MFP ITEM 1
February 24, 2000
Worksession

MEMORANDUM

TO: Management and Fiscal Policy Committee

FROM: MF 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, 1999. 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 (OHR), 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).

At a worksession held on November 29, this Committee made tentative decisions on certain issues, described below, and encouraged OHR and MCGEO to work together, if possible, to reconcile their views on the kind of binding arbitration that should be adopted.

Summary

Bill 26-99 would make the following 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 permits 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, which is only for public safety (police, fire) employees. (Unlike other jurisdictions, the distinction between employee groups is not based on the presence or absence of a right to strike; our 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. (See excerpts of Prince George's County law, ©52.) 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 allows binding arbitration. Nor does the federal government or any Virginia jurisdiction (Virginia does not allow any 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 item separately and would not be bound by the parties' offers. Under the bill the arbitrator decides 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 "go along for the ride" and are given scant separate consideration. In that case, 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 suggested limits on what issues are defined as economic. See item #8 on ©25-26. At the worksession OHR Director Perez reiterated that the economic issues should be limited to wages, pensions, and health benefits. MCGEO preferred the broader definition in Bill 26-99.

After negotiations since the November worksession, OHR and MCGEO agreed to support an amendment to adopt the last best offer for the entire contract ("total package") process that is used in the police bargaining unit. If the Committee endorses this approach, Council staff will draft appropriate language, based generally on the current provisions in County

Code §33-81, for the Committee's approval. A "total package" approach would eliminate the need for the arbitrator to decide which issues are economic or non-economic. In staff's view, it would also continue the pattern we have observed in the police bargaining unit, where the arbitrator's award effectively hinges on the economic issues, especially the proposed wage and salary adjustments. Whether this process makes equal sense in the more varied MCGEO units merits further discussion.

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. **At the November worksession the Committee recommended that changes in the scope of the bargaining unit not be addressed in this bill.**

Collective bargaining agreement calendar Bill 26-99 would move the deadline for the arbitrator's award from February 1 to March 1. The Executive preferred February 15. While these changes move the bargaining deadline closer to the operating budget submission deadline, in our view they reflect how the process has actually functioned in recent years. **After negotiations since the November worksession, OHR and MCGEO agreed to split their difference and move the relevant dates forward a half-month.** In other words, they agreed to require impasse to be declared by February 1 (the current law says January 15), and the arbitrator's report would be due by February 15 (the current law says February 1).

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. **After negotiations since the November worksession, OHR and MCGEO agreed to leave the current law unchanged on this point.**

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. **After negotiations since the November worksession, OHR and MCGEO agreed to leave the current law unchanged on this point.**

5-year term Executive staff would lengthen the maximum term of a collective bargaining agreement with MCGEO from 3 to 5 years. The collective bargaining agreement could, of course, allow one or more issues to be reopened during that period. At the November worksession OHR staff argued that a 5-year term would send a message of stability to County employees and bond rating agencies. Committee Chair Praisner noted that a 5-year contract could bypass an entire Council term, effectively taking major collective bargaining issues of the table during that period and allowing only isolated consideration of any reopeners. (However, the bypassed Council could decline to fund a cost item approved by the previous Council.)

Councilmember Andrews asked about the experience of other jurisdictions with length of collective bargaining agreements. **In negotiations since the November worksession, OHR and MCGEO agreed to support this amendment.**

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, in redrafting this bill Council staff will work with the parties to make sure that the Council's role is preserved as originally intended.

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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

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.

(5)

(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

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.

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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)

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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.

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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
Rose Crenca
Scott Fosler
Michael L. Gudis, Vice President
Neal Potter
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

(d) No election shall be conducted pursuant to this Section in any appropriate bargaining unit within which in the preceding 12-month period an election shall have been held nor during the term of any lawful collective bargaining agreement between the employer and a labor organization, except that this restriction shall not apply to that period of time covered by any collective bargaining agreement which exceeds three years. For the purposes of this Section, extensions of agreement shall not affect the expiration date of the original agreement. Where a valid collective bargaining agreement is in existence, a petition for election may be filed only during the period beginning November 1 and ending on November 30 of the fiscal year in which said agreement will terminate.
(CB-1-1973)

Sec. 13A-108. Rights accompanying exclusive recognition.

(a) The labor organization which has been certified by the Panel shall be the exclusive representative of all employees in the unit and as such shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to membership in the labor organization.

(b) When the collective bargaining agreement provides for a grievance procedure, only that procedure shall be applicable to the employees in the unit.

(c) Where a labor organization has been certified as the exclusive representative of the employees in a unit, it shall be the only labor organization eligible to obtain an agreement from the employer to deduct from the pay of those employees in the unit, who provide written authorization, any fees designated or certified by the appropriate officer of the labor organization and to remit said fees to said labor organization, provided that any such authorization shall not be irrevocable for a period of more than one year or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner.
(CB-1-1973)

Sec. 13A-109. Negotiations.

(a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours and other terms and conditions of employment which are subject to negotiation under this law and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation shall not compel either the employer or the exclusive representative to agree to a proposal or require the making of a concession. The County Executive, or his designated authorized representative(s), shall represent the employer in collective bargaining, except as otherwise provided herein. Where a collective bargaining agreement pertains to fire fighters, the President of the Prince George's County Volunteer Fire Association and the Chairman of the Prince George's Fire Commission shall be notified of all negotiations between the County and the fire fighters union and the County Executive or his designated representative shall, prior to concluding negotiations, meet and confer with the President of the Volunteer Fire Association or his representative and the Chairman of the Fire Commission or his representative who shall be a Fire Commissioner. The purpose of said conference or conferences shall be to

apprise the President and Chairman of the terms of the proposed contract so that an opportunity is afforded the Volunteer representatives to advise the Executive of any concerns the proposed contract may have on the volunteer service.

(b) The employer shall not be obligated to negotiate with respect to those Countywide matters which must necessarily be uniform for all employees, such as a Countywide pension plan or reductions-in-force, unless a labor organization or council or group of labor organizations represent more than 50 percent of all employees, within the meaning of this law, subject to such uniform rules. However, the foregoing shall not prevent the employer from meeting with any other labor organization for the purpose of hearing the views and requests of its members on such matters, provided that the organization or council or group designated as representing more than 50 percent of such employees is informed in advance of the meeting, and any changes in the terms of such Countywide matters is effected only through negotiations with it; or be construed to deny to the employer or an exclusive representative the right to bargain for a variation of a particular application of any Countywide policy or variation of an agreement reached pursuant to these provisions, where considerations are special and unique to the class of employees or unit involved. Disputes over the identification of matters "which must necessarily be uniform" may be resolved pursuant to the procedures provided in Section 13A-111.

(c) Because effective and orderly operations of government are essential to the public, it is declared to be in the public interest that in the course of collective bargaining, the employer and the exclusive representative shall make every reasonable effort to conclude negotiations no later than March 1 of each year, and shall include provisions for an effective date, a reopening date, and an expiration date. Where an agreement is a multiyear agreement, negotiations thereon should be concluded by March 1 of the year in which the existing agreement will expire. With respect to matters requiring the appropriation of funds, the effective date of an agreement shall coincide with the employer's fiscal year.

(d) An agreement may contain a grievance procedure culminating in final and binding arbitration of grievances and disputed interpretations of such agreement. The grievance procedure shall set forth requirements for an election of remedies where other avenues of appeal may be equally available. The employer is authorized to agree, in his discretion, to voluntary binding arbitration with respect to negotiation impasse, which involves employees other than protective service employees. Negotiation impasses involving protective service employees are covered separately by the procedures contained in Section 13A-111.01.

(e) Any agreement reached by the negotiators shall be reduced to writing and shall be executed by both parties. Such agreement shall be valid and enforced under its terms when entered into, in accordance with the provisions of this law and County Charter.

(f) A request for funds necessary to implement such written agreement and for approval of any provision of the agreement which is in conflict with any County Law, Ordinance, Rule or Regulation, including those adopted by its agents such as the Personnel Board, or other action adopted by the employer with the force of law, shall be submitted to the County Council by the employer within the time schedule provided in the agreement. The County Council, except for agreements covering protective service employees governed by Section 13A-111.01 and Section 908 of the County Charter, may approve or reject such request as a whole. If the submission is rejected, the entire agreement shall be returned to the parties for further bargaining and either party may reopen all or part of the agreement. Rejection shall be accompanied by a detailed

bargaining. Such request shall be considered rejected if the Council fails within ninety (90) days after submission to said body to take final action thereon. Failure by the bargaining representative of the employer to submit request within the designated time period shall be considered an unfair labor practice committed by the employer.

(g) If upon approval of the County Council, there is a conflict between the collective bargaining agreement and any rule or regulation adopted by the employer, including merit system or other personnel regulations, the terms of such agreement shall prevail, except where specifically precluded by Charter or State law. Similarly, County Council, upon approval of such agreement, shall enact such legislation and appropriate whatever funds are required to comply with the collective bargaining agreement.

(h) The employer shall have the obligation to bargain on matters which, although otherwise within the scope of bargaining, require action by a body, agency, or official other than the County Executive or the County Council. In addition, the employer shall have the obligation to bargain on the question of whether it should request such body, agency or official to take such action or support such request, provided, however, that no impasse panel or other third party neutral utilized for impasse resolution shall be empowered to recommend that the employer make or support such a request.

(i) If the provisions of the Constitution or By-Laws of the exclusive representative require ratification of a collective bargaining agreement by its membership, only those members who belong to the bargaining unit involved shall be entitled to vote on such ratification notwithstanding such provisions.

(j) At least one representative of the exclusive representative shall be given reasonable time off without loss of compensation during normal working hours to participate in collective bargaining, subject to such terms as an agreement between the parties may provide.
(CB-1-1973; CB-172-1974; CB-24-1981; CB-24-1995)

Sec. 13A-118. Negotiability disputes.

(a) General. A negotiability dispute shall exist when a labor organization and an employer disagree on whether the collective bargaining agreement, applicable rules or regulations, this law, other law or the County Charter, as the case may be, prohibits bargaining with respect to a specified matter. For the purposes of this law, a negotiability dispute shall not refer to the situation where a party refuses to bargain as a matter of choice and not as the result of a purported legal or contractual prohibition or to the situation where the parties are unable to agree upon the terms of a collective bargaining agreement, insofar as the issue in dispute is not "what is negotiable."

(b) Grievances. An issue which involves the interpretation of a controlling agreement in existence shall be resolved under the procedures of the controlling agreement. Additionally, disputes over what is subject to a grievance procedure and what is arbitrable under such procedure shall not be resolved under the procedures set forth in this Section.

(c) Procedure.

(1) The services of the Unfair Labor Practices Panel shall be invoked in the manner prescribed in Section 13A-104(c), provided however, that the parties submit a sworn statement verifying that tentative agreement has been reached on all items of negotiations except those presented to the Panel, or, if this is not the case, a statement indicating why agreement has not

(54)

Sec. 13A-111. Procedures pertaining to collective bargaining impasses other than those involving protective service employees.

(a) General.

(1) "Impasse" means the failure of the employer and the exclusive representative to reach a collective bargaining agreement despite good faith efforts to do so. However, the Impasse Panel shall be empowered to provide such dispute resolution services as deemed needed either by the parties or as found by the Panel to be essential to the public interest and welfare, even if impasse has not been reached.

(2) An Impasse Panel member shall have power to mediate, hold hearings, compel the attendance of witnesses and the production of documents, review data, make public any recommendations or findings after notice to the parties and take whatever action he considers necessary to resolve the impasse, provided that such action does not impose a final and binding settlement on the parties except as mutually authorized by the parties or except where the Impasse Panel has denied a labor organization the right to strike and has in its discretion required compulsory binding arbitration. In such cases, the decision of the Impasse Panel shall be submitted to the Council for approval. Unless the parties otherwise provide, a single Panel member rather than multiple members shall provide the services herein described, provided further that a member acting as a mediator shall not act as a fact finder or arbitrator in the same matter without the consent of the parties.

(3) Confidential information disclosed by the parties to a mediator in the performance of his mediation functions shall not be divulged voluntarily or by compulsion. All files, records, reports, documents or other papers received or prepared by a mediator while serving in such capacity shall be classified as confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by him on behalf of any party to any case pending in any type of proceeding. A party shall have the right to bar a Panel member who becomes privy to confidential information about that party gained through mediation techniques, from serving in any fact finding or arbitration role relevant to that dispute.

(b) Action by the Parties.

(1) The employer shall have the power to enter into a written agreement with the exclusive representative setting forth an impasse procedure to resolve disputes over the terms or conditions of an initial or renewed collective bargaining agreement. The parties are not precluded from using third party neutrals other than on the impasse panel described in Section 13A-111(c)(4).

(2) The employer, by collective bargaining agreement or by written memorandum, may at any time agree to submit any or all of the issues in dispute to final and binding arbitration.

(3) Any final and binding settlement imposed upon the parties shall be subject to the same conditions for approval as set forth in Section 13A-110(f).

(c) Procedures.

(1) At least 30 days prior to the expiration date of any collective bargaining agreement but not later than March 1, or when 90 days have passed after the commencement of negotiations of an initial agreement, the parties shall notify the Panel of the status of negotiations. The Panel may on its own motion invoke mediation, except if the parties have provided otherwise pursuant to Section 13A-111(b)(1).

been reached on such other matters and why the Panel nevertheless should assert jurisdiction.

(2) The Impasse Panel, while dealing with an impasse, may invoke the provisions of this Section, pursuant to Section 13A-111(c)(2), without the consent of the parties.

(3) The parties, upon request of the Panel, or in petitioning the Panel to settle the dispute, shall stipulate the precise issue to be resolved. Each party shall file within 5 days after the submission of such stipulation, a brief supporting its position along with proof of service of a copy of such brief to all parties.

(4) If the parties cannot agree on a stipulation after reasonable attempts to do so, each shall file a written statement as to what it believes the issue to be, why agreement could not be reached on phrasing of the issue, what attempts were made to reach a stipulation and a brief in support of its position on the issue in dispute.

(d) **Powers of the Panel.** The Panel, at its discretion, may:

(1) Request the parties to file reply briefs;

(2) Refuse to entertain the matter, or a part thereof, and return the dispute to the parties;

(3) Rephrase the issue and request the parties to submit additional briefs;

(4) Call upon mediation or fact finding to be used by the parties prior to the Panel's acceptance of the case;

(5) Compel the parties to continue bargaining while the Panel is trying to resolve the issue; or

(6) Render a decision on the issue, in whole or in part.

(e) **Panel Procedures upon acceptance of the issue.**

(1) The Panel may decide the issue on the record or, after having notified the parties its phrasing of the issue to be resolved, may hear oral argument. Before, during, or after formal proceedings, the Panel may request evidence of added briefs on specified items.

(2) The Panel may invite as participants, experts, witnesses and others who may have an interest, direct or indirect, in the disputed issue or whose participation may assist the Board in reaching a determination. The Panel may also grant requests for the appearance of witnesses and the production of documents or records. The Panel may also take or cause to be taken depositions. Failure to comply with such requests shall be subject to the Panel sanctions applicable to unfair labor practices.

(3) An issue once submitted to the Panel may be withdrawn only upon consent of the Panel and subject to whatever conditions the Panel may prescribe.

(f) **The Panel's Decision.**

(1) The Panel may issue a statement, accompanied by reasons therefor, indicating whether item in dispute is negotiable. The statement may be accompanied also, when the Panel deems necessary, by an order directing the parties to take or pursue the actions specified in the order. The Panel by means of such order may compel the parties to bargain on such matter. The Panel may also determine, subject to the procedures set forth in Sections 13A-113 and 114, that an unfair labor practice has been committed and may also provide remedies therefor.

(2) To minimize the potential recurrence of similar disputes, the Panel shall publish periodically such decisions and shall distribute copies to all employers within the meaning of this law and to all labor organizations that have attained exclusive recognition.

(CB-1-1973)

(2) The Panel, except as otherwise provided by mutual agreement of the parties, may return the parties to collective bargaining for any or all items in dispute or may refer such items as deemed necessary to the procedure outlines in Section 13A-111 with respect to deciding the negotiability of a matter within the meaning of this law, other applicable laws and the County Charter.

(3) Nothing shall preclude a third party neutral from returning to mediation even after the institution of fact finding or arbitration, or from utilizing such mediation techniques as may be appropriate while engaged in fact finding or arbitration.

(4) The Impasse Panel may not make recommendations or findings upon any matter which requires implementation by a body, agency or official which is not a party to the negotiations and who have not agreed to be a party to such impasse resolution.

(5) From the date on which a collective bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or, if impasse procedures have been invoked, until such time as the Panel has certified that it or other authorized parties have terminated efforts to resolve the dispute, the labor organization party to the negotiations and the public employees it represents, shall not induce or engage in any strikes, and the employer shall refrain from unilateral changes in wages, hours or working conditions.

(d) Notwithstanding any other provision of this Section or Subtitle, any clause in a collective bargaining agreement which sets forth procedures for a reduction-in-force, layoff, and recall, and/or guarantees against a reduction-in-force or a furlough of employees subject to that agreement, shall expire on the date that agreement expires by its express terms. If a collective bargaining agreement, which has remained in effect beyond its expiration date, provides for an annual merit increase for employees, payment of such increase shall be eliminated unless provided for in a successor bargaining agreement.

