MFP ITEM 1
November 29, 1999
Worksession

MEMORANDUM

TO: Management and Fiscal Policy Committee

FROM: Michael Faden, Senior Legislative Attorney

SUBJECT: **Worksession**: Bill 26-99, Collective Bargaining - Amendments

Bill 26-99, Collective Bargaining – Amendments, sponsored by Councilmembers Subin and Silverman, was introduced September 14. Bill 26-99 requires arbitration of collective bargaining agreements for County government employees. The form of binding arbitration proposed is last best offer for the entire economic package, and last best offer item-by-item for non-economic items. The arbitrator would decide which issues are economic or non-economic. Bill 26-99 also revises the process for certifying employee organizations and the timetable for certain collective bargaining actions.

A public hearing was held on November 16. The only speakers were James Torgesen of the Office of Human Resources, representing the County Executive, and representatives of the Municipal & County Government Employees Organization (MCGEO), the bargaining agent for County employees. Both supported the bill but suggested different amendments. See testimony, ©15-30.

Attorneys for MCGEO requested corrective amendments to clarify the Council's role in reviewing collective bargaining agreements. See MCGEO letter, ©31-39. They also responded to amendments proposed on behalf of the County Executive (see Executive testimony, ©22-27).

Summary

Bill 26-99 would make the folowing changes in the current County employee collective bargaining law:

1) It allows the Labor Relations Administrator to resolve issues regarding the negotiability of any collective bargaining proposal. See ©2, lines 12-13. This is consistent with current practice.

2) It maintains continuity in a collective bargaining agreement when a different union takes over representation. See ©3, lines 22-26. In staff's view, this is a sensible clarification.
3) It allows a combined decertification/certification election if proper petitions have been filed. See ©2, lines 28-39. This appears to be reasonable, but may already be allowed under current law.
4) It moves the collective bargaining agreement schedule back 1 month, so that the report from the fact finder (under the bill, the arbitrator) would be due on March 1 instead of February 1.
5) It converts the current mediation/fact finding collective bargaining process for the County employees bargaining units to a binding arbitration system.

In 1998, Council staff sought the County Attorney's opinion on an initial **legal issue** raised then by Bill 45-97, the predecessor to Bill 26-99. Binding arbitration was mandated for employees in the public safety (police and fire) bargaining units by express provisions in the County Charter (§§510, 510A). In contrast, Charter §511 authorizes the Council to provide "arbitration or other impasse resolution procedures" for the remaining bargaining units but does not expressly authorize binding arbitration. Bill 26-99 would grant binding arbitration rights to employees, and impose similar legal obligations on the County Executive, by legislation. The legal issue this posed is whether, without expressly amending the Charter to permit it, delegating the County Executive's decision-making authority regarding a collective bargaining agreement to a private arbitrator would amount to an unlawful delegation of the executive power assigned to the Executive by §201 of the Charter. The County Attorney concluded that this issue is not squarely posed because, in drafting Charter §511 in 1984, the Council intended the term "arbitration" to include binding arbitration and expressly rejected an amendment to allow only "non-binding" arbitration. (See County Attorney memo, ©40-51.)

Major Issues

Binding arbitration for non-public safety employees? Until now, binding arbitration has been legislatively adopted in Montgomery County only when the Charter requires it, and only for public safety (police, fire) employees. (Unlike some other jurisdictions, the distinction between employee groups is not based on the presence or absence of a right to strike; here the Charter expressly prohibits strikes by any employee group.) Binding arbitration transfers authority from the County Executive to a third-party arbitrator; it directly removes the Executive's discretion to accept or not accept a collective bargaining agreement, and indirectly increases the pressure on the Council to fund the arbitrator's award. Experts argue about whether binding arbitration increases or reduces the willingness of the parties to reach agreement on their own, and whether it increases an employer's costs over time.

A major difference between the public safety employee groups and the broader County employee bargaining units is the greater uniformity of issues in the public safety bargaining units. Each unit has fewer employees, they are in a single occupation, and they work for a single department with its own unique set of demands and work requirements. By contrast, MCGEO represents a larger and more heterogeneous group of employees, who are subject to widely

varied demands, and who work in more than two dozen different departments and offices and many dissimilar work settings and working conditions. (The larger size of the MCGEO units also means, of course, that the fiscal impact of an arbitrator's award can be much greater than it is for the public safety units.) In addition, without diminishing the risks and stresses faced by non-public safety employees, they rarely if ever rise to the life-threatening levels that public safety employees may face at any time.

Of other Maryland jurisdictions, only Prince George's County has adopted a form of binding arbitration for non-public safety employees; however, it can only be used if the employer and union both agree. Prince George's County also has binding arbitration for its public safety employees, broadly defined. The District of Columbia has binding arbitration on compensation issues for all represented employees, and on all issues for police and firefighters. Baltimore City has binding arbitration for firefighters only. No other Maryland jurisdiction employs binding arbitration. Nor does the federal government or any Virginia jurisdiction (Virginia does not allow public employee collective bargaining).

Type of binding arbitration The form of binding arbitration that now applies to the County fire and police collective bargaining units is **last best offer for the entire contract** ("total package"), rather than **last best offer issue-by-issue** ("line item") or conventional (**arbitrator's discretion** or "split the difference") arbitration. The binding arbitration proposed by Bill 26-99 for the MCGEO units is a **hybrid**: the economic issues would be decided on a last best offer total package basis, but the arbitrator could decide each non-economic issue separately and would not be limited to the parties' offers. Under the bill the arbitrator would decide which issues are economic and which are non-economic.

For the parties' views on which form of binding arbitration is preferable, see ©16-17 (Executive) and ©28-33 (MCGEO). In Council staff's view, a bifurcated system may offer little incentive for the parties to compromise on non-economic issues, which are mainly day-to-day operating issues. On the other hand, one can argue that in total package arbitration the economic issues normally drive the arbitrator's decision and the non-economic issues are "along for the ride"; in that system the arbitrator would give the non-economic issues scant separate consideration. If so, the system proposed in Bill 26-99 would elevate the importance and visibility of the non-economic issues.

If the economic/non-economic distinction is maintained in the law, Executive staff suggest limits on what issues are defined as economic. See item #8 on ©25-26. MCGEO did not respond to this definition.

Scope of bargaining unit The Executive would exclude from the bargaining unit those probationary employees whose probationary period is 12 months or more, and certain confidential employees. See ©23. MCGEO opposes these exclusions and would broaden the bargaining unit to cover non-attorneys in the State's Attorney's Office, temporary employees, and sergeants in the Sheriff's Office. See ©37-38. As Councilmember Subin announced at the hearing, he plans to introduce separate legislation next week to expand the bargaining unit along the lines of some of MCGEO's proposals. Council staff suggest that issues regarding the scope of the bargaining unit be handled in the context of Councilmember Subin's bill.

Collective bargaining agreement calendar Bill 26-99 would move the deadline for the arbitrator's award from February to March 1. The Executive prefers February 15. While the bill moves the deadline closer to the operating budget submission deadlines, in our view it reflects how the process has actually operated in recent years.

Economic comparisons Executive staff proposed an amendment to allow the arbitrator to consider private sector wages and benefits in the entire Washington metropolitan area and the state, rather than only the County. See ©24. MCGEO strongly opposes this. See ©35. In our view, this amendment seems reasonable because public sector wages and benefits are already compared across these jurisdictions, and the arbitrator can certainly take differing costs of living in the various areas into account as well.

Management rights Executive staff proposed language that would direct the arbitrator to not diminish or condition management rights in determining whether a collective bargaining item is negotiable. See ©24-25. MCGEO strongly opposes this. See ©35-36. While we agree that management rights may need more protection, Council staff is not sure what the actual effect of this language would be.

5-year term Executive staff would lengthen the maximum term of a collective bargaining agreement with MCGEO from 3 to 5 years. MCGEO did not comment on this amendment. The collective bargaining agreement could, of course, allow one or more issues to be reopened during that period. This amendment seems reasonable.

Council role MCGEO proposed several amendments to clarify that the Council, in reviewing a collective bargaining agreement, only can act on those terms and conditions that require funding or a change in law. While the thrust of these amendments is consistent with the intent of the current law, Council staff would prefer to work with the parties in sharpening the language to make sure that the Council's role is not inadvertently limited.

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Bill No. 26-99
Concerning: Collective Bargaining - Amendments
Revised: 9-8-99 Draft No. 2
Introduced: September 14, 1999
Expires: March 14, 2001
Enacted:
Executive:
Effective:
Sunset Date: None
Ch. ____, Laws of Mont. Co. ____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Subin and Silverman

AN ACT to:

(1) modify certain functions of the Labor Relations Administrator;
(2) revise the process for certifying employee organizations;
(3) revise the timetable for certain collective bargaining actions;
(4) require binding arbitration of certain collective bargaining agreements; and
(5) generally amend the law governing collective bargaining for certain County employees.

