and acting on it. The Bill was introduced by the Council President and can go through the normal legislative process without regard to the findings of the LRA.*

2. Should the Executive have the authority to non-competitively re-appoint a retiree to a position of comparable status if the retiree’s disability retirement pension is discontinued due to a medical re-evaluation?

Under Bill 37-08, Personnel – Disability Retirement – Amendments, enacted on May 12, 2009 and signed into law on May 20, 2009, the CAO must require an annual medical re-evaluation of disability for a member for the first 5 years after retirement and once every 3 years after that up to age 55. Prior to Bill 37-08, the CAO had the authority to require a medical re-evaluation, but it was rarely done. The CAO is also authorized to discontinue a member’s disability retirement pension if the member no longer qualifies after a medical re-evaluation. However, the law does not currently permit the CAO to non-competitively re-appoint a retiree to a County position after the disability pension is discontinued. The member must apply for a vacant position to return to County service or, if eligible, receive a normal retirement pension. Under current law, if the employee is successful in returning to County service, the employee must become a member of the retirement plan for that new position.

Bill 36-16 would permit the CAO to non-competitively appoint the retiree to a position of comparable status in the same department. For a public safety employee, such as a fire fighter or police officer, the employee could be re-appointed to a non-sworn position in the department with the same grade and salary range as their prior position. Bill 36-16 would also permit the retiree to return to the same defined benefit plan the retiree belonged to as a sworn fire fighter or police officer instead of the Retirement Savings Plan or the Guaranteed Retirement Plan. Bill 36-16 would also permit a public safety employee to enter the Deferred Retirement Option Plan, if eligible.

Bill 36-16 would provide a better path for a disability retiree to return to County service if the medical re-evaluation results in a discontinuation of a disability retirement pension.

³ The IAFF attached an early draft of the Bill that does not contain this limitation to its prohibited practice charge.

This packet contains:

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Expedited Bill No. 36-16
Concerning: Employees' Retirement System – Disability Retirement – Redetermination of Eligibility – Amendments
Revised: August 15, 2016 Draft No. 4
Introduced: August 2, 2016
Expires: February 2, 2018
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. , Laws of Mont. Co.

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Council President at the request of the County Executive

AN EXPEDITED ACT to:

- (1) require the County to re-employ certain former County employees if the individual's disability retirement benefits are discontinued;
- (2) define a position of comparable status; and
- (3) generally amend the law regarding disability retirement.

By amending

Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-37, 33-38A and 33-43

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

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

1 **Sec. 1. Sections 33-37, 33-38A, and 33-43 are amended as follows:**

2 **33-37. Membership requirements and membership groups.**

3 * * *

4 (e) *Retirement plans.*

5 * * *

6 (7) An individual whose disability retirement benefits under Section
7 33-43(g)(1) are discontinued and who returns to County service
8 pursuant to Section 33-43(g)(2), (3), (4), or (5) must again
9 become a member of the retirement plan in which the individual
10 was enrolled when the individual left County service if the
11 individual was vested under Section 33-45 at the time the
12 individual left County service.

13 (f) *Membership groups and eligibility.* Any full-time or part-time
14 employee is eligible for membership in the appropriate membership
15 group if the employee meets all of the requirements for the group:

16 (1) Group A: An employee, elected official, or appointed official not
17 eligible for membership in another group is a group A member.
18 An employee who otherwise would be eligible for membership
19 in group A must participate in the guaranteed retirement income
20 plan or the retirement savings plan if the employee:

21 (A) begins, or returns to, County service on or after October 1,
22 1994 (except as provided in the last sentence of subsection
23 (e)(2) or (e)(7));

24 (B) is not represented by an employee organization;

25 (C) does not occupy a bargaining unit position; and

26 (D) is not an elected official (except as provided in subsection
27 (e)(4)[(D)(ii)]).

28

* * *

29

(4) Group E: The Chief Administrative Officer, the Council Administrator, the hearing examiners, the County Attorney and each head of a principal department or office of the County government, if appointed to that position before July 30, 1978, or a member having held that position on or before October 1, 1972. Any sworn deputy sheriff and any County correctional staff or officer as designated by the chief administrative officer. Any group E member who has reached elective early retirement date may retain membership in group E if the member transfers from the position which qualified the member for group E. Any group E member who is temporarily transferred from the position which qualified the member for group E may retain membership in group E as long as the temporary transfer from the group E position does not exceed 3 years. Any former group E member who returns to County service under Section 33-43(g)(4) because the member's disability retirement benefits are discontinued pursuant to Section 33-43(g)(1) must return as a group E member even if the position is not qualified for group E membership if the individual was vested under Section 33-45 at the time the individual left County service. Notwithstanding the foregoing provisions in group E, any employee who is eligible for membership in group E must participate in the guaranteed retirement income plan or the retirement savings plan under Article VIII if the employee:

- 53 (A) (i) begins, or returns to, County service on or after
54 October 1, 1994 (except as provided in the last
55 sentence of subsection (e)(2) or (e)(7));
56 (ii) is not represented by an employee organization; and
57 (iii) does not occupy a bargaining unit position; or
58 (B) (i) begins County service on or after October 1, 1994;
59 and
60 (ii) is subject to the terms of a collective bargaining
61 agreement between the County and an employee
62 organization which requires the employee to
63 participate in the guaranteed retirement income plan
64 or the retirement savings plan.

65 (5) Group F: sworn police officers.

- 66 (A) A group F member who has reached elective early
67 retirement date may retain membership in group F if the
68 member is transferred from the position that qualified the
69 member for group F membership.
70 (B) A group F member who is temporarily transferred from
71 the position that qualified the member for group F
72 membership may retain membership in group F as long as
73 the temporary transfer from the group F position does not
74 exceed 3 years.
75 (C) Notwithstanding the foregoing provisions in group F, an
76 employee who is eligible for membership in group F must
77 participate in the retirement savings plan under Article
78 VIII or the guaranteed retirement income plan if the
79 employee:

- (i) begins, or returns to, County service on or after October 1, 1994 (except as provided in the last sentence of subsection (e)(2) or (e)(7));
 - (ii) is not represented by an employee organization; and
 - (iii) does not occupy a bargaining unit position.

