

MEMORANDUM

June 17, 2016

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Introduction:** Expedited Bill 24-16, Collective Bargaining – Impasse Procedures - Amendments

Expedited Bill 24-16, Collective Bargaining – Impasse Procedures - Amendments, sponsored by Lead Sponsor Council President Floreen and Co-Sponsor Rice, is scheduled to be introduced on June 21, 2016. A public hearing is tentatively scheduled for July 12 at 7:30 p.m.

Background

The County enacted 3 separate collective bargaining laws at different times. The first law enacted was the Police Labor Relations Law. The law governing general County employees was enacted second, and the law governing fire and rescue employees was enacted last. The amendments would make similar changes in each law. The lead sponsor, Council President Floreen, explained these changes in a June 14 memorandum at ©28-30. The goal of this Bill is to create a system that encourages the Executive and the union to negotiate sustainable collective bargaining agreements that can be approved by the Council without resorting to interest arbitration. Bill 24-16 would amend these laws in the following 6 areas:

1. **Transparency** – The Bill would:
 - (a) require public disclosure of each party’s initial bargaining position on all provisions; and
 - (b) require that any evidentiary hearing before the arbitration panel be open to the public.

The purpose of these amendments is to make the collective bargaining process, which results in wages and benefits that consumes the overwhelming majority of the County operating budget, more open to the public.

2. **Time for negotiation** – The Bill would give the union and the Executive an extra 2 weeks by requiring negotiations to begin on October 15 instead of November 1.
3. **Employer rights** – Employer or management rights are those topics that are not subject to collective bargaining. The Police Labor Relations Law contains 10 listed employer rights. Each of the other 2 collective bargaining laws has 19 employer

rights. The Bill would make the list the same in each law by adding the additional 9 employer rights to the Police Labor Relations Law. In addition, the Bill would clarify that any subject that is not expressly identified as a mandatory subject of bargaining is not subject to bargaining as an employer right.

4. **Selection of Labor Relations Administrator (LRA)** – The LRA (or umpire under the Police Labor Relations Law) serves as a public official responsible for deciding if either the Executive or the union has violated the collective bargaining law. The LRA conducts evidentiary hearings and issues decisions that are subject to appeal on the record in the Circuit Court as a decision of an administrative agency. Although the LRA is appointed by the Executive for a 5-year term of office, subject to Council confirmation, each law gives the union certain rights to help select this public official. The union representing police officers has the right to veto the re-appointment of the LRA. Under the other 2 laws, the Executive must appoint the LRA from a list that is agreed upon by the Chief Administrative Officer and the union. The Bill would repeal the right of the union to help choose the LRA and leave it to the elected Executive and Councilmembers in the same manner that other County public officials are appointed. The Bill would also change the qualifications for the LRA from a person with experience as a neutral party in labor relations to a person who is experienced conducting adjudicatory hearings, such as a retired judge. Due in part to Maryland’s mandatory retirement policy for its judges, many retired judges with a wealth of experience in deciding cases based upon the evidence and the relevant law continue to work as mediators and arbitrators.
5. **Mediation** – Each law requires one person to serve as both the mediator and the arbitrator. While this “med-arb” is efficient because the arbitrator is already familiar with the disputed issues before the arbitration hearing, it does not permit the mediator to serve the traditional role of a mediator. A traditional mediator has no power to impose a solution to the parties. The parties are then free to confide both the strengths and weaknesses in their positions in private with the mediator. The parties are generally reluctant to do this with a mediator who is also serving as the arbitrator who can impose a final decision on the parties.
6. **Arbitration** – Each law provides for final offer by package arbitration before a single neutral labor arbitrator who also served as the mediator. Under final offer by package, each party must submit a final offer on each disputed item to the arbitrator. The arbitrator must select the complete final offer package submitted by one of the parties without compromise. The result is a clear winner and loser. The Bill would make 2 changes to this process:
 - (a) The Bill would create a 3-person arbitration panel. The Executive would select 1 member, the union would select 1 member, and the parties would jointly agree on a 3rd neutral member, who must be a retired judge. If the parties were unable to agree, they would be required to select a retired judge from a panel of 5 pre-selected by the Council by alternate strikes with the union going first.

- (b) The Bill would also amend the criteria for the arbitration panel to consider in making its decision. In 2010, the Council enacted Bill 57-10, which required the arbitrator to consider first the ability of the County to pay for a party's offer before looking at traditional comparisons. The County Attorney's Office suggested amendments to strengthen these criteria which were not enacted by the Council in 2010. Bill 24-16 would amend the criteria for the arbitration panel to consider consistent with the County Attorney's suggested language in 2010.

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Expedited Bill No. 24-16
Concerning: Collective Bargaining –
Impasse Procedures - Amendments
Revised: June 15, 2016 Draft No. 8
Introduced: June 21, 2016
Expires: December 21, 2017
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Council President Floreen
Co-Sponsor: Councilmember Rice

AN EXPEDITED ACT to:

- (1) increasing the time for collective bargaining;
- (2) modifying the scope of collective bargaining;
- (3) modifying the selection procedure and qualifications for labor relations administrator and permanent umpire;
- (4) require public disclosure of each party's initial bargaining position on major economic provisions;
- (5) separating the role of mediator and arbitrator in resolving a bargaining impasse;
- (6) establishing an arbitration panel to serve as arbitrator;
- (7) requiring the evidentiary hearing before the arbitration panel to be open to the public;
- (8) modifying the criteria for an arbitration panel to consider; and
- (9) generally amending the collective bargaining laws for County employees.