(e) Costs. The costs for mediation shall be borne by the County. All other costs shall be borne equally by the parties involved in the dispute, except in the unusual event that the National Center or an arbitrator appointed by it shall find pursuant to such rules as it shall issue, that the impasse has been caused or prolonged by flagrant conduct of one of the parties.
(CB-1-1973; CB-24-1981; CB-24-1995).

Sec. 13A-111.01. Procedures pertaining to collective bargaining impasses involving protective service employees.

(a) An impasse in collective bargaining shall exist if, by March 1 of the calendar year in which a collective bargaining agreement covering sworn police officers, uniformed firefighters, correctional officers, and deputy sheriffs (hereinafter "protective service employees") expires, the County and the organization recognized as the exclusive collective bargaining representative for such employees (hereinafter "Exclusive Representative") have failed to reach agreement in regard to wages, hours, and other terms and conditions of employment, provided that the County and the exclusive representative may, by written agreement, extend the period for collective bargaining beyond the last day of February, in which event an impasse shall exist if, by the first calendar day after the end of any period of extension, the parties have failed to reach agreement.

(b) Within three (3) calendar days after there is an impasse in collective bargaining, the County Executive shall send a written notice to the American Arbitration Association (hereinafter "AAA"), with a copy to the exclusive representative, informing them of the impasse and requesting

that the disputed matters be subm to an arbitrator who shall make findings of fact an opose terms of settlement which shall be binding upon the parties. If the County Executive fai. .o send the aforesaid notice within the time allowed, the exclusive representative may send such a notice to the AAA and, for purposes of this Section, the notice shall have the same effect as if it had been sent by the County Executive.

(c) Within five (5) calendar days after receipt of the written notice provided for in Subsection (b), above, the AAA shall designate an arbitrator. Said designation shall be made in accordance with the general rules of the AAA for the designation of arbitrators, provided that the person designated shall be a member of a special panel of three (3) arbitrators that the AAA shall maintain to perform the functions provided for in this Section. The members of this panel shall be designated by the County Executive, from among persons recommended to him by the AAA, and shall be subject to approval by a majority vote of the full County Council. Said designation shall stand approved if not acted upon by the County Council within thirty (30) working days. The County Council shall consider the views of the County Executive and all exclusive representatives in deciding whether to approve a panel nominee. Panel members shall be selected to serve for a period of three (3) years and shall be eligible for reappointment. A member of the panel may be removed upon recommendation of the County Executive and approval by a majority vote of the full County Council for just cause. A vacancy on the panel, whether created by removal, resignation or otherwise, shall be filled by the County Executive with the approval of the County Council promptly in accordance with the procedure set forth herein, and the person appointed to fill a vacancy shall serve pursuant to such appointment only for the unexpired period of the member whom he or she succeeds. Arbitrators shall be compensated for actual services performed on a case by case basis in accordance with the prevailing rates for such service in the Washington Metropolitan Area. The prevailing rate shall be established in the annual budget based upon information supplied to the County from AAA not later than March 1 of each year.

(d) Following notice of an impasse the AAA, within two (2) calendar days after an arbitrator has been designated, shall send a written notice to the County Executive and the exclusive representative informing them, among other things, of the name and address of the arbitrator. Within five (5) calendar days after receipt of said notice, the County Executive and the exclusive representative each shall submit to the arbitrator and the other party, a list which sets forth:

(1) Any agreement which that party contends the parties have reached in regard to any position of each subject of bargaining, the party's understanding of such agreement, and if the agreement has been reduced to writing, a copy of the document in question; and

(2) Any portion of each subject of bargaining in regard to which it contends the parties have not reached agreement and its position in regard to such disputed portion. As used in this Section, the phrase "subject of bargaining" means a subject matter area (e.g., a grievance procedure) and not the specific items within a subject matter area (e.g., a grievance procedure) and not the specific items within a subject matter area (e.g., the number and nature of the steps in a grievance procedure).

(e) Within seven (7) calendar days after receipt of the submissions provided for in Subsection (d), above, the arbitrator shall hold a prehearing conference with the County Executive and the exclusive representative in order to identify any portion of each subject of bargaining in regard to which the parties:

(1) Have reached agreement and the nature of such agreement; and

(2) Have not reached agreement and the nature of the dispute.

At this prehearing conference, the arbitrator also shall obtain from the County Executive and the exclusive representative, their position in regard to any portion of each subject of bargaining as to which the parties have not reached agreement. This position shall be referred to as the party's "final position" and need not be the same as the position set forth in the list submitted pursuant to Subsection (d), above.

(f) If the impasse is not resolved prior to the conclusion of the prehearing conference, the arbitrator shall schedule a hearing in Prince George's County to begin as soon thereafter as possible, but in no event more than twenty (20) calendar days after the conclusion of the prehearing conference. Said hearing shall be open to the public and shall be conducted in accordance with rules and regulations adopted by the AAA for such purpose, provided that the arbitrator shall have the power, at the request of either party or at his or her own initiative, to request the County Council to issue subpoenas pursuant to rules established by the Council for the issuance of subpoenas, requesting the attendance and testimony of witnesses and the production of any records, papers or other information relating to any matter in issue before the arbitrator. The arbitrator shall have the power to request that testimony be under oath and may administer the oath or affirmation of the witness.

(g) If the impasse is not resolved prior to the conclusion of the hearing, the arbitrator shall prepare a written report, which shall include findings of fact and conclusions to which shall be attached a collective bargaining agreement between the County and the exclusive representative. This collective bargaining agreement shall include all agreements reached by the parties at any time prior to the conclusion of the hearing in regard to any portion of each subject of bargaining or other matter, and the final position of either the County or the exclusive representative in regard to the entire disputed portion of each separate subject of bargaining. In determining, for each separate subject of bargaining, whether to include in the collective bargaining agreement the final position of the County or the exclusive representative in regard to the entire disputed portion of each such subject of bargaining, the arbitrator shall consider, among other relevant factors, the following:

(1) The existing terms and conditions of employment of the employees in the bargaining unit;

(2) The ability of the County to meet costs, including both available financial resources and sources of additional financial resources;

(3) (A) The annual increase or decrease in consumer prices for goods and services as reflected in the most recent Consumer Price Index for the Washington Metropolitan Area published by the Bureau of Labor Statistics, United States Department of Labor, commonly known as the cost of living;

(B) The cost of living in the Washington, D.C. Metropolitan Area as compared to the national average and to other comparable metropolitan areas;

(4) The developments in regard to the wages and terms and conditions of employment of other employees performing similar services in other jurisdictions in the Washington Standard Metropolitan Statistical Area and comparable communities;

(5) The special nature of the work performed by the employees in the bargaining unit, including specifically, hazards of employment, physical requirements, educational qualifications, job training and skills, shift assignments and the demands placed upon such employees as compared to other County employees; and

(6) The interest and welfare of the public and the employees in the bargaining unit.

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November 30, 1999

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

Re: Bill 26-99

Dear Mr. Faden:

At yesterday's MFP hearing, we indicated that MCGEO would provide some case law regarding two issues: the relationship between interest arbitration and the legislative authority of the Council, and the classic "balancing" test which labor tribunals such as the County's Labor Relations Administrator utilize in determining whether particular subjects or negotiating proposals are bargainable, or impinge too directly on management rights.

Enclosed is a copy of Baltimore Teachers Union v. Mayor and CC of Baltimore, 151 LRRM 2706, cert. denied, 677 A.2d 565 (Ct. Spec. App. 1996). The BTU case is a detailed treatment of the whole subject of arbitration in the public sector in Maryland. In particular, the nature of the relationship between interest arbitration and the legislative budget making authority is discussed in "Section II" at pages 2716-20. BTU follows the general rule around the country that any labor contract provisions requiring the itemized legislative appropriation of implementing funds, or changes in the formal statutes of a jurisdiction, are only binding upon the legislature after such implementing actions are taken.

Also enclosed is the classic decision of the Wisconsin Supreme Court in City of Beloit v. Wisconsin Employment Relations Commission, 92 LRRM 3318 (1976). As I indicated yesterday, this case is considered to be a persuasive demonstration of the "balancing" process required for any tribunal to reach a determination regarding the negotiability of any subject matter in the public sector. Of course, the specific application of the

(60)

balancing principle must begin with the specific language of whatever state or local statute is being applied.

We will be happy to discuss this matter with the members of the Committee or with staff. Please ensure that this letter and material is provided to the members of the Committee. Thanks.

Very truly yours,

William W. Thompson, II

wwt:dr

cc: Gino Renne (By Fax, w/out enc.)

***167** 108 Md.App. 167

671 A.2d 80, 151 L.R.R.M. (BNA) 2706,
106 Ed. Law Rep. 1214

BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS, LOCAL 340, AFL-CIO
v.
MAYOR AND CITY COUNCIL OF BALTIMORE.

No. 710, Sept. Term, 1995.
Court of Special Appeals of Maryland.
Feb. 7, 1996.

City teachers union moved to modify or vacate arbitrator's decision not to grant remedy for city's alleged breach of wage agreement. The Circuit Court for Baltimore City, Thomas Ward, J., denied union's motion, and union appealed. The Court of Special Appeals, Davis, J., held that: (1) arbitrator's refusal to grant remedy for city's breach of wage agreement was improper abdication of his jurisdiction, but (2) arbitrator erred in determining that wage agreement was valid and binding agreement without Board of Estimate's approval.

Affirmed.

1. LABOR RELATIONS ⚖476
232A ----
232AVIII Alternative Dispute Resolution
232AVIII(D) Judicial Review and Enforcement of Decisions
232Ak476 In general.
Md.App. 1996.
Common-law principles for reviewing arbitration awards, rather than Uniform Arbitration Act, controlled arbitration of city's breach of wage agreement with teachers union, where neither agreement nor side letters expressly provided that Uniform Arbitration Act should apply. Code, Courts and Judicial Proceedings, § 3-206(b).

2. ARBITRATION ⚖77(4)
33 ----
33VI Award
33k75 Impeachment or Vacation
33k77 Motion to Set Aside or Vacate
33k77(4) Scope of inquiry in general.
Md.App. 1996.
Courts generally must defer to arbitrator's findings of fact and applications of law, since arbitration is considered to be "favored" dispute resolution method.

3. ARBITRATION ⚖77(.5)
33 ----
33VI Award
33k75 Impeachment or Vacation
33k77 Motion to Set Aside or Vacate
33k77(.5) In general.
Md.App. 1996.
Courts are reluctant to disturb award of arbitrator where award reflects honest decision of arbitrator and is product of full and fair hearing of parties.

4. ARBITRATION ⚖77(6)
33 ----
33VI Award
33k75 Impeachment or Vacation
33k77 Motion to Set Aside or Vacate
33k77(6) Affidavits, evidence, or record.
Md.App. 1996.
Burden of showing that arbitration award is invalid rests with party attacking award.

5. ARBITRATION ⚖77(7)
33 ----
33VI Award
33k75 Impeachment or Vacation
33k77 Motion to Set Aside or Vacate
33k77(7) Determination and relief; modification.
Md.App. 1996.
Where no issue of fact exists to be tried before circuit court, summary judgment may be granted in judicial proceeding challenging arbitration award.

6. APPEAL AND ERROR ⚖863
30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 In general.
Md.App. 1996.
In reviewing trial court's grant of summary judgment, appellate court is required to determine whether trial court's ruling was legally correct.

7. LABOR RELATIONS ⚖461
232A ----
232AVIII Alternative Dispute Resolution
232AVIII(C) Proceedings and Award
232Ak459 Award
232Ak461 Requisites and sufficiency in general.

Md.App. 1996.
Arbitrator's refusal to grant remedy to city teachers union after determining that city had breached wage parity agreement was improper abdication of his jurisdiction; after determining that city breached its obligation to identify revenues with which to fund pay increase, arbitrator's finding that union was not entitled to remedy could only be described as gross mistake resulting in manifest injustice.

8. ARBITRATION ⚿61
33 ----
33VI Award
33k61 Consistency and reasonableness.
Md.App. 1996.
Arbitrators exceed their powers where they issue award which cannot be supported by any rational construction of parties' substantive contractual provisions.

9. ARBITRATION ⚿31
33 ----
33V Arbitrators and Proceedings
33k31 Mode and course of proceedings in general.
Md.App. 1996.
Arbitrators exceed their jurisdiction by refusing to consider all claims that are properly before them.

10.MUNICIPAL CORPORATIONS ⚿250
268 ----
268VII Contracts in General
268k250 Construction and operation.
Md.App. 1996.
Municipal contracts, particularly those made in furtherance of proprietary functions of municipality, are controlled by same rules of construction that apply to contracts of private corporations and individuals.

11.LABOR RELATIONS ⚿463
232A ----
232AVIII Alternative Dispute Resolution
232AVIII(C) Proceedings and Award
232Ak459 Award
232Ak463 Scope of relief.
Md.App. 1996.
Statute specifically defining salary setting powers of board of school commissioners did not divest arbitrator of power to award contract damages in arbitration over city's alleged breach of wage agreement with teachers union; provision did not define arbitrator's power to provide remedies for breach of salary agreements between city and its teachers, and arbitration order would merely compel city to follow procedure to set teacher salaries.

12.ARBITRATION ⚿29.6
33 ----
33V Arbitrators and Proceedings
33k29 Nature and Extent of Authority
33k29.6 Scope of relief.
Md.App. 1996.
Arbitrators have broad discretion in fashioning remedy for injustice which is found to have occurred.

13.LABOR RELATIONS ⚿462
232A ----
232AVIII Alternative Dispute Resolution
232AVIII(C) Proceedings and Award
232Ak459 Award
232Ak462 Conformity to submission and completeness.
Md.App. 1996.
Arbitrator erred in determining that binding and valid agreement existed between city teachers union and city on wage increase for fiscal year, where Board of Estimates never appropriated funds for wage increase; wage agreement was not binding until Board of Estimates actually included appropriations to fund wage increase in Ordinance of Estimates and City Council passed Ordinance of Estimates according to City Charter.

14.CONSTITUTIONAL LAW ⚿115
92 ----
92VII Obligation of Contracts
92VII(A) Powers of States in General
92k114 The Law Impairing the Obligation
92k115 In general.
Md.App. 1996.
To determine whether government has violated Contract Clause of United States Constitution, determination is required on whether there has been impairment of contract, whether state law has actually operated to substantially impair contractual relationship, and where, assuming substantial impairment, that impairment is permissible as legitimate exercise of government's sovereign powers. U.S.C.A. Const. Art. 1, § 10, cl. 1.

15.LABOR RELATIONS ⚿257.1
232A ----
232AV Labor Contracts
232Ak257 Construction
232Ak257.1 In general.
Md.App. 1996.
City Charter provision for setting salaries of school

personnel did not render wage parity agreement between city teacher's union and city final and binding upon city; provision made clear that no increase in teachers salaries above maximum scale could be made during ensuing fiscal year without Board of Estimate's approval. Baltimore, MD. City Charter, Art. VII, § 65(b).

[671 A.2d 81] ***170** Joel A. Smith (Christyne L. Neff and Kahn, Smith & Collins, P.A., on the brief), Baltimore, for appellant.

James S. Ruckle, Jr. (Otho M. Thompson, Deputy City Solicitor, on the brief), Baltimore, for appellee.

Argued before BLOOM, CATHELL and DAVIS, JJ.

***171** DAVIS, Judge.

This appeal arises out of a dispute between the Baltimore Teachers Union, American Federation of Teachers, Local 340, AFL-CIO (appellant) and the Mayor and City Council of Baltimore (appellee) over appellee's alleged breach of a wage agreement between the parties. Although a number of questions are presented for our review, we [671 A.2d 82] restate them, distilled to two substantive issues, as follows:

I. Was it a "mistake so gross as to work manifest injustice" for the arbitrator to determine that he was without authority to award a remedy for the breach of contract?

II. Was it a "mistake so gross as to work manifest injustice" for the arbitrator to determine that a valid contract existed under which appellee could be liable?

We answer both questions in the affirmative. As we shall explain, the result of our disposition of these questions is that the judgment of the Circuit Court for Baltimore City (Ward, J.) must be affirmed.

FACTS

The sad affair that gives rise to this appeal presents yet another setback for the most noble of professions whose members perform the most essential function in a well-ordered society. Appellants won a Pyhrric victory in their quest for parity in pay with the jurisdictions surrounding Baltimore City--that victory coming in the form of an agreement with appellees to grant the pay increases--only to then face the dual obstacles of procedural barriers and budget shortfalls.

On June 24, 1992, appellant filed suit against appellee in the Circuit Court for Baltimore City to compel appellee to submit to arbitration a contract grievance between the parties, the details of which are fully discussed below. On June 25, 1993, the circuit court ordered that the parties submit their dispute to arbitration. The circuit court amended this order on August 3, 1993, directing "that the Parties proceed to arbitration on all issues, both procedural and substantive." Collectively, ***172** these orders shall be referred to as the circuit court's Orders to Arbitrate.