(D) An employee who is eligible for membership in group F must participate in the retirement savings plan under Article VIII if the employee:

 - (i) begins County service on or after October 1, 1994; and
 - (ii) is subject to the terms of a collective bargaining agreement between the County and an employee organization that requires the employee to participate in the retirement savings plan.

(E) A group F member who is a member of the Police Bargaining Unit may transfer to the retirement savings plan under Article VIII if the employee has accumulated enough credited service to obtain the maximum retirement benefit under the optional or integrated plan.

(F) Any former group F member who returns to County service under Section 33-43(g)(2) because the member's disability retirement benefits are discontinued pursuant to Section 33-43(g)(1) must return as a Group F member even if the individual does not qualify as a sworn police officer if the individual was vested under Section 33-45 at the time the individual left County service.

- 107 (6) Group G: Any paid firefighter, paid fire officer, and paid rescue
108 service personnel. Any group G member who has reached normal
109 retirement may retain membership in group G if the member
110 transfers from the position which qualified the member for group
111 G. Any group G member who is temporarily transferred from the
112 position which qualified the member for Group G may retain
113 membership in group G as long as the temporary transfer from
114 the group G position does not exceed 3 years.
- 115 (A) Notwithstanding the foregoing provisions in group G, any
116 employee who is eligible for membership in group G must
117 participate in the retirement savings plan under Article
118 VIII if the employee:
- 119 (i) begins County service on or after October 1, 1994;
120 and
- 121 (ii) is subject to the terms of a collective bargaining
122 agreement between the County and an employee
123 organization which requires the employee to
124 participate in the retirement savings plan.
- 125 (B) An employee who is eligible for membership in group G
126 must participate in the retirement savings plan under
127 Article VIII or the guaranteed retirement income plan if:
- 128 (i) the employee begins, or returns to, County service
129 on or after October 1, 1994 (except as provided in
130 the last sentence of subsection (e)(2) or (e)(7);
- 131 (ii) is not represented by an employee organization;
132 and
- 133 (iii) does not occupy a bargaining unit position.

134 (C) Any former group G member who returns to County
135 service under Section 33-43(g)(3) because the member's
136 disability retirement benefits are discontinued pursuant to
137 Section 33-43(g)(1) must return as a group G member
138 even if the individual does not qualify as a paid firefighter,
139 paid fire officer or paid rescue service personnel if the
140 individual was vested under Section 33-45 at the time the
141 individual left County service.

142 (7) Group H: Any member, including any probationary employee,
143 who holds a bargaining unit position described in section 33-
144 105(a)(1) or section 33-105(a)(2), unless the member is eligible
145 for membership in group B or E. Notwithstanding the foregoing
146 provisions in group H, any employee who is eligible for
147 membership in group H must participate in the guaranteed
148 retirement income plan or the retirement savings plan under
149 Article VIII if the employee:

150 (A) begins, or returns to, County service on or after October 1,
151 1994 (except as provided in the last sentence of subsection
152 (e)(2) or (e)(7)); and

153 (B) is subject to the terms of a collective bargaining agreement
154 between the County and an employee organization which
155 requires the employee to participate in the guaranteed
156 retirement income plan or the retirement savings plan.

157 * * *

158 **33-38A. Deferred Retirement Option Plans.**

159 * * *

160 (a) *DROP Plan for Group F members.* "Discontinued Retirement Service
161 Program" or "DRSP" means the DROP program for Group F members.
162 (1) *Eligibility.* A Group F member who is at least 46 years old and
163 has at least 25 years of credited service may participate in the
164 DRSP. A member who returns to County employment under
165 Section 33-43(g)(2)(B) and participates as a Group F member
166 under Section 33-37 is eligible to participate if, prior to receiving
167 disability retirements benefits under Section 33-43, the member
168 had 12 years and 6 months of credited service as a sworn police
169 officer with Montgomery County government.

170 * * *

171 (b) *DROP Plan for Group G members.*
172 (1) *Eligibility.* An employee who is a member of Group G and who
173 has met the minimum requirements for a normal retirement may
174 participate in the DROP Plan. A member who returns to
175 employment under Section 33-43(g)(3)(B) and participates as a
176 Group G member under Section 33-37 is eligible to participate
177 if, prior to receiving disability retirements benefits under Section
178 33-43, the member had 10 years of credited service as a paid
179 firefighter, paid fire officer or a paid rescue service personnel
180 with Montgomery County government.

181 * * *

182 (c) *DROP Plan for Sworn Deputy Sheriffs and Uniformed Correctional
183 Officers.*

184 * * *

185 (3) *Eligibility.* A sworn deputy sheriff or uniformed correctional
186 officer who is at least age 55 years old and has at least 15 years

of credited service or is at least 46 years old and has at least 25 years of credited service may participate in the DROP. A uniformed correctional officer or sworn deputy sheriff must participate in the optional retirement plan or the integrated retirement plan as a Group E member in order to participate in the DROP. A member who returns to employment under Section 33-43(g)(4) and participates as a Group E member under Section 33-37 is eligible to participate if prior to receiving disability benefits under Section 33-43, the member had 12 years and six months of credited service as a sworn deputy sheriff or uniformed correctional officer with Montgomery County government.

* * *

200 **33-43. Disability Retirement.**

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

* * *

Position of comparable status means a position:

- (1) with a grade and salary range resulting in the same pay as the position the member was assigned before receiving disability retirement benefits;
 - (2) in the same department; and
 - (3) for which the member is qualified.

* * *

212 (g) *Medical reexamination of disability retiree.*

213 (1) The Chief Administrative Officer must require a member
214 receiving disability pension payments to undergo either a yearly
215 physical examination or to submit a medical doctor's certificate
216 verifying continuation of the disability during the 5 years after
217 retirement, and once in every 3 years thereafter, until age 55 for
218 a member of group B, E, F, or G, or age 60 for a member of group
219 A or H, unless the Chief Administrative Officer finds that a
220 physical examination is unnecessary because of the nature and
221 severity of the injury or illness. The Chief Administrative Officer
222 must review the findings of the physical examination and take
223 appropriate action, which may include submitting the results of
224 the evaluation to the Disability Review Panel for a
225 redetermination whether the individual qualifies for disability
226 benefits in accordance with subsection (d). If a member does not
227 submit to the examination, the Chief Administrative Officer may
228 reduce or discontinue any disability pension payments which the
229 member receives. The Disability Review Panel may require the
230 member to submit to an additional independent medical
231 examination. A member may appeal a decision to reduce or
232 discontinue disability pension payments to the appropriate
233 Disability Arbitration Board.