By amending

Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-77, 33-80, 33-81, 33-103, 33-107, 33-108, 33-149, 33-152, and 33-153

By adding

Montgomery County Code
Chapter 33, Personnel and Human Resources
Section 33-103A

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

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

1 **Sec. 1. Sections 33-77, 33-80, 33-81, 33-103, 33-107, 33-108, 33-149, 33-**
2 **152, and 33-153 are amended as follows:**

3 **33-77. Permanent umpire.**

4 (a) There is hereby created the position of permanent umpire, so as to provide
5 for the effective implementation and administration of sections 33-79 and
6 33-82 of this article concerning selection, certification and decertification
7 procedures and prohibited practices. The permanent umpire [shall] must
8 exercise the following powers and perform the following duties and
9 functions:

- 10 (1) Adopt regulations under method (1) of section 2A-15 of this Code,
11 for the implementation and administration of sections 33-79 and
12 33-82 as are consistent with this article;
- 13 (2) Request from the employer or any employee organization, and the
14 employer or such organization may at its discretion provide, such
15 relevant assistance, service and data as will enable the permanent
16 umpire to properly carry out his functions;
- 17 (3) Hold hearings and make inquiries, administer oaths and
18 affirmations, examine witnesses and documents, take testimony
19 and receive evidence, and compel by issuance of subpoenas the
20 attendance of witnesses and the production of relevant documents;
- 21 (4) Hold and conduct elections for certification or decertification
22 pursuant to the provisions of this article and issue said certification
23 or decertification;
- 24 (5) Investigate and attempt to resolve or settle, as provided in this
25 article, charges of engaging in prohibited practices; however, if the
26 employer and a certified representative have negotiated a valid
27 grievance procedure, the permanent umpire must defer to that

28 procedure for the resolution of disputes properly submissible to the
 29 procedure absent a showing that such deferral will result or has
 30 resulted in the application of principles repugnant to this article;
 31 furthermore, the permanent umpire [shall] must defer to state
 32 procedures in those matters which are governed by the law
 33 enforcement officers bill of rights, [article 27, sections 727 et seq.,
 34 Annotated Code of Maryland] MD Code, Public Safety, §§3-101
 35 to 3-113, as amended.*

36 (6) Obtain any necessary support services and make necessary
 37 expenditures in the performance of duties to the extent provided
 38 for these purposes in the annual budget of Montgomery County;
 39 and

40 (7) Exercise any other powers and perform any other duties and
 41 functions as may be specified in sections 33-79 and 33-82 of this
 42 article.

43 (b) The [permanent umpire must be appointed by the] County Executive
 44 must appoint the permanent umpire, subject to confirmation by the
 45 County Council, [serve] for a term of 5 years. [, and] The Executive may
 46 [be reappointed to another 5-year term] reappoint an incumbent umpire.
 47 [The permanent umpire must not be reappointed if, during the period
 48 between 60 days and 30 days before the umpire's term expires, the
 49 certified representative files a written objection to the umpire's
 50 reappointment with the County Executive.]

51 (c) If the permanent umpire dies, resigns, becomes disabled, or otherwise
 52 becomes unable or ineligible to continue to serve, the Executive must
 53 appoint a new permanent umpire, subject to confirmation by the Council,

54 to serve the remainder of the previous umpire's term. The umpire
55 appointed under this subsection may be reappointed under subsection (b).

56 (d) The permanent umpire must be a person with experience [as a neutral in
57 the field of labor relations] conducting adjudicatory hearings, such as a
58 retired judge, and must not be a person who, because of vocation,
59 employment, or affiliation, can be categorized as a representative of the
60 interests of the employer or any employee organization.

61 (e) The permanent umpire must be paid a daily fee as specified in a contract
62 with the County, and must be reimbursed for necessary expenses incurred
63 in performing the duties of umpire.

64 **33-80. Collective bargaining.**

65 * * *

66 (b) *Employer rights.* [This article and any agreement pursuant hereto shall
67 not impair the right and responsibility of the employer.] All elements of
68 the employment relationship that are not expressly identified as a
69 mandatory subject of bargaining in subsection (a) are employer rights that
70 are not subject to bargaining. Employer rights include the employer's
71 right to:

- 72 (1) [To] determine the overall budget and mission of the employer and
73 any agency of county government;
- 74 (2) [To] maintain and improve the efficiency and effectiveness of
75 operations;
- 76 (3) [To] determine the services to be rendered and the operations to be
77 performed;
- 78 (4) [To] determine the overall organizational structure, methods,
79 processes, means, job classifications or personnel by which
80 operations are to be conducted and the location of facilities;

- 81 (5) [To] direct or supervise employees;
- 82 (6) [To] hire, select and establish the standards governing promotion
83 of employees and to classify positions;
- 84 (7) [To] relieve employees from duties because of lack of work or
85 funds, or under conditions when the employer determines
86 continued work would be inefficient or nonproductive;
- 87 (8) [To make and enforce rules and regulations not inconsistent with
88 this law or a collective bargaining agreement;]
- 89 [(9)] [To] take actions to carry out the mission of government in
90 situations of emergency;
- 91 [(10)] (9) [To] transfer, assign and schedule employees.
- 92 (10) determine the size, grades, and composition of the work force.
- 93 (11) set the standards of productivity and technology.
- 94 (12) establish employee performance standards and evaluate
95 employees, except that evaluation procedures shall be a subject for
96 bargaining.
- 97 (13) make and implement systems for awarding outstanding service
98 increments, extraordinary performance awards, and other merit
99 awards.
- 100 (14) introduce new or improved technology, research, development,
101 and services.
- 102 (15) control and regulate the use of machinery, equipment, and other
103 property and facilities of the employer, subject to subsection (a)(6)
104 of this section.
- 105 (16) maintain internal security standards.
- 106 (17) create, alter, combine, contract out, or abolish any job
107 classification, department, operation, unit, or other division or

108 service, provided that no contracting of work which will displace
 109 employees may be undertaken by the employer unless ninety (90)
 110 days prior to signing the contract, or such other date of notice as
 111 agreed by parties, written notice has been given to the certified
 112 representative.

