Statement of George B. Driesen on Behalf of the Fraternal Order of Police, Montgomery County Lodge 35 Before the Montgomery County Council, January 14, 1982

The voters' adoption of Section 510 of the Montgomery County Charter at the last election brings Montgomery County into line with most other forward looking governments that employ police officers in the United States by providing that terms and conditions of those officers' employment may be fixed through collective bargaining, rather than by administrative fiat. Like the law in most of those jurisdictions, the Charter now prohibits strikes or work stoppages by police officers but provides that unresolved disputes over the content of a collective bargaining agreement shall be settled by binding arbitration. That too, as I shall explain more fully later on, brings this County into line with most jurisdictions that have legislated about the matter around the country.

The bill before you presents, in our view, a good faith effort by the County Executive to propose an ordinance that, in many respects, would comply with the voters' mandate. The police of this County appreciate the opportunity which the County Executive afforded them to be heard with respect to the provisions that are included in that bill. We agree with many of them. But it is our position that the proposed ordinance falls short of compliance with the mandate of the voters and, if enacted without the changes we propose, could prove unworkable and generate extreme frustration instead of assuring the harmonious relationship that a well crafted public sector bargaining law is designed to secure.

As I said at the outset, the voters mandated "collective bargaining with binding arbitration." The ordinance before you does not provide for binding arbitration. Instead, it provides that in the event the County Council fails to appropriate funds or enact legislation required to implement an agreement, there will be a fact finding proceeding with recommendations for resolution of the still unresolved dispute. That is not binding arbitration. It is also not in accordance with the law elsewhere.

Many jurisdictions have now adopted laws providing for collective bargaining for public employees generally. Some of these statutes permit strikes as the final arbiter of collective bargaining impasses; others mandate arbitration as the final step. Other statutes prohibit strikes, do not require arbitration and leave the ultimate decision on contract law terms to the legislature. But in most of those jurisdictions, special statutes or provisions of generally applicable public sector bargaining laws do require binding arbitration of bargaining impasses involving the uniformed services - of course, including police. Among the jurisdictions which do not provide mandatory arbitration for other represented employees but do provide such arbitration for police, are Massachussetts, New York, Pennsylvania, New Jersey, Oregon, Washington, Wisconsin, Wyoming, Minnesota (assuming as we do that police are essential employees), and Alaska. We urge the County Council to follow that pattern -- as the voters have decreed.

There is nothing new in our proposal for mandatory arbitration to make sure that an agreement is always reached between the County

and the certified representative of the police. Students of collective bargaining are familiar with the practice of mandating arbitration as a substitute for the strike in labor relations statutes governing uniformed employees. It is widely recognized that there must be a fair and equitable method of resolving once and for all disagreements over the contents of a collective bargaining agreement when one of the bargaining parties represents the uniformed services. Otherwise, uniformed employees may strike, even though a strike is unlawful, because they have no other means of obtaining a settlement that is -- and is perceived to be -- fair. That, indeed, is the lesson of the PATCO tragedy, as the New York Times pointed out in a thoughtful piece shortly after PATCO employees walked out. And it is the explanation for the eleven year history of essentially strike-free labor relations in the postal service. That is the reason why in so many jurisdictions statutes authorizing police to bargain and providing for mandatory arbitration antedate laws authorizing collective bargaining for other public employees.

Let me not be misunderstood. The FOP is opposed to strikes by police officers. The Fraternal Order of Police has expressly forbidden strikes by its locals and that rule binds Lodge 35. But experience shows, that though very rare, such strikes have occurred despite the efforts of union leaders. And there is no assurance that the FOP will perpetually be the representative of County police officers. It makes good sense, therefore, to provide for mandatory arbitration in the event the parties are unable to agree upon a collective agreement. And make no mistake about it, the Council is a party to the collective bargaining process since it must decide whether to fund agreements reached through bargaining.