234 (2) Group F.

235 (A) A retired Group F member must be non-competitively
236 reappointed (unless the reappointment is declined) to a
237 sworn police officer position, or to a Police Officer
238 Candidate's position, at a rank, grade and step equal to that

239 of the position to which the member was assigned when
240 the disability occurred, if:

- 241 (i) the employee became disabled on or before July 1,
242 2016;
- 243 (ii) the member's disability pension payments are
244 discontinued as a result of a physical examination
245 conducted under subsection (g)(1);
- 246 (iii) the member is determined by the Chief
247 Administrative Officer to be physically able to
248 perform all of the essential duties of a sworn police
249 officer; and
- 250 (iv) the member is eligible for certification as a law
251 enforcement officer by the Police Training
252 Commission

253 (B) A retired Group F member must be non-competitively
254 reappointed to a non-sworn position of comparable status
255 within the Police Department (unless the reappointment is
256 declined) if:

- 257 (i) the member became disabled on or before July 1,
258 2016;
- 259 (ii) the member's disability pension payments are
260 discontinued as a result of a physical examination
261 conducted under subsection (g)(1); and
- 262 (iii) the member is not eligible for certification as a
263 sworn law enforcement officer, or if the member is
264 not medically approved for reappointment to a

265 sworn police officer position by the Employee
266 Medical Examiner; or

267 (iv) the member is determined by the Chief
268 Administrative Officer to be unable to perform all
269 of the essential duties of a sworn police officer, but
270 the Chief Administrative Officer determines that the
271 member is able to perform the duties of a position
272 of comparable status within the Police Department.

273 (3) Group G.

274 (A) A retired Group G member must be non-competitively
275 reappointed (unless the reappointment is declined) to a
276 paid fire fighter, paid fire officer, or paid rescue service
277 personnel position, at a rank, grade and step equal to that
278 of the position to which the member was assigned when
279 the disability occurred, if:

- 280 (i) the employee became disabled on or before July 1,
281 2016;
282 (ii) the member's disability pension payments are
283 discontinued as a result of a physical examination
284 conducted under subsection (g)(1); and
285 (iii) the member is determined by the Chief
286 Administrative Officer to be physically able to
287 perform all of the essential duties of a paid fire
288 fighter, paid fire officer or paid rescue service
289 personnel.

290 (B) A retired Group G member must be non-competitively
291 reappointed to a position of comparable status within the

292 Fire and Rescue Service Department (unless the
293 reappointment is declined) if:

- 294 (i) the member became disabled on or before July 1,
295 2016;
296 (ii) the member's disability pension payments are
297 discontinued as a result of a physical examination
298 conducted under subsection (g)(1); and
299 (iii) the member is not eligible for certification as a paid
300 fire fighter, paid fire officer, or paid rescue service
301 position, or if the member is not medically approved
302 for reappointment to a paid fire fighter, paid fire
303 officer, or paid rescue service position by the
304 Employee Medical Examiner; or
305 (iv) the member is determined by the Chief
306 Administrative Officer to be unable to perform all
307 of the essential duties of a paid fire fighter, paid fire
308 officer, or paid rescue service personnel, but the
309 Chief Administrative Officer determines that the
310 member is able to perform the duties of a position
311 of comparable status within the Fire Department.

312 (4) Group E:

- 313 (A) A retired Group E member must be non-competitively
314 reappointed (unless the reappointment is declined) to a
315 position at a rank, grade and step equal to that of the
316 position to which the member was assigned when the
317 disability occurred if;

- 318 (i) The member became disabled on or before July 1,
319 2016;
320 (ii) the member's disability pension payments are
321 discontinued as a result of a physical examination
322 conducted under subsection (g)(1); and
323 (iii) the member is determined by the Chief
324 Administrative Officer to be physically able to
325 perform all of the essential duties of the position to
326 which the member was assigned when the disability
327 occurred;
- 328 (B) A retired Group E member must be non-competitively
329 reappointed to a position of comparable status (unless the
330 reappointment is declined) if:
- 331 (i) the member became retired on or before July 1,
332 2016;
333 (ii) the member's disability pension payments are
334 discontinued as a result of a physical examination
335 conducted under subsection (g)(1); and
336 (iii) the member is not eligible for the position to which
337 the member was assigned when the disability
338 occurred.
- 339 (5) Groups A and H: A retired Group A or H member must be non-
340 competitively reappointed (unless the reappointment is declined)
341 to either that position at the grade and step equal to the position
342 the individual held when the disability occurred or a comparable
343 position at the same grade and step if:
- 344 (A) the member became retired on or before July 1, 2016;

- 345 (B) the member's disability pension payments are
346 discontinued as a result of a physical examination
347 conducted under subsection (g)(1); and
348 (C) the member is determined by the Chief Administrative
349 Officer to be physically able to perform all of the essential
350 duties of the position to which the member was assigned
351 when the disability occurred.

352 * * *

353 **Effective Date.**

354 The Council declares that this legislation is necessary for the immediate
355 protection of the public interest. This Act takes effect on the date it becomes law.

356 *Approved:*

357

358

Nancy Floreen, President, County Council

Date

359 *Approved:*

360

Isiah Leggett, County Executive

Date

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

362

Linda M. Lauer, Clerk of the Council

Date

LEGISLATIVE REQUEST REPORT

Expedited Bill 36-16

Employees' Retirement System-Disability Retirement-Redetermination of Eligibility-Amendments

DESCRIPTION: The Bill amends the County's retirement law to permit the CAO to non-competitively re-employ certain former County employees to a position of comparable status if the individual has disability retirement benefits discontinued after a medical reexamination. The Bill would define a position of comparable status. The Bill would also permit the former disability retiree to become a member of the retirement plan in which the individual was enrolled when the individual left County service if the individual was vested at the time the individual left County service.