By amending
Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-103, 33-106, and 33-108

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

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

Sec. 1. Sections 33-103, 33-106, and 33-108 are amended as follows:

33-103. Labor Relations Administrator.

(a) [There is established the position of] A Labor Relations Administrator[, to provide for the effective implementation and administration of] must be appointed to effectively administer this Article [concerning] as it governs selection, certification and decertification procedures, prohibited practices, and the choice of a mediator/fact-finder. The [Labor Relations] Administrator [shall exercise the following powers and perform the following duties and functions] must:

* * *

(8) Determine any issue regarding the negotiability of any collective bargaining proposal.

[(8)] (9) Exercise any other powers and perform any other duties and functions [as may be] specified in this Article.

33-106 Selection, certification, and decertification procedures.

(a) The certification or decertification of an employee organization as the representative of a unit for [the purpose of] collective bargaining [shall be initiated in accordance with] must comply with the following procedures:

(2)

* * *

(5) If a different employee organization is certified as the result of an election carried out under subsection (b)(8), that organization must be treated in all respects as a successor in interest and party to any collective bargaining agreement that the previous employee organization was a party to.

(b) * * *

(8) If a properly supported and timely filed petition to decertify an existing certified employee organization, and a properly supported and timely filed petition to certify another employee organization, are filed during the same time period under subsection (a)(3) or (a)(4), one election must be held to determine which organization, if any, the employees in the unit desire to represent them. The election ballot must contain, as choices to be made by the voter, the names of the petitioning and certified employee organizations, and a choice that the employee does not desire to be represented by any of the named employee organizations. All other applicable requirements and procedures for the election must be followed.

* * *

33-108. Bargaining, impasse, fact-finding, and legislative procedures.

(a) Collective bargaining [shall] must begin no later than November 1 before the beginning of a fiscal year for which there is no agreement between the employer and the certified representative, and [shall] must be finished on or before [January] February 15. [The resolution of a bargaining impasse or fact-finding shall be finished by February 1.]

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

(c) A collective bargaining agreement [becomes effective] takes effect only after ratification by the employer and [by] the certified representative. The certified representative may [provide] adopt its own [rules for] ratification procedures.

(d) Before November 10 of any year in which the employer and the certified representative bargain collectively, the Labor Relations Administrator [shall] must appoint a mediator/[fact-finder] arbitrator, who may be a person recommended [to her] by both parties. The mediator/[fact-finder] arbitrator [shall] must be available [during the

(4)

period] from January 2 to [February 1] June 30. Fees and expenses of the mediator/[fact-finder] arbitrator [shall] must be shared equally by the employer and the certified representative.

(e) (1) During the course of collective bargaining, either party may declare an impasse and request the services of the mediator/[fact-finder] arbitrator, or the parties may jointly request [his] those services before [declaration of] an impasse is declared. If the parties do not reach an agreement by [January] February 15, an impasse exists. Any issue regarding the negotiability of any bargaining proposal must be referred to the Labor Relations Administrator for an expedited determination.

(2) This dispute [shall] must be submitted to the mediator/[fact-finder] arbitrator whenever an impasse has been reached, or [before that] as provided in subsection (e)(1). The mediator/[fact-finder] arbitrator [shall] must engage in mediation by bringing the parties together voluntarily under such favorable circumstances as will [tend to bring about the] encourage settlement of the dispute.

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(3) If [and when] the mediator/[fact-finder] arbitrator finds, in [his] the mediator/arbitrator's sole discretion, that the parties are at a bona fide impasse, [he shall implement the following fact-finding process:] or as of February 15 when an impasse is automatically reached, whichever occurs earlier, the dispute must be submitted to binding arbitration.

[(a.) He shall require the parties to submit jointly a memorandum of all items previously agreed upon, and separate memoranda of their proposals on all items not previously agreed upon.]

(f)(1) If binding arbitration is invoked, the mediator/arbitrator must require each party to submit a final offer, which must consist either of a complete draft of a proposed collective bargaining agreement or a complete package proposal, as the mediator/arbitrator directs. If only complete package proposals are required, the mediator/arbitrator must require the parties to submit jointly a memorandum of all items previously agreed on. The final offer submitted by each party must separately identify economic and non-economic proposals. Economic proposals must include salary and wages, pension and other welfare benefits, such as health insurance. The

mediator/arbitrator must decide any issue regarding whether a particular proposal is economic or non-economic.

[(b.)] (2) [He] The mediator/arbitrator may require the parties to submit oral or written evidence [or make oral or written] and arguments in support of their proposals. [He] The mediator/arbitrator may hold a hearing for this purpose at a time, date, and place selected by [him] the mediator/arbitrator. This hearing [shall] must not be open to the public.

[(c.)] (3) [On or before February 1, the mediator/fact-finder shall issue a report of his findings of fact and recommendations on those matters still in dispute between the parties. The report shall be submitted to the parties but shall not be made public at this time.]

On or before March 1, the mediator/arbitrator must select, as a whole, the more reasonable of the final economic offers submitted by the parties. With regard to the economic offers, the mediator/arbitrator must not compromise or alter a final offer. The mediator/arbitrator must not consider or receive any argument or evidence related to the history of collective bargaining in the immediate dispute, including any previous

settlement offer not contained in the final offers. However, the mediator/arbitrator must consider all previously agreed-on economic items, integrated with the disputed economic items, to decide which economic offer is the most reasonable. The mediator/arbitrator must also decide which of each of the parties' non-economic proposals is the most reasonable under all the circumstances. The mediator/arbitrator may compromise, alter, or reject any non-economic proposal.

[(d.)] (4) In making [findings of fact and recommendations] a determination under this subsection, the mediator/[fact-finder] arbitrator may [take into account] consider only the following factors:

[(i)] (A) Past collective bargaining agreements between the parties, including the past bargaining history that led to the agreements, or the pre-collective bargaining history of employee wages, hours, benefits, and working conditions.

[(ii)] (B) Comparison of wages, hours, benefits, and conditions of employment of similar employees of other public

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employers in the Washington Metropolitan Area and in Maryland.

[(iii)](C) Comparison of wages, hours, benefits, and conditions of employment of other Montgomery County personnel.

[(iv)] (D) Wages, benefits, hours, and other working conditions of similar employees of private employers in Montgomery County.

[(v)] (E) The interest and welfare of the public.

[(vi)] (F) The ability of the employer to finance economic adjustments, and the effect of the adjustments [upon] on the normal standard of public services provided by the employer.

(5) The economic offer selected by the mediator/arbitrator, together with the mediator/arbitrator's conclusion on each non-economic proposal, integrated with all previously agreed on items, is the final agreement between the employer and the certified representative, need not be ratified by any party, and has the effect of a contract ratified by the parties under subsection (c). The parties must execute the agreement, and any provision which requires action in the County budget must

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

[(f) After receiving the report of the mediator/fact-finder, the parties shall meet again to bargain. If 10 days after the parties receive the report they have not reached full agreement, or if either party does not accept, in whole or in part, the recommendations of the mediator-fact-finder, the report of the mediator-fact-finder, with recommendations on agreed items deleted, shall be made public by sending it to the Council. The mediator/fact-finder shall also send the Council the joint memorandum of items agreed upon, up-dated with any items later agreed upon. The parties shall also send to the Council separate memoranda stating their positions on matters still in dispute.]

(g) The budget that the employer submits to the Council [shall] must include the items that have been agreed to, as well as the employer's position on matters still in dispute. Any agreed or disputed term or condition submitted to the Council that requires an appropriation of funds, or the enactment[, repeal, or modification] or adoption of any County law or regulation, or which has or may have a present or future fiscal impact, may be accepted or rejected in whole or in part by the Council. [Such terms or conditions shall be identified to the

Council by either or both parties.] The employer must expressly identify any term or condition that requires Council review. The employer [shall] must make a good faith effort to have the Council take action to implement [any term or condition to which the parties have agreed] all terms of the final agreement.

(h) The Council may hold a public hearing to enable the parties and the public to testify on the agreement [and the recommendations for resolving bargaining disputes].

(i) On or before May 1, the Council [shall] must indicate by resolution its intention to appropriate funds for or otherwise implement the [items that have been agreed to] agreement or its intention not to do so, and [shall] must state its reasons for any intent to reject any [items of the kind specified in subsection (g) that have been agreed to] item of the final agreement. [The Council shall also indicate by resolution its position on disputed matters which could require an appropriation of funds or enactment, repeal, or modification of any County law or regulation, or which have present or future fiscal impact.]

(j) [Then] If the Council indicates its intention to reject any item of the final agreement, the Council [shall] must designate a representative to

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meet with the parties and present the Council's views in the parties' further negotiation on [disputed matters and/or agreed upon] matters that the Council has indicated its intention to reject. The parties must submit the results of the negotiation, whether a complete or a partial agreement, [shall be submitted] to the Council on or before May 10.