As ordered, the matter proceeded to arbitration. Over the course of several days in April and May of 1994, full hearings were held before an arbitrator from the Federal Mediation and Conciliation Service. Evidence was presented, testimony was taken, and arguments were submitted. On December 7, 1994, the arbitrator issued a lengthy written Opinion and Award. The Opinion and Award comprehensively recites the underlying facts of this dispute. As the parties do not dispute these facts, our discussion below summarizes the facts as set forth in the Opinion and Award.

Appellant represents appellee's teachers in collective bargaining negotiations with appellee. Salaries of Baltimore City teachers have historically been lower than the salaries of teachers in surrounding jurisdictions. This gap between salaries has reached $5,000 per year in recent years, and has caused difficulty in attracting quality teachers to Baltimore City and an ongoing loss of experienced teachers to higher paying surrounding jurisdictions. This disparity has been a concern of elected officials, including Mayor Schmoke, administrators, teachers, and appellant.

According to the testimony of witnesses for appellant, to address the wage disparity problem, appellant desired an 8% wage increase in the first two years of a three-year collective bargaining agreement and, in the third year, wage parity with surrounding jurisdictions. Appellant states that, in response, Mayor Schmoke stated something to the effect of "you've got it." According to appellant's witnesses, the Mayor was aware of anticipated APEX funding (FN1) from the State, and the parties contemplated that parity would be achieved out of those funds.

***173** In 1988, appellee and appellant entered into negotiations over a collective bargaining agreement (Agreement). During these negotiations, then-Labor Commissioner Richard J. Whalen represented appellee. Whalen opposed the concept of automatic parity and refused to agree to the parity package. Appellant went to the Mayor, who supported appellant's position, and worked with appellant[671 A.2d 83] to craft a comparability formula. (FN2) According to appellant's witnesses, appellee thereupon changed its position at the bargaining table and accepted appellant's parity concept.

The agreement that was eventually negotiated covered the period July 1, 1989 through June 30, 1992 (fiscal years 1990, 1991 and 1992). (FN3) The agreement provided wage increases of 8% in each of the first two fiscal years. The following "wage reopener" provision (Section 5.1.3. of Article V, Compensation and Related Matters, of the Agreement) controlled in the third year of the Agreement (fiscal year 1992):

> The Employer and the Union agree to reopen negotiations on salaries for the 1991-92 school year. It is the goal of the City of Baltimore and the [Union] to support salary levels for teachers comparable to competitive area districts. Adjustments to the salary schedule for the third year shall be determined by the following methods:
>
> a. A list of districts shall be identified and 1991-92 salary schedules obtained from those districts.
>
> ***174** b. Benchmark positions are the minimum and maximum positions on each lane of the schedule.
>
> c. The benchmark positions shall be averaged for all districts in the sample.
>
> d. The City will cooperate with [Union] requests for revenue or expenditure estimates.
>
> e. Once implemented, the schedule shall remain in effect until modified through subsequent agreements.

By the fall of 1990, when negotiations began between appellee and appellant under the wage reopener provision, the economy was stagnant, and appellee and the State were experiencing serious financial problems. The Opinion and Award refers to *Baltimore Teachers Union v. Mayor and City Council of Baltimore,* 6 F.3d 1012, 1020 (4th Cir.1993), wherein appellee's poor financial condition and its operational and budgetary actions in response thereto are fully described.

In early February 1991, in advance of fiscal year 1992, the parties attempted to negotiate a successor agreement to the 1989-1992 Agreement. Appellant sought both general and parity wage increases, asserting that such increases were due under the wage parity reopener provision of the Agreement and that revenues were available to fund the increases. Furthermore, appellant asserted that a wage gap between appellee's teachers and surrounding jurisdictions remained. Appellant's calculations for fiscal year 1992 indicated a 12.9% wage gap. Appellant insisted that the agreed-upon parity "goal" meant a definite commitment to "do something" about achieving parity, assuming revenues could be identified.

Appellee's position, on the other hand, was that there were no funds available for wage increases for fiscal year 1992. Moreover, based on arguments concerning national wage levels for teachers in large cities, appellee asserted that parity increases were not due. Appellee further argued that the Agreement's use of the word "goal" was insufficient to constitute a binding promise. The parties ultimately agreed to a wage freeze for fiscal year 1992.

***175** The wage agreement for the fiscal year 1992 wage reopener was embodied in a September 12, 1991 letter from Jesse E. Hoskins, appellee's acting Labor Commissioner, to Irene Dandridge, appellant's President. The parties refer to this letter as the first "Side Letter." Dandridge counter-signed and dated the first Side Letter in an underlined space corresponding to the typed-word "ACCEPTED." Paragraph 3 of the first Side Letter reads, in pertinent part, as follows:

> [671 A.2d 84] [Appellee] and [appellant] agree to restate our position on Article V--Compensation and Related Matters, Paragraph 5.1(3). The parties agree that the *goal* of [appellee] and [appellant] is to support salary levels for teachers comparable to our competitive area districts. To further our mutual commitment, effective July 1, 1992, a minimum annual parity increase of not less than one percent (1%) will be received. Such parity increases in the aggregate shall not exceed six percent (6%). During FY 1993 and subsequent years both parties agree that the parity increase

will only be received *provided revenues can be identified.*

(Emphasis added).

During fiscal year 1992, the State cut funding to appellee twice, totalling approximately $37.5 million. These cuts, along with a decline in tax revenues, forced appellee to terminate or cut programs, and furlough and lay off employees. During the course of fiscal year 1992, appellee also imposed several unpaid furlough days ("K days") on teachers.

The Agreement and first Side Letter were set to expire at the end of fiscal year 1992. For fiscal year 1993, the parties signed a second Side Letter, dated June 19, 1992, in which the parties confirmed their agreement to extend for one year the Agreement and the terms of the first Side Letter. The Opinion and Award states that appellant had the second Side Letter approved by appellee's Board of Estimates, committing appellee to honor its terms for fiscal year 1993. The second Side Letter was stamped "APPROVED BY THE BOARD OF ESTIMATES JUL 29 1992," and signed by appellee's comptroller. According to the arbitrator, Board of Estimates ***176** approval of the second Side Letter was consistent with its treatment of contracts with vendors and others, but not consistent with its general practice in reviewing collective bargaining agreements.

During negotiations for fiscal year 1993 (and also for previous fiscal year 1992), Hoskins reviewed the proposed "provided revenues can be identified" language of the first Side Letter with Edward Gallagher, appellee's Director of Finance. Gallagher assumed that Hoskins wrote that language, and indicated to Hoskins that Gallagher could "live with it." Gallagher testified that he understood the language to "obligat[e] the [appellee] to try, if it could identify revenues, to provide th[e] parity adjustment," and asserted that the identification of revenues was the right of appellee, rather than a joint task of appellee and appellant. Gallagher testified that "identifying revenues" was a budget term of art for finding revenues from new or unanticipated sources, over and above the current budget allocation. Gallagher conceded that appellee's administration was obligated to make a good-faith effort to identify revenues to fund the parity increase.

Notwithstanding this understanding, Gallagher stated that neither he nor his department carried out this obligation. Gallagher confirmed that the Board was ultimately responsible for identifying revenues, based on, though not necessarily adopting, appellee's recommendations. Gallagher conceded that neither the wage increase nor the obligation to identify revenues was included in his transmittals submitted to the Board of Estimates. Nor did Gallagher do anything else to alert the Board of Estimates of appellee's obligation to identify revenues. Gallagher conceded that it was appellee's duty to do this, and that the Board of Estimates might not have been aware of the obligation to identify revenues. In sum, Gallagher dismissed the process of identifying revenues as being much less important than his overall efforts to balance the budget that year.

Appellee spent its fiscal year 1993 APEX monies on fixed assets, additional administrators, a new management information ***177** system, and other items, none of which included salary increases for teachers, despite the fact that $16 million of the $38 million of APEX money that the State directed to appellee for education was considered "unrestricted." (FN4) The Department of Finance did not allocate [671 A.2d 85] revenues in its proposals for the fiscal year 1993 budget for a parity increase. When the budget proposals reached the Board of Estimates, neither the Department of Finance nor the Board raised the issue of wage parity. The budget recommendations adopted by the Board of Estimates for fiscal year 1993 included no such monies.

By letter dated June 15, 1992, appellant reiterated its position that revenues were available in the budget for a parity increase for fiscal year 1993. Appellant requested arbitration as to the meaning of the term "revenues" and the nature of the parties' obligations under the Side Letter for fiscal year 1993. (FN5) Appellee refused to arbitrate, whereupon appellant obtained the circuit court's Order to Arbitrate the fiscal year 1993 dispute.

After presenting these facts, the arbitrator made certain determinations. Central was the determination that the Side Letters constituted a binding contract for fiscal year 1993. Under this contract, the fiscal year 1993 wage increase to achieve parity was conditioned on the identification of revenues. The arbitrator further determined that appellee had an obligation to review its revenues and priorities diligently and in good faith in an attempt to identify sufficient revenues from which wage parity

could be funded. According to the arbitrator, ***178** however, appellee failed to do this, thereby breaching its contract under the Side Letters for fiscal year 1993.

Although finding that appellee breached the fiscal year 1993 wage increase agreement, the arbitrator determined that he was without authority to grant a remedy for the breach. In this regard, the Opinion and Award reads, in pertinent part, as follows:

> Wages paid to teachers, including any parity increase for [fiscal year] 1993 which might have been paid pursuant to the Side Letters, come from appropriated funds. To be paid, the funds must be approved in accordance with the budget process. I have searched the language of the Agreement; and I am not persuaded that it gives me authority to direct the budget process and, in particular, no authority to direct the policy or legislative processes. I have searched [appellant's] arguments and case law for authorities which would support my authority to direct such a result. I find none.
>
> Indeed, the facts that the political and budget process have been completed for [fiscal year] 1993, the revenues (including the APEX funds) spent, and the books closed would appear to require that any monetary award be paid from funds from the current or subsequent fiscal year. And those payments would also require authorization from the appropriate legislative bodies. Thus, it does not appear that there is *any* effective way for any forum other than the Board of Estimates to remedy [appellee's] breach of its obligation.
>
> To require [appellee], at this time, to conduct a review to determine whether [fiscal year] 1993 APEX monies were required to have been spent on the parity increase, or whether other revenues might have been identified, would be an exercise in futility. The actual spending figures for that year superseded the budget figures prepared in advance. To require [appellee], retroactively, to pay the parity increase assumes the very determination as to revenue identification and priorities which the Side Letters did not require.
>
> ***179** Of [appellant's] argument that State law (the Maryland Educational Code) binds [appellee] to accept both arbitral determination and remedy, notwithstanding limitations the Charter might impose, I am not convinced. Neither the Agreement nor the general provision of the Code give me authority to order the appropriation of taxpayer funds. That is the exclusive prerogative of the legislature. Further, the most that I can enforce is the agreement of the Parties themselves. As the discussion in the foregoing sections indicates, I am not [671 A.2d 86] persuaded that the Side Letters required [appellee] to pay a parity increase.
>
> It may well be that other forums, judicial or political, have authority to compel [appellee] and Board to take concrete steps toward the goal of pay equity, based on the [fiscal year] 1993 obligation of [appellee], as expressed in the Side Letters. I express no opinion as to the existence of such authority by any other forum. If so, my conclusion and Award that [appellee] violated its obligation under those Letters may be a useful finding. However, I am not persuaded that I have authority to more than make such a declaration. The Award so reflects.
>
> (Citation omitted).

After the issuance of the arbitrator's Opinion and Award, appellant filed a motion with the circuit court to modify or vacate the arbitrator's decision. Therein, appellant requested, among other things, that the circuit court order the "payment of the parity wages due in Fiscal Year 1993 to the City's teachers" in order to correct the arbitrator's "palpable mistake of law" in refusing to fashion a remedy. Both parties filed motions for summary judgment. In support of its motion, appellee argued that the arbitrator's Opinion and Award should not be modified or vacated because: (1) the arbitrator did not commit a "palpable error of law" in determining that he was without authority to order or appropriate the expenditure of taxpayer money, and (2) since there was not a genuine dispute of material fact that the Board of Estimates did not appropriate the money for the wage increase, there was not a final approval of the wage increase agreement for fiscal year ***180** 1993, and thus, a valid and binding contract did not exist between the parties under which appellee could be liable.

On April 10, 1995, the circuit court granted appellee's motion for summary judgment and denied appellant's motion for summary judgment. In so doing, the circuit court "adopt[ed] the reasoning of [appellee]," without any further explanation. This appeal follows.

LEGAL ANALYSIS

Standard of Review

[1] The principles controlling the standard of appellate review of an arbitrator's award are crucial in the case at hand. Because neither the Agreement nor Side Letters expressly provided that the Maryland Uniform Arbitration Act (MUAA) should apply, the MUAA does not apply here. MD.CODE ANN., CTS. & JUD.PROC. § 3-206(b) (1995); *Board of Educ. v. Prince George's County Educators' Ass'n.*, 309 Md. 85, 96, 522 A.2d 931 (1987). "Rather, the Maryland common law principles for reviewing arbitration awards are controlling." *Prince George's County Educators' Ass'n.*, 309 Md. at 98, 522 A.2d 931. In *Prince George's County Educators' Ass'n.*, the Court of Appeals held:

> Under Maryland common law standards for reviewing arbitration awards ... we hold that an award is subject to being vacated for a "palpable mistake of law or fact ... apparent on the face of the award" or for a "mistake so gross as to work manifest injustice."

Id. at 105, 522 A.2d 931. Additionally, *Prince George's County Educators' Ass'n.* recognized that courts have vacated arbitration awards based on the similar standard of "manifest disregard of law." *Id.* at 101-05, 522 A.2d 931. According to the Court of Appeals, courts consider a " 'manifest disregard of law ... [to] be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.' " *Id.* at 102, 522 A.2d 931 (quoting *San Martine Compania De Navegacion, SA v. Saguenay Terminals, Ltd.*, 293 F.2d 796, 801 (9th Cir.1961)). ***181** *See also Jih v. Long & Foster Real Estate, Inc.*, 800 F.Supp. 312, 317, 320 (D.Md.1992) ("manifest disregard of the law" is a common law basis for judicial review of arbitration awards connoting more than a mere legal error or misunderstanding).

[2] [3] Similarly, in *Chillum-Adelphi Volunteer Fire Dep't v. Button & Goode, Inc.*, 242 Md. 509, 517, 219 A.2d 801 (1966) (citations omitted), the Court of Appeals stated:

> [671 A.2d 87] Although a court may modify an arbitration award for a mistake of form such as an evident miscalculation of figures, an arbitrator's honest decision will not be vacated or modified for a mistake going to the merits of the controversy and resulting in an erroneous arbitration award, unless the mistake is so gross as to evidence misconduct or fraud on his part.

Indeed, because Maryland courts have historically considered arbitration to be a "favored" dispute resolution method, common law rule dictates that courts generally must defer to the arbitrator's findings of fact and applications of law. *Baltimore County v. City of Baltimore,* 329 Md. 692, 701, 621 A.2d 864 (1993). Thus, courts are fairly reluctant to disturb the award of an arbitrator where the award reflects the honest decision of the arbitrator and is the product of a full and fair hearing of the parties. *Id.* (citing *Prince George's County Educators' Ass'n,* 309 Md. at 98, 522 A.2d 931). *See also Mayor & City Council of Baltimore v. Allied Contractors, Inc.*, 236 Md. 534, 545, 204 A.2d 546 (1964) ("an award is final and conclusive on both parties in the absence of fraud or mistake so gross as to imply bad faith or the failure to exercise honest judgment.").

[4] Distinguishing between a "palpable mistake of law or fact ... apparent on the face of the award" or a "mistake so gross as to work manifest injustice," or a "manifest disregard" is like shoveling smoke. *Williams v. Superintendent,* 43 Md.App. 588, 591, 406 A.2d 1302 (1979), *vacated,* 288 Md. 523, 419 A.2d 383 (1980). Indeed, these standards are so closely related to each other that they appear to be no more than different ways of describing the same thing. However the ***182** mistake is characterized, the burden of showing that an award is invalid rests with the party attacking the award. *Parr Constr. Co. v. Pomer,* 217 Md. 539, 543, 144 A.2d 69 (1958). In view of the foregoing, this burden is a heavy one.

[5] [6] In addition to these principles, we must be mindful that the circuit court granted appellee's motion for summary judgment and denied appellant's motion for summary judgment, thereby denying appellee's petition to modify or vacate the arbitrator's award. Where no issue of fact exists to be tried before the circuit court, as in this case, summary judgment may properly be granted in a judicial proceeding challenging an arbitration award. *Chillum-Adelphi Volunteer Fire Dep't,* 242 Md. at 519, 219 A.2d 801. Thus, in reviewing a trial court's grant of summary judgment, an appellate court is required to determine whether the trial court's ruling was legally correct. *Nationwide Mut. Ins. Co. v. Scherr,* 101 Md.App. 690, 694, 647 A.2d 1297 (1994); *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md.App. 772, 785, 614 A.2d 1021

(1992), *cert. denied,* 330 Md. 319, 624 A.2d 490 (1993). If, therefore, the arbitrator's award should, as a matter of law, remain undisturbed, then the trial court was legally correct in entering summary judgment against appellant and in favor of appellee. *Chillum-Adelphi Volunteer Fire Dep't,* 242 Md. at 519, 219 A.2d 801.