PROBLEM: The County Code does not provide for non-competitive re-employment of persons whose disability retirement benefits have been stopped due to a medical reexamination.

GOALS AND OBJECTIVES: The goal of the Bill is to encourage the re-employment of former County employees whose disability retirement benefits have been stopped due to a medical reexamination.

COORDINATION: Montgomery County Employee Retirement Plans, Office of Human Resources, and the County Attorney's Office have reviewed this Bill.

FISCAL IMPACT: Office of Management and Budget

ECONOMIC IMPACT: Finance

EVALUATION: N/A

EXPERIENCE ELSEWHERE: Numerous other retirement plans in the surrounding jurisdictions offer similar re-employment rights to certain persons whose disability retirement benefits have been stopped.

SOURCE OF

INFORMATION: Linda Herman, Montgomery County Employee Retirement Plans
Shawn Stokes, Office of Human Resources
Amy Moskowitz, Office of the County Attorney

APPLICATION

WITHIN

MUNICIPALITIES:N/A

PENALTIES: N/A

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OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

July 20, 2016

TO: Nancy Floreen, Council President

FROM: Isiah Leggett, County Executive 

SUBJECT: Expedited Bill to Amend the County's Retirement Law

I am attaching for the Council's consideration a bill that would amend the County's retirement law to permit persons whose Employees' Retirement System's disability retirement benefits have been stopped, due to no longer being medically eligible to receive the benefits, to be non-competitively rehired by the County government.

The County Code establishes the requirements for disability retirement benefits in Section 33-43 and provides for the ongoing re-evaluation of certain persons receiving the disability benefits. However, it does not currently provide for the non-competitive reappointment of persons whose disability benefits are stopped. The legislation would permit the County government to re-employ these individuals non-competitively to County government positions within the department in which they were working prior to the disability award being granted.

The bill would permit the Board to delegate its duties as it deems appropriate and consistent with its fiduciary duties and its written policies and procedures.

Thank you for your prompt consideration of this bill.

Attachments

Fiscal Impact Statement
Expedited Bill XX-16, Employees' Retirement System - Disability

1. Legislative Summary.

This bill would amend the law concerning the re-employment of certain former County employees to County employment following a discontinuation of disability benefits, and define a "position of comparable status".

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

This bill would provide for the non-competitive re-employment of certain former County employees whose disability benefits had been stopped due to their no longer being medically eligible to receive the benefits. These individuals would be placed into either the position formerly occupied, if qualifications are met, or into positions of comparable status. Since the bill would permit non-competitive re-employment into a vacant position, this bill is not estimated to have a fiscal impact.

This bill would have no impact on County revenues.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

Not applicable

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

The number of individuals who may no longer be eligible for disability retirement payments and could be non-competitively re-employed is not expected to be significant. This bill is not estimated to have a material fiscal impact.

5. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

Not applicable.

6. An estimate of the staff time needed to implement the bill.

Not applicable.

7. An explanation of how the addition of new staff responsibilities would affect other duties.

Not applicable.

8. An estimate of costs when an additional appropriation is needed.

Not applicable.

9. A description of any variable that could affect revenue and cost estimates.

In the event the individual being re-employed is on the high end of the particular grade/step scale, there could be a fiscal impact between the personnel costs of the re-employment over the personnel costs of an alternative hire lower in the grade/step. The number of re-employments is difficult to project, but is not expected to be significant.

10. Ranges of revenue or expenditures that are uncertain or difficult to project.

See response to #9.

11. If a bill is likely to have no fiscal impact, why that is the case.

Not applicable.

12. Other fiscal impacts or comments.

Not applicable.

13. The following contributed to and concurred with this analysis:

Corey Orlosky, Office of Management and Budget

Linda Herman, Director, Montgomery County Employee Retirement Plans

J Hughes

Jennifer A. Hughes, Director
Office of Management and Budget

7/15/16

Date

**Economic Impact Statement
Bill ##-16, Employees' Retirement System**

Background:

This legislation would amend the County's retirement plan to re-employ certain former County employees to County employment if the individual's disability retirement benefits are discontinued under County Code Section 33-43G. Section 33-43 governs the award and payment of disability retirement benefits and sets forth the criteria for the required ongoing medical evaluation of persons receiving disability retirement benefits. However, current law does not provide for the non-competitive re-employment of persons whose disability retirement benefits have been discontinued. Bill ##-16 would amend the Code to permit re-employment of such individuals. Also, County Council did not define comparable status in the County Code. Bill ##-16 amends Section 33-43 by adding the following definition to Section 33-43(b):

"Position of comparable status means a position that is the same pay as the position the member was assigned before receiving disability retirement benefits and which is in the same department and for which the member is qualified."

1. The sources of information, assumptions, and methodologies used.

Sources of information include the Montgomery County Employees Retirement Plans (MCERP) and the Office of Management and Budget (OMB). The Department of Finance did not use any assumptions or methodologies in the preparation of the economic impact statement (EIS). Data provided by MCERP as of June 30, 2015, states that there were 6,380 retirees and beneficiaries of which 1,125 (17.6%) were receiving disability retirement benefits. However, without specific data on the probability that current retirees receiving disability benefits will be ineligible for such benefits and not be re-employed, it is uncertain if Bill ##-16 would have an impact on the County's economy.

2. A description of any variable that could affect the economic impact estimates.

The variable that could affect the impact estimates are the number of retirees who would be re-employed.

3. The Bill's positive or negative effect, if any on employment, spending, savings, investment, incomes, and property values in the County.

As stated in paragraph 1, without specific data on the number of retirees who may be re-employed, it is uncertain whether Bill ##-16 would have an impact on the County's employment, spending, savings, incomes, and property values. However, if the number of retirees who are re-employed is small in terms of the County's total employment, there would be no significant positive effect on the County's economy.

4. If a Bill is likely to have no economic impact, why is that the case?

Please see paragraph 3 on the impact to the County's economy.