(k) Any agreement [shall] must provide for automatic reduction or elimination of wage [and/]or benefits adjustments if:

(1) The Council does not take action necessary to implement the agreement, or a part of it; or

(2) Sufficient funds are not appropriated for any fiscal year [in which] when the agreement is in effect.

[(k)] (l) The Council [shall] must take [whatever actions it considers] any action required by the public interest with respect to [matters] any matter still in dispute between the parties. However, [those actions shall not be] any action taken by the Council is not part of the agreement between the parties unless the parties specifically incorporate [them] it in the agreement.

Approved:

Isiah Leggett, President, County Council Date

Approved:

Douglas M. Duncan, County Executive Date

This is a correct copy of Council action.

Mary A. Edgar, CMC, Clerk of the Council Date

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LEGISLATIVE REQUEST REPORT

Bill 26-99

Collective Bargaining - Amendments

DESCRIPTION:	Requires binding arbitration of collective bargaining agreements for County government employees. The form of binding arbitration is last best offer for the entire economic package, and last best offer item-by-item for non-economic items. The arbitrator would decide which issues are economic or non-economic. Also revises the process for certifying employee organizations and the timetable for certain collective bargaining actions.
PROBLEM:	Need for other County government employees to have the same right to bargaining arbitration as County public safety employees now have.
GOALS AND OBJECTIVES:	To make the collective bargaining process fairer to employees.
COORDINATION:	Office of Human Resources, Office of Management and Budget
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Michael Faden, Senior Legislative Attorney, 240-777-7905
APPLICATION WITHIN MUNICIPALITIES:	Applies only to County government.
PENALTIES:	None

(14)

TESTIMONY FOR COUNTY EXECUTIVE
BILL NO. 26-99
COLLECTIVE BARGAINING - AMENDMENTS

GOOD AFTERNOON, MY NAME IS JAMES TORGESEN, LABOR/EMPLOYEE RELATONS MANAGER IN THE OFFICE OF HUMAN RESOURCES, I HAVE BEEN ASKED BY THE COUNTY EXECUTIVE TO PROVIDE THE POSITION OF THE EXECUTIVE BRANCH CONCERNING BILL NO 26-99. IN GENERAL, WE SUPPORT THE DIRECTION OF THE PROPOSED AMENDMENTS TO THE COUNTY COLLECTIVE BARGAINING LAW. THE COUNTY COLLECTIVE BARGAINING LAW WAS PASSED BY COUNCIL IN JUNE 1986 AND HAS REMAINED UNCHANGED, EXCEPT FOR AMENDMENTS AFFECTING THE BARGAINING UNIT STATUS OF FIRE/RESCUE EMPLOYEES. THE COUNTY EXECUTIVE AND MCGEO, UFCW/LOCAL 1994, THE CERTIFED REPRESENTATIVE WHICH REPRESENTS THE OPT AND SLT BARGAINING UNITS, HAVE BEEN SERVED WELL BY THE FRAMEWORK THAT THE LAW PROVIDES FOR THE CONDUCT OF COLLECTIVE BARGAINING AND THE DAY TO DAY RELATIONSHIP BETWEEN THE PARTIES. OVER THE YEARS THE PARTIES HAVE UTILIZED VIRTUALLY ALL OF THE KEY ELEMENTS OF THE LAW. WITH THIS EXPERIENCE IN MIND, THE FOLLOWING COMMENTS CONCERNING THE PROPOSED AMENDMENTS, AS WELL AS OTHERS I WILL SUGGEST, ARE MADE FOR THE COUNCIL'S CONSIDERATION.

- THE MOST SIGNIFICANT CHANGES IN THE PROPOSED AMENDMENTS AFFECT THE IMPASSE RESOLUTION PROCESS. THE CURRENT LAW CULMINATES IMPASSE WITH A FACT-FINDING PROCESS, THAT ALLOWS A NEUTRAL THIRD PARTY TO RECOMMEND TO THE PARTIES A RESOLUTION FOR EACH IMPASSE ITEM. THE PARTIES MAY ACCEPT OR MODIFY THE RECOMMENDATION TO ACHIEVE AGREEMENT. ITEMS WHICH REMAIN IN DISPUTE ARE SUBMITTED TO COUNCIL FOR DISPOSITION. THE BILL REPLACES THE FACTFINDING PROCESS WITH BINDING ARBITRATION. IT BIFURCATES ECONOMIC AND NON-ECONOMIC ISSUES AND REQUIRES THE PARTIES TO SUBMIT A TOTAL PACKAGE OFFER ON ECONOMIC ITEMS AND SEPARATE OFFERS ON EACH NON-ECONOMIC ITEM. FOR THE ECONOMIC ITEMS, THE ARBITRATOR MUST CHOOSE AS A TOTAL PACKAGE THE EMPLOYER'S OFFER OR THE UNION'S OFFER. IN CONTRAST, ON NON-ECONOMIC ITEMS THE ARBITRATOR MAY FASHION A SEPARATE AWARD ON EACH ITEM. WE DO NOT FAVOR THE TREATMENT OF ECONOMIC AND NON-ECONOMIC ITEMS AS PROPOSED IN THE BILL. WE PROPOSE THAT THE ARBITRATOR MAKE AN AWARD ON EACH ITEM, ACCEPTING EITHER THE EMPLOYER'S OR UNION'S OFFER, WITHOUT PERMITTING THE ARBITRATOR TO MODIFY AN OFFER. THE PARTIES ARE ACCUSTOMED TO AN ITEM BY ITEM REVIEW UNDER THE CURRENT FACTFINDING PROCESS. IT IS PREFERABLE TO HAVE THE PARTIES WRITE THE LANGUAGE, RATHER THAN ALLOW AN ARBITRATOR TO IMPOSE A

HYBRID ON THE PARTIES WHICH CREATES A POTENTIAL FOR AMBIGUITY.

- IF THE COUNCIL DECIDES TO ADOPT THE AMENDMENTS AS PROPOSED, THE LAW SHOULD BE AMENDED TO PROVIDE, AT THE VERY LEAST, GREATER DEFINITION AS TO WHAT CONSTITUES AN ECONOMIC ITEM, RATHER THAT LEAVING THAT DETERMINATION SOLELY TO THE ARBITRATOR.
- THE AMENDMENTS PROPOSE TO MOVE THE DATE FOR ISSUANCE OF THE ARBITRATOR'S AWARD FROM FEBRUARY 1 TO MARCH 1. WE AGREE THAT SOME ADJUSTMENT IS NEEDED TO THE DATES IN THE IMPASSE PROCESS. MORE TIME IS NEEDED TO ALLOW THE PARTIES TO REACH AGREEMENT ON THEIR OWN. MOREOVER, ADDITIONAL TIME IS NEEDED TO FIRM UP ECONOMIC PARAMETERS IN THE EARLY PART OF THE CALENDAR YEAR. HOWEVER, THE PROPOSED MARCH 1 DATE LEAVES LITTLE TIME FOR THE EXECUTIVE TO FINALIZE BUDGET RECOMMENDATIONS AND DOCUMENTS FOR PUBLICATION ON MARCH 15. WE PROPOSE THAT THE DATE OF THE AWARD BE MOVED BACK TO FEBRUARY 15 AND THE INITIAL IMPASSE DATE BE ADJUSTED TO FEBRUARY 1. THUS GIVING THE PARTIES ADDITIONAL TIME TO BARGAIN.

IN ADDITION, TO THESE MODIFICATIONS THE COUNTY EXECUTIVE REQUESTS THAT THE COUNCIL CONSIDER THE FOLLOWING ADDITIONAL AMENDMENTS TO THE LAW.

- IN SECTION 33-102, THE DEFINITION SECTION OF THE LAW, WE BELIEVE TWO CHANGES ARE NEEDED. UNDER THE DEFINITION OF "EMPLOYEE" THE LAW DEFINES WHICH EMPLOYEES ARE ELIGIBLE FOR COLLECTIVE BARGAINING RIGHTS. CURRENTLY PROBATIONARY EMPLOYEES ARE EXCLUDED, BUT THE LAW DOES NOT DEFINE THE LENGTH OF THE PROBATIONARY PERIOD. TO INSURE THAT THE LENGTH OF THE PROBATIONARY PERIOD IS ESTABLISHED AND IS NOT OTHERWISE SUBJECT TO NEGOTIATION, WE RECOMMEND THAT A 12 MONTH PROBATIONARY PERIOD BE INCLUDED IN THE LAW. THIS IS CONSISTENT WITH THE NEW HIRE PROBATIONARY PERIOD FOR UNREPRESENTED EMPLOYEES. SECONDLY, WE REQUEST THAT AN ADDITIONAL EXEMPTION BE ADDED TO COVER "CONFIDENTIAL EMPLOYEES" THIS IS A COMMON EXCLUSION IN A COLLECTIVE BARGAINING ENVIRONMENT. CONFIDENTIAL EMPLOYEES ARE THOSE EMPLOYEES WHO PREPARE OR REVIEW CONFIDENTIAL PERSONEL MATTERS INVOLVING BARGAINING UNIT EMPLOYEES OR THE DEVELOPMENT OF POLICIES AFFECTING WAGES, HOURS AND WORKING CONDITIONS OF THOSE EMPLOYEES. IN ORDER TO AVOID CONFLICTS OF INTEREST, EMPLOYEES WITH THESE RESPONSIBILITIES ARE TYPICALLY EXCLUDED FROM THE BARGAINING UNIT IN OTHER

JURISDICTIONS. THIS PROPOSAL WOULD PRIMARILY IMPACT EMPLOYEES PROVIDING CLERICAL SUPPORT TO SECTION AND DIVISION CHIIEFS WITHIN THE GOVERNMENT AND WOULD EFFECT APPROXIMATELY 50-75 POSITIONS.