Before turning to the merits of this appeal, while keeping in mind the above principles, it is necessary to bring into focus our specific task on this review, in light of the nature of the circuit court's order granting summary judgment in favor of appellee and against appellant. As we stated above, the trial judge adopted appellee's reasoning in ruling as it did. Also as mentioned above, appellee's reasoning was that it was entitled to summary judgment on two grounds: (1) the arbitrator did not commit a "palpable error of law" in determining that he was without authority to grant a remedy; and (2) since it was undisputed that the Board of Estimates did not appropriate funds for the wage increase, the Board of Estimates did not ***183** finally approve the wage increase agreement, and, therefore, a binding, valid agreement did not exist.

Because the circuit court did not state on which of these two grounds its grant of summary judgment was based, we must operate on the basis that the circuit court's ruling was alternative in nature. In other words, under the circuit court's ruling, appellee was entitled to judgment as a matter of law because the arbitrator's determination that he was without authority to grant a remedy (assuming a valid contract existed) was not so erroneous under the above standard of [671 A.2d 88] review principles as to require that determination to be set aside or modified, or, in the alternative, because there was no contract between the parties. This means that on this review we must determine whether the circuit court was legally correct in basing its grant of summary judgment in favor of appellee and against appellant on either of the two alternative grounds.

I

[7] Our first task, under the above enunciated principles of judicial review, is to determine whether the circuit court was legally correct in leaving undisturbed the arbitrator's conclusion that he was without authority to grant a remedy. Essentially, appellant argues that the arbitrator's refusal to grant a remedy was a palpable error of law apparent on its face, which will work a manifest injustice. In this regard, appellant contends that the arbitrator "ducked" his responsibilities under the circuit court's Orders to Arbitrate, which required arbitration of "all issues, both procedural and substantive." Moreover, appellant asserts that the arbitrator defeated the strong public policy underlying arbitration (namely, that arbitration bring the dispute to a final resolution) by finding a breach of contract but not awarding a remedy therefor. Appellant relies on *Snyder v. Berliner Constr. Co.,* 79 Md.App. 29, 555 A.2d 523 (1989), for this proposition.

We agree with appellant's position. The arbitrator's decision declining to award a remedy was a palpable error resulting in a manifest injustice requiring the vacation or modification ***184** of the arbitrator's Opinion and Award. As fully explained below, consistent with the principles of appellate review of an arbitration award, we find that the arbitrator's refusal to grant appellant a remedy, after so definitely determining that appellee had breached the fiscal year 1993 wage parity agreement, to be an improper abdication of his jurisdiction.

Our holding rests largely on *Snyder.* While we recognize that *Snyder* may not be controlling on this appeal, because it was decided under the MUAA, the case is highly persuasive and is instructive in the resolution of this issue. In *Snyder,* a building owner refused to pay a contractor the final installment under a renovation contract. *Id.* at 31, 555 A.2d 523. The contract contained an arbitration clause, and the owner submitted the dispute by letter to the American Arbitration Association (AAA). *Id.* at 32, 555 A.2d 523. The letter, among other things, stated that "no money is due from the owner to the contractor." *Id.* The contractor responded with an "Answer and Counterclaim," stating that all work was properly performed under the contract, and that the final installment was therefore due and owing. *Id.* AAA then advised the contractor that the counterclaim was not necessary since the question of liability for the installment had been submitted by the owner's initial letter. *Id.* Accordingly, the contractor withdrew the counterclaim, reserving it as a defense to the owner's claim. *Id.* at 32-33, 555 A.2d 523.

After an evidentiary hearing, the arbitrator issued an order and opinion granting the owner's claim that it was not liable to the contractor for the final installment. *Id.* at 33, 555 A.2d 523. "In the same breath, however, the arbitrator stated that [the contractor's] claim was meritorious, lacking only a

request for monetary relief." *Id.* In this regard, the arbitrator concluded that he was without authority to grant monetary relief since the counterclaim requesting such relief had been withdrawn. *Id.* The arbitrator "nevertheless granted [the owner] a monetary award of $1,500.00, 'in full settlement of all claims submitted.' " *Id.*

***185** In response, the contractor requested the circuit court to vacate the arbitrator's award. *Id.* Finding the arbitrator's award to be "clearly irrational," the trial judge vacated the award and remanded the case to AAA for a determination of the owner's liability. *Id.* The owner appealed the trial judge's remand order to this Court, and we affirmed the circuit court. *Id.*

[8] [9] During our discussion of an appellate court's standard of review under the MUAA of an arbitrator's award, we made several important observations. First, we noted that an arbitrator will be deemed to have exceeded his powers where he issues [671 A.2d 89] "an award which cannot be supported by any rational construction of the parties' *substantive contractual provisions.* " *Id.* at 37, 555 A.2d 523 (citing *O.S. Corp. v. Samuel A. Kroll, Inc.,* 29 Md.App. 406, 408-09, 348 A.2d 870 (1975)). (FN6) Second, we observed that "arbitrators exceed their jurisdiction by refusing to consider all claims that are properly before them." *Id.* at 37-38, 555 A.2d 523 (citing *McKinney Drilling Co. v. Mach I Ltd. Partnership,* 32 Md.App. 205, 211, 359 A.2d 100 (1976)).

With these principles in tow, we then set out to determine whether the arbitrator's failure to fashion a remedy warranted correction of the award. In so doing, we explained as follows:

> We begin by reiterating that [the owner's] original letter of submission to AAA requested a finding that "no money is due from the [owner] to the [contractor]." [The owner] plainly was referring to the final $86,767.28 contract installment.... Whether the arbitrator ever resolved this issue is difficult to ascertain due to the sparse record of the arbitration proceedings and the rather obtuse opinion issued by the arbitrator when announcing his award. While the arbitrator ultimately found that [the owner] owed no money to [the contractor], the basis for this decision is at best ***186** murky. He either decided the matter on a substantive basis, concluding that the [contractor's] work on [the owner's] property was deficient, or he decided the case on a procedural basis, concluding that he lacked the jurisdiction to grant an award in response to [the contractor's] perhaps otherwise meritorious position. In either case, we will affirm the ruling of the trial court.

Id. at 38, 555 A.2d 523. Accordingly, we held that if the arbitrator's decision was a substantive determination, then it was completely irrational. *Id.* at 39, 555 A.2d 523. In this regard, we stated that it approached the "height of irrationality" for the arbitrator to deny the contractor relief, yet state that the contractor's position was meritorious. *Id.* at 39, 555 A.2d 523.

Alternatively, if the arbitrator concluded that he was without authority to grant a remedy to the contractor for the owner's breach, then this was improper as a matter of law. *Id.* We held that the arbitrator's belief that the contractor's withdrawal of the counterclaim precluded monetary relief was an "unduly restrictive view of his jurisdiction." *Id.* at 39-40, 555 A.2d 523. This was because the arbitrator's power to grant an award emanated not from the contractor's counterclaim, but from the owner's original submission of the dispute to arbitration. *Id.* at 40, 555 A.2d 523. "Indeed, there would have been no need for an arbitration had this central issue of contract liability been removed from consideration." *Id.* at 39, 555 A.2d 523. We therefore affirmed the trial court's ruling remanding the case to the arbitrator for a full and complete determination. *Id.* at 40, 555 A.2d 523.

As mentioned, *Snyder* is not necessarily controlling on this appeal. Most obviously, *Snyder* was a MUAA case, and the instant appeal is under the common law. This, however, does not render *Snyder* uninstructive here. Although we need not decide conclusively, the common law principles discussed above relating to our standard of review appear to be quite similar to those embodied in the MUAA. As we explained in *Snyder*

> ***187** Section 3-223 of the MUAA provides that the court shall modify or correct an arbitrator's award if:
>
> (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;
>
> (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> (3) The award is imperfect in a matter of form,

not affecting the merits of the controversy.

[671 A.2d 90] Section 3-224(b) further provides that an arbitrator's award will be vacated if:

(1) An award was procured by corruption, fraud, or other undue means;
(2) There was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;
(3) The arbitrators exceeded their powers;
(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise so conducted the hearing ... as to prejudice substantially the rights of a party; or
(5) There was no arbitration agreement ..., the issue was not adversely determined in proceedings under § 3-208, and the party did not participate in the arbitration hearing without raising the objection.

Id. at 36, 555 A.2d 523 (quoting MD.CODE ANN., CTS. & JUD.PROC. § 3-223(b) & § 3-224(b)).

As *Snyder* explained, under the provisions of the MUAA, an arbitrator will be deemed to have exceeded its powers where the arbitrator issues an award not supported by any rational construction of the parties' substantive contractual provisions, or refuses to consider all properly submitted claims. These principles provided the basis upon which *Snyder* held that the ***188** arbitrator's refusal to grant a remedy, after having found a breach, warranted correction of the arbitrator's award. These principles also appear to be embodied in the common law standard of a "mistake so gross as to work manifest injustice." In other words, an arbitrator's refusal to grant a remedy where empowered to do so would seem to result in a mistake so gross as to work manifest injustice. We are satisfied, therefore, that *Snyder* 's legal principles relating to an arbitrator's failure to provide a remedy, after having found a breach, are, at a minimum, helpful here. (FN7)

Thus, with *Snyder* as our guide, we are convinced that it was a mistake so gross as to work manifest injustice for the arbitrator to refuse to provide a remedy after determining that appellee breached the fiscal year 1993 wage parity agreement. Despite appellee's suggestion to the contrary, after our review of the arbitrator's Opinion and Award, we have no doubt that the arbitrator determined that a valid wage contract for fiscal year 1993 did in fact exist between the parties. (FN8) It is equally clear that the arbitrator found that appellee breached the contract by failing to undertake a good-faith effort to identify revenues with which to fund the pay increase. Having determined that appellee breached its obligation to identify revenues--a "precondition," according to the arbitrator, ***189** of appellee's duty to actually increase teacher salaries--that obligation was excused and appellant was entitled to damages. *See, e.g., Kahn v. Schleisner,* 165 Md. 106, 113, 166 A. 435 (1933) (where a promise is conditioned upon the happening of an event, the condition is dispensed with if the promisor prevents the event from happening). *See also Bushmiller v. Schiller,* 35 Md.App. 1, 368 A.2d 1044 (1977) (where a home buyer failed to make a good faith effort to satisfy the condition precedent of obtaining financing, seller was entitled to damages for the breach).

[671 A.2d 91] The arbitrator, however, determined that he was without authority to award damages. In this regard, the arbitrator concluded that, since the political and budget processes were completed for fiscal year 1993 and the revenues have been spent, any monetary damages would have to be paid from current or future fiscal years, which would "require authorization from the appropriate legislative bodies. Thus, it does not appear that there is *any* effective way for any forum other than the Board of Estimates to remedy [appellee's] breach of its obligation." Similarly, appellee argues that the arbitrator's factual finding that the Board of Estimates did not appropriate funds for the pay increase precluded the arbitrator from fashioning a remedy. In this regard, the arbitrator was not empowered to appropriate taxpayer funds to provide a remedy because this would be in contravention of the "virtually unfettered authority [that] the Board of Estimates has over the budget." Furthermore, appellee argues that "the arbitrator was required to keep within the limits set by law. Those limits included the State law making salaries of teachers subject to the approval of the City. See Maryland Education Code Annotated § 4-304(a)(3)." With all of these assertions, we disagree.

In this case, as in *Snyder,* both appellee and the arbitrator have an "unduly restrictive view of [the arbitrator's] jurisdiction." *See Snyder,* 79 Md.App. at 39-40, 555 A.2d 523. Preliminarily, we observe that the arbitrator made the critical mistake of believing that "[t]o require the City, retroactively, to

pay the parity increase assumes the very determination as ***190** to revenue identification and priorities which the Side Letters did not require." Although it is true that the Side Letters conditioned the payment of wage increases on the identification of funds, appellee's failure to satisfy its good faith obligation to identify funds resulted in the condition being excused, as we just pointed out. The practical effect, therefore, is as if the condition precedent never existed in the first place. As a result, in awarding a remedy, the arbitrator should not have been concerned by the fact that revenues remained unidentified.

[10] The arbitrator made a second critical mistake in concluding that "[n]either the Agreement nor the general provision of the Code g[a]ve [him] authority to order the appropriation of taxpayer funds. That is the exclusive prerogative of the legislature." We fail to see why appellee's breach of contract in this case should be treated differently than any other instance when a municipality (or any other party for that matter) breaches a contract. Municipalities and counties are routinely sued for breach of contract and held answerable for contract damages. *American Structures, Inc. v. Mayor & City Council of Baltimore,* 278 Md. 356, 359-60, 364 A.2d 55 (1976). "Municipal contracts, particularly those made in furtherance of the proprietary functions of a municipality, are controlled by the same rules of construction as are applicable to the contracts of private corporations and individuals." *City of Frederick v. Brosius Homes Corp.*, 247 Md. 88, 92, 230 A.2d 306 (1967). *See also Anne Arundel County v. Crofton Corp.*, 286 Md. 666, 673, 410 A.2d 228 (1980).

Under the reasoning of the arbitrator and appellee, binding and final arbitration is rendered utterly impotent. The arbitrator determined that a contract existed, that appellee breached it, but that appellant was not entitled to a remedy. Such a result frustrates the very purpose of binding arbitration, and can only be described as a gross mistake resulting in manifest injustice.

[11] Additionally, we disagree with appellee that MD.CODE ANN., EDUC. § 4-304(a)(3) (1989) divested the arbitrator of the ***191** power to award contract damages in this case. Section 4-304 reads as follows:

> (a) *Powers.*--Subject to the applicable provisions of this article, the Board of School Commissioners of Baltimore City may:
>
> (1) Examine, appoint, and remove teachers;
>
> (2) Set teacher qualifications;
>
> (3) Subject to the approval of the Mayor and City Council, set teacher salaries; and
>
> (4) Select textbooks for the public schools in Baltimore City, except that [671 A.2d 92] the textbooks may not contain anything of a sectarian or partisan character.
>
> (b) *Duties.*--(1) The Board of School Commissioners shall report annually to the State Board on the condition of the schools under its jurisdiction.
>
> (2) The report shall include a statement of:
>
> (i) Expenditures;
>
> (ii) The number of children taught; and
>
> (iii) Any other statistical information the State Board requires.

For three reasons, § 4-304(a)(3) does not operate as appellee suggests. First, § 4-304 generally defines the "Powers" and the "Duties" of the Board of School Commissioners as limited by the Education Article. Subsection (a)(3) specifically defines the salary setting "Powers" of the Board of School Commissioners as limited by both the Education Article and the Mayor and City Council of Baltimore City. Thus, this provision focuses on what the Board of School Commissioners can and cannot do in relation to the Education Article, generally; and in relation to the Education Article and Mayor and City Council, specifically with respect to setting teacher salaries. The provision does not define the arbitrator's power to provide remedies for the breach of salary agreements between the appellee and its teachers. Second, the arbitrator, by ordering a remedy, is not compelling the Board of School Commissioners to "set teacher salaries." Rather, such an ***192** order compels appellee to follow procedure to set teacher salaries. After all, the arbitrator found that a valid wage contract previously existed between appellee and appellant. Third, MD.CODE ANN., EDUC. § 6-408(a)(2) specifically allows agreements for the employment of public school teachers to provide for binding arbitration of grievances. Binding arbitration would certainly lose much of its utility if

the arbitrator could not issue a remedy for a breach of such an agreement.

[12] Thus, despite the large degree of deference afforded to an arbitrator, the arbitrator's failure to provide a remedy for the breach would normally warrant the vacation or correction of his Opinion and Award. "Arbitrators have broad discretion in fashioning a remedy for the injustice which is found to have occurred." *Baltimore County,* 329 Md. at 708, 621 A.2d 864. The record reflects, and the arbitrator acknowledged, that appellant "offer[ed] for consideration a number of alternative calculations" for determining a monetary award for appellee's breach.

In light of the foregoing, the circuit court was not legally correct in granting summary judgment against appellant and in favor of appellee on the first alternative ground. Ordinarily, we would be compelled to reverse the circuit court and remand this case to the arbitrator to fashion an appropriate remedy for the breach. Because in Part II of this opinion we hold that the circuit court was legally correct in granting summary judgment as it did based on the second alternative ground, however, we shall not reverse the circuit court.

II

[13] Next, we must determine whether the trial court was legally correct in entering summary judgment against appellant and in favor of appellee based on the second alternative ground. As we noted, the second alternative ground was that, since there was no genuine dispute of material fact, the Board of Estimates did not appropriate the money for the wage increase, there was not a final approval of the wage increase ***193** agreement for fiscal year 1993, and thus, a valid and binding contract did not exist between the parties.