We have provided as an exhibit to this statement suggested language that would implement our insistence that the ordinance provide for binding arbitration. We believe that without that provision, or one like it, the proposed ordinance would not comply with the mandate of the voters. They have ordained that there be collective bargaining for police, that strikes be prohibited, and that "binding arbitration" be provided as a substitute for the strike as the final mechanism for resolving disputes over contract terms. The proposed ordinance ignores that requirement.

The next serious deficiency in the bill before you is the very narrow range of subjects that may be bargained about. What could be more frustrating to represented employees than a law which promised them collective bargaining on the one hand but then so narrowly restricts the scope of what may be negotiated that keeps the word of promise to the ear and breaks it to the hope. That is what this ordinance does.

By its terms, it prohibits bargaining about some of the very matters that led to the police officers' insistence that there be collective bargaining with the County. For example, schedules are not bargainable. The Department's insistence upon a five day instead of a four day week has been a serious bone of contention between the Police Department and police officers in the very recent past. It still is. The police do not insist that they have their own way; but a statute that does not even authorize them to bargain about a subject as important as scheduling carries with it the seeds of difficulty for the future. Similarly, the statute would prohibit bargaining about transfers. This, too, is a matter of very great

importance to the police. Where one works is obviously a term and condition of employment and the procedures that will be followed and the matters that will be considered when a transfer becomes necessary are matters that traditionally labor organizations negotiate about with employers. Under the proposed ordinance, such negotiations are not required. That borders on being fatuous.

The narrow scope of bargaining in this ordinance reflects an extended list of "management rights" which the employer need not bargain about. Statutes with such provisions in them are a frequent source of irritation. Often, the parties are reduced to bargaining about what they will bargain about and much litigation is provoked where, as here, the statute gives with one hand the right to bargain and then takes it away with the other by a broad, amorphous, series of rights given to management. That is the case here. For example, one of the matters that is not bargainable is "technology". No one knows what that term means. Does it mean, for example, that the police have no right to bargain with their employer about matters which vitally affect their safety, such as the weapons that they may use or the protections built into their patrol vehicles? Similarly, what is more important than the procedures and the factors that will be considered when an employee seeks promotion? Nevertheless, under this ordinance, those matters are not fit subjects for the bargaining table. Again, the restrictive approach taken in this statute is likely to produce frustration and litigation. And so is the kind of language that gives management the right to "maintain and improve the efficiency of operation." If management asserts that a particular proposal

would reduce the "efficiency of operations" is the proposal not bargainable and shall the parties argue about that rather than seek to achieve a compromise or suitable arrangement which preserves the interests of both sides?

No one denies the legitimacy of the objectives which are listed in the enumerated rights of management. But the purpose of collective bargaining is to provide a means of exchanging ideas that will accomodate management's objectives and employees' needs. That is what collective bargaining is all about. This statute virtually makes that exchange impossible because of the very narrow scope of bargaining that is left after all the management rights and other prohibitions in the ordinance are taken into consideration.

For that reason, we have provided an Exhibit II to this statement. It contains a revised definition of collective bargaining and what is to be a fit subject for it. That definition, in force in many states, is taken literally from the New York State statute which governs bargaining between municipalities there and police officers, as well as other employees. There is no reason why Montgomery County should adopt a more niggardly approach to the collective bargaining process or to its police officers than other jurisdictions. We urge the Council to substitute the language we have proposed for the narrow scope of bargaining provided in the statute.

The remaining concerns we have are narrow in scope but very important to us. Among those are a series of prohibited practices

we think do not belong in a labor relations ordinance. They go to things like sabotage, violent action to prevent people from entering a place of employment, taking possession of property of the employer and the like. All of these actions seem to us likely to be criminal violations. Yet they are made subject to the procedures of the ordinance, procedures that are totally unsuited to the adjudication of what obviously are crimes. Furthermore, we have never seen a list of such law violations in a labor relations statute. Since the ordinance is hardly adventurous when it comes to affording rights to employees, we see no excuse whatsoever for the laundry list of horribles that is contained in subsections 5 through 8 of sub-paragraph B of the prohibited practice sections of the ordinance. They should be deleted. No one knows what they mean and they obviously have no place in a labor relations statute.