- WE PROPOSE THAT THE CURRENT LANGUGE AT SECTION 33-108(b), WHICH LIMITS THE TERM OF ANY COLLECTIVE BARGAINING AGREEMENT TO THREE YEARS, BE AMENDED TO PERMIT AGREEMENTS OF UP TO FIVE YEARS. THE PARTIES MAY FIND IT IN THEIR MUTUAL INTEREST TO HAVE LONGER AGREEMENTS TO ENCOURAGE THE STABILITY OF LABOR RELATIONS.
- THE BILL DOES NOT CHANGE THE CRITERIA USED TO DETERMINE THE REASONABLENESS OF THE PARTIES FINAL OFFERS. IN PARTICULAR, THE ARBITRATOR UNDER 33-108(f)(4)(D) MAY REVIEW THE WAGES HOURS AND WORKING CONDITIONS OF SIMILAR EMPLOYEES OF **PRIVATE EMPLOYERS** IN MONTGOMERY COUNTY WITH COUNTY BARGAINING UNIT EMPLOYEES. HOWEVER, IN COMPARING SIMILAR EMPLOYEES IN **PUBLIC EMPLOYMENT,** THE WASHINGTON METROPOLITAN AREA AND MARYLYAND ARE USED. PROPER BALANCING OF PUBLIC AND PRIVATE EMPLOYER COMPARISONS SHOULD ALLOW FOR SIMILAR JURISDICTIONS TO BE USED IN BOTH SECTORS. WE PROPOSE THAT PRIVATE EMPLOYER COMPARISONS BE EXPANDED TO INCLUDE THE WASHINGTON METROPOLITAN AREA AND MARYLAND.

- FINALLY, AS YOU KNOW, THE COUNTY COLLECTIVE BARGAINING LAW ESTABLISHES CERTAIN EMPLOYER RIGHTS WHICH ARE DESIGNED TO RESERVE TO THE EMPLOYER RESPONSIBILITIES WHICH ARE CRITICAL TO THE EFFECTIVE MANAGEMENT OF THE COUNTY GOVERNMENT. UNDER THE LAW, COLLECTIVE BARGAINING AGREEMENTS OR THE APPLICATION OF PROVISIONS OF THE LABOR LAW ARE NOT SUPPOSED TO IMPAIR THE EMPLOYER'S EXERCISE OF THESE RIGHTS. A FAIR AMOUNT OF TIME, WHETHER IN NEGOTIATIONS OR IN THE DAY TO DAY ADMINISTRATION OF THE LABOR AGREEMENTS THE PARTIES FOCUS ON ISSUES THAT FALL UNDER THE AMBIT OF THESE ARTICULTED RIGHTS, SUCH AS MATTERS PERTAINING TO ASSIGNMENT OF WORK, SCHEDULING OF EMPLOYEES AND DETERMINATION OF PROMOTIONAL STANDARDS. WE PROPOSE THAT THE PREFATORY LANGUAGE UNDER SECTION 33-107(b) BE AMENDED TO INSURE THAT EMPLOYER RIGHTS ARE NOT DIMINISHED, RESTRICTED OR OTHERWISE CONDITIONED. THIS CHANGE WILL SERVE AS ADDITIONAL GUIDANCE TO THE PARTIES, AND IN PARTICULAR, TO THE LABOR RELATIONS ADMINISTRATOR, WHO IS REQUIRED BY THE LAW TO INTERPRET AND ADJUDICATE NEGOTIABILITY OR OTHER DISPUTED APPLICATIONS OF THE LAW.

I HAVE INCLUDED DRAFT LANGUAGE FOR PROPOSED CHANGES WITH COPIES OF MY WRITTEN TESTIMONY.

WITH THESE CHANGES, WE BELIEVE WE WILL CONTINUE TO HAVE A WORKABLE COLLECTIVE BARGAINING FRAMEWORK THAT WILL PROVIDE LABOR RELATIONS STABILITY TO INSURE THAT THE SERVICES TO THE CITIZENS OF THE COUNTY ARE PROVIDED IN AN EFFICIENT AND EFFECTIVE MANNER. THANK YOU.

County Executive's Proposed Amendments to Bill-26-99. Collective Bargaining - Amendments

Key: Underlining indicates new language in draft bill. Double underlining indicates language recommended to be added to the bill. [**Boldface brackets**] indicate language deleted in draft bill. ~~Strikethroughs~~ indicate language recommended to be deleted from the bill.

Item #1: Change impasse process in bill.

Sec. 33-108. *Bargaining, impasse, fact-finding, and legislative procedures.*

(f) (1) If binding arbitration is invoked, the mediator/ arbitrator must require each party to submit a final offer, which must consist either of a complete draft of a proposed collective bargaining agreement or a complete package proposal, as the mediator/arbitrator directs. If only complete package proposals are required, the mediator/arbitrator must require the parties to submit jointly a memorandum of all items previously agreed on. ~~The final offer submitted by each party must separately identify economic and non-economic proposals. Economic proposals must include only salary and wages, pension and other welfare benefits, such as health insurance. The mediator/arbitrator must decide any issue regarding whether a particular proposal is economic or non-economic.~~

* * *

(3) On or before March 1, the mediator/arbitrator must select~~, as a whole, the more reasonable of the final economic offers~~ for each proposal the most reasonable offer submitted by the parties. ~~With regard to the economic offers, the~~ The mediator/arbitrator must not compromise or alter a final offer. The mediator/arbitrator must not consider or receive any argument or evidence related to the history of collective bargaining in the immediate dispute, including any previous settlement offer not contained in the final offers. However, the mediator/arbitrator must consider all previously agreed-on ~~economic~~ items, integrated with the disputed ~~economic~~ items, to decide which ~~economic~~ offer on each item is the most reasonable. ~~The mediator/arbitrator must also decide which of each of the parties' non-economic proposals is the most reasonable under all the circumstances. The mediator/arbitrator may compromise, alter, or reject any non-economic proposal.~~

Item #2: Require a minimum 12-month probationary period before employee is eligible for bargaining unit membership.

Sec. 33-102. *Definitions.*

* * *

(4) *Employee* means any person who works under the County government merit system on a continuous full-time, career or part-time, career basis except:

* * *

(N) newly hired persons ~~on probationary status~~ who have not successfully completed a probationary period of at least 12 months;

Item #3: Exclude confidential employees from bargaining unit.

Sec. 33-102. *Definitions.*

* * *

(4) *Employee* means any person who works under the County government merit system on a continuous full-time, career or part-time, career basis except:

* * *

(U) confidential employees, which means those employees whose regular duties include the preparation or review of confidential personnel matters affecting bargaining unit employees or the development of policies affecting the wages, hours, or working conditions of bargaining unit employees.

Item #4: Establish earlier deadline dates for declaring and resolving bargaining impasses.

Sec. 33-108. *Bargaining, impasse, fact-finding, and legislative procedures.*

* * *

(e) (1) During the course of collective bargaining, either party may declare an impasse and request the services of the mediator/[fact-finder] arbitrator, or the parties may jointly request [his] those services before [declaration of] an impasse is declared. If the parties do not reach an agreement by [January] February ~~15~~, 1st an impasse

exists. Any issues regarding the negotiability of any bargaining proposal must be referred to the Labor Relations Administrator for an expedited determination.

* * *

(f) (3) On or before ~~March 1~~ February 15th, the mediator/arbitrator must select~~, as a whole, the more reasonable of the final economic offers~~ for each item in dispute, the most reasonable offer submitted by the parties.

Item #5: Allow labor agreements to have a maximum 5-year term.

Sec. 33-108. *Bargaining, impasse, fact-finding, and legislative procedures.*

* * *

(b) Any provision for automatic renewal or extension of a collective bargaining agreement is void. An agreement is not valid if it extends for less than one ~~(1)~~ year or for more than ~~three (3)~~ 5 years. All agreements become effective July 1 and end June 30.

