



Montgomery
County Council

Committee GO
Staff: Robert H. Drummer, Senior Legislative Attorney
Purpose: Final action – vote expected
Keywords: #FairRepresentationMoCo

AGENDA ITEM #4A
February 4, 2020
Action

SUBJECT

Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation
Lead Sponsor: Councilmember Hucker

EXPECTED ATTENDEES

None

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

- The GO Committee recommends enacting the Bill as introduced.
- Action – Roll call vote required

DESCRIPTION/ISSUE

Bill 35-19 would:

- amend the duty of fair representation for a certified representative of County employees;
- authorize a certified representative to impose the reasonable costs of filing a grievance or pursuing arbitration on an employee who does not pay membership dues or the equivalent; and
- permit a certified representative to refuse to file a grievance or pursue arbitration for an employee who does not pay membership dues or the equivalent unless the employee pays the reasonable costs imposed.

SUMMARY OF KEY DISCUSSION POINTS

Should this issue be left to negotiation with each exclusive representative?

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MEMORANDUM

January 30, 2020

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation

PURPOSE: Action – Roll call vote required

Government Operations and Fiscal Policy Committee recommendation (3-0): enact Bill as introduced.

Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation, sponsored by Lead Sponsor Councilmember Huckler, was introduced on November 19, 2019. A public hearing was held on December 3 at which two speakers testified on the bill. A Government Operations and Fiscal Policy Committee worksession was held on January 16.¹

Bill 35-19 would:

- amend the duty of fair representation for a certified representative of County employees;
- authorize a certified representative to impose the reasonable costs of filing a grievance or pursuing arbitration on an employee who does not pay membership dues or the equivalent; and
- permit a certified representative to refuse to file a grievance or pursue arbitration for an employee who does not pay membership dues or the equivalent unless the employee pays the reasonable costs imposed.

The Supreme Court, in *Abood v. Detroit Board of Education*, 431 US 209 (1977), upheld a collective bargaining agreement between a union representing teachers and the public school board requiring bargaining unit members to either join the union or pay an equivalent service fee to the union to support its duty to represent all bargaining unit members. The Court rejected a claim that this provision violated the First Amendment rights of employees who do not want to join the union

¹#FairRepresentationMoCo

but required the union to reduce the service fee in an amount equal to the cost to express ideological or political views unrelated to collective bargaining.

Forty-one years later, different members of the Supreme Court overruled *Abood* and held that an agency shop clause in the public sector violated the First Amendment rights of public employees who choose not to join the union in *Janus v. AFSCME*, 138 S.Ct. 2448 (2018). County collective bargaining laws require the exclusive representative to represent all bargaining unit members and permit the union and the employer to negotiate an agency shop provision. The union certified as the exclusive representative of each County employee bargaining unit has negotiated an agency shop provision that is no longer valid under the *Janus* decision. Bill 35-19 would modify the union's duty of fair representation by permitting the union to refuse to process a grievance or arbitration on behalf of a bargaining unit member who chooses not to pay union dues unless the employee pays the union the reasonable costs to process the grievance or arbitration. Bill 35-19 is patterned after a recent State law making similar modifications to the duty of fair representation for the exclusive representative of M-NCPPC employees. See Chapter 562 of the 2019 Laws of Maryland at ©8-11.

The Executive's Fiscal and Economic impact statements conclude that the Bill would have no fiscal impact on the County's finances and would have no impact on the County's economy. See ©12-16.

Public Hearing

Each of the two witnesses at the public hearing spoke on behalf of a labor union representing County employees and supported the Bill. Amy Millar, representing the UFCW Local 1994 MCGEO (©17), and Jeffrey Buddle, representing the IAFF Local 1664, argued that it was unfair to require the union to represent an employee in the bargaining unit in a grievance or arbitration hearing who chooses to not pay either union dues or the equivalent.

GO Committee Worksession

The Committee discussed the Bill with Senior Legislative Attorney Robert Drummer. Mr. Drummer discussed the legal history of agency shop fees in the public sector and the decision of the US Supreme Court holding that an agency shop clause in the public sector violates the First Amendment rights of employees who do not want to join the union. The Committee also discussed the reasonableness of the Bill.

The Committee recommended (3-0) to enact the Bill as introduced

Issues

1. Should the Council permit the Executive to negotiate with each County employee union possible changes to the law governing the duty of fair representation of an exclusive representative before amending the law?

Under the County collective bargaining laws, changes to the statutory duty of fair representation is subject to collective bargaining as a term or condition of employment. If the parties agreed to a change, the Executive would submit the proposed legislation to the Council for its consideration. To date, the Executive has not negotiated any modifications to the duty of fair representation with any of the exclusive representatives as a result of the *Janus* decision.

The General Assembly enacted a law modifying the duty of fair representation for an exclusive representative of employees of the M-NCPPC and the Montgomery County Housing Opportunities Commission. Bill 35-19 is patterned after these