113 (18) suspend, discharge, or otherwise discipline employees for cause,
 114 subject to Charter section 404, any grievance procedure set forth
 115 in the collective bargaining agreement, and the Law Enforcement
 116 Officers Bill of Rights, MD Code, Public Safety, §§3-101 to 3-
 117 113, as amended.

118 (19) issue and enforce rules, policies, and regulations necessary to carry
 119 out these and all other managerial functions which are not
 120 inconsistent with this article, federal or state law, or the terms of
 121 the collective bargaining agreement.

122 * * *

123 (d) Time limits. Collective bargaining [shall] must commence no later than
 124 [November 1] October 15 preceding a fiscal year for which there is no
 125 contract between the employer and the certified representative and [shall]
 126 must be concluded by January 20. The employer must publish the
 127 certified representative's initial proposal on all terms and the employer's
 128 initial counter-proposal on all terms on an internet site accessible to the
 129 public within 10 days after the employer's initial counter-proposal is
 130 made. The resolution of an impasse in collective bargaining [shall] must
 131 be completed by February [1] 15. These time limits may be waived only
 132 by prior written consent of the parties.

133 * * *

134 **33-81. Impasse procedure.**

- 135 (a) Before September 10 of any year in which the employer and a certified
136 representative bargain collectively, they [shall] must choose [an impasse
137 neutral] a mediator either by agreement or through the processes of the
138 American Arbitration Association. The [impasse neutral shall] mediator
139 must be required to be available during the period from January 20 to
140 February [1] 15. Fees, costs and expenses of the [impasse neutral shall]
141 mediator must be shared equally by the employer and the certified
142 representative.
- 143 (b) (1) During the course of collective bargaining, either party may
144 declare an impasse and request the services of the [impasse
145 neutral] mediator. If the parties have not reached agreement by
146 [January 20] February 1, an impasse exists.
- 147 (2) Whenever an impasse has been reached, the dispute [shall] must
148 be submitted to the [impasse neutral] mediator. The [impasse
149 neutral shall] mediator must attempt mediation by bringing the
150 parties together voluntarily under such favorable auspices as will
151 tend to effectuate the settlement of the dispute.
- 152 (3) If the [impasse neutral] mediator, in the [impasse neutral's]
153 mediator's sole discretion, finds that the parties are at a bona fide
154 impasse, the [impasse neutral] mediator must certify the impasse
155 for arbitration before an arbitration panel selected pursuant to
156 Section 33-103A. The arbitration panel must require each party to
157 submit a [final offer which must consist either of a complete draft
158 of a proposed collective bargaining agreement or a] complete
159 package proposal, [as the impasse [neutral chooses] including a
160 final offer on each item that remains in dispute. [If only complete
161 package proposals are required, the] The [impasse neutral]

162 arbitration panel must require the parties to submit jointly a
 163 memorandum of all items previously agreed upon.

164 (4) The [impasse neutral] arbitration panel may, in the [impasse
 165 neutral's] arbitration panel's discretion, require the parties to
 166 submit evidence or make oral or written argument in support of
 167 their proposals. The [impasse neutral] arbitration panel may hold
 168 a hearing for this purpose at a time, date and place selected by the
 169 [impasse neutral] arbitration panel. [Said] The hearing must [not]
 170 be open to the public.

171 (5) On or before February [1] 15, the [impasse neutral] arbitration
 172 panel must select, as a whole, the more reasonable, in the [impasse
 173 neutral's] arbitration panel's judgment, of the final offers
 174 submitted by the parties.

175 (A) The [impasse neutral] arbitration panel must first [evaluate
 176 and give the highest priority to] determine the ability of the
 177 County to [pay for additional] afford any short-term and
 178 long-term expenditures [by considering] required by a final
 179 offer:

180 (i) [the limits on the County's ability to raise taxes under
 181 State law and the County Charter] assuming no
 182 increase in any existing tax rate or the adoption of any
 183 new tax;

184 (ii) [the added burden on County taxpayers, if any,
 185 resulting from increases in revenues needed to fund a
 186 final offer] assuming no increase in revenue from an
 187 ad valorem tax on real property above the limit in
 188 County Charter Section 305; and

189 (iii) considering the County's ability to continue to
 190 provide the current [standard] level of all public
 191 services.

192 (B) [After evaluating the ability of the County to pay] If the
 193 arbitration panel finds under subparagraph (A) that the
 194 County can afford both final offers, the [impasse neutral
 195 may only] arbitration panel must consider:

196 (i) the interest and welfare of County taxpayers and
 197 service recipients;

198 (ii) past collective bargaining contracts between the
 199 parties, including the bargaining history that led to
 200 each contract;

201 (iii) a comparison of wages, hours, benefits, and
 202 conditions of employment of similar employees of
 203 other public employers in the Washington
 204 Metropolitan Area and in Maryland;

205 (iv) a comparison of wages, hours, benefits, and
 206 conditions of employment of other Montgomery
 207 County employees; and

208 (v) wages, benefits, hours and other working conditions
 209 of similar employees of private employers in
 210 Montgomery County

211 (6) The [impasse neutral] arbitration panel must:

212 (A) not compromise or alter the final offer that [he or she] the
 213 panel selects;

214 (B) select an offer based on the contents of that offer;