Item #6: Allow the arbitrator to consider the wages, benefits, and working conditions of similar employees of private employers in the Washington Metropolitan Area and in Maryland.

Sec. 33-108. *Bargaining, impasse, fact-finding, and legislative procedures.*

(f) (4) In making [findings of fact and recommendations] a determination under this subsection, the mediator/[fact-finder] arbitrator may [take into account] consider only the following factors:

* * *

[(iv)] (D) Comparison of wages, benefits, hours, and other working conditions of similar employees of private employers in ~~Montgomery County~~ the Washington Metropolitan Area and in Maryland.

Item #7: Include language in the bill that prohibits the Labor Relations Administrator from diminishing management rights when he makes a negotiability determination.

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

(a) [There is established the position of] A Labor Relations Administrator[, to provide for the effective implementation and administration of] must be appointed to effectively administer this article [concerning] as it governs selection, certification and decertification procedures, prohibited practices, and the choice of a mediator/fact-finder. The [Labor Relations] Administrator [shall exercise the following powers and perform the following duties and functions] must:

* * *

(8) Determine any issue regarding the negotiability of any collective bargaining proposal.

[(8)] (9) Exercise any other powers and perform any other duties and functions [as may be] specified in this article.

(b) The Administrator must not diminish, restrict, or place conditions on the employer rights in Section 107(b) when the Administrator determines if a collective bargaining proposal is negotiable.

[(b)] (c) * * *

[(c)] (d) * * *

Item #8: Proposed amendment to impasse process if Council bifurcates consideration of economic and non-economic items.

Sec. 33-108. *Bargaining, impasse, fact-finding, and legislative procedures.*

(f) (1) If binding arbitration is invoked, the mediator/ arbitrator must require each party to submit a final offer, which must consist either of a complete draft of a proposed collective bargaining agreement or a complete package proposal, as the mediator/arbitrator directs. If only complete package proposals are required, the mediator/arbitrator must require the parties to submit jointly a memorandum of all items previously agreed on. The final offer submitted by each party must separately identify economic and non-economic proposals. Economic proposals must include only salary and wages, including the percentage of the increase in the salary and wages budget that will be devoted to merit increments and cash awards, pension and other ~~welfare~~ retirement benefits, ~~such as health insurance~~

and employee benefits such as insurance, leave, holidays, and vacations. The mediator/arbitrator must decide any issue regarding whether a particular proposal is economic or non-economic.

COUNTY COLLECTIVE BARGAINING LAW AMENDMENTS

Impasse resolution – Proposed legislation differentiates treatment of economic and non-economic items in dispute. As an alternative to the proposed language the arbitrator would determine reasonableness on each item in dispute. The current fact-finding process permits this and this would provide a balanced opportunity for the Arbitrator to review each offer separately or in combination with others, rather that deciding economics as a package and non-economics item by item. In addition, a clearer definition of what is "economic" is needed, tracking the definition contained in the scope of bargaining.

Minimum 12 month probationary period – law needs to be clarified to insure that newly hired employees are not eligible to participate in the bargaining unit until having completed 12 months probation.

Confidential Employees- defines a group of employees currently not excluded from the bargaining unit who regularly handle personnel matters concerning bargaining unit employees. Many of these employees provide clerical support to division and section level heads and process discipline or other employee related actions.

Deadline dates for declaring and resolving bargaining impasse – move the proposed impasse deadlines back by two weeks to provide adequate time to finalize the Executive's budget recommendations.

Term of labor agreements – increase capability to negotiate agreements up to 5 years in duration. Provides flexibility for parties to establish long term contracts and enhance the stability of labor relations.

Comparison of wages, benefits and working conditions – parties to include comparable jurisdictions in comparison of private sector employers during impasse proceedings. Currently, comparisons are limited to Montgomery County.

Labor Relations Administrator decision parameters- include language which directs LRA not to interpret the bargaining law in such a way so as to diminish or restrict in any way issues which touch on enumerated management rights.

OHR/9-24-99

TESTIMONY IN SUPPORT OF BILL 26-99
COLLECTIVE BARGAINING - AMENDMENTS

Good afternoon, my name is Bill Thompson. I am a principal in the firm of Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly, P.C., 1025 Connecticut Avenue, N. W., Suite 712, Washington, D.C. 20036, 202-857-5000. I am the General Counsel of MCGEO-UFCW Local 1994, and have been its attorney since the early 1980's. I was also one of the drafters of the County Collective Bargaining Law in 1986.

The County now has three collective bargaining laws: for police, for fire and rescue, and for general blue collar and white collar employees. This last law is colloquially known as the "MCGEO" law.

The proposed amendments to the MCGEO law which are before you this afternoon, if adopted by the Council, will add to the MCGEO law highly effective impasse resolution procedures which already exist both in the police bargaining law and the fire and rescue bargaining law.

Specifically, the MCGEO law lacks a binding arbitration provision. As you know, both the police and fire and rescue statutes force a definitive closure to the bargaining process by means of an arbitrator's binding award. Such an award resolves outstanding unsettled bargaining issues by requiring the union and the Executive to accept the arbitrator's decision regarding those issues, as their final contract. Whether or not the final contract results from arbitration, the Council thereafter reviews

and acts upon any provisions of the agreement which require its involvement.

The current MCGEO law is flawed by lack of a binding arbitration provision. Instead of forcing finality both on the union and the Executive, the MCGEO fact-finding process replicates the procedure of binding arbitration -- final offers and a hearing before the fact-finder (who is invariably an arbitrator) -- but lacks the substance of a binding decision. Instead of ending the bargaining process, the fact-finder can only issue toothless recommendations. And, as the current MCGEO law provides:

> After receiving the report of the mediator/fact-finder, the parties shall meet again to bargain.

Section 108(f). Thus, we have an entirely circular process.

Today the MCGEO bargaining law has the "worst of both worlds" in this regard. If an impasse in negotiations is reached, the Executive and MCGEO are forced to spend the time, money, and effort to present and defend their respective proposals in a formal proceeding before the fact-finder. However, unlike binding arbitration the resulting "recommendations" don't force the parties to a resolution. Rather, the fact-finder's toothless recommendations invariably drop into a proverbial "file 13," and the parties go back to the table again.

Furthermore, this non-binding fact-finding procedure also robs the initial stage of third party intervention in a

bargaining dispute of any real possibility of success. Here we are speaking of mediation, which proceeds both binding arbitration in the two public safety laws, and fact-finding in the MCGEO law. At mediation the third party neutral arbitrator or fact-finder attempts to bring the parties together without the need for a formal proceeding. Common sense dictates that a mediator can be more persuasive in leading both sides into a mediated settlement, if the parties know that he or she will later have the power to bind them via an ultimate arbitration award. We strongly urge that the Council add binding arbitration of impasses to the MCGEO law.

Other bargaining process-related proposals in this bill are more technical. The bill would amend the statutory deadlines for various stages of the bargaining process, so that they are more realistically in tune with the Executive and Council operating budget cycle. Another proposed amendment will enable employees to make more efficient choices about which, if any, union they want to represent them. Also included are several clarifications of the authority of the Labor Relations Administrator, and the parameters of bargaining subjects. We urge that these aspects of Bill 26-99 be adopted, as well.

As the certified collective bargaining representative for more than 3000 blue and white collar County Merit System employees, we respectfully urge the Council to pass Bill 26-99.

ZWERDLING, PAUL, LEIBIG, KAHN, THOMPSON & WOLLY, P.C.

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November 22, 1999

VIA FACSIMILE & U.S. MAIL

Michael Faden, Esquire
Montgomery County Council
100 Maryland Avenue, Room 601
Rockville, Maryland 20850

Re: Bill 26-99

Dear Mike:

As was requested by the Council during the November 16, 1999 hearing regarding this bill, these are MCGEO-UFCW Local 1994's comments regarding the County Executive's proposed amendments to the bill introduced at the hearing, together with some criticisms and suggestions we have regarding a few aspects of the existing bill.

The Executive's Proposed Amendments

Executive Item #1: Change Impasse Process In Bill.

- The bill proposes an interest arbitration procedure bifurcated between economic and non-economic proposals. (See bill pages 6-8). Economic proposals of each side will be decided as a complete package, "winner-take-all." This is the same method which exists for all proposals in the Police and Fire and Rescue bargaining laws. Non-economic "working condition" proposals will be decided item by item, and the Arbitrator will be empowered to compromise or alter the proposals in his/her final award.

- The reason this bill (as did its predecessor bill 45-97) varies from the complete "winner-take-all" system used in the two other bargaining laws it that while the economic benefits of employment for those in the MCGEO bargaining units are basically uniform, working conditions vary greatly. In the Police and Fire and

Rescue bargaining units, working conditions as well as economic benefits are relatively homogeneous. However, MCGEO-represented employees have working conditions which are as varied as the myriad of job classifications included in the blue collar and white collar units.