If this assertion is correct--namely, that a valid contract never existed between the parties--then the circuit court must have necessarily (albeit implicitly) determined that the arbitrator manifestly disregarded the law or committed a "palpable mistake" or a "mistake so gross as to work manifest injustice" in determining that a valid contract existed. Although the circuit court provided no explanation, this must be the case since there is no doubt that the arbitrator found that a valid and binding contract existed between the parties. In other words, for the circuit court to grant summary judgment against appellant and in favor of appellee on this ground, [671 A.2d 93] it had to disagree with the arbitrator's finding of a valid contract. This disagreement, however, did not result in the modification or vacation of the arbitration award because the arbitrator ultimately concluded that appellant was not entitled to any relief. Stated differently, because the outcome in arbitration was identical to the outcome in the circuit court (though based on different grounds) the circuit court could leave the arbitrator's award intact. (FN9)

***194** As a result, our review of this issue is limited under the above principles of judicial review to whether the arbitrator's determination that a legally binding wage contract existed between the parties should be set aside. As we alluded to in the closing paragraph of Part I, we agree with the circuit court that the arbitrator erred in determining that a valid contract existed, and that this error was "so gross as to work manifest injustice."

As we shall explain, our holding is required under *Mayor & City Council of Baltimore v. American Fed'n of State, County & Mun. Employees,* 281 Md. 463, 379 A.2d 1031 (1977) (*AFSCME*), and *Baltimore Teachers Union v. Mayor & City Council of Baltimore,* 6 F.3d 1012 (4th Cir.1993) (*BTU*). These cases fully support appellee's position that a legally binding contract between appellee and appellant did not exist because the Board of Estimates never appropriated the funds for the wage increase.

AFSCME is a Court of Appeals case that comprehensively examines the role of the Board of Estimates in the appropriation process of Baltimore City. In *AFSCME,* various employee organizations (unions) exclusively represented certain Baltimore City employees pursuant to the provisions of the Municipal Employee Relations Ordinance (MERO) of the Baltimore City Code. *AFSCME,* 281 Md. at 466, 379 A.2d 1031. Following negotiations in 1976, each union executed a "Memorandum of Understanding" (memorandum) with the Board of Estimates covering the two-year period from July 1, 1976 to June 30, 1978. *Id.* The memoranda provided pay raises in each of the two years. *Id.* In addition, each memorandum contained the following preamble:

> To the extent that implementation of these points requires action by the City Council, this memorandum will ***195** serve as a request and recommendation to such body that it be so implemented.

For the first contract year, the Board of Estimates included in its Ordinance of Estimates (FN10) that was submitted to the City Council appropriations sufficient to cover the pay increases. *Id.* at 467, 379 A.2d 1031. The Ordinance of Estimates for the second contract year, however, did not include appropriations for the pay increase for that year. *Id.* "Because, under the Baltimore City Charter, the City Council may neither increase any appropriation in the proposed Ordinance of Estimates nor include any new appropriations, the action of the Board of [671 A.2d 94] Estimates precluded the payment of annual increments to city employees." *Id.*

The unions contended that the memoranda constituted binding two-year contracts with the Board of Estimates, and that MERO authorized these contracts. *Id.* In this regard, the unions maintained that the agreements obligated the Board to include in the Ordinance of Estimates appropriations sufficient to cover the pay increase. *Id.* at 467-68, 379 A.2d 1031. The City, however, denied that the Board was contractually obligated to include the appropriations in the Ordinance of Estimates, arguing that the memoranda did not constitute a binding contract. *Id.* at 468, 379 A.2d 1031. Alternatively, the City contended that, under the terms of the memoranda, the parties intended that the pay increase promises were conditioned upon the Board's discretion to withhold payment of the pay increases in any contract year for financial reasons. *Id.* Finally, the City argued that, if the memoranda required the Board to appropriate the money for the pay increase, the memoranda would be invalid because "a municipality 'may not contract so as to deprive itself of powers conferred upon it' by its charter." *Id.* at 468, 379 A.2d 1031.

The unions filed suit and the Baltimore City Court agreed with their position, issuing an injunction requiring the Board ***196** to submit to the City Council an amended Ordinance of Estimates containing the appropriations. *Id.* at 465, 379 A.2d 1031. The City appealed to this Court, but the Court of Appeals granted a writ of certiorari before proceedings commenced here. *Id.*

Before resolving the dispute, the Court of Appeals reviewed the role of the Board in the appropriation process as provided in the Charter of Baltimore City. The Court of Appeals comprehensively delineated the mechanism by which appropriations become law:

The City of Baltimore, like the State of Maryland, has what is commonly known as an "executive budget system." At the heart of the City's system is the Board of Estimates which is composed of the Mayor, the President of the City Council, the Comptroller, the City Solicitor, and the Director of Public Works. Charter, Art. VI, § 1. Under the City Charter, the Board of Estimates is vested with broad discretionary powers concerning the City's fiscal management. The Board is "responsible for formulating, determining, and executing the fiscal policy of the City...." Art. VI, § 2(a). Accordingly, it is required to submit to the City Council for each fiscal year a proposed Ordinance of Estimates, Art. VI, § 2(b). The proposed ordinance must contain "[e]stimates of appropriations needed for the operations of each municipal agency," estimates for appropriations for other purposes, and a separate listing of appropriations needed for capital improvements, Art. VI, §§ 2(c)(1), (2). Accompanying the proposed Ordinance of Estimates must be "[a] breakdown of the amounts stated for each ... purpose ... of each municipal agency," including information concerning "the compensation of every officer and salaried employee of the City," Art. VI, § 2(f)(1). The Board also must submit comparisons between the appropriations actually contained in the ordinance for each agency with the appropriation requested by the agency, as well as the amounts appropriated for the current fiscal year compared to the amounts expended in the prior year, Art. VI, § 2(f)(2). Detailed information as to the source of funding ***197** for the appropriations must be submitted, Art. VI, § 2(f)(3). And the Mayor must send to the Council a message "explaining the major emphasis and objectives of the City's budget for the next ensuing fiscal year." Art. VI, § 2(f)(6).

The City Council has only limited powers in relation to the proposed Ordinance of Estimates. It "may reduce or eliminate any of the amounts fixed by the Board in the proposed Ordinance of Estimates...." However, the City Council does not have "the power to increase the amounts fixed by the Board or to insert any amount for any new purpose in the proposed Ordinance of Estimates," Art. VI, § 2(g). After the passage of the Ordinance of Estimates by the City Council, the Board of Estimates must certify to the City Council the difference between the anticipated expenditures [671 A.2d 95] contained in the ordinance and expected revenues other than those from the property tax. The Board must then state a property tax rate sufficient to meet this difference and the

City Council must by ordinance set a property tax rate not less than that stated by the Board so as to insure a balanced budget, Art. VI, § 2(g). Once funds are appropriated, they may not be "diverted or used for any purpose other than that named in said ordinance," except under certain circumstances requiring the approval of the Board of Estimates, Art. VI, § 2(i).

Id. at 468-70, 379 A.2d 1031.

According to the Court of Appeals, "It is the Board of Estimates which is initially required to review the financial status of the City on an annual basis and to determine, in its sole discretion, which items should be included in the City budget." *Id.* at 471, 379 A.2d 1031. The Court of Appeals also stated that "if the Board determines, in its judgment, that an appropriation for a certain purpose should not be included in the budget, this determination is final, as the City Council is without power to include any new item in the Ordinance of Estimates." *Id.* The Court further explained:

> Consequently, under the Baltimore City Charter, the Board of Estimates plays a critical role in the appropriation process. The submission by the Board of Estimates to the ***198** City Council of the Ordinance of Estimates is not merely a request or a recommendation for an appropriation of funds. Instead, the Board finally determines the maximum appropriation for any particular purpose. The Board's submission of the Ordinance of Estimates is, therefore, an integral part of the law-making function.
>
> *Id.*

Turning to the facts in *AFSCME,* the Court of Appeals recognized that "the Board attempted to bind itself to include in the Ordinance of Estimates sufficient appropriations for payment of the annual [pay] increments." *Id.* The Court determined, however, that the Board was without authority to do so under MERO. *Id.* According to the Court of Appeals, MERO "is made expressly subject to the City Charter provision governing public employment and fiscal practices." *Id.* at 472, 379 A.2d 1031. Additionally, MERO states that any memorandum of understanding between the employer and union is subject to the provisions of the City Charter. *Id.* Furthermore, MERO requires that labor negotiations be conducted between the union and a *committee named by the Mayor*--not between the union and the Board. *Id.* at 472-73, 379 A.2d 1031. Finally, the Court of Appeals recognized that MERO treated memoranda of understanding as recommendations to the Board. *Id.* at 473-74, 379 A.2d 1031. Consequently, the Board's final approval of appropriations recommendations occurs when the Board actually includes the appropriations in the Ordinance of Estimates. *Id.* at 474, 379 A.2d 1031. As a result, therefore, the memoranda accepted by the Board were not binding upon the Board, and the unions were not entitled to relief. *Id.*

Because the facts of the instant case are extremely similar to those in *AFSCME,* we are satisfied that the principles of *AFSCME* control the outcome of the instant case. Here, as in *AFSCME,* despite the Board's prior approval, the Board did not appropriate funds in the Ordinance of Estimates for the fiscal year 1993 wage increase. For the same reasons that the Board's attempt to bind itself to include in the Ordinance of Estimates sufficient appropriations to cover pay increases was ***199** ineffective under the City Charter in *AFSCME,* the Board's similar attempt in the instant case is ineffective. In other words, just as the memoranda of understanding were not binding in *AFSCME* under the City Charter, the stamped-approved Side Letter is not binding here.

We recognize that *AFSCME* relied heavily on the provisions of MERO, which are not applicable here, in determining that the memoranda of understanding were not binding. From our reading of *AFSCME,* however, we believe that the Court of Appeals would have reached the same conclusion, based exclusively on the provisions of the City Charter, even had MERO not applied. Indicative of the fact that the result would have been the same is that the Court of [671 A.2d 96] Appeals recognized that MERO "is made expressly subject to the City Charter provision governing public employment and fiscal practices." *Id.* at 472, 379 A.2d 1031. "This would embrace the Charter provisions vesting in the Board of Estimates the duty of determining, according to the standard set forth in the Charter, the maximum limits of appropriations for particular purposes in the Ordinance of Estimates submitted to the City Council." *Id.* Furthermore, the Court of Appeals held:

> Considering this language [of MERO providing that agreements contained in memoranda of understanding are recommendations to the Board] *and the provisions of the City Charter together,* it is reasonable to conclude that final "approval" by the Board of Estimates of recommendations

requiring appropriations will only take place by the Board's including such appropriations in the Ordinance of Estimates.

Id. at 474, 379 A.2d 1031 (emphasis added). Thus, it reasonably appears that *AFSCME* 's holding applies in full force to the instant case, regardless of the fact that MERO is not involved in this case.

As a result, the language in *AFSCME* relating to the finality of the Board's decision to appropriate or not to appropriate funds in the budget is determinative of this issue. *AFSCME* makes clear that the Board "finally determines the ***200** maximum appropriation for any particular purpose." *AFSCME,* 281 Md. at 471, 379 A.2d 1031. *See Baker v. Mayor & City Council of Baltimore,* 894 F.2d 679, 681 (4th Cir.1990) ("The Board's determination to exclude an appropriation for a given purpose, *e.g.,* an agency position, is final."). Thus, without the appropriation, the Side Letter wage agreement, like the memoranda of understanding in *AFSCME,* was never really an agreement at all, the Board's stamp of approval falling short of actual appropriation. In other words, under *AFSCME,* the Side Letter wage agreement was not binding unless and until the Board actually included the appropriations to fund the wage increase in the Ordinance of Estimates and the City Council passed the Ordinance of Estimates pursuant to the Baltimore City Charter.

In addition to *AFSCME, BTU*--a fairly recent United States Fourth Circuit Court of Appeals case--supports our holding. In *BTU,* Baltimore City implemented one-percent salary reductions for city employees, including public school teachers, in response to budgetary shortfalls. *BTU,* 6 F.3d at 1014. The Baltimore Teachers Union (union) filed suit under the Contract Clause of the U.S. Constitution against the City in the United States District Court for the District of Maryland, alleging that the pay cuts were an impermissible impairment of their employment contracts with the City. *Id.* The District Court ruled in the union's favor, and the City appealed. *Id.* The Court of Appeals for the Fourth Circuit agreed "that the City substantially impaired an extant contract with its teachers ...", but concluded that, "affording the requisite degree of deference to the City's legislature ... the impairment was in exercise of the City's legitimate powers and thus permissible under the Contract Clause." *Id.* at 1015. In so doing, the Fourth Circuit Court of Appeals made certain observations that support appellee's position.

First, the Court stated:

> We have little trouble concluding, as did the district court, that Baltimore intended to and did enter into contractual relationships with its teachers and police, *at least upon enactment into law of the Ordinance of Estimates. Upon* ****201*** *enactment of the Ordinance [of Estimates], the City Council formally ratified the essential agreement between the City and its employees embodied in the memoranda of understanding and authorized funding for the City's obligations under those memoranda.*

Id. (citations omitted) (emphasis added). In addition, the Fourth Circuit Court of Appeals explained:

> [T]he Contract Clause does not ... require the courts--even where public contracts have been impaired--to sit as superlegislatures, determining, for example, whether it would have been more appropriate instead for Baltimore to close its schools for a week, an option actually considered but rejected, or to reduce funding to the arts, as [the union] argue[s] should have been [671 A.2d 97] done. Not only are we ill-equipped even to consider the evidence that would be relevant to such conflicting policy alternatives; we have no objective standards against which to assess the merit of the multitude of alternatives.

Id. at 1021-22.

[14] As the above-italicized language plainly indicates, it is not until the enactment of the Ordinance of Estimates that the City Council formally ratifies an agreement between the City and its employees. In other words, the above language makes clear that the City enters into contractual relationships with its teachers only upon enactment into law of the Ordinance of Estimates. Thus, because the Ordinance of Estimates in the instant dispute did not contain appropriations for the parity increase, there was not a final and binding agreement to increase the teachers' pay in this regard. Although we recognize that *BTU* deals with the constitutional issue of whether the City impaired various employment contracts under the Contract Clause--an entirely different analysis than a breach of contract claim (FN11)--much of the language in *BTU* is instructive here.

***202** Appellant, however, argues as follows that

reliance on *BTU* is inappropriate:

> [Appellee] also argues that an arbitrator or court must not act as a super legislature. ... That concern is not at issue here where the relevant legislative body blessed the contractual instrument and it [sic] content. In [*BTU*], the Union was challenging a wage *cut* approved by the Board of Estimates. Here, [appellant] seeks to *enforce* an instrument approved by the Board of Estimates. *Accord Baker v. Mayor and City Council of Baltimore,* 894 F.2d 679, 682 (4th Cir.1990) (cited for the proposition that the Board has broad discretionary powers whether or not to adopt fiscal policy--not whether a policy once adopted must be enforced). [Appellant] seeks simply to enforce an official action taken by the Board of Estimates, an action never rescinded, altered or rejected later by the Board of Estimates.

The obvious retort to this assertion, of course, is that it is only "[u]pon enactment of the Ordinance [of Estimates], [that] the City Council formally ratifie[s] the essential agreement between the City and its employees embodied in the memoranda of understanding and authoriz[es] funding for the City's obligations under those memoranda." *Id.* at 1015.

In addition, in its reply brief and during oral argument, appellant strenuously argued that *Fraternal Order of Police v. Baltimore County,* 340 Md. 157, 665 A.2d 1029 (1995) (*FOP*)--a very recently decided case from the Court of Appeals--supports its position that a contract existed between the parties and that appellant is entitled to a remedy. We, however, find *FOP* to directly cut against appellant's position.

In *FOP,* Baltimore County entered into a collective bargaining agreement with its police officers' union for fiscal year ***203** 1992. *Id.* at 160, 665 A.2d 1029. This agreement contained a provision prohibiting the furlough of police officers during that year. *Id.* Subsequent to the County Executive's signing of the agreement, the County Executive submitted the budget for fiscal year 1992 to the Baltimore County Council, which enacted the budget. *Id.* at 161, 665 A.2d 1029. Included in the 1992 budget were appropriations for the full wages and benefits of the police officers as provided in the agreement. *Id.* In January 1992, despite the agreement's furlough prohibition provision, the County enacted a five-day furlough plan for all County employees, including police officers. *Id.* The police officers' union objected and the matter ultimately proceeded to arbitration, where the union sought reimbursement of lost wages resulting from the furlough plan. *Id.* Finding that the County breached the agreement, the arbitrator ordered that the police officers be reimbursed for lost wages. *Id.* at 162, 665 A.2d 1029. The County filed a petition in circuit court to vacate the arbitrator's[671 A.2d 98] award. *Id.* Among other things, the circuit court ruled that the County had impermissibly delegated its budget-making authority (including compensation-setting authority) by submitting to an arbitrator the issue of whether the County breached the agreement. *Id.* at 163, 665 A.2d 1029. The Court of Appeals granted certiorari before this Court heard the matter. *Id.* at 163-64, 665 A.2d 1029.

The Court of Appeals reversed the circuit court, holding that the arbitrator correctly determined that the County breached its contract. *Id.* at 164, 171, 665 A.2d 1029. In so doing, the Court recognized that the County works under an "executive budget system." *Id.* In many respects, the County's budget system is very similar to the City's. Under the County system, the County Executive must submit the budget to the Council for approval or disapproval of the appropriations made therein. *Id.* at 165, 665 A.2d 1029. Agreements between the County and its employees are made in advance of that submission and appropriations are fully subject to the County's annual budget process. *Id.* at 166, 665 A.2d 1029.