The ordinance, which we have indicated is hardly venturesome in affording rights to police, went further in a prior draft than any other law we have seen by attempting to regulate the contract ratification procedures that the certified organization must follow. We regarded this as an improper intrusion in the internal affairs of the FOP or any successor certified representative. Every labor organization has a constitution and by-laws which govern these matters. Under State law, they are subject to the control of the courts. We saw no reason why they should be the subject of litigation between the County Executive and a labor organization. Indeed, given the informality of unfair labor practice proceedings and the ease of access that any person may have to them, we were concerned that the FOP's enemies could have used this procedure as a way of preventing a contract from becoming final. We are pleased that the draft before you no longer contains the offending provision and now provides only that there be ratification. The FOP's internal rules require membership ratification, so that should ordinarily pose no problem.

Exhibit III to this statement contains a suggested change in language with respect to decertification proceedings which we understand is entirely in accord with what the County Executive sought to accomplish but which we think requires a technical change in the ordinance as proposed.

Exhibit III also contains a proposed deletion of one of the provisions of the ordinance dealing with strikes and lockouts. It prohibits the County Executive from compensating any employee for a period when he is directly or indirectly engaged in a strike.

As we have stated, we oppose strikes and we ourselves submitted the Charter Amendment outlawing them. We believe that police strikes will not occur in this County. Of course, we have no objection to a County Executive disciplining an employee who strikes pursuant to existing law. And we agree that employees who break the law by striking should ordinarily not be compensated for periods when they were on strike.

But a strike by police officers can readily create a serious emergency. We think it is unwise and imprudent to tie the hands of a future County Executive by absolutely prohibiting him from taking steps he deems essential. There may be circumstances that we cannot now foresee when a County Executive may conclude that some police who were "indirectly" (whatever that means) engaged in a strike must out of necessity or in fairness should receive some

compensation. For that decision the County Executive would be answerable to the voters, as he should be. But he is equally answerable if he fails adequately to deal with an emergency of such gravity. For this Council to decide in advance what a future County Executive should do when faced with circumstances it cannot now foresee seems to us the height of folly.

Again, we do not wish to be misunderstood. We support the view that police strikes should be illegal. And we have no problem with vigorous enforcement of that prohibition in the highly unlikely event it is violated. But the manner and means that a responsible County official chooses to discharge his duty under the law and to the citizens must, in our view, be left to him. The provision should be deleted.

To summarize our position, we believe that the bill before you does not comply with the voters' mandate. It does not provide for binding arbitration. Its narrow scope of bargaining makes a mockery of the process of collective bargaining. In some respects, we believe that the ordinance goes too far -- for example, in enumerating a series of criminal acts which are to be subject to the prohibited practices provisions of the ordinance, provisions which I might add are unprecedented in my experience.

Despite these objections, we think that the bill represents a salutary step forward. With the changes we have proposed, we think the ordinance will provide a useful mechanism for resolving problems

and establishing wages and working conditions that are fair both to the police and the citizens they serve. With the changes we have proposed, adoption of the ordaince, we are confident, will lead to an era of mutual harmony between the police and the County. So amended, the bill should be enacted.

Thank you.

EXHIBIT I

Section 33-81 COUNCIL ACTION AND ARBITRATION

A. On or before March 31, 1981, the County Council shall by a majority of four votes indicate and notify the parties of its intent to appropriate funds or otherwise enact legislation to implement an agreement referred to in sub-section VII-H hereof, or its intent not to do so. The Council's failure to act with respect to an agreement as aforesaid shall constitute a commitment to appropriate the funds and enact legislation required to implement the agreement.

B. If the Council indicates its intent not to appropriate funds or not to enact legislation to implement an agreement in whole or in part, it shall forthwith state its reasons and designate an arbitrator to serve on the arbitration panel provided for below. The certified representative shall also select an arbitrator to serve on that panel.