- Therefore, it may be very difficult and unwieldy for any Arbitrator to reach a decision choosing one or the other final offer, each of which includes many working conditions which only affect subgroups of employees within the MCGEO bargaining units. By removing non-economic working conditions from the winner-take-all system, we feel that the Arbitrator will have the appropriate flexibility to arrive at a coherent non-economic working condition award which he/she can integrate logically with the winner-take-all economic award.

- The Executive's proposed amendment would authorize item-by-item choices by the Arbitrator for all proposals, economic and non-economic, but without giving the Arbitrator the ability to compromise or vary from one or the other proposal. This suggestion is a recipe for bargaining chaos. What if the parties have differing proposals which do not mirror the same subject matter? For instance, if MCGEO presents a final proposal for some item and there is no directly corresponding County counter proposal, does that mean MCGEO automatically wins? Without the ability to compromise or ignore various aspects of each side's proposals, the Arbitrator will be hard pressed to correlate them on a "one-to-one" basis.

- Regardless of how the Arbitrator differentiates between economic and non-economic proposals, his determinations of what is "economic" or "non-economic" will not be binding on the Council. Under the bill, the Arbitrator's final award including both categories of proposals becomes the parties' complete collective bargaining agreement. (See bill pages 9 and 10). Only after that agreement has been concluded does the Council review process begin. That separate review

process in the bill requires that the Council approve "[a]ny ... term or condition ... that requires an appropriation of funds, or the enactment or adoption of any County law or regulation, or which has or may have a present or future fiscal impact." With one purely technical amendment, this substantive standard for Council review continues the system which has existed since 1986.

- Therefore, we request that the Council reject the Executive's proposed item by item impasse resolution system.

Executive Item #2: Require A Minimum 12-Month Probationary Period.

- This proposed amendment is an effort by the County to have the Council overturn a recent decision by the County Labor Relations Administrator that determined the length of the new hire probationary period to be bargainable under the law. The County has appealed the LRA's decision to Circuit Court.

- We strongly object to the County's effort to overturn the LRA's decision. That critical piece of background information was deleted from the County's explanation. The County's desire to delay for six months the graduation of probationary employees into the MCGEO bargaining units is a matter which must be negotiated between the Executive and MCGEO, not improperly injected into the political process.

Executive Item #3: Exclude Confidential Employees From The Bargaining Unit.

- The law already excludes from the bargaining units:

  (A) Confidential aides to elected officials.

  * * *

  (D) Deputies and assistants to heads of principal departments, offices, and agencies.

(E) Persons who provide direct staff or administrative support to the head ... or to a deputy or assistant within the immediate office of a head of a principal department, office, or agency.

* * *

(G) Persons who work for the Office of the County Executive and the Office of the Chief Administrative Officer.

* * *

(J) Persons who work for the Office of Management and Budget.

(K) Persons who work for the Office of Human Resources.

* * *

(S) Supervisors....

(T) Persons in Grade 27 or above....

Section 33-102(4).

- Given the breadth of these and other existing exclusions from the bargaining units, the proposed exclusion of "those employees whose regular duties include the preparation or review of confidential personnel matters affecting bargaining unit employees or the development of policies affecting the wages, hours, or working conditions of bargaining unit employees..." constitutes either a repetition of an existing exclusions, or an effort by the County Executive to stretch the concept of "policies affecting" working conditions far beyond what is necessary to safeguard management's privacy. Under this definition, a decision by a building service work to move a water cooler closer to the office door could be argued to constitute a policy decision affecting working conditions.

- We urge the Council to reject this suggestion.

Executive Item #4: Establish Earlier Deadline Dates For Declaring And Resolving Bargaining Impasses.

Executive Item #5: Allow Labor Agreements To Have A Maximum 5-Year Term.

- We are reviewing these suggestions, and have not yet concluded our considerations.

Executive Item #6: Allow The Arbitrator To Consider The Wages, Benefits, And Working Conditions Of Similar Employees Of Private Employers In The Washington Metropolitan Area And In Maryland.

- We are strenuously opposed to any effort to dilute the economic comparisons between County employees and who usually live in the Montgomery County vicinity with those in the distant suburbs, the Eastern Shore, Baltimore, and Western Maryland. Many of these proposed "comparables" are radically less expensive communities with much lower costs of living.

Executive Item #7: Include Language In The Bill That Prohibits The Labor Relations Administrator From Diminishing Management Rights When He Makes A Negotiability Determination.

- The current law includes the following provision at Section 33-107(b):

  > Employer rights. This article and any agreement made under it shall not impair the right and responsibility of the employer to perform the following [management rights].

  Any negotiability determination made by the LRA under the current law cannot "impair the right and responsibility of the employer...." Therefore this proposal is entirely unnecessary.

- Moreover, all negotiability determinations must balance management rights with the subjects which are negotiable. We are concerned that the County will try

to use this proposed new language to shift the balance which has existed since 1986 by claiming in a court appeal that the Council has enacted this amendment to criticize or somehow repudiate the LRA decisions regarding negotiability which have been issued between 1986 and 1999.

- We request that the Council reject this proposal.

Executive Item #8: Proposed Amendment To Impasse Process If Council Bifurcates Consideration Of Economic And Non-Economic Items.

- We are reviewing this suggestion and have not yet completed our deliberations.

MCGEO's Suggested Amendments

We have several suggested amendments to the current bill as follows:

Item A: Clarification of Council Review Language

§33-108(g) [p. 10 line 171]:

(g) The budget that the employer submits to the Council [shall] must include any term or condition of the parties' agreement [[the items that have been agreed to, as well as the employer's position on matters still in dispute. Any agreed or disputed term or condition submitted to the Council]] that requires an appropriation of funds, or the enactment [, repeal, or modification] or adoption of any County law or regulation, or which has or may have a present or future fiscal impact [[,]]. Any such term or condition of the agreement, may be accepted or rejected in whole or in part by the Council. [Such terms or conditions shall be identified to the Council by either or both parties.] The employer must expressly identify any term or condition that requires Council review, and

simultaneously provide notice of that identification to the other party. The employer [shall] must make a good faith effort to have the Council take action to implement [any term or condition [[to which the parties have agreed] all terms of the final agreement]] so identified.

33-108(i) [p. 11, lines 190-2]

...[shall] must state its reasons for any intent to reject any [items of the agreement of the kind specified in subsection (g) that have been agreed to] [[item of the final agreement]].

33-108(j) [p. 11, lines 196-7]

(j) [Then] If the Council indicates its intention to reject any item of the final agreement of the kind specified in subsection (g), the Council must....

- The purpose for these proposed additional amendments is to ensure that the language accurately reflects the facts that a complete agreement between the parties, whether or not as the result of arbitration, must exist prior to the transmittal of the Executive's proposed budget, and that council review is not of the complete agreement, but only the specifically identified terms and conditions.

Item B: Amendments To Definitions Of Employees Included In The Collective Bargaining Units.

Section 33-102:

(4) Employee means any person who works under the County government merit system, or any non-attorneys who work for the Office of the State's Attorney for Montgomery County, on a continuous full-time, career or part-time, career basis, except:

* * *

- This proposed amendment would extend collective bargaining rights for the specified employees only to the extent their terms and conditions of employment (including, e.g., health insurance and retirement benefits) are regulated by the County.

[(M) Persons who work on a temporary, seasonal or substitute basis.]

- We are deeply concerned that the Executive is increasing the use of temporary, seasonal and substitute employees at sub-par wages and benefits to do regular work which should be performed by merit system employees. We ask the Council to provide collective bargaining protection to these working members of our community, so that the principles of work place fairness can be extended to them, as well.

[(P) Officers in the uniformed services (Corrections, ~~Fire and Rescue, Police,~~ Office of the Sheriff) in the rank of ~~sergeant~~ lieutenant and above. Subject to any limitations in State law, Deputy Sheriffs below the rank of ~~sergeant~~ lieutenant are employees.]

- This proposed amendment clarifies the fact that no sworn police officers or firefighters in the uniformed services are included in the MCGEO law. Furthermore, police and/or Sheriffs office sergeants are often included in collective bargaining units because, while they are often supervisors, they are not members of the command staff. Local jurisdictions where police sergeants are in the bargaining unit include Baltimore City, Baltimore County, and Prince George's County.

We will be happy to discuss all these matters with you, Council staff, and/or Council members at your convenience. Feel free to contact me if you have any questions.