**Economic Impact Statement
Bill ##-16, Employees' Retirement System**

5. The following contributed to or concurred with this analysis: David Platt, Finance; Linda Herman, Executive Director, Montgomery County Employee Retirement Plans; Corey Orlosky, OMB.

RHager
Robert Hagedorn, Acting Director
Department of Finance

7/12/16
Date

**TESTIMONY ON BEHALF OF THE COUNTY EXECUTIVE LEGGETT ON
EXPEDITED BILL 36-16, EMPLOYEES' RETIREMENT SYSTEM -
DISABILITY RETIREMENT – REDETERMINATION OF ELIGIBILITY -
AMENDMENTS**

Good afternoon. I am Linda Herman, Executive Director of the Montgomery County Employee Retirement Plans, which oversees the assets and the administration of the County's three retirement plans. I am here today on behalf of the County Executive to testify in support of Bill 36-16E, Employees' Retirement System - Disability Retirement – Redetermination of Eligibility - Amendments.

The County Code does not provide for non-competitive re-employment of persons whose disability retirement benefits have been stopped. This Bill would permit the County to re-employ certain former County employees to County positions if their disability benefits had been stopped, due to their no longer being medically eligible to receive the disability benefits, as defined in the County Code. Section 33-43, which governs the award and payment of disability retirement benefits, also sets forth the criteria for the required ongoing medical evaluation of persons receiving disability benefits. However, it does not currently provide for the non-competitive re-employment of persons whose disability benefits are stopped due to no longer being eligible for the benefits. The County Executive would like to amend the Code to permit the non-competitive re-employment of certain individuals whose retirement disability benefits have been stopped.

In addition, the Bill provides a definition for position of comparable status which is currently not defined in the County Code.

We look forward to working with the Council in its deliberations on this legislation.



LOCAL 1664

Montgomery County Career Fire Fighters Association

9

PUBLIC HEARING TESTIMONY OF THE MONTGOMERY COUNTY CAREER FIRE FIGHTERS ASSOCIATION, IAFF LOCAL 1664, AFL-CIO

EXPEDITED BILL 36-16: EMPLOYEES' RETIREMENT SYSTEM – DISABILITY RETIREMENT – REDETERMINATION OF ELIGIBILITY – AMENDMENTS

The Montgomery County Career Fire Fighters Association, IAFF Local 1664, AFL-CIO (hereinafter, “MCCFFA” or “the Union”) is submitting this written testimony to express its opposition at this time to Expedited Bill 36-16, a bill sponsored by the Council President at the request of the County Executive. The amendments to the Employees’ Retirement System that are contained in the bill pertain to matters that are clearly mandatory subjects of bargaining between the County Government employee unions and the County Executive.

As noted in the explanatory memo from Senior Legislative Attorney Robert Drummer to the Council, the proposed legislation seeks to amend County Code provisions regarding disability retirement of County employees in various ways. First, when former employees who retired due to a disability are deemed fit to return to active employment in their former department, they may receive a non-competitive appointment to the same position or a position of comparable status within the department that they retired from. Second, disability retirees who are reappointed in accordance with these criteria would be permitted to become a member of the retirement plan in which the individual was enrolled when he or she previously left County employment provided the individual was vested at the time he or she initially retired. The proposed legislation also defines the term “position of comparable status”.

The MCCFFA is not taking a position, currently, on the merits of any of these proposed amendments to the disability retirement provisions of the County Code. It does, however, urge the Council members to *preclude the proposed legislation’s application to bargaining unit members* since it strikes at the heart of employees’ collective bargaining rights.

Section 33-152(a)(2) of the Code provides that the employer and the employees’ certified representative must bargain collectively with respect to pension and other retirement benefits for active employees. The phrase “pension and other retirement benefits” is to be interpreted broadly, and covers the issues addressed in Expedited Bill 36-16. By establishing via legislation conditions upon which disability retirement benefits may be discontinued and individuals re-enrolled in retirement plans, the MCCFFA would then be foreclosed from addressing these important matters at the bargaining table. Such impediment to bargaining is clearly inconsistent with the Fire & Rescue Collective Bargaining Law.

It may be that the County Executive considers these proposed amendments to the Code as impacting only individuals who have already retired, and therefore outside the authority granted to MCCFFA (and other County Government Employee unions) to bargain for active employees only. However, it is clearly established that the MCCFFA has been granted the right to bargain over pension and other retirement benefits for *future retirees*, i.e., current active employees who may become eligible for retirement benefits from the County at a later date. The MCCFFA may bargain over the discontinuance of disability

retirement benefits and re-enrollment in retirement plans as these issues are applied to active employees who later become disabled, just as it may bargain over retirement benefits for active employees who later leave County service under normal retirement criteria.

The MCCFFA notes that the provisions in the County Executive's proposed legislation concerning non-competitive re-appointments and re-enrollments in pension plans apply only to employees who became disabled on or before July 1, 2016. It may be that by limiting these amendments to employees who became disabled on or before this date, the County Executive believes he is not interfering with the bargaining rights of current employees. However, that is simply not the case. There are fire and rescue service employees who became disabled from performing the required duties of their assigned position *before* July 1, 2016 yet are still in an active employment status. They are either on disability leave or assigned to a light duty position. Some of these individuals may subsequently reach "maximum medical improvement" and be physically unable to return to their former positions, and will then become disability retirees. As current employees who became disabled on or before July 1, 2016, they would clearly be impacted by the legislation, if passed, and would not have had any benefit of negotiations between the MCCFFA and the County Executive on these issues. Thus, it cannot be credibly argued that the County Executive's proposed legislation does not affect *current* employees.