***204** The following portion of *FOP* 's holding speaks directly to the central issue of the instant case:

> Simply put, there was no violation of the Charter in this case [when the arbitrator determined that the County breached its agreement and was liable to the police officers]. The County Executive and County Council exercised their appropriation function under the Charter. *The annual budget enacted by the Executive and Council could have appropriated less money for police officers than the collective bargaining agreement called for and could have provided that the shortfall be made up by furloughs of police officers. If the enacted annual budget had done this, the budget provisions, and not the collective bargaining agreement's terms, would prevail under our [prior] opinions.... But the enacted annual budget for fiscal 1992 did not appropriate less money for police officers' compensation than contemplated by the collective bargaining agreement. The arbitrator's decision did not alter the amount of compensation set forth*

in the budget. Rather, the arbitrator determined only that the County had violated the terms of the contract which it had made, and that the County should pay to the police officers the compensation that had already been appropriated in the annual budget pursuant to the County Charter.

Id. at 171, 665 A.2d 1029 (emphasis added). The obvious import of the Court's teaching in *FOP* can be summed up as follows: If the final enacted budget contains the agreed upon appropriations from which compensation should have been paid, then the County or City is obligated to pay; but, if the final enacted budget contains less appropriations than were previously agreed upon, then the budget controls and the County or City is only liable up to the amount actually appropriated. In our case, appellant and appellee entered into an agreement for a wage increase, but the money to cover the wage increase was not specifically appropriated in the final enacted budget. Therefore, under *FOP,* there was not a final binding contract under which appellee is liable.

***205** [15] Before concluding, we shall address appellant's suggestion that Section 65(b) of Article VII of the Baltimore City Charter somehow renders the wage parity agreement for fiscal year 1993 final and binding upon appellee. This provision reads, in pertinent part, as follows:

> The salaries of superintendents, assistant superintendents, directors, supervisors, assistant supervisors, principals, assistant principals, *teachers,* secretaries, clerks and employees shall be fixed by the Board [of School Commissioners], not to exceed in the aggregate the amount appropriated for such personnel in the Ordinance of Estimates; ... The Board [of School Commissioners], in submitting its budget each year, shall also include a maximum compensation scale for superintendents, assistant superintendents, directors, supervisors, assistant supervisors, principals, assistant principals, *teachers,* and all other employees ... and no increase above the maximum scale shall be made during the ensuing year without the approval of the Board of Estimates.

[671 A.2d 99] BALTIMORE CITY CHARTER, Art. VII, § 65(b) (1994) (emphasis added). (FN12) We do not believe that this provision operates in the manner in which appellant suggests. Rather, we find § 65(b) to be completely supportive of our holding. Section 65(b) makes clear that no increase in teacher salaries above the maximum scale shall be made during the ensuing fiscal year without the Board of Estimate's approval. Under *AFSCME* and *BTU,* "approval" occurs when the Board of Estimates actually includes the pay increase in the Ordinance of Estimates. Thus, because the pay increase was not included in the Ordinance of Estimates in the instant case, the Board of Estimates never formally gave its "approval" as was required under § 65(b).

Based on the foregoing, we hold that the fiscal year 1993 wage parity agreement, as embodied in the Side Letters, was ***206.** not a final and binding agreement. As a result, the arbitrator erred in determining that a binding and valid agreement existed between the parties. The consequence of this mistake is extremely severe. It results in the subversion of the internal governmental and political operations and procedures of appellee as set forth in the City Charter. In our opinion, this is a mistake so gross as to work manifest injustice. Consequently, the circuit court correctly determined, based on the second alternative ground, that summary judgment should be granted in favor of appellee and against appellant. We therefore affirm the circuit court's ruling in this regard.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

FN1. According to appellant, "APEX (the 'State and Federal Aid to Education' statute) is codified at [MD.CODE ANN., EDUC. § 5-201]. Each year the City receives hundreds of millions of dollars in APEX monies according to the requirements set forth in the Education article. Sec[tion] 5-401(a)(2)(i) authorizes local government expenditure of 'compensatory education funds' (discretionary APEX money) in any of seven expense categories, one of them being teacher salaries."

FN2. The comparability formula was a formula by which the wages of appellee's teachers and teachers in other jurisdictions could be effectively and accurately compared.

FN3. The Opinion and Award initially states that the Agreement covered years 1988 through 1991. This, however, appears to be a mistake. The record reflects that the correct date of the Agreement is 1989-1992. The parties refer in their briefs to the 1989-1992 Agreement, and the date of the Agreement in the Record Extract is 1989-1992.

In addition, farther into the Opinion and Award, the arbitrator refers to the 1989-1992 Agreement.

FN4. Appellant points out that a one-percent pay increase would have cost appellee $2.5 million. The arbitrator recognized this when he wrote in his Opinion and Award that in a budget of $460 million for the Department of Education, "184 $2.5 million 'chunks' " may have been found to cover the pay increase.

FN5. In the event of contract disagreements between the parties, dispute resolution procedures are provided for in Article IV of the Agreement. These procedures culminate in final and binding arbitration. Apparently, it was under these provisions that appellant demanded arbitration of the matter.

FN6. We note that the "completely irrational" standard discussed in *O.S. Corp.* has neither been accepted nor rejected by the Court of Appeals. *See Stephen L. Messersmith, Inc. v. Barclay Townhouse Assocs.*, 313 Md. 652, 659, 547 A.2d 1048 (1988).

FN7. Whether an arbitration award under the MUAA may be vacated for a "mistake so gross as to work manifest injustice" or for a "manifest disregard" of the law remains an open question. *See Prince George's County Educators' Ass'n,* 309 Md. at 105, 522 A.2d 931. *See also Stephen L. Messersmith, Inc.*, 313 Md. at 659 n. 2, 547 A.2d 1048.

FN8. As one of many examples, the Opinion and Award reads at pages 26-27, as follows:

> As indicated, I am persuaded that the Side Letters amended a contract between the Parties. By their terms, the Side Letters constitute valid amendments. They are possessed of all the elements and formalities of a contract; and [appellee] represented to [appellant], and led it to believe, that there was a contract. I am persuaded that [appellant] had every right to require [appellee] to perform its obligations under the resulting contract. I reject [appellee's] intimations that Paragraph 3 of the [first Side Letter] did not bind the Parties to do anything. The question for interpretation is what the Side Letters obligated [appellee] to do.

FN9. When it raised the argument before the circuit court that a valid and binding contract never existed between the parties, appellee was not challenging the validity of the arbitrator's findings, even though, as we explained above, the Opinion and Award clearly reflects that the arbitrator found a valid and binding contract. Rather, appellee maintained that the arbitrator "reached the opposite conclusion" and determined that a valid and binding contract did not exist. Most probably because appellee was under this mistaken belief, appellee did not cross-appeal from the Opinion and Award, challenging the finding of a valid contract, but maintaining that the arbitrator ultimately reached the correct outcome. Nonetheless, it was within the circuit court's power to render a determination in this regard. *See, e.g., C.W. Jackson & Assocs., Inc. v. Brooks,* 289 Md. 658, 666-67, 426 A.2d 378 (1981) (Under the MUAA, the circuit court is an equity court empowered to adjust and determine all rights of the parties, and will ordinarily retain such power for all purposes, deciding all issues raised by the subject matter of the dispute, and awarding complete relief, even as to matters over which it would not have taken jurisdiction originally) (citing non-Uniform Arbitration Act cases). *Cf., Chillum-Adelphi Volunteer Fire Dep't,* 242 Md. at 517, 219 A.2d 801 ("A court does not act in an appellate capacity in reviewing the arbitration award, but enters judgment on what may be considered a contract of the parties, after it has made an *independent determination* that the contract should be enforced.... The trial court was exercising common law jurisdiction....") (emphasis added) (non-MUAA case).

***206** FN10. The Ordinance of Estimates and the budget process is more fully explained below.

FN11. To determine whether the government has violated the Contract Clause of the U.S. Constitution, the following must be determined: (1) whether there has been an impairment of a contract; (2) whether state law has actually operated to substantially impair a contractual relationship; and (3) whether, assuming a substantial impairment, that impairment is permissible as a legitimate exercise of the government's sovereign powers. *BTU,* 6 F.3d at 1015.

FN12. Section 65(b) was formerly codified as § 59(b) in the 1964 version of the Baltimore City Charter. The 1994 codification is nearly identical to the 1964 version.

for injunctive relief is denied.[10] In all other respects, plaintiff's claims for relief are denied. Plaintiff's counsel will prepare a proposed form of judgment, to be approved as to form by defendant's counsel and submitted for entry by the Court.

IT IS SO ORDERED.

CITY OF BELOIT v. WERC

Wisconsin Supreme Court

CITY OF BELOIT, etc. v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION; BELOIT EDUCATION ASSOCIATION and WISCONSIN EDUCATION ASSOCIATION COUNCIL v. Same, Nos. 75-105 and 75-106, June 2, 1976

STATE PUBLIC EMPLOYMENT RELATIONS ACTS

—Teachers — Evaluation procedures—Subject for bargaining—Wisconsin Act ▶ 100.02

Teacher evaluation procedures is mandatory subject of bargaining between teachers association and board of education under Wisconsin Municipal Employment Relations Act (SLL 60:243), since procedures relate to teachers' rights to have notice of and input into procedures that affect their job security.

—Teachers — Files and records — Subjects for bargaining — Wisconsin Act ▶ 100.02

Scope of teachers' files and records kept for purposes of teacher evaluation or continued employment and right of teacher access to files and records are mandatory subjects of bargaining between teachers association and board of education under Wisconsin Municipal Employment Relations Act (SLL 60:243), since such matters relate primarily to teachers' wages, hours, and conditions of employment.

—Teachers — Non-renewal of contract—'Just cause'—Subjects for bargaining—Wisconsin Act ▶ 100.02

Establishment of "just cause" standard for non-renewal of teachers' contracts is mandatory subject of bargaining between teachers association and board of education under Wisconsin Municipal Employment Relations Act (SLL 60:243), despite board's contention that Wisconsin statute requiring board to give teachers annual notice of renewal or nonrenewal of contracts is inconsistent with requirement of mandatory bargaining; setting of minimum procedure for notice and hearing before board may decide not to rehire teacher does not limit or negate right of teachers to bargain collectively on matters primarily related to teachers' wages, hours, and conditions of employment.

—Teachers — Layoffs — Subjects for bargaining — Wisconsin Act ▶ 100.02

Teacher layoffs in inverse order of appointment of teachers as result of decrease in student population is mandatory subject of bargaining between teachers association and board of education under Wisconsin Municipal Employment Relations Act (SLL 60:243), since such matters primarily relate to teachers' wages, hours, and conditions of employment and do not invade board's right to determine curriculum and to retain, in case of layoff, teachers qualified to teach particular subjects in curriculum.

—Teachers — 'Problem students' — Subjects for bargaining — Wisconsin Act ▶ 100.02

Misbehavior of "problem students" that presents physical threat to teacher safety is mandatory subject of bargaining between teachers association and board of education under Wisconsin Municipal Employment Relations Act (SLL 60:243), since such matter primarily relates to teachers' wages, hours, and conditions of employment. However, referral of problem students for counseling is not mandatory subject of bargaining.

—Teachers — School calendar — In-service training — Subjects for bargaining—Wisconsin Act ▶ 100.02

School calendar and number of in-service training days during school year are mandatory subjects of bargaining between teachers association and board of education under Wisconsin Municipal Employment Relations Act (SLL 60:243), since such matters primarily relate to teachers' wages, hours, and conditions of employment. Board need only bargain in good faith with respect to proposals and need not reach agreement with respect to particular proposal.

—Teachers — Impact of class size —Subjects for bargaining—Wisconsin Act ▶ 100.02

Impact of class size is mandatory

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10 If specific performance is required at some future date, the Union may apply for that relief at that time. Cf. Bird v. Computer Technology, Inc., supra, 364 F.Supp. at 1345.

subject of bargaining between teachers association and board of education under Wisconsin Municipal Employment Relations Act (SLL 60:243), since class size has impact upon teachers' wages, hours, and conditions of employment.

—Assistance to teachers having professional problems — Subjects for bargaining—Wisconsin Act ▶ 100.02

Teachers association's proposal for training assistance to teachers having professional problems is not mandatory subject of bargaining under Wisconsin Municipal Employment Relations Act (SLL 60:243), even though such assistance is related to teachers' continued employment or promotion, since it primarily relates to "management and direction" of school system.

Appeal from the Wisconsin Circuit Court, Dane County (89 LRRM 2052). Affirmed.

Robert J. Arnot (John C. Carlson and Lawton & Cates, on brief), Madison, Wis., for teachers association.

Charles D. Hoornstra, Assistant Attorney General of Wisconsin (Bronson C. La Follette, Attorney General of Wisconsin, on brief), for Wisconsin Employment Relations Commission.

Herbert P. Wiedemann, Milwaukee, Wis. (Foley & Lardner, Milwaukee, Wis., and George Blakely, Beloit, Wis., on brief), for City of Beloit.

Henry A. Gempeler, City Attorney, and Gerald C. Kops, Deputy City Attorney, amicus curiae, for the City of Madison Joint School District No. 8 in support of the City of Beloit.

Text of Statement of Facts

The Beloit Education Association, the exclusive collective bargaining agent for school teachers in the Beloit city school system, and the Beloit City School Board were parties to a collective bargaining agreement which expired on August 24, 1973. On February 8, 1973, the parties began negotiating a successor contract. The negotiations continued until April 25, 1973. On that date the board filed a petition with the Wisconsin Employment Relations Commission, seeking a declaratory ruling under sec. 111.70(4)(b), Stats., as to whether certain proposals submitted by the Beloit Education association were mandatory subjects of collective bargaining under sec. 111.70(1)(d)., Stats. The subjects on which such declaratory ruling was sought were as follows:

(1) the manner in which supervision and evaluation of teachers will be conducted.

(2) the structure and maintenance and availability to teachers of school district files and records,

(3) right of representation prior to reprimand, warning or discipline,

(4) whether or not "just cause" shall be the standard applied in ilmitation of the Board's actions with respect to renewal of individual teachers contracts,

(5) the procedure and order of preference to be utilized in event of teacher layoffs,

(6) the treatment and disposition of problem students.

(7) class size,

(8) type and extent of in-service training to be conducted,

(9) the type and extent of reading program to be utilized,

(10) the establishment and structure of summer programs,

(11) the school calendar.

On September 11, 1974, following a hearing, the Wisconsin Employment Relations Commission issued a declaratory ruling finding certain subject matters to be matters for mandatory collective bargaining, and certain others not to be such. On September 23, 1974, the Beloit Education Association moved for reconsideration of the ruling, and, in response thereto, certain changes were made in the commission's ruling. Both parties filed petitions for review with the circuit court. On March 31, 1975, 89 LRRM 2052, the circuit court modified the ruling of the commission and affirmed the ruling, as modified. From this judgment both parties have appealed.

Full Text of Opinion

ROBERT W. HANSEN, Justice:— This is an appeal by a school board and by a teachers' association from a circuit court judgment. That judgment modified and affirmed a ruling of the state employment relations commission. That ruling declared the rights of the school board as employer and of the teachers' association as collective bargaining agent under sec. 111.70(1)(d), Stats.

THE STATUTE. This statute (sec. 111.70(1)(d), Stats.), establishing the right of "collective bargaining" in the public sector in this state, provides as follows:

"(d) *'Collective bargaining'* means the performance of *the mutual obligation* of a municipal employer, through its officers and agents, and the representatives of its employes, *to meet and confer* at reasonable times, *in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement,* or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes *the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees.* In creating this subchapter the legislature recognizes that *the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter.*" [Emphasis supplied.]

THE LIMITS. As to collective bargaining in the public sector, the italicized portions of the statute establish three categories: (1) Where collective bargaining is required; (2) where collective bargaining is permitted, but not required; and (3) where collective bargaining agreements are prohibited.[1] The obligation of the public employer to "meet and confer" and its right to agree to a policy in a "written and signed document" extends only to matters of "wages, hours and conditions of employment." Beyond such limit is the area of "subjects reserved to management and direction of the governmental unit," where the public employer may, but is not required, to "meet and confer" and may, but is not required, to agree in a "written and signed document." Beyond such limit of voluntary bargaining is the area involving the exercise of the public employer's "powers and responsibilities to act for the . . . good order of the municipality, its commercial benefit and the health, safety and welfare of the public." Here the proper forum for the determination of the appropriate public policy is not the closed session at the bargaining table. More than the bilateral input of the public employer and the employees' bargaining agent is required for deciding the appropriate public policy. Here the multilateral input of employer, employees, taxpayers, citizen groups and individual citizens is an integral part of the decision-reaching process, and bargaining sessions are not to replace public meetings of public bodies in the determination of the appropriate policy.