- 215 (C) not consider or receive any evidence or argument
216 concerning the history of collective bargaining in this
217 immediate dispute, including offers of settlement not
218 contained in the offers submitted to the [impasse neutral]
219 arbitration panel; and
- 220 (D) consider all previously agreed on items integrated with the
221 specific disputed items to determine the [single] most
222 reasonable offer.
- 223 (7) The offer selected by the [impasse neutral] arbitration panel,
224 integrated with the previously agreed upon items, [shall] must be
225 deemed to represent the final agreement between the employer and
226 the certified representative, without the necessity of ratification by
227 the parties, and [shall] must have the force and effect of a contract
228 voluntarily entered into and ratified as set forth in subsection 33-
229 80(g) above. The parties [shall] must execute such agreement.
- 230 (c) An impasse over a reopener matter must be resolved under the procedures
231 in this subsection. Any other impasse over a matter subject to collective
232 bargaining must be resolved under the impasse procedure in subsections
233 (a) and (b).
- 234 (1) If the parties agree in a collective bargaining agreement to bargain
235 over an identified issue on or before a specified date, the parties
236 must bargain under those terms. Each identified issue must be
237 designated as a “reopener matter.”
- 238 (2) When the parties initiate collective bargaining under paragraph (1),
239 the parties must choose, by agreement or through the processes of
240 the American Arbitration Association, [an impasse neutral] a

- 241 mediator who agrees to be available for impasse resolution within
242 30 days.
- 243 (3) If, after bargaining in good faith, the parties are unable to reach
244 agreement on a reopener matter by the deadline specified in the
245 collective bargaining agreement, either party may declare an
246 impasse.
- 247 (4) If an impasse is declared under paragraph (3), the dispute must be
248 submitted to [the] an [impasse neutral] arbitration panel selected
249 pursuant to Section 33-103A no later than 10 days after impasse is
250 declared.
- 251 (5) The [impasse neutral] arbitration panel must resolve the dispute
252 under the impasse procedure in subsection (b), except that:
- 253 (A) the dates in that subsection do not apply;
- 254 (B) each party must submit to the [impasse neutral] arbitration
255 panel a final offer on only the reopener matter; and
- 256 (C) the [impasse neutral] arbitration panel must select the most
257 reasonable of the parties' final offers no later than 10 days
258 after the [impasse neutral] arbitration panel receives the
259 final offers.
- 260 (6) This subsection applies only if the parties in their collective
261 bargaining agreement have designated:
- 262 (A) the specific reopener matter to be bargained;
- 263 (B) the date by which bargaining on the reopener matter must
264 begin; and
- 265 (C) the deadline by which bargaining on the reopener matter
266 must be completed and after which the impasse procedure
267 must be implemented.

268 **33-103. Labor relations administrator.**

269 * * *

270 (b) (1) The Administrator must be a person with experience [as a neutral
271 in the field of labor relations] conducting adjudicatory hearings,
272 such as a retired judge, and must not be a person who, because of
273 vocation, employment, or affiliation, can be categorized as a
274 representative of the interest of the employer or any employee
275 organization.

276 (2) The County Executive must appoint, subject to confirmation by
277 the County Council, the Administrator for a term of 5 years [from
278 a list of 5 nominees agreed upon by any certified representative(s)
279 and the Chief Administrative Officer]. The [list] Executive may
280 [include] reappoint the incumbent Administrator. [If the Council
281 does not confirm the appointment, the new appointment must be
282 from a new agreed list of 5 nominees. If no certified representative
283 has been selected, the Administrator must be appointed for a 4-
284 year term by the Executive, subject to Council confirmation.]

285 * * *

286 **33-107. Collective bargaining.**

287 * * *

288 (c) *Employer rights.* [This article and any agreement made under it shall not
289 impair the right and responsibility of the employer to perform] All
290 elements of the employment relationship that are not expressly identified
291 as a mandatory subject of bargaining in subsections (a) or (b) are
292 employer rights that are not subject to bargaining. Employer rights
293 include the following:

- 294 (1) Determine the overall budget and mission of the employer and any
295 agency of county government.
- 296 (2) Maintain and improve the efficiency and effectiveness of
297 operations.
- 298 (3) Determine the services to be rendered and the operations to be
299 performed.
- 300 (4) Determine the overall organizational structure, methods,
301 processes, means, job classifications, and personnel by which
302 operations are to be conducted and the location of facilities.
- 303 (5) Direct and supervise employees.
- 304 (6) Hire, select, and establish the standards governing promotion of
305 employees, and classify positions.
- 306 (7) Relieve employees from duties because of lack of work or funds,
307 or under conditions when the employer determines continued work
308 would be inefficient or nonproductive.
- 309 (8) Take actions to carry out the mission of government in situations
310 of emergency.
- 311 (9) Transfer, assign, and schedule employees.
- 312 (10) Determine the size, grades, and composition of the work force.
- 313 (11) Set the standards of productivity and technology.
- 314 (12) Establish employee performance standards and evaluate
315 employees, except that evaluation procedures shall be a subject for
316 bargaining.
- 317 (13) Make and implement systems for awarding outstanding service
318 increments, extraordinary performance awards, and other merit
319 awards.

- 320 (14) Introduce new or improved technology, research, development,
321 and services.
- 322 (15) Control and regulate the use of machinery, equipment, and other
323 property and facilities of the employer, subject to subsection (a)(6)
324 of this section.
- 325 (16) Maintain internal security standards.
- 326 (17) Create, alter, combine, contract out, or abolish any job
327 classification, department, operation, unit, or other division or
328 service, provided that no contracting of work which will displace
329 employees may be undertaken by the employer unless ninety (90)
330 days prior to signing the contract, or such other date of notice as
331 agreed by parties, written notice has been given to the certified
332 representative.
- 333 (18) Suspend, discharge, or otherwise discipline employees for cause,
334 except that, subject to Charter section 404, any such action may be
335 subject to the grievance procedure set forth in the collective
336 bargaining agreement.
- 337 (19) Issue and enforce rules, policies, and regulations necessary to carry
338 out these and all other managerial functions which are not
339 inconsistent with this article, federal or state law, or the terms of
340 the collective bargaining agreement.