The MCCFFA has filed a Prohibited Practice Charge with the Fire and Rescue Service Labor Relations Administrator (LRA) to protect its bargaining rights attendant to these issues. The LRA will issue a decision that will resolve the Union's claim that bargaining on these matters as to current employees is required, and that the proposed legislation, as drafted, forecloses bargaining. **We respectfully request the County Council to defer further hearings and any action on this legislation until after the issue of mandatory bargaining over the subject matter is resolved by the Labor Relations Administrator.**

Submitted by: Jeffrey Buddle, President
MCCFFA – IAFF local 1664

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From: "Tcooke35" <tcooke35@verizon.net>

Date: 9/13/2016 1:29:47 PM

To: "county.council@montgomerycountymd.gov" <county.council@montgomerycountymd.gov>

Cc:

Subject: FOP Testimony For Bill 36-16

PUBLIC HEARING TESTIMONY OF THE
FRATERNAL ORDER OF POLICE MONTGOMERY COUNTY, LODGE 35
EXPEDITED BILL 36-16: EMPLOYEES' RETIREMENT SYSTEM DISABILITY
RETIREMENT – REDETERMINATION OF ELIGIBILITY AMENDMENTS

The Fraternal Order of Police, Montgomery County Lodge 35, is submitting this written testimony in opposition to Expedited Bill 36-16, a bill requested by the County Executive and submitted by the County Council President. This bill impacts not only those currently retired, it also intrudes on the rights provided under Collective Bargaining Agreements of both current employees and retirees. The subject matter contained in the bill falls within the Executive's obligation to bargain.

The Executive's actions in proposing legislation affecting retirement benefits impact established rights as well as his obligations to bargain under the PLRA. Section 33-80(a) expressly requires that the "Employer," defined elsewhere in the law as the "county executive and the Executive's designees," must bargain with the Union over, among other matters, pension and retirement benefits for active employees. There are provisions for disability retirement Group F employees (police officers) that, by the terms of bill 36-16, will also not only limited the bill to current retirees as of July 1, 2016, it also includes active employees. With the contained ambiguities, the County Executive makes the claim that the legislation only applies to current disability retirees, while plainly other provisions within the bill states to have application to future retirees and, thus, to current employees.

Legislative Attorney Robert Drummer, in his summary to the Council, states the proposed legislation seeks to amend County Code provisions regarding disability retirement of County employees in various ways. First, when former employees who retired due to a disability are deemed fit to return to active employment in their former department, they may receive a non-competitive appointment to the same position or a position of comparable status within the department that they retired from. Second, disability retirees who are reappointed in accordance with these criteria would be permitted to become a member of the retirement plan in which the individual was enrolled when he or she previously left County employment provided the individual was vested at the time he or she initially retired. The proposed legislation also defines the term "position of comparable status." The very nature of Mr. Drummer's explanation embodies the intent of the PLRA (Section 33-80(a) (2) pension and retirement benefits) which

provides that the employer and the employees' certified representative must bargain collectively with respect to pension and other retirement benefits for active employees (Future Retirees). Bill 36-16 would establish non-bargained unspecified conditions by which the Employer may terminate disability retirement benefits and force individuals to be reemployed and re-enrolled in retirement plans at the county's pleasure. FOP Lodge 35 would then be forestalled from addressing at the table important matters that impact its members and are subject to bargaining. An obstruction in this manner is not consistent with the collective bargaining laws for either, IAFF, FOP, or MCGEO.

The County Executives representatives did not inform the Council of the FOP's bargained provision for retaining disabled officers. Through collective bargaining, FOP Lodge 35 worked to keep disabled officers employed and working within their capacity. The FOP negotiated a contract provision to allow disabled/injured police officers to perform police functions within their capabilities through non-competitive placement as an alternative to disability retirement (The County has complained of the number of chronically disabled working police officers, sought and obtained a contract amendment requiring a reopeners should the number of chronically incapacitated officers exceed 1.5% of the bargaining unit). Officers who have reached maximum medical improvement may be accommodated by assigning them to duties within their capacity and within the bargaining unit.

Additionally, the impact on retirees will be severe considering that most have moved on with their life and family goals. Some have transitioned to other states to lessen the impact of the lost income or to provide better opportunities for a spouse who has to bear the extra burden. The impacted individual would have their retirement benefit terminated, and then be subject to taking a job outside of the profession for which they originally applied. There is no job comparison to a police officer. This bill creates an undue burden for the retiree by forcing them to accept the position the county dictates. In the case of a retiree of FOP Lodge 35 (police department), that individual was a police officer which have strict requirements. Furthermore, the county must be aware that injured officers, especially catastrophically injured individuals, receive compensation from the Workers' Compensation Commission. Should this bill be passed, the county is not excused from its obligation to individuals who forfeited compensation for their injury when they went out on disability retirement. Bill 36-16 is regressive and stands to increase employee cost for the county government.

In the most recent contract negotiations, the County Executive submitted proposals to bargain over the discontinuance of disability retirement benefits and re-enrollment in retirement plans as it applied to active employees who might later become disabled. The County Executive is aware that pursuant to Section 33-80 of the Montgomery County Code, FOP Lodge 35 has the right to bargain over pension and other retirement benefits for future retirees, those active employees who become eligible for benefits from the County at a later time.

The County Executive has bargained with the FOP a provision that allows for the continued employment of disabled officers. The county Executive can retain disabled officers by allowing them to work within their capabilities through non-competitive placement as an alternative to disability retirement. This agreement has been in existence for more than a decade.

FOP Lodge 35 has filed a Prohibited Practice Charge with the Police Labor Relations Administrator to protect its bargaining rights as they apply to this issue. FOP Lodge 35 requests the County Council defer further hearings and any action on this legislation to allow the matter to be bargained as negotiations for the next collective bargaining agreement begin in November of this year.

Torrie Cooke

President
Montgomery County FOP, Lodge 35

LAW OFFICES
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MEGAN K. MECHAK
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DIANA J. NOBILE
REID COPLOFF
MICHAEL R. WILLATS
DONNA K. MCKINNON
WILLIAM W. LI

August 25, 2016

**VIA ELECTRONIC MAIL TO
HOMERLARUE641@GMAIL.COM
AND OVERNIGHT MAIL**

Homer C. LaRue
Labor Relations Administrator
Montgomery County
5430 Lynx Lane
Suite 339
Columbia, MD 21044

Re: Prohibited Practice Charge by the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC -- County's Failure to Bargain in Good Faith Regarding Changes to Disability Retirement

Dear Administrator LaRue:

Pursuant to Section 33-154 of the Montgomery County Code, the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC (“Union”), respectfully submits for your review and consideration the enclosed prohibited practice charge concerning the County’s failure to bargain in good faith regarding changes it has proposed to employees’ disability retirement.