Very truly yours,

William W. Thompson, II

wwt:dr

cc: Gino Renne

OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

July 22, 1998

TO: Michael Faden, Senior Legislative Attorney
Montgomery County Council

VIA: Charles W. Thompson, Jr.
County Attorney

FROM: Marc P. Hansen, Chief
Division of General Counsel

RE: Bill 45-97, Collective Bargaining - Binding Arbitration

QUESTION

You have asked for our opinion regarding the legality of a provision in Bill 45-97, Collective Bargaining - Amendments, which requires a neutral party to resolve a collective bargaining impasse between the County Executive and the representative of non-public safety employees. You state, "The fundamental legal issue this poses is whether, without expressly amending the Charter to permit it, delegating the County Executive's decision-making authority with respect to a collective-bargaining agreement to a private arbitrator would amount to an unlawful delegation of the executive power assigned to the Executive by §201 of the Charter."

SHORT ANSWER

Because Charter §511 authorizes the County Council by legislation to provide for arbitration to resolve an impasse in reaching a collective bargaining agreement, Bill 45-97 may authorize a third party to resolve that impasse.

(40)

101 Monroe Street, Rockville, Maryland 20850-2589
301-217-2600 • TTD 301-217-2499 • FAX 217-2662 • hansem@co.mo.md.us

ANALYSIS

The Court of Appeals has on several occasions concluded that authorization to engage in arbitration to resolve an impasse in collective bargaining must arise from a public general law or County charter. *See, Anne Arundel County v. Fraternal Order of Anne Arundel Detention Officers and Personnel,* 313 Md. 98, 543 A.2d 841 (1988).[1] The key issue, therefore, is whether Charter §511 authorizes the Council to provide for arbitration. If it does, Bill 45-97 may validly impose a binding dispute resolution process to resolve an impasse in collective bargaining.

You have pointed out that Charter §§510 and 510A require the Council to provide by law for collective bargaining with "binding" arbitration.[2] Charter §511, on the other hand, omits the term "binding." You have raised the question whether the failure to use the term "binding" in Charter §511 means that the Council is not authorized to provide for "binding" arbitration in Bill 45-97.

We do not believe that the failure to use the term "binding" in Charter §511 is significant in this case. Both the plain meaning of the language used in Charter §511 and its legislative history leave little doubt that Charter § 511 authorizes the Council to provide by law for a binding dispute resolution process to resolve collective bargaining impasses.

A county charter is to be read and construed in the same manner as a statute and its words generally are to be given their natural meaning. *Anderson v. Harford County,* 50 Md. App. 48, 435 A.2d 496 (1981). Charter §511 provides:

> The Montgomery County Council may provide by law for collective bargaining, **with arbitration** or other impasse-resolution procedures, with authorized representatives of officers and employees of the County Government not covered by either Section 510

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[1]In *Anne Arundel County v. Fraternal Order*, the Court of Appeals indicated that a charter provision authorizing collective bargaining arbitration must be consistent with Article XI-A of the Maryland Constitution. *Id*, at 111. Because neither Charter §511 nor Bill 45-97 attempts to limit the decision-making authority of the County Council, we do not believe that Article XI-A of the Maryland Constitution would be violated by imposing binding arbitration on representatives of the collective-bargaining unit and the County Executive. *See Ritchmount Partnership v. Bd. of Supervisors of Elections*, 283 Md. 48, 388 A.2d 523 (1977) (County Council of a charter county must serve as the primary legislative body of the county.)

(41)

[2]Charter §510 (collective bargaining for police officers) was approved in 1980; Charter §511 was approved in 1984; and Charter §510A (collective bargaining for firefighters) was approved in 1994. While Charter §511 was placed on the ballot by the County Council, Charter §§510 and 510A were placed on the ballot as the result of citizen petition.

> or Section 510A of this Charter. Any law so enacted shall prohibit strikes or work-stoppages for such officers and employees. (Emphasis added.)

Webster's dictionary defines the term "arbitration" as: "settlement of a dispute by a person or persons chosen to hear both sides and come to a decision."[3] Black's Law Dictionary defines "arbitration" as, "a method of dispute resolution involving one or more neutral third parties who are chosen by or agreed to by the disputing parties, **and whose decision is binding**." (Emphasis added.)[4] Accordingly, the normal meaning of the term "arbitration" involves as a key element a binding dispute resolution process.

The legislative history concerning Charter §511 confirms that §511 was intended to authorize a binding dispute resolution process. The 1984 report of the Charter Review Commission recommended that the County Council place on the ballot for approval by the voters Charter §511.[5] The Charter Review Commission report states, "The Commission believes that the Council should have the opportunity and the clear authority to deal **uniformly** with the issue of collective bargaining for County employees other than police officers; that position was unanimous and bi-partisan." (Emphasis added.) As noted, Charter §510, which had been approved in 1980, mandated binding arbitration to resolve an impasse in collective bargaining for police officers.

On July 26, 1984, the County Council discussed placing Charter §511 on the ballot. There was considerable discussion regarding whether Charter §511 should authorize the Council to provide for a binding dispute resolution process.[6] The Council minutes reflect that Council member Hanna moved to delete from Charter §511 the phrase "arbitration or other impasse-resolution procedures," and substitute "mediation or **non-binding** arbitration." (Emphasis added.) Ms. Spencer, a member of the Charter Review Commission, pointed out that Mr. Hanna's amendment would create a conflict with §510, which provides for binding arbitration for police officers. Mr. Renne, president of the Montgomery County Government Employees Organization, indicated that his organization hoped that the Charter would provide for "one system of arbitration for all employees." Mr. Renne indicated that "binding arbitration is preferred because without it there will be inconsistency and uncertainty about how an impasse will be resolved."

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[3]Webster's New World Dictionary of the American Language (College Edition, 1960)

[4]Black's Law Dictionary (Bryan A. Garner, ed., West Publishing Company, Pocket Edition, 1996)

[5]Relevant portions of the 1984 Charter Review Commission Report are attached.

[6]Relevant portions of the Council minutes for July 26, 1984, are attached.

In short, the legislative history of Charter §511 clearly indicates that the Charter amendment was intended to enable the Council to provide for binding dispute resolution, and the actual words used in Charter §511 are consistent with that intent.

CONCLUSION

Unless authorized by the County Charter, the Council would be without the authority to enact legislation to impose a binding dispute-resolution process on the exercise of an executive function—like agreeing to a collective bargaining agreement—by the County Executive. But Charter §511 does authorize the Council to enact legislation providing for arbitration to resolve collective bargaining impasses. Bill 45-97 accordingly may legally provide for arbitration to resolve an impasse in the collective bargaining process.

We trust you will find this memorandum responsive to your inquiry. If you have any concerns or questions regarding our advice, please let us know.

# # #

MPH:manm
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c: Bruce Romer, Chief Administrative Officer
Marta Brito Perez, Director/Office of Human Resources
Deborah Snead, Assistant Chief Administrative Officer
Bernadette F. Lamson, Assistant County Attorney
David E. Stevenson, Associate County Attorney

1984 REPORT of the CHARTER REVIEW COMMISSION

May 1984

(44)

Montgomery County, Maryland

RECOMMENDATION B. Collective Bargaining for County employees.

A new Section 511 should be added to the Charter to authorize the County Council to provide by law for collective bargaining with arbitration or other impasse resolution procedures, with authorized representatives of officers and employees of the county government not covered by Section 510 of the Charter; such law would prohibit strikes and work stoppages.

PROPOSED CHARTER LANGUAGE

Revised Section 511

SECTION 511 Collective Bargaining - County Employees

The Montgomery County Council may provide by law for collective bargaining, with arbitration or other impasse resolution procedures, with authorized representatives of officers and employees of the county government not covered by Section 510 of this Charter. Any law so enacted shall prohibit strikes or work stoppages for such officers and employees.

A new second sentence for Section 401 shall be added as follows:

PROPOSED CHARTER LANGUAGE

Revised Section 401

SECTION 401 Merit System

The Council shall prescribe by law a merit system for all officers and employees of the County government, except members of the Council, the County Executive, the Chief Administrative Officer, the County Attorney, the heads of the departments, the heads of the principal offices and agencies, as defined by law, one confidential aide for each member of the Council, two senior professional staff positions for the

Council as a whole as may be designated from time to time by the Council, three special assistant positions in the office of the County Executive as may be designated from time to time by the County Executive, special legal counsel employed pursuant to this Charter, and members of boards and commissions and other officers authorized by law to be appointed to serve in a quasi-judicial capacity. Officers and employees who are members of a unit for which a collective bargaining contract exists may be excluded from provisions of the merit system only to the extent that such provisions are subject to collective bargaining pursuant to legislation enacted under Section 510 or Section 511 of this Charter. The merit system shall provide the means to recruit, select, develop, and maintain an effective, non-partisan, and responsive work force with personnel actions based on demonstrated merit and fitness. Salaries and wages of all classified employees in the merit system shall be determined pursuant to a uniform salary plan. The Council shall establish by law a system of retirement pay.