341 * * *

342 **33-108. Bargaining, impasse, and legislative procedures.**

- 343 (a) Collective bargaining must begin no later than [November 1] October 15
344 before the beginning of a fiscal year for which there is no agreement
345 between the employer and the certified representative, and must be
346 finished on or before February [1] 15. The employer must publish the

347 certified representative's initial proposal on all terms and the employer's
348 initial counter-proposal on all terms on an internet site accessible to the
349 public within 10 days after the employer's initial counter-proposal is
350 made.

351 (b) Any provision for automatic renewal or extension of a collective
352 bargaining agreement is void. An agreement is not valid if it extends for
353 less than one (1) year or for more than three (3) years. All agreements
354 take effect July 1 and end June 30.

355 (c) A collective bargaining agreement takes effect only after ratification by
356 the employer and the certified representative. The certified representative
357 may adopt its own ratification procedures.

358 (d) Before September 10 of any year in which the employer and the certified
359 representative bargain collectively, the Labor Relations Administrator
360 must appoint a [mediator/arbitrator] mediator, who may be a person
361 recommended by both parties. The [mediator/arbitrator] mediator must
362 be available from January 2 to June 30. Fees and expenses of the
363 [mediator/arbitrator] mediator must be shared equally by the employer
364 and the certified representative.

365 (e) (1) During the course of collective bargaining, either party may
366 declare an impasse and request the services of the
367 [mediator/arbitrator] mediator, or the parties may jointly request
368 those services before an impasse is declared. If the parties do not
369 reach an agreement by February 1, an impasse exists. Any issue
370 regarding the negotiability of any bargaining proposal must be
371 referred to the Labor Relations Administrator for an expedited
372 determination.

- 373 (2) Any dispute, except a dispute involving the negotiability of a
374 bargaining proposal, must be submitted to the [mediator/arbitrator]
375 mediator whenever an impasse has been reached, or as provided in
376 subsection (e)(1). The [mediator/arbitrator] mediator must engage
377 in mediation by bringing the parties together voluntarily under
378 such favorable circumstances as will encourage settlement of the
379 dispute.
- 380 (3) If the [mediator/arbitrator] mediator finds, in the
381 [mediator/arbitrator's] mediator's sole discretion, that the parties
382 are at a bona fide impasse, or as of February 1 when an impasse is
383 automatically reached, whichever occurs earlier, the dispute must
384 be submitted to binding arbitration before an arbitration panel
385 selected under Section 33-103A.
- 386 (f) (1) If binding arbitration is invoked, the [mediator/arbitrator]
387 arbitration panel must require each party to submit [a final offer,
388 [which must consist either of a complete draft of a proposed
389 collective bargaining agreement or] a complete package proposal,
390 [as the mediator/arbitrator directs] including a final offer on each
391 item that remains in dispute. [If only complete package proposals
392 are required, the mediator/arbitrator] The arbitration panel must
393 require the parties to submit jointly a memorandum of all items
394 previously agreed on.
- 395 (2) The [mediator/arbitrator] arbitration panel may require the parties
396 to submit oral or written evidence and arguments in support of their
397 proposals. The [mediator/arbitrator] arbitration panel may hold a
398 hearing for this purpose at a time, date, and place selected by the

399 [mediator/arbitrator] arbitration panel. This hearing must [not] be
400 open to the public.

401 (3) On or before February 15, the [mediator/arbitrator] arbitration
402 panel must select, as a whole, the more reasonable of the final
403 offers submitted by the parties. The [mediator/arbitrator]
404 arbitration panel must not compromise or alter a final offer. The
405 [mediator/arbitrator] arbitration panel must not consider or receive
406 any argument or evidence related to the history of collective
407 bargaining in the immediate dispute, including any previous
408 settlement offer not contained in the final offers. However, the
409 [mediator/arbitrator] arbitration panel must consider all previously
410 agreed-on items, integrated with the disputed items, to decide
411 which offer is the most reasonable.

412 (4) In making a determination under this subsection, the
413 [mediator/arbitrator] arbitration panel must first [evaluate and give
414 the highest priority to] determine the ability of the County to [pay
415 for additional] afford any short-term and long-term expenditures
416 [by considering]:

417 (A) [the limits on the County's ability to raise taxes under State
418 law and the County Charter] assuming no increase in any
419 existing tax rate or the adoption of any new tax;

420 (B) [the added burden on County taxpayers, if any, resulting
421 from increases in revenues needed to fund a final offer]
422 assuming no increase in revenue from an ad valorem tax on
423 real property above the limit in County Charter Section 305;
424 and

- 425 (C) considering the County's ability to continue to provide the
426 current [standard] level of all public services.
- 427 (5) [After evaluating the ability of the County to pay] If the arbitration
428 panel finds that under paragraph (4) the County can afford both
429 final offers, the [mediator/arbitrator may only] the arbitration panel
430 must consider:
- 431 (A) the interest and welfare of County taxpayers and service
432 recipients;
- 433 (B) past collective bargaining agreements between the parties,
434 including the past bargaining history that led to each
435 agreement;
- 436 (C) a comparison of wages, hours, benefits, and conditions of
437 employment of similar employees of other public
438 employers in the Washington Metropolitan Area and in
439 Maryland;
- 440 (D) a comparison of wages, hours, benefits, and conditions of
441 employment of other Montgomery County employees; and.
- 442 (E) wages, benefits, hours, and other working conditions of
443 similar employees of private employers in Montgomery
444 County.
- 445 (6) The offer selected by the [mediator/arbitrator] arbitration panel,
446 integrated with all previously agreed on items, is the final
447 agreement between the employer and the certified representative,
448 need not be ratified by any party, and has the effect of a contract
449 ratified by the parties under subsection (c). The parties must
450 execute the agreement, and any provision which requires action in

451 the County budget must be included in the budget which the
452 employer submits to the County Council.