As set forth in the attached charge, the Union requests expedited hearing in advance of the County Council’s consideration of the draft legislation, which is scheduled to occur on September 13, 2016.

To schedule the hearing, or if you require additional information, please do not hesitate to contact me by telephone at (202) 833-8855, facsimile at (202) 452-1090, or electronic mail at mkm@wmlaborlaw.com.

Homer LaRue
August 25, 2016
Page 2 of 2

Sincerely,

WOODLEY & McGILLIVARY LLP

Megan K. Mechak

Megan K. Mechak

Enclosures

cc: The Honorable Isiah Leggett, Montgomery County Executive (via e-mail and first class mail)
Shawn Stokes, Director, Montgomery County Office of Human Resources (via e-mail and first class mail)
Linda A. Herman, Executive Director, Montgomery County Employee Retirement Plans (via e-mail and first class mail)

CHARGE OF PROHIBITED PRACTICE
TO THE
LABOR RELATIONS ADMINISTRATOR
MONTGOMERY COUNTY, MARYLAND

EXPEDITED HEARING REQUESTED

THE UNION RESPECTFULLY REQUESTS AN EXPEDITED HEARING ON THIS PROHIBITED PRACTICE CHARGE FOR THE REASONS SET FORTH BELOW.

NOTE

A written Charge of a prohibited practice by an individual must be filed with the Labor Relations Administrator within six (6) months of the incident giving rise to the charge, or within six (6) months of the date upon which the charging party knew or should have known of the matter that is the subject of the charge. (Article 33-154(f) of the Montgomery County Government Fire and Rescue Collective Bargaining Law.).

1. **Charging Party.**

Montgomery County Career Fire Fighters Association, International Association of Fire Fighters Local 1664, AFL-CIO, CLC
932 Hungerford Drive, Suite 33A
Rockville, Maryland 20850-1713
(301) 762-6611 (telephone)

2. **Charged Parties.**

The Honorable Isiah Leggett, County Executive
Montgomery County, Maryland
101 Monroe Street, 2nd Floor
Rockville, Maryland 20850
240-777-2500
ike.leggett@montgomerycountymd.gov

Shawn Stokes, Director
Montgomery County Office of Human Resources
101 Monroe Street, 7th Floor
Rockville, Maryland 20850
240-777-5010
shawn.stokes@montgomerycountymd.gov

Linda A. Herman, Executive Director
Montgomery County Employee Retirement Plans
101 Monroe Street, 15th Floor
Rockville, Maryland 20850
240-777-8224
linda.herman@montgomerycountymd.gov

3. **Statement of the Charges.**

Sections of the Montgomery County Government Fire and Rescue Collective Bargaining Law violated:

Section 33-147
Section 33-152(a)(2)
Section 33-154(a)(5)

Statement of Facts Constituting Prohibited Practice:

Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC (the "Union") is the sole and exclusive bargaining agent of the employees in the Montgomery County Fire and Rescue Services who are in the classification of: Fire Fighter/Rescuer I, Fire Fighter/Rescuer II, Fire Fighter/Rescuer III, Master Fire Fighter/Rescuer, Fire/Rescue Lieutenant, Fire/Rescue Captain and who are associated with fire suppression, fire protection, fire communications, fire service training, rescue and emergency medical services, fire investigation, fire code enforcement.

On July 22, 2016, via electronic mail, the Montgomery County Government informed Union President Jeffrey Buddle that it planned to submit draft legislation amending Montgomery County Code Sections 33-37, 33-38A, and 33-43. A copy of this correspondence is attached hereto as **Exhibit 1**. These sections concern employee pensions, specifically, how employees who are retired on disability but later found fit for duty will be treated.

On July 27, 2016, the Union submitted a demand to bargain to Charged Party Leggett. A copy of the demand to bargain is attached hereto as **Exhibit 2**.

To date, Respondents have not bargained with the Union over the proposed changes to employment conditions. Instead of negotiating with the Union, the County ignored its request and, on July 29, 2016, submitted the draft legislation to the County Council for consideration, which will occur on September 13, 2016. A copy of the memorandum submitting this draft legislation to the County Council is attached hereto as **Exhibit 3**.

Because the County has already submitted the draft legislation to the Montgomery County Council, and because the Union will suffer irreparable harm if its rights are not

remedied prior to any further consideration of this issue by the Council, the Union respectfully requests an expedited hearing on this Charge, with expedited briefing scheduled to occur prior to the hearing.

4. **Relief Requested.**

The Union seeks an Order:

- 1) declaring that Respondents have committed a prohibited practice by failing to bargain with the Union regarding changes to Montgomery Code Sections 33-37, 33-38A, and 33-43, which will impact current employees' pensions;
- 2) directing Respondents to cease and desist their unlawful conduct immediately, including but not limited to ordering Respondents to negotiate with the Union regarding changes to employee working conditions;
- 3) awarding the Union appropriate injunctive and affirmative relief, including payment of all costs, fees and expenses incurred as a result of Respondents' prohibited practices and any and all other legal or equitable relief deemed appropriate.

5. **Supporting Documents.**

Supporting documents are attached hereto. Should the Administrator need further documentation, upon request and during your investigation of this matter, the Union will gladly provide such requested documentation.