C. The two arbitrators appointed as provided in sub-section B hereof shall immediately appoint a third impartial member who shall serve as chairman of the arbitration panel. If the first two arbitrators are unable to agree upon a third arbitrator, either arbitrator may request

the Federal Mediation and Conciliation Service, or, in the event its services are not available, the American Arbitration Association, to provide a list of five persons willing and able to arbitrate the dispute. Upon receipt of the list, the two arbitrators designated by the parties shall select an arbitrator by alternately striking names from the list. The arbitrator so selected shall serve as chairman of the panel, or, if the parties agree, as sole arbitrator.

D. The single arbitrator or the arbitration panel acting through its chairman, shall conduct a hearing within 10 days after the date of appointment of its chairman, at a place within Montgomery County, where feasible. The chairman shall give at least seven days notice in writing to each of the other arbitrators. The chairman or single arbitrator shall give like notice to the County Council and to the employee organization of the time and place of such hearing.
The single arbitrator or chairman shall preside over the hearing and shall take testimony. The proceedings shall be informal. Any oral or documentary evidence and other data deemed relevant by the arbitration panel or single arbitrator may be received into evidence. The arbitrators shall have the power to

administer oaths and to require by subpoena the attendance and testimony of witnesses, the production of books, records, and other evidence relative to or pertinent to the issues presented to them for determination. If any person refuses to obey a subpoena, or refuses to be sworn or to testify, or if any witness, party, or attorney is guilty of any contempt while in attendance at any hearing, the arbitration panel or single arbitrator may, or the County attorney, if requested, shall invoke the aid of the District Court which shall issue an appropriate order.

A record of the proceedings shall be kept, and the chairman or single arbitrator shall arrange for the necessary recording service. Transcripts may be ordered at the expense of the party ordering them, but the transcripts shall not be necessary for an award by the panel or single arbitrator. The hearing may be continued at the discretion of the panel or single arbitrator and shall be concluded not later than April 2oth. At the conclusion of the hearing, each party may submit a written statement containing its last and best offer for each of the issues in dispute and of its contentions to the panel or single arbitrator, who shall take said statements under advisement. Within 10 days after the conclusion of the hearing, a majority of the panel, or the single arbitrator, shall give

written notice of his or its award resolving all issues in dispute. The panel or single arbitrator may and, upon request of either party, shall, provide a written statement of reasons for his or its award. In making an award, the panel or single arbitrator shall afford weight to the matters set out in Article VIII, sub-section 5 hereof, to stipulations of the parties, and to such other factors as are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties in the public service and private employment. The award shall be final and binding upon the Council, the Employer, and the employee organization and, if supported by evidence, shall be enforcible against either party in accordance with law. The fees of the impartial arbitrator and all costs except the fees and expenses of the arbitrator designated by the employee organization shall be borne by the County.

[Re-number succeeding Sections.]

EXHIBIT II

Section 33-80 COLLECTIVE BARGAINING

(a) Upon certification of an employee organization, as provided in Section 33-79, the employer and the said certified representative shall have the duty, through their designees, to bargain collectively.

(b) For the purpose of this article, to bargain collectively is the performance of the mutual obligation of the employer and a certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

[Re-designate sub-sections "(e)" and "(f)" as sub-sections "(c)" and "(d)", and omit present sub-sections (b)-(g) inclusive. Re-designate "H." as sub-section "(e)" and include all down to the sentence beginning "On or before April 25," etc., except for the word "ratified" on line 23. For substitution of the omitted portion of sub-section (h), see our Exhibit I].

EXHIBIT III

Amend Section 33-79(b) by substituting for the first paragraph thereof the following:

B. If the Permanent Umpire determines that a petition is properly supported and timely filed, and in the case of a decertification petition filed pursuant to sub-section A. 3. hereof, that the employer has reasonable cause to believe that the certified representative is not or is no longer the choice of the majority of the employees of the unit, the Permanent Umpire shall cause an election of all eligible employees to be held within a reasonable time, but no later than October 20 of that year, to determine if and by whom the employees wish to be represented, as follows:

Amend Section 33-84 by deleting sub-section (b) thereof.