453 * * *

454 **33-149. Labor Relations Administrator.**

455 * * *

456 (b) The Administrator must be a person with experience [as a neutral in labor
457 relations] conducting adjudicatory hearings, such as a retired judge, and
458 must not be a person who, because of vocation, employment, or
459 affiliation, can be categorized as a representative of the interest of the
460 employer or any employee organization.

461 (c) The County Executive must appoint the Administrator, subject to
462 confirmation by the County Council [, from a list of 5 nominees agreed
463 on by the certified representative and the Chief Administrative Officer].
464 [If there is no certified representative, the Executive must appoint an
465 Administrator, subject to confirmation by the Council. If the Council does
466 not confirm an appointment, the Executive must appoint another person
467 from a new agreed list of 5 nominees and submit that appointee to the
468 Council for confirmation.] The Administrator serves a term of 5 years.
469 [An incumbent Administrator is automatically reappointed for another 5-
470 year term, subject to Council confirmation, unless, during the period
471 between 60 and 30 days before the term expires, the certified
472 representative notifies the Chief Administrative Officer or the employer
473 notifies the certified representative that either objects to the
474 reappointment.] The Executive may reappoint the incumbent
475 Administrator.

476 * * *

477 **33-152. Collective bargaining.**

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(b) *Employer rights.* [This Article and any collective bargaining agreement made under it must not impair the right and responsibility of the employer to] All elements of the employment relationship that are not expressly identified as a mandatory subject of bargaining in subsection (a) are employer rights that are not subject to bargaining. Employer rights include the right to:

- (1) determine the overall budget and mission of the employer and any agency of County government;
- (2) maintain and improve the efficiency and effectiveness of operations;
- (3) determine the services to be rendered and the operations to be performed;
- (4) determine the overall organizational structure, methods, processes, means, job classifications, and personnel by which operations are conducted, and the location of facilities;
- (5) direct and supervise employees;
- (6) hire, select, and establish the standards governing promotion of employees, and classify positions;
- (7) relieve employees from duties because of lack of work or funds, or when the employer determines continued work would be inefficient or nonproductive;
- (8) take actions to carry out the mission of government in emergency situations;
- (9) transfer, assign, and schedule employees;
- (10) determine the size, grades, and composition of the work force;
- (11) set standards of productivity and technology;

- 505 (12) establish employee performance standards and evaluate
 506 employees, but evaluation procedures are subject to bargaining;
- 507 (13) make and implement systems for awarding outstanding service
 508 increments, extraordinary performance awards, and other merit
 509 awards;
- 510 (14) introduce new or improved technology, research, development,
 511 and services;
- 512 (15) control and regulate the use of machinery, equipment, and other
 513 property and facilities of the employer, subject to subsection (a)(6);
- 514 (16) maintain internal security standards;
- 515 (17) create, alter, combine, contract out, or abolish any job
 516 classification, department, operation, unit, or other division or
 517 service, but the employer must not contract work which will
 518 displace employees unless it gives written notice to the certified
 519 representative 90 days before signing the contract or other notice
 520 agreed by the parties;
- 521 (18) suspend, discharge, or otherwise discipline employees for cause,
 522 except that, subject to Charter Section 404, any such action may
 523 be subject to a grievance procedure included in a collective
 524 bargaining agreement; and
- 525 (19) issue and enforce rules, policies, and regulations necessary to carry
 526 out these and all other managerial functions which are not
 527 inconsistent with this Article, federal or State law, or the terms of
 528 a collective bargaining agreement.

529 * * *

530 **33-153. Bargaining, impasse, and legislative procedures.**

- 531 (a) Collective bargaining must begin no later than the [~~November 1~~] October
532 15 before the beginning of a fiscal year for which there is no agreement
533 between the employer and the certified representative, and must be
534 completed on or before [~~January~~] February 15], including the [~~The~~]
535 resolution of a bargaining impasse [~~must be completed by February 1~~].
536 These time limits may be waived or extended by written agreement of the
537 parties. The employer must publish the certified representative's initial
538 proposal on all terms and the employer's initial counter-proposal on all
539 terms on an internet site accessible to the public within 10 days after the
540 employer's initial counter-proposal is made.
- 541 (b) Any provision for automatic renewal or extension of a collective
542 bargaining agreement is void. An agreement is void if it extends for less
543 than 1 year or more than 3 years. Each collective bargaining agreement
544 must take effect July 1 and end June 30.
- 545 (c) A collective bargaining agreement takes effect only after ratification by
546 the employer and the certified representative. The certified representative
547 may adopt its own ratification procedures.
- 548 (d) Before September 10 of any year in which the employer and the certified
549 representative bargain collectively, they must choose [~~an impasse~~
550 ~~neutral~~] a mediator, either by agreement or through the processes of the
551 American Arbitration Association. The [~~impasse neutral~~] mediator must
552 be available from January 15 to February [~~1~~] 15. The [~~impasse neutral's~~]
553 mediator's fees and expenses must be shared equally by the employer and
554 the certified representative.
- 555 (e) During the course of collective bargaining, either party may declare an
556 impasse and request the services of the [~~impasse neutral~~] mediator, or the
557 parties may jointly request those services before declaring an impasse. If

558 the parties have not agreed on a collective bargaining agreement by
 559 [January 15] February 1, an impasse exists by operation of law.

560 (f) When an impasse is reached, the parties must submit the dispute to the
 561 [impasse neutral] mediator. The [impasse neutral] mediator must attempt
 562 mediation by bringing the parties together voluntarily under conditions
 563 that will tend to bring about a settlement of the dispute.

564 (g) If the [impasse neutral] mediator, in the [impasse neutral's] mediator's
 565 sole discretion, finds that the parties are at a bona fide impasse, the
 566 [impasse neutral] mediator must refer the dispute to an arbitration panel
 567 selected under Section 33-103A. The arbitration panel must require the
 568 parties to jointly submit all items previously agreed on, and each party to
 569 submit a final offer [consisting of proposals] on each item not agreed
 570 upon. Neither party may change any proposal after it is submitted to the
 571 [impasse neutral] arbitration panel as a final offer, except to withdraw a
 572 proposal on which the parties have agreed.