Dated: August 25, 2016

Respectfully Submitted,

/s/ Megan K. Mechak
Megan K. Mechak
WOODLEY & McGILLIVARY LLP
1101 Vermont Avenue, N.W.,
Suite 1000
Washington, DC 20005
Telephone: (202) 833-8855
Facsimile: (202) 452-1090
mkm@wmlaborlaw.com

Counsel for Charging Party

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2016, the above Prohibited Practice Charge by the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC has been delivered electronically upon the following Charged Parties:

The Honorable Isiah Leggett, County Executive
Montgomery County, Maryland
101 Monroe Street, 2nd Floor
Rockville, Maryland 20850
240-777-2500
ike.leggett@montgomerycountymd.gov

Shawn Stokes, Director
Montgomery County Office of Human Resources
101 Monroe Street, 7th Floor
Rockville, Maryland 20850
240-777-5010
shawn.stokes@montgomerycountymd.gov

Linda A. Herman, Executive Director
Montgomery County Employee Retirement Plans
101 Monroe Street, 15th Floor
Rockville, Maryland 20850
240-777-8224
linda.herman@montgomerycountymd.gov

/s/ Megan K. Mechak
Megan K. Mechak
WOODLEY & McGILLIVARY LLP
1101 Vermont Avenue, N.W., Suite 1000
Washington, D.C. 20005
mkm@wmlaborlaw.com



Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

OFFICE OF THE COUNTY ATTORNEY

September 8, 2016

BY EMAIL (RESPONSE LETTER ONLY) AND OVERNIGHT MAIL

Homer LaRue
Labor Relations Administrator
5305 Village Center Drive, Suite 339
Columbia, Maryland 21044
homerlarue641@gmail.com

Re: International Association of Fire Fighters Local 1664 and Montgomery County, Maryland
Prohibited Practice Charge: Proposed Unilateral Change Regarding Disability Retirement

Dear Administrator LaRue:

As the representative of record for Montgomery County, Maryland (the “Employer” or the “County”), the Charged Party in this matter, I am presenting the County’s Response to the Charge of Prohibited Practice filed on behalf of International Association of Fire Fighters Local 1664 (“IAFF” or the “Union”) by Megan K. Mechak, Esquire, in a letter to you dated August 25, 2016. In its charge of prohibited practice, the Union alleges the following:

To date, Respondents have not bargained with the Union over the proposed changes to employment conditions. Instead of negotiating with the Union, the County ignored its request and, on July 29, 2016, submitted the draft legislation to the County Council for consideration, which will occur on September 13, 2016...

The County denies the allegations set forth by IAFF in that, for the reasons discussed below, the County is not obligated to negotiate proposed legislation contained in Montgomery County Expedited Bill 36-16 (see attached Exhibit “A”), because IAFF lacks standing to raise the Prohibited Practice Charge, and because the right to hire and select employees, and classify positions are Employer’s Rights recognized by Montgomery County Code (“MCC”) § 33-152(b) and Article 5 of the Collective Bargaining Agreement.

BACKGROUND

On August 2, 2016, Montgomery County Council President Nancy Floreen introduced

Expedited Bill 36-16 (the “Bill”) to address situations in which disability retirees under MCC § 33-43 are no longer medically eligible for the disability retirement benefit. The purpose of the Bill is to create a Non-Competitive hiring and selection procedure for those retirees that became disabled prior to July 1, 2016 and meet specific criteria. The Bill also provides a definition for the term “position of comparable status.” The Bill does not alter any of the disability retirement benefits available to employees under MCC § 33-43 and does not affect any current County employees or bargaining unit members.

DISCUSSION

MCC § 33-148(4) defines “employee” as:

[A] fire and rescue employee in the classification of Fire/Rescue Captain, Fire/Rescue Lieutenant, Master Firefighter/Rescuer, Firefighter/Rescuer III, Firefighter/Rescuer II, and Firefighter/Rescuer I, but not: (A) an employee in a probationary status; (B) an employee in the classification of District Chief or an equivalent or higher classification; or (C) a Fire/Rescue Lieutenant or Captain whose primary assignment is in: (i) budget; (ii) internal affairs; (iii) labor relations; (iv) human resources; (v) public information; or (vi) quality assurance.

Id. Retirees are not included in the definition and as such are *not employees*. See *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

MCC § 33-148(5) defines “employee organization” as “any organization that admits *employees* to membership and that has as a primary purpose the representation of employees in collective bargaining.” *Id.* (Emphasis added).

IAFF does not represent retirees or former employees for the purpose of bargaining. It is clear from the plain language of Bill 36-16 that nothing contained therein affects current bargaining unit members. Therefore, the County is not obligated to negotiate and IAFF lacks standing to demand to bargain the provisions contained in Bill 36-16. See *Allied Chemical*, 404 U.S. at 172.

Furthermore, the proposed changes in Bill 36-16 specifically relates to the hiring and selection procedure of persons who are no longer employed with the County. Bill 36-16 does not address future disability retirement benefits for active employees. Contrary to IAFF’s assertion, the changes in no way affect the rights of bargaining unit employees, including whether or not an employee may retire from County service with disability retirement benefits should the employee qualify, working conditions, or pension benefits previously granted. Rather, the Bill focuses on the re-hiring procedure should the retiree no longer qualify for said benefits.

The County has reserved the right to hire and select candidates for employment, classify positions, as well as “determine the overall organizational structure, methods, processes, means,

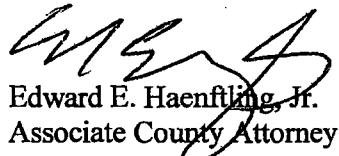
job classifications, and personnel by which operations are conducted,” free from collective bargaining under MCC § 33-152(b). As previously stated, Bill 36-16 deals specifically with how the County will hire and select those former employees that are no longer eligible for disability retirement benefits. By defining “position of comparable status,” the County has exercised its right to classify jobs and determine which position a candidate for employment will fill. Requiring the County to bargain over Bill 36-16 with IAFF would be an impermissible infringement on the County’s Employer Rights.

The fact that the County has not discussed potential legislation affecting matters that fall within the scope of its Employer rights does not equate to a prohibited practice. Under MCC § 33-152(c), the County may *voluntarily* “discuss with the representatives of its employees any matter concerning the employer’s exercise of any right specified in [§ 33-152(b)]. However, any matter so discussed is *not subject to bargaining*.” (Emphasis added). The County Code has, therefore, carved out an exemption for the County to receive input from IAFF on employer rights matters, without the requirement to bargain or a waiver of its Employer Rights.

CONCLUSION

For the foregoing reasons, the County requests that the Prohibited Practice Charge filed by IAFF, be dismissed.

Sincerely,



Edward E. Haenftling, Jr.
Associate County Attorney

EEH

Enclosures

cc: Megan K. Mechak, Esquire (mkm@wmlaborlaw.com), Response and Exhibit via email only.