Note: New matter: underscored

DISCUSSION

Collective bargaining for county employees has been considered by previous Charter Review Commissions and County Councils. Other public employees (i.e. teachers, school supporting service employees, and employees of Montgomery College) have obtained collective bargaining through passage of public general laws by the Maryland General Assembly. In addition, Montgomery County Police Officers obtained the right to bargain collectively through a Charter amendment which they proposed by initiative.

The Commission believes that the Council should have the opportunity and the clear authority to deal uniformly with the issue of collective bargaining for County employees other than police officers; that position was unanimous and bipartisan.

The proposed amendment would leave to the discretion of the Council the decision as to whether or not county employees should have the right to bargain collectively. The proposed amendment also leaves to Council discretion the extent to which county employees under collective bargaining should remain within the merit system. The proposed amendment would also prohibit strikes by county employees who are the subject of a collective bargaining agreement.

There was disagreement among the Commission members as to whether the proposed amendment should mandate action by the Council to create a framework for collective bargaining (five members favored the mandatory language) and on whether there should be a "no strike" provision in the proposal (the same five members opposed the strike ban). Commissioner Michael Gildea has written a minority statement covering these two positions, and Commissioners Goldman, Garber, and Gildenhorn subscribed to those views. They are included in this report, pages 21-26. Commissioner Frosh has also written a minority statement on these two positions. His comments are included on page 27 of this report.

The Commission does not recommend any action at this time on the issues of a separate merit system for legislative and/or judicial employees, RIF/replacement rights between and among executive, legislative, and judicial employees, or increased non-merit staff for the County Council. The Commission believes that these issues require further study.

Submitted in packet of 8/17
Council review cutoff 8/23
Approval scheduled 8/28

NOT APPROVED (8/17)
DISTRIBUTION LIMITED TO COUNCIL & STAFF

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Thursday, July 26, 1984 Rockville, Md.

The County Council for Montgomery County, Maryland, convened in the Council Hearing Room, Stella B. Werner Council Office Building, Rockville, Maryland, at 9:47 A.M. on Thursday, July 26, 1984.

PRESENT

Esther P. Gelman, President — Michael L. Gudis, Vice President
Rose Crenca — Neal Potter
Scott Fosler — David L. Scull
William E. Hanna, Jr., President Pro Tem

The President in the Chair.

Re: Worksession on Charter Amendments, Petitions and Ballot Questions

The Council reviewed Charter amendments, petitions, and ballot questions in accordance with a memorandum of July 24, 1984 from Myriam Bailey, Office of Legislative Counsel. The Council began its review by considering recommendations of the Charter Review Commission.

Ballot Question A and Proposed Charter Amendment (Approval of the Budget) - This involves an amendment to Section 305 of the Charter which exempts the budgets of certain self-funding programs from the computation of the aggregate operating budget when determining whether an affirmative vote of five Councilmembers is required to approve the budget; provides that the Consumer Price Index shall be computed for the twelve months preceding December first of each year; and makes a clarifying change.

Councilman Potter directed attention to his proposed additional amendment to add the following language after the phrase "For the purposes of this limitation the aggregate operating budget":

shall include all items for which appropriations were included in the operating budget of the preceding year

Mr. Potter said that his amendment has been discussed with the Office of Management and Budget. The amendment is proposed to ensure that the comparison from one year to the next truly reflects the increase in operating budget expenditures. He said that it might be helpful to add the following clarifying language:

Mr. Spengler directed attention to the Charter Review Commission's proposed Charter language for Section 305, noting that the word "fully" between "for" and "self-supporting" in the proposed language is used to describe enterprise funds which are not necessarily fully self-supporting.

Councilman Gudis moved, duly seconded, to delete the word [fully] between "for" and "self-supporting" in the Charter amendment.

Councilman Hanna suggested that the word "self-supporting" be deleted also. Mr. Gudis accepted Mr. Hanna's suggestion as an amendment to his motion.

Mr. Spengler said that accountants use the term "primarily" self-supporting. If it meets that test, it is considered an enterprise fund.

Councilman Potter moved, duly seconded, an amendment to Mr. Gudis' motion to substitute the word "primarily" for "fully."

Councilman Hanna said that, if the word "primarily" is used, it will have to be defined. In his opinion, it is simpler to say "enterprise funds" without any adjectives.

Councilmembers Potter and Fosler voting in the affirmative and Councilmembers Hanna, Gudis, Scull, Crenca and Gelman voting in the negative, the amendment to Mr. Gudis' motion failed for lack of a majority vote.

Without objection, the Council approved Mr. Gudis' motion, as amended, to delete the words [fully self-supporting].

Upon motion of Councilman Gudis, duly seconded and without objection, the Council agreed to delete [the Parking Lot districts] from the proposed Charter amendment for Section 305 of the Charter.

Ballot Question B and Proposed Charter Amendment (Collective Bargaining - County Employees - This involves an amendment to Section 401 of the Charter and the addition of a new Section 511 authorizing the Council to provide by law for collective bargaining.

President Gelman asked about the distinction between "mediation" and "arbitration." Mr. Newman said that mediation is a resolution of differences by an informal procedure, while arbitration is a resolution of differences by a formal procedure involving the issuance of a decision by an arbitrator. The question of whether the decision is binding or not depends upon the agreements reached by the parties involved. Councilman Fosler noted that "binding arbitration" is another term to be considered.

Councilman Hanna moved, duly seconded, to delete from the proposed Charter amendment for Section 511 the words [arbitration or other impasse resolution procedures] and to substitute mediation or non-binding arbitration.

Ms. Elizabeth Spencer, a member of the Charter Review Commission, said that the Charter Review Commission felt that the language in the Charter should be as broadly permissive as possible because the legislation enacted by the Council may be different for different groups.

President Gelman expressed the view that the language in the Charter amendment should be broad because it empowers the Council to enact legislation.

Councilman Hanna said that he prefers to restrict the law that may be enacted to provide for only non-binding arbitration.

Councilman Potter suggested that Mr. Hanna would only need to add the word "non-binding" before the word "arbitration" to accomplish his objective. Mr. Hanna accepted Mr. Potter's suggestion as an amendment to his motion.

Ms. Spencer pointed out that this will create a conflict with Section 510 of the Charter which provides for binding arbitration with an authorized representative of the Montgomery County police officers.

Mr. Geno Renne, President of the Montgomery County Government Employees' Organization (MCGEO), cited the need for equity among County employees. He said that, regardless of whether it is included in the Charter, the Council has the ultimate responsibility of deciding whether it will accept binding arbitration. He said that both of the groups represented by MCGEO are currently under "meet and confer", and that it was hoped that the Charter amendment would provide one system of arbitration for all employees. He said that binding arbitration is preferred because without it there will be inconsistency and uncertainty about how an impasse will be resolved.

Councilman Potter said that he believes binding arbitration would remove from the Council its authority to make the final decision. Noting that he believes that it might be appropriate in situations where strikes are prohibited, Mr. Potter raised objections to the language proposed for Section 511 that says that "any law so enacted shall prohibit strikes or work stoppages." He believes that the Charter amendment should provide some flexibility and balance. He noted that Section 510 prohibits strikes, but provides for binding arbitration.

Councilman Hanna said that he objects to relinquishing of the Council's responsibility to an arbitrator and believes that it could have negative results. He cited a case where employees negotiated an agreement under binding arbitration which called for salary increases which could not be met without a tax increase. He said that the court ruling in this case was that the only individuals who have the overall responsibility of the government are the elected officials; an arbitrator cannot remove those powers and demand something that is against the public interest. He said that he is in favor of collective bargaining for employees if this is what the employees wish.

Councilmembers Hanna and Scull voting in the affirmative and Councilmembers Gudis, Potter, Crenca, Fosler and Gelman voting in the negative, Mr. Hanna's motion to add non-binding before the word "arbitration" failed for lack of a majority vote.

With respect to the language which indicates that the authority for collective bargaining may be granted to authorized representatives of officers and employees of the County government not covered by Section 510, Mr. Renne pointed out that MCGEO cannot represent non-merit employees. He believes that the Council can address this issue through the legislation it enacts in this regard.

Councilman Potter moved to substitute the word may for "shall" before the word "prohibit" in the language proposed for Section 511. The motion failed for lack of a second. In making the motion, Mr. Potter said that he believes that the issue of prohibiting or permitting strikes could be addressed in legislation the Council enacts.

Mr. Renne requested that the record reflect MCGEO's opposition to the lack of flexibility in the Charter amendment for County employees.

Councilman Potter moved to delete the word [only] between "system" and "to" in the language proposed for Section 401. Following discussion, without objection, the Council agreed to amend this language by including a comma before the word "only", as suggested by Ms. Spencer.

Councilman Hanna raised a question about the language proposed for Section 401 that says that "officers and employees who are members of a unit for which a collective bargaining contract exists may be excluded from the provisions of the merit system." He expressed the view that employees should