573 (h) The [impasse neutral] arbitration panel may require the parties to submit
 574 evidence or present oral or written arguments in support of their
 575 proposals. The [impasse neutral] arbitration panel may hold a hearing at
 576 a time, date, and place selected by the [impasse neutral] arbitration panel.
 577 The hearing must [not] be open to the public.

578 (i) On or before February [1] 15, unless that date is extended by written
 579 agreement of the parties, the [impasse neutral] arbitration panel must
 580 select, without compromising, the final offer that, as a whole, the
 581 [impasse neutral] arbitration panel judges to be the more reasonable.

582 (1) In determining which final offer is the more reasonable, the
 583 [impasse neutral] arbitration panel must first [evaluate and give the
 584 highest priority to] determine the ability of the County to [pay for

585 additional] afford any short-term and long-term expenditures [by
 586 considering] required by the final offers:

587 (A) [the limits on the County's ability to raise taxes under State
 588 law and the County Charter] assuming no increase in any
 589 existing tax rate or the adoption of any new tax;

590 (B) [the added burden on County taxpayers, if any, resulting
 591 from increases in revenues needed to fund a final offer]
 592 assuming no increase in revenue from an ad valorem tax on
 593 real property above the limit in County Charter Section 305;
 594 and

595 (C) considering the County's ability to continue to provide the
 596 current [standard] level of all public services.

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

601 (A) the interest and welfare of County taxpayers and service
 602 recipients;

603 (B) past collective bargaining agreements between the parties,
 604 including the past bargaining history that led to each
 605 agreement;

606 (C) wages, hours, benefits and conditions of employment of
 607 similar employees of other public employers in the
 608 Washington Metropolitan Area and in Maryland;

609 (D) wages, hours, benefits, and conditions of employment of
 610 other Montgomery County employees; and

611 (E) wages, benefits, hours, and other working conditions of
 612 similar employees of private employers in Montgomery
 613 County.

614 (j) The [impasse neutral] arbitration panel must base the selection of the
 615 most reasonable offer on the contents of the offer and the integration of
 616 any previously agreed-on items with the disputed items. In making a
 617 decision, the [impasse neutral] arbitration panel must not consider or
 618 receive any evidence or argument concerning offers of settlement not
 619 contained in the offers submitted to the [impasse neutral] arbitration
 620 panel, or any other information concerning the collective bargaining
 621 leading to impasse. The [impasse neutral] arbitration panel must neither
 622 compromise nor alter the final offer that [he or she selects] they select.

623 (k) The final offer selected by the [impasse neutral] arbitration panel,
 624 integrated with any items previously agreed on, is the final agreement
 625 between the parties, need not be ratified by any party, and has the force
 626 and effect of an agreement voluntarily entered into and ratified under
 627 subsection (c). The parties must execute that agreement.

628 * * *

629 **Sec. 2. Section 33-103A is added as follows:**

630 **33-103A. Arbitration Panel.**

631 (a) Purpose. An arbitration panel may conduct a hearing and resolve an
 632 impasse in collective bargaining between a certified employee
 633 representative and the employer under Sections 33-81, 33-108, and 33-
 634 153.

635 (b) Panel. The Council must appoint 5 retired judges for a 5-year term to
 636 serve as an arbitration panel neutral member if the parties are unable to
 637 agree on a neutral member.

- 638 (c) Composition. An arbitration panel contains 3 members. One member
639 must be selected by the certified employee representative involved in the
640 impasse. One member must be selected by the employer. The employee
641 representative member and the employer representative member may
642 jointly select the neutral member. The neutral member must be a retired
643 judge. If they are unable to agree, the parties must select a retired judge
644 from a panel appointed by the Council under subsection (b) by alternate
645 strikes with the employee representative going first. The neutral member
646 must not be the mediator who attempted to mediate the impasse.
- 647 (d) Term. An arbitration panel selected under subsection (c) serves until the
648 Council takes final action on the collective bargaining agreement at
649 impasse.
- 650 (e) Procedure. The neutral member is the panel chair and must preside at
651 any hearing. A majority of the arbitration panel must vote for a decision
652 resolving an impasse.
- 653 (f) Compensation. The employer and the certified representative must pay
654 any fees and expenses for their own representative. Fees and expenses of
655 the neutral member must be shared equally by the employer and the
656 certified representative.

657 **Sec. 3. Expedited Effective Date.** The Council declares that this
658 legislation is necessary for the immediate protection of the public interest. This Act
659 takes effect on the date when it becomes law.

660

661 *Approved:*

662

Nancy Floreen , President, County Council

Date

LEGISLATIVE REQUEST REPORT

Expedited Bill 24-16

Collective Bargaining – Impasse Procedures - Amendments

DESCRIPTION:	Expedited Bill 24-16 would amend the collective bargaining laws to increase transparency, expand the time for bargaining, modify the employer rights, amend the qualifications of the Labor Relations Administrator and the selection process, and amend the process for mediation and arbitration of interest disputes.
PROBLEM:	The County collective bargaining laws have not resulted in sustainable negotiated agreements that are approved by the Council in recent years.
GOALS AND OBJECTIVES:	The goal of the Bill is to promote sustainable negotiated agreements that can be approved by the Council without resorting to arbitration.
COORDINATION:	Chief Administrative Officer, Director of Human Resources, County Attorney.
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Robert H. Drummer, Senior Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	Not applicable.
PENALTIES:	None.



MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

NANCY FLOREEN
COUNCIL PRESIDENT

MEMORANDUM

June 14, 2016

TO: Councilmembers

FROM: Nancy Floreen,  Council President

SUBJECT: Proposed Bill to amend the procedures for resolving an impasse in collective bargaining

Now that we have unanimously adopted the budget, it is a good time to review some of our collective bargaining laws. Although we have separate collective bargaining laws for police, fire, and general County employees, the procedures for resolving a collective bargaining impasse are almost identical in each law. I plan to introduce the attached Bill to make several important changes to the impasse procedures in each collective bargaining law. The Bill would make changes in the system in 6 important areas – changes that would make the system work better for employees, government operations, and taxpayers alike.

Transparency

The entire collective bargaining process is currently handled out of the public eye. Negotiations are private, and the evidentiary hearing before the arbitrator is held in private. As the County government moves to more transparency, I believe it is time to open up a collective bargaining process that results in decisions on wages and benefits that consume the overwhelming majority of our operating budget. The Bill would:

1. require public disclosure of each party's initial bargaining position on all provisions; and
2. require that any evidentiary hearing before the arbitration panel be open to the public.

Time for Negotiation

Although negotiations must end in time for the Council to review the final agreements before adopting the operating budget, we can provide additional time by requiring negotiations to begin before November 1. The Bill would give the union and the Executive an extra 2 weeks by requiring negotiations to begin on October 15.

Employer Rights

Each of the collective bargaining laws contains a list of employer rights that cannot be “impaired” by a collective bargaining agreement. The Police Labor Relations Act contains 10 employer rights. Both the law governing general County employees and the law governing fire employees have the same 19 employer rights. The Bill would make the list of employer rights for police employees consistent with the other 2 bargaining laws that were enacted more recently. In addition, the Labor Relations Administrators have minimized these employer rights over the years by narrowly interpreting the language in each law that prohibits bargaining from “impairing” these rights and consequently expanding the scope of collective bargaining. The Bill would also clarify that bargaining is limited to the subjects listed in the law as subject to bargaining and strengthens the application of employer rights.

Selection of Labor Relations Administrator

Each collective bargaining law requires the Executive to appoint a labor relations administrator or permanent umpire (LRA) for a 5-year term of office, subject to Council confirmation. Each LRA holds a quasi-judicial office in County government and is responsible for resolving disputes between the employer and the union by conducting adjudicatory hearings. The LRA resolves questions concerning a bargaining unit, representation elections, the scope of collective bargaining, and prohibited practice charges. The LRA serves the function performed by the National Labor Relations Board for the private sector. Each current law requires the LRA to be experienced as a neutral in the field of labor relations. In practice, the LRA is normally chosen from the universe of professional labor arbitrators who often work as grievance arbitrators in the field of labor relations. The Bill would require the LRA to be experienced in conducting adjudicatory hearings, such as a retired judge. Due in part to Maryland’s mandatory retirement policy for its judges, many retired judges continue to work as mediators and arbitrators. Many have a wealth of experience and excellent reputations for issuing well-reasoned decisions in many areas of the law. In addition, the Bill would repeal the right of a union to veto the re-appointment by the Executive of the LRA. The Executive and the Council are the elected representatives who are charged with appointing County officials.

Mediation

Each of the current collective bargaining laws requires one neutral person to serve as both the mediator and the arbitrator. This is known as med-arb. The advantage of med-arb is that the mediator-arbitrator is already familiar with the issues and the respective positions of the parties before the arbitration hearing begins. However, this procedure subverts the traditional role of the mediator by giving the mediator too much authority to impose his or her own will on the parties. The parties may be reluctant to speak freely in front of a mediator who will ultimately serve as the judge or arbitrator. The negotiators for each party are discouraged from revealing to the mediator-arbitrator the full extent of their authority. A traditional mediator has no power to impose a final decision on either party, and can therefore provide better feedback to each party in separate meetings and encourage a negotiated settlement rather than force one. The Bill would separate the role of mediator and arbitrator.

Arbitration

Under current law, the arbitration is held before one person who previously served as the mediator. Each party submits a final package that includes a final offer on each item still in dispute along with all of the items that have been previously agreed upon. The arbitrator is required to select either the Executive's final package or the union's final package. This is known as final offer by package arbitration. The system is designed to discourage each party from submitting a final offer on any item that is unreasonable in order to avoid losing the entire package. It results in a clear winner and loser in each arbitration and is designed to discourage the parties from going to arbitration. Although the Executive has reached negotiated agreements with each union without arbitration in the last several years, the Executive has explained his agreements, in part, by opining that an arbitration decision would result in a worse outcome. In fact, the union has won 16 of the 20 arbitration decisions under this system since 1988. Although there are many possible explanations for these results other than the "system," I believe it is time to try a different approach. The Bill would make 2 changes in this area.

3-Person Arbitration Panel

The Bill would create a 3-person arbitration panel that includes 1 member appointed by the Executive, 1 member appointed by the union, and a neutral 3rd member. The neutral 3rd member would be a retired judge. The management member and the union member would agree on the neutral member. If they were unable to agree, the person would be selected from a panel of retired judges selected by the Council. This would ensure that the perspectives of each party would be considered in the panel's deliberations.

The criteria for the arbitration panel to consider

In December 2010, the Council enacted Bill 57-10, which modified the criteria for the arbitrator to consider by requiring the arbitrator to consider first the ability of the County to afford a proposed economic provision. The Bill would better define the first factors for the arbitration panel to consider by adopting amendments to Bill 57-10 that were recommended by the County Attorney's Office in 2010, but not adopted by the Council. The Bill would require the arbitration panel to first consider affordability before applying the traditional factors with the following language:

The arbitration panel must first determine the ability of the County to afford any short-term and long-term expenditures required by a final offer:

- (i) assuming no increase in any existing tax rate or the adoption of any new tax;*
- (ii) 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 level of all public services.*

I would welcome your support for this Bill.