THE PARTIES. Here we deal with collective bargaining between a local school board and a teachers' association. Both board and association are involved, not only in the collective bargaining process as statutorily defined,[2] but also in the political process as constitutionally assured.[3] The school board is an employer under the statute,[4] and it is also a public body of elected officials with powers and duties for the operation of the school system in the public interest.[5] As such employer, it must bilaterally "meet and confer" and may agree in a "written and signed document" as to matters involving "wages, hours and conditions of employment." As such public body and as to matters of school management and educational policy, it cannot be required to collectively bargain with the collective bargaining agent for its employees. The teachers' association here is a collective bargaining agent under the statute,[6] and also a professional association of teachers concerned with matters of school system management and educational policy.[7] As such bargaining agent the association can collectively bargain with the board as to matters of "wages, hour and conditions of employment." As professional association it may also be heard as to matters of school and educational policies, but it makes such contribution or input along with

1 Compare: National Labor Relations Board v. Borg-Warner Corp. (1958), 356 U.S. 342, 348, 349, 78 S.Ct. 718, 2 L.Ed.2d 823, 42 LRRM 2034.

2 Sec. 111.70(1)(d), Stats.

3 Art. X, sec. 1, Wis.Const., providing: "The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law. . . ."

4 Sec. 111.70(1)(a), Stats.

5 Sec. 120.001 to sec. 120.61, Stats.

6 Sec. 111.70(1)(g), Stats.

7 See: Smith, Edwards and Clark, Labor Relations Law in the Public Sector (Bobbs-Merrill 1974) at page 366; quoting Wellington and Winters, The Unions and the Cities (1971) at pages 21-30, the authors stating: ". . . [S]ome of the services government provides are performed by professionals—teachers, social workers, and so forth—who are keenly interested in the underlying philosophy that informs their work. . . .

" 'The issue is not a threshold one of whether professional public employees should participate in decisions about the nature of the services they provide. . . . The issue rather is the method of that participation.' "

(82)

other groups and individuals similarly concerned.[8]

THE PROBLEM. The difficulty encountered in interpreting and applying sec. 111.70(1)(d), Stats., is that many subject areas relate to "wages, hours and conditions of employment," but not only to such area of concern. Many such subjects also have a relatedness to matters of educational policy and school management and operation. What then is the result if a matter involving "wages, hours and conditions of employment" also relates to educational policy or school administration? An illustration is the matter of classroom size, subsequently discussed. The number of pupils in a classroom has an obvious relatedness to a "condition of employment" for the teacher in such classroom. But the question of optimum classroom size can also be a matter of educational policy. And if a demand for lowered classroom size were to require the construction of a new school building for the reduced-in-size classes, relatedness to management and direction of the school system is obvious. Would such required result of a new building not be a matter on which groups involved, beyond school board and teachers' association, are entitled to have their say and input? Other courts have faced this same problem. Some limit required bargaining to matters "directly" related to "wages, hours and conditions of employment."[9] Some make the test whether the subject matter is "significantly" related to "wages, hours and conditions of employment."[10] Some make the test whether the subject "materially" affects the working conditions.[11] Commentators appear to agree that drawing the line or making the distinction is not easy.[12]

THE CONSTRUCTION. The state employment relations commission was petitioned to determine by declaratory ruling which of various proposals for bargaining were mandatorily bargainable. It responded by initially concluding that only subject matters that were *primarily* related to wages or hours or conditions of employment were mandatorily bargainable.[13] As to such matters, the school board was *required* to "meet and confer" and collectively bargain as to demands of the teachers' association. This construction of the statute was upheld as reasonable by the reviewing court. We agree. The dictionary defines "primarily" as meaning "fundamentally."[14] It is in this sense of the word that "primarily" is here used. What is fundamentally or basically or essentially a matter involving "wages, hours and conditions of employment" is, under the statute, a matter that is required to be bargained. The commission construed the statute to require mandatory bargaining as to (1) matters which are *primarily* related to "wages, hours and

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8 Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. (1974), 1156, 1195, the author stating: "To say that curriculum content is not a proper subject of bargaining does not mean that teachers have no legitimate interest in that subject or that they should not participate in curriculum decisions. It means only that the bargaining table is the wrong forum and the collective agreement is the wrong instrument. . . . [N]o organization should purport to act as an exclusive representative; the discussions should not be closed; and the decision should not be bargained for or solidified as an agreement. In addition, all of the ordinary political processes should remain open for individuals or groups of teachers to make their views known to the politically responsible officials and thus to infuence the decision."

9 See: National Education Association v. Board of Education (1973), 212 Kan. 741, 753, 512 P.2d 426, 435, 84 LRRM 2223, the court holding: "The key, as we see it, is how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole." See also: School Dist. of Seward Education Ass'n v. School Dist. of Seward (1972), 188 Neb. 772, 784, 199 N.W.2d 752, 759, 80 LRRM 3393.

10 See Clark County School Dist. v. Local Government Employee Management Rel. Bd. (Nev. 1974), 530 P.2d 114, 118, 88 LRRM 2774, the court holding: "[C]lass size is significantly related to wages, hours, and working conditions. . . ."

11 See: Aberdeen Education Ass'n v. Aberdeen Bd. of Education, Ind. School Dist. (S.D. 1974), 215 N.W.2d 837, 841, 85 LRRM 2801, the court holding: "It is our opinion that the term 'other conditions of employment' as used in SDCL 3-18-3 means conditions of employment which materially affect rates of pay, wages, hours of employment and working conditions. . . ."

12 Smith, Edwards and Clark, supra, footnote 7, 379, quoting Perry and Wildman. The Impact of Negotiations in Public Education: The Evidence from the Schools (1970), 165-171, the authors stating: " 'First, it should be noted that it is exceedingly difficult to distinguish between "educational policy" and "salaries and working conditions" where teacher bargaining is concerned.' "

13 The exact language of the "WERC holding being: "3. That matters primarily relating to wages, hours and conditions of employment of teachers are not reserved to the management and direction of the school system of the City of Beloit, by its duly elected officials and other agents, within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act, and, therefore, the City of Beloit, and its agent, the Beloit City School Board, and other agents are required to engage in collective bargaining, as defined in said section of the Act, on such matters, with the Beloit Education Association."

14 Webster's New International Dictionary (3d ed., unabridged), page 1800.

conditions of employment," and (2) the impact of the "establishment of educational policy" affecting the "wages, hours and conditions of employment." We agree with that construction.

THE APPLICATION. Having adopted the "primarily so" test as to the matters where mandatory bargaining is required by the statute, the commission proceeded to apply that test to a variety of the teachers' association demands submitted to the commission for testing. That was correct for we have here a case-by-case approach to specific situations. There was no attempt by the commission and there is none by this court to develop broad and sweeping rules that are to apply across the board to all situations.[15] As did the commission and the reviewing court, we will now proceed to discuss the application of the "primarily so" test to each of the subject areas claimed by the teachers' association to be appropriate subjects for required bargaining.

(A) TEACHER EVALUATION. A series of proposals relating to teacher evaluation were submitted to the school board by the teachers' association as appropriate subjects for required bargaining. As to two of them, (1) who were to evaluate teacher performance, and (2) assistance to teachers whose evaluations were poor, the commission held that they did not primarily involve "wages, hours and conditions of employment." As to the others,[16] involving procedures to be used in evaluation, the commission held that they did primarily relate to "wages, hours and conditions of employment." The circuit court affirmed these holdings. Obviously the area of teacher evaluation relates to "management and direction" as well as to "wages, hours and conditions of employment." However, as to the procedures followed, these matters go to the right of teachers to have notice and input into procedures that affect their job security. On the record that was before it, we uphold the conclusions reached by the commission as to teacher evaluation procedures being mandatorily bargainable.[17]

(B) TEACHER FILES. The teachers' association suggested as required bargaining matters certain proposals concerning teacher files and records.[18] The commission found these proposals to relate primarily to "wages, hours and conditions of employment," with bargaining required. The commission incorporated the rationale of its holding as to teacher evaluation, and the reviewing court affirmed, holding the purpose of keeping teacher files to be "for the purpose of evaluating teachers and may well affect their continued employment." Once again it is clear that the proposals relate to "management and direction" as well as to "wages, hours and conditions of employment." However, the trial court noted that the proposals go only to those complaints or files which have effect on evaluation or continued employment. So limited, the scope of a teacher's personnel file and the right of teacher access to it would appear to relate primarily to "wages, hours and conditions of employment." At least, on the record before us, we affirm the commission holding as to teacher files and records.

(C) JUST CAUSE STANDARD. The

15 See: Pennsylvania Labor Rel. Bd. v. State College Area School Dist. (1975), 461 Pa. 494, 337 A.2d 262, 265, 90 LRRM 2081, the court holding: "We also recognize the wisdom of refraining from attempting to fashion broad and general rules that would serve as a panacea. The obviously wiser course is to resolve disputes on a case-by-case basis until we develop, through experience in the area, a sound basis for developing overall principles."

16 The proposals can be summarized as follows: "Teacher Supervision and Evaluation (1) Orientation of new teachers as to evaluative procedures and techniques, (2) Length of observation period and openness of observation, (3) Number and frequency of observations, (4) Copies of observation reports and conferences regarding same, and teachers' objections to evaluations, and (5) Notification of complaints made by parents, students and others."

17 Clark County School Dist. v. Local Government Employee Management Rel Bd., supra, footnote 10, using the "significantly related" test, stating: ". . . the evaluation of a teacher's performance is significantly related to a teacher's working conditions inasmuch as the evaluation affects transfer, retention, promotion and the compensation scale."

18 The proposals can be summarized as follows: "Teacher Files and Records (1) Review of personal files and copies of contents therein, and entitlement to representation at such review, (2) Identification of obsolete matters in teacher files, and if obsolete, or otherwise inappropriate to retain, the same shall be destroyed, (3) Prior review of derogatory material and right to submit written answer thereto, the latter to be included in personal file, (4) Conclusion of final evaluation prior to severance, and exclusion of material, received after severance or following receipt of notice or resignation or notice of 'consideration of nonrenewal' from teacher files, (5) Limitation on establishment of more than one file per teacher, and (6) Notification, in writing, to teacher of alleged delinquencies, indication of expected correction, and time period therefor, as well as notification of breaches of discipline, and, where possibility of termination exists, notification thereof to Beloit Education Association."

(84)

teachers' association claimed bargaining was required under the statute as to its proposals regarding the "just cause standard" for disciplinary action against teachers.[19] The commission held that these "just cause" proposals primarily relate to "wages, hours and conditions of employment," and mandated bargaining. The trial court affirmed this holding. As to this holding the school board does not challenge the requirement of bargaining as to a just cause for dismissal. Instead it challenges the bargainability of renewal or nonrenewal of a teacher's contract. Outside of Milwaukee county where teachers have tenure,[20] the state statute provides that, on or before March 15 of each year, the school board "shall give the teacher written notice of renewal or refusal to renew his contract."[21] While there are restrictions on the right to renew,[22] the school board contends that this statute is not consistent with required bargaining as to renewal or nonrenewal of teacher contracts. The trial court found no conflict, finding the only effect of the "written notice" statute to be that "no labor agreement can alter the dates on which notice of nonrenewal is to be given, or any of its other terms." (Absent notice of nonrenewal, the contract renews itself.) We agree that such setting of a minimum procedure for notice and hearing, before a school board can decide not to rehire a teacher, does not limit or negative the right, also granted by the legislature, to teachers to collectively bargain in areas primarily related to "wages, hours and conditions of employment."[23] On the facts before it the commission was entitled to hold that the proposals relating to the "just cause standard" were mandatorily bargainable.

(D) TEACHER LAYOFFS. The teachers' association submitted certain proposals in the field of teacher layoffs as mandatorily bargainable items.[24] As to a decrease in the number of teachers "by reason of a substantial decrease of pupil population," the association's proposal was that such layoffs be "only in the inverse order of the appointment of such teachers."[25] While the commission held all of the teacher layoff proposals to primarily relate to "wages, hours and conditions of employment," it is the proposal for seniority in case of layoffs that was challenged on review and is challenged on this appeal. The school board claims an impingement on the right of the board to determine what programs will be reduced and what staff qualifications are needed. The trial court held that nothing in the association proposal, as worded, went to what school programs were to be reduced or eliminated in case of layoff due to a decrease in pupil population. To the suggestion that "a more senior Fourth Grade athletic teacher must displace a less senior Twelfth Grade physics teacher," the trial court responded that "such an absurd result was not required." While terming it a clarification, it then modified the commission holding to require that "a reasonable clarification to that effect be inserted in the collective bargaining agreement if proposed by the School Board." As so clarified and modified, the proposals stop well short of invading the school board's

19 The "just cause" proposals can be summarized as follows: "*Just Cause Standard* (1) A just cause basis prior to discharge, nonrenewal, suspension, discipline, reprimand, reduction in rank or compensation, or deprivation of any professional advantage, (2) Permissible suspension with pay, (3) Charges forwarded to School Board, and copies thereof to suspended teacher, Association president, and chairman of Grievance Committee, by certified mail, and (4) Hearing on charges, together with appeal procedures."

20 See: Sec. 118.23, Stats.

21 Sec. 118.22(2), Stats.

22 See: Muskego-Norway C.S.J.S.D. No. 9 v. WERB (1967), 35 Wis.2d 540, 151 N.W.2d 617. See also: Miller v. Joint School Dist. (1957), 2 Wis.2d 303, 312, 86 N.W.2d 455, requiring dismissal of a teacher under contract to be for "good and sufficient cause."

23 See: Richards v. Board of Education (1973), 58 Wis.2d 444, 460a, 460b, 206 N.W.2d 597, 606, holding on motion for rehearing: "Under the act, a school district is considered to be a 'municipal employer,' Sec. 111.70(1)(a), Stats. and this court has no difficulty in concluding that a grievance procedure established by a collective bargaining agreement, and relating to dismissals falls within the embrace of "wages, hours and conditions of such an agreement are binding on the parties." Distinguishing Adamczyk v. Caledonia (1971), 52 Wis.2d 270, 190 N.W.2d 137, handed down prior to the enactment of sec. 111.70(1)(d), Stats., and involving "a personal employment contract rather than a collective bargaining agreement enacted in accordance with sec. 111.70, Stats."

24 The teacher layoff proposals can be summarized as follows: "*Teacher Layoffs* (1) The basis for layoffs, (1) Order of recall, (3) Qualification for recall, (4) Non-loss of previous service credits, and (5) No new or substitute appointments while qualified teachers are in layoff status."

25 The actual proposal states in part: "If necessary to decrease the number of teachers by reason of a substantial decrease of pupil population . . . [the employer] may lay off the necessary number of teachers, but only in the inverse order of the appointment of such teachers."

(85)

right to determine the curriculum,[26] and to retain, in case of layoff, teachers qualified to teach particular subjects in such curriculum. As so limited and modified, the proposal, we hold, is one primarily related to "wages, hours and conditions of employment," and hence required to be bargained.

(E) PROBLEM STUDENTS. The teachers association submitted as proper subjects for mandated bargaining a number of proposals involving "problem students."[27] The commission found the proposals to be "ambiguous" and divided them into two categories of student misbehavior: (1) Misbehavior that does not involve threats to physical safety (of the teachers); and (2) misbehavior of students that presents a physical threat to the teacher's safety. It then held that the first category was not mandatorily bargainable, and that the second was. The reviewing court continued this sharp distinction, upholding the commission ruling that held the portions of the association's proposals that were required bargaining subjects to be confined "strictly to student misbehavior involving physical threats to the teacher's safety." The trial court also noted a particular association proposal dealing with referral of problem students for needed counseling.[28] The trial court held that this proposal did not primarily relate to "wages, hours and conditions of employment," and held it not to be mandatorily bargainable. With the limitations set by the commission and the modification made by the reviewing court, we affirm the holding that the proposals as to the problem students who present a physical threat to teacher safety are primarily related to "wages, hours and conditions of employment," and are required by the statute to be bargained.

(F) SCHOOL CALENDAR. The teachers' association suggested the school calendar as a required bargaining topic.[29] The commission ruled that "all aspects of the school calendar" were mandatorily bargainable. The reviewing court affirmed this holding, adding that "all that is required of the employer in collective bargaining is to bargain in good faith with respect to proposals submitted by the collective bargaining agent of the employees. An agreement with respect to a particular proposal is not required." The school board challenges this finding of bargainability, relying heavily upon the case, decided prior to the enactment of sec. 111.70(1)(d), Stats., in which our court held that a school board ". . . need neither surrender its discretion in determining calendar policy nor come to an agreement in the collective-bargaining sense."[30] However, subsequently, our court has held: "The school calendar and in-service days are subject to negotiation with the bargaining agent under sec. 111.70(2), Stats."[31] Given this applicable ruling by this court, we affirm the trial court holding that, while the school board cannot be required to agree or concede to an association demand as to calendar days, it is required to meet, confer and bargain as to any calendaring proposal that is primarily related to "wages, hours and conditions of employment."

(G) IN-SERVICE TRAINING. A variety of proposals regarding teach-

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26 See: Joint School Dist. No. 8 v. Wis. E. R. Board (1967), 37 Wis.2d 483, 493, 155 N.W.2d 78, 82, this court holding: "The contents of the curriculum would be a different matter. Subjects to study are within the scope of basic educational policy and additionally are not related to wages, hours and conditions of employment."

27 The proposals as to problem students can be summarized as follows: "*Problem Students* (1) Referral of problem students to specialized personnel and others, (2) Relief of teacher responsibility with respect to problem students, (3) Consent of teacher to whom problem student is assigned, (4) Exclusion of problem student from classroom, report thereof, and consultation prior to return to classroom, (5) Teacher self-protection and report of action taken, and (6) Liability insurance coverage and compensation resulting in absence from duty from injuries in performance of teaching and related duties, with no deduction from accumulated sick leave."

28 The particular proposal was as follows: ". . . . Whenever it appears that a particular pupil requires the attention of special counselors, special teachers, social workers, law enforcement personnel, physicians or other professional persons, such students shall be referred to that particular person."

29 The association's original proposals raised the subject of school calendar, but no specific proposal was made.

30 Joint School Dist. No. 8 v. Wis. E. R. Board, supra, footnote 26, at page 494, 155 N.W.2d at page 83, this court also stating: "If the school calendar was subject to collective bargaining in the conventional sense in which that term is used in industrial labor relations under sec. 111.02(5), Stats., there would be merit to the argument of the school board that its legislative function is being delegated or surrendered and thus the calendar could not constitutionally be a subject of negotiation although it fell within the broad terms of the statute."

31 Board of Education v. WERC (1971), 52 Wis.2d 625, 633, 634, 191 N.W.2d 242, 246, 78 LRRM 3040, 3042, this court also holding: "Likewise educational conventions, and whether they are to be considered in-service or school days, and questions of compensation for such days are, we believe, within the statutorily defined area of negotiation on 'wages, hours and conditions of employment.'"

er in-service training were submitted by the teachers' association as proper subjects for required bargaining.[32] With a single exception all such proposals were held by the commission not to primarily relate to "wages, hours and conditions of employment," and, therefore, not to be subject matters where bargaining is required.[33] The single exception and the only proposal in this area held to be mandatorily bargainable was the one regarding: "The number of in-service days during the school year and the day of the week such days will fall." The trial court held this proposal to be a matter of calendaring, and to be governed by the holding, heretofore upheld, as to calendar day proposals being mandatorily bargainable. We agree, noting that the decision of this court making the school calendar subject to negotiation included "in-service days" in its holding.[34] On the record before it the commission was entitled to hold the "in-service days" proposal mandatorily bargainable.

(H) CLASSROOM SIZE. The teachers' association submitted to the commission as a subject matter requiring mandated bargaining a proposal concerning class size.[35] The commission, on the evidence before it, concluded that the size of a class is not primarily a matter of "wages, hours and conditions of employment" but is primarily a matter of basic educational policy.[36] Therefore, it concluded, "decisions on class size are permissive and not mandatory subjects of bargaining." The trial court affirmed this holding, stating that, on the basis of the evidence before it, the commission could conclude that a school board's prerogatives in making educational policy include the power to decide that class size does affect the quality of education and to set class size accordingly. The commission also held that the size of a class has an impact upon conditions of employment of teachers.[37] So it concluded that: "While the School Board has the right to unilaterally establish class size, it nevertheless has the duty to bargain the impact of the class size, as it affects hours, conditions of employment and salaries." The reviewing court also affirmed this commission holding that, while class size was not bargainable, the impact of class size upon "wages, hours and conditions of employment" was mandatorily bargainable. We affirm the trial court holding, agreeing that the commission was warranted in reaching the conclusions it did.

(I) READING PROGRAM. The teachers' association claimed that its proposal as to a school reading program was a matter that required bargaining.[38] The commission held that the association's proposal on "reading" related primarily to educational policy,[39] and not to "wages,

32 The in-service training proposals included: "The afternoon of the third Thursday of each month will be designated as in-service day," if the third Thursday of any given month falls on a holiday or during a vacation, another appropriate day will be substituted. The calendar for in-service days will be structured jointly by representatives of the association and the central administration. Although the in-service program will be planned to make maximum use of staff talents, outside consultants may be required. In such cases, the board agrees to pay the reasonable costs of said consultants provided that the cost does not exceed $1,000 (one thousand dollars). The time of in-service will be 12:00-4:00. Adequate time for lunch will be provided."

33 The WERC memorandum stated: "However, we conclude that the type of programs to be held on such days, and the participants therein are not subjects to mandatory bargaining, since we are satisfied that such programs and the participants therein have only a minor impact on working conditions, as compared to the impact on educational policy."

34 Board of Education v. WERC, supra, footnote 31, at page 633, 191 N.W.2d 242, 78 LRRM 3040.

35 The proposal as to class size was as follows: "Because the pupil-teacher ratio is an important aspect of an effective educational program, the Board agrees that class size should be lowered wherever possible to meet the optimum standards of one (1) to twenty-five (25). Exceptions may be allowed in traditional large group instruction or experimental classes, where the Association has agreed in writing to exceed this standard."

36 The WERC memorandum stated: "The size of a class is a matter of basic educational policy because there is very strong evidence that the student-teacher ratio is a determinant of educational quality. Therefore, decisions on class size are permissive and not mandatory subjects of bargaining."

37 Id., continuing: "On the other hand, the size of the class affects the conditions of employment of teachers. The larger the class, the greater the teacher's work load, e.g., more preparation, more papers to correct, more work projects to supervise, the probability of more disciplinary problems, etc."

38 The proposal as to a reading program was as follows: "The Board and the Association agree that each child shall have the opportunity to enhance and expand reading skills necessary to allow a child to reach his optimum reading expectancy level. Therefore the Board agrees to assess the reading achievement and the native ability of each child annually. These figures shall be made available to the Association. The necessary staff, materials, and programs shall be furnished for the child found to be one or more years below his optimum reading expectancy level, to remedy his reading deficit."

39 The WERC memorandum stated: "It is clear to the Commission that the Association's proposal on 'reading' relates primarily to basic educational policy, and therefore

hours and conditions of employment." It concluded that such proposal was subject to voluntary or permissive bargaining, but that bargaining as to it was not required. The trial court affirmed this holding. The commission further held that: "If a reading program is established, which involves teachers, the impact of the same upon their wages, hours and working conditions, is a subject of mandatory bargaining." This commission ruling was not challenged on appeal, and is here set forth in the interest of completeness. We see no basis upon which it could be successfully challenged.

(J) SUMMER SCHOOL. The teachers' association sought to have declared mandatorily bargainable its proposals for the initiation of a summer school program.[40] The commission held that such proposal for initiating a summer school program related primarily to basic educational policy, and did not primarily relate to "wages, hours and conditions of employment." Therefore it concluded the proposals for a summer school were subject to permissive, but not mandatory bargaining. However the commission also held, should the school board determine unilaterally to establish a summer school session, "matters relating to wages, hours and working conditions of teachers participating in a summer school session, are subject to mandatory bargaining." This holding by the commission is not challenged by either party on appeal, and is set forth, this being an action for declaring of rights, in the interests of completeness. We find it to be entirely correct as a conclusion of law.

(K) ASSISTANCE TO TEACHERS. The teachers' association urged that the commission find mandatorily bargainable its proposals for assistance to teachers having professional difficulties.[41] The commission declined so to do, holding instead that the proposals for teacher assistance primarily related to the management of the school system, and were not primarily or even significantly related to "wages, hours and conditions of employment." In explaining its reasons for so concluding, the commission stated in its memorandum: ". . . the proposals involving . . . assistance to teachers having professional difficulties, and the techniques to be employed in dealing with teachers found to be suffering professional difficulties, reflect efforts to determine management techniques rather than 'conditions of employment.' As such, they are not subjects of mandatory bargaining." The trial court affirmed this holding. While such assistance to teachers having professional difficulties is not unrelated to their continued employment or promotion, it is evident that the primary relatedness is to the "management and direction" of the school system. On the record before it the commission acted properly in so concluding.

THE STANDARD. As its standard of review for the commission rulings, the trial court held that standard to be ". . . whether each ruling constitutes a rational interpretation of sec. 111.70(1)(d), Stats." The trial court held that it is ". . . only when the interpretation by the administrative agency is an irrational one that a reviewing court does not defer to it."[42] It is certainly true, as the trial court observed, that the general rule in this state is that ". . . the construction and interpretation of a statute adopted by the administrative agency charged by the legislature with the duty of applying it

concerns a matter subject to permissive, but not mandatory bargaining. The need for such a program is essentially a determination of whether the District should direct itself toward certain educational goals."

40 The proposals for a summer program included in relevant part: (1) That a summer program be initiated; (2) that a maximum of ten teachers be employed for a period of one month at a total salary cost of $10,000; (3) that all other teachers involved receive six credits on the salary schedule; (4) all students participating to do so free of charge; (5) federal grants or aid be applied for when and if possible; (6) that the program be under the direction of the director of curriculum; and (7) that the summer workshop be for one month with hours of 8-12 and 1-4.

41 The teacher assistance proposals were as follows: "1. Definite positive assistance shall be immediately provided to teachers upon recognition of 'professional difficulties.' . . . 2. Beginning immediately with the conference after the classroom observation, specific appropriate direction shall be offered to guide the individual toward the solution of his particular professional problem. Suggested actions shall include at least three of the following: (a) Demonstration in an actual classroom situation (b) Direction of the teacher toward a model for emulation, allowing opportunities for observation (c) Initiation of conferences with evaluator, teacher and area coordinator or department chairmen to plan positive moves toward improvement of professional classroom performance (d) Guidance for the teacher toward professional growth workshops (e) Observation, continued and sustained, by the evaluator to note the day-to-day lessons and their interrelationships (f) Maintenance and expansion of the collection of professional literature with assigned reading, designed to suggest possible solutions to indentified problems."

42 The trial court citing Wisconsin Southern Gas Co. v. Public Service Comm. (1973), 57 Wis.2d 643, 652, 205 N.W.2d 403.

is entitled to great weight."[43] However, as this court has made clear, the rule that great weight is to be given and any rational basis will sustain the practical interpretation of the agency charged with enforcement of a statute ". . . does not apply unless the administrative practice is long continued, substantially uniform and without challenge by governmental authorities and courts."[44] In this petition for declaratory rulings, addressed to the state employment relations commission, we have very nearly questions of first impression raised concerning the areas of mandatory bargaining between a school board and a teachers' association under sec. 111.70(1)(d), Stats.[45] Given this situation, we would hold, quoting a very recent case, that ". . . this court is not bound by the interpretation given to a statute by an administrative agency. Nevertheless, that interpretation has great bearing on the determination as to what the appropriate construction should be."[46] It is such "great bearing" of "due weight" standard, not the "any rational basis" test, that we find here applicable. However we here hold that the applicability of such higher standard does not affect the validity of the reviewing court's upholding of the rulings of the commission. The commission's holdings were conclusions of law. We find that, under either standard of review, due weight or great weight, the holdings of the employment relations commission met either test on judicial review.

THE EVIDENCE. As to each ruling or conclusion of law reached by the employment relations commission, the trial court and this court have upheld each such holding as sufficiently supported by the evidence in the record before the commission. The teachers' association attacks the evidence admitted as part of that record, specifically contending that the admission and use of certain book and magazine articles offered by the school board was improper. The claim is that such evidence, admitted over objection, was (1) hearsay, (2) without foundation having been laid, (3) inadmissible as opinion evidence, (4) admitted without opportunity to cross-examine the authors of the articles, and (5) irrelevant and immaterial. The articles objected to referred to many of the subjects involved in the commission's ruling. The exhibits challenged were copies of articles that appeared in various educational journals on these subjects. We hold that they were properly admitted. The employment relations commission has broad discretion as to what evidence it can consider. The applicable statute provides that: "Agencies may take official notice of any generally recognized fact or any established technical or scientific fact; but parties shall be *notified either before or during hearing or by full reference* in preliminary reports or otherwise, of the facts so noticed, and they shall be afforded an opportunity to contest the validity of the official notice." [Emphasis supplied.][47] With notice given as to admission of the articles and that they would be considered by the commission, we would find the "notified during hearing" provisions of the statute here complied with. In any event, with this a petition for a declaring of rights under a statute, we find no error committed by the commission or prejudice established to the Beloit Education Association. Here the commission set forth the proposals of the association and, in its findings and conclusions, moved directly from such proposals to determining whether each proposal related primarily to "wages, hours and conditions of employment" so that bargaining was required. As the trial court held: "The test of whether a finding is supported by substantial evidence is whether the evidence supporting the finding is such that a reasonable man could accept the same to support the con-

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43 The trial court citing Libby, McNeill & Libby v. Wisconsin E. R. Comm. (1970), 48 Wis.2d 272, 280, 179 N.W.2d 805, 75 LRRM 2759; Chevrolet Division, G. M. C. v. Industrial Comm. (1966), 31 Wis.2d 481, 488, 143 N.W.2d 532; Cook v. Industrial Comm. (1966), 31 Wis.2d 232, 240, 142 N.W.2d 827.

44 Wood County v. Bd. of Vocational, T. & A. Ed. (1973), 60 Wis.2d 606, 618, 211 N.W. 2d 617, 623.

45 See: Whitefish Bay v. Wisconsin E. R. Board (1967), 34 Wis.2d 432, 444, 445, 149 N.W. 2d 662, 669, 65 LRRM 2302, this court holding: "In view of this poverty of administrative experience and of the recent passage of the statute giving rise to this strictly legal question of jurisdiction, perhaps the court ought to examine it afresh as a question of law not especially involving administrative expertise. For such a question the court feels free to substitute its own judgment for that of the administrative agency." Citing Pabst v. Department of Taxation (1963), 19 Wis.2d 313, 323, 120 N.W.2d 77.

46 Milwaukee v. WERC (1976), 71 Wis.2d 709, 714, 239 N.W.2d 63, 66, 91 LRRM 3019.

47 Sec. 227.10(3), Stats. Sec. 227.10(1), Stats., also provides: "Agencies shall not be bound by common law or statutory rules of evidence.

clusion made."[48] And, exactly as the trial court concluded, "[U]nder this test the questioned finding needs no evidentiary facts to support it other than the wording of the Association's proposal to which this finding relates." The state employment relations commission was asked for a declaratory ruling as to whether each or all of various proposals were subjects of mandatory bargaining. The commission examined each such proposal and ruled as to whether it was a subject of required bargaining under sec. 111.70(1)(d) Stats. Its holdings or conclusions as to each have been modified in part and, as modified, affirmed by the circuit court and again affirmed for reversal in the procedures followed by the commission and upheld on judicial review.

Judgment affirmed.

YONKERS SCHOOL DIST. v. TEACHERS

New York Court of Appeals

In the Matter of BOARD OF EDUCATION, YONKERS CITY SCHOOL DISTRICT v. YONKERS FEDERATION OF TEACHERS, et al., No. 278, July 1, 1976

ARBITRATION

—Teachers — Reduction in staff — Job-seniority clause—Financial emergency—Arbitrability ▶ 100.07 ▶ 100.35

Board of education may be compelled to arbitrate grievance of teachers federation arising from board's termination, because of city's severe financial crisis, of some teachers covered by collective bargaining contract providing that no person in bargaining unit be terminated due to budgetary reasons or abolition of programs during life of contract, despite contention that contract's job security provision is invalid as contrary to public policy. (1) Public employer is free to bargain voluntarily about job security and also free, under contractual provisions, to submit to arbitration disputes about job security; (2) provision in contract guaranteeing public employees job security for reasonable period of time is not prohibited by any statute or controlling decisional law and is not contrary to public policy; and (3) no merit is found in board's contention that New York State Financial Emergency Act evinces legislative determination of public policy that job abolition must be permitted, since Act provides that it should not be construed to impair right of employees to bargain collectively and specifies that primary recourse must be had to attrition to effect any reduction in work force.

Appeal from the New York Supreme Court, Appellate Division, Second Department (92 LRRM 2459, 51 A.D.2d 568, 379 N.Y.S.2d 109). Reversed.

James R. Sandner, David N. Stein, and Thomas C. Greble, New York, N.Y., for appellant.

Eugene J. Fox, Corporation Counsel (William N. Carroll, of counsel), Yonkers, N.Y., for respondent.

William H. Englander and Robert E. Sapir, Yonkers, N.Y., for Levittown UFSD, amicus curiae.

Full Text of Opinion

BREITEL, Chief Judge:—This appeal, in arbitration, involves a so-called "job security" clause in a collective agreement between a public employer and public employees. The Yonkers City Board of Education, because of the City's severe financial stringency, terminated the services of some teachers covered by the "job security" clause. The Yonkers City School District is not "independent" but receives its funds from the City of Yonkers.

The teachers' union demanded arbitration under the collective agreement and the board brought this proceeding to stay arbitration (CPLR art. 75). Supreme Court granted the stay and declared the job security provision invalid as contrary to public policy. The Appellate Division affirmed and the teachers' union appeals.

The issue is whether a public employer is free to bargain voluntarily about job security and also free, under the collective agreement's provisions, to submit to arbitration disputes about job security.

There should be a reversal. A provision in a collective bargaining guaranteeing public employees job security for a reasonable period of time is not prohibited by any statute or controlling decisional law and is not contrary to public policy. Hence, the board of education was free to bargain voluntarily about job security and was also, therefore, free to agree

[48] The trial court citing Robertson Transport. Co. v. Public Serv. Comm. (1968), 39 Wis.2d 653, 658, 159 N.W.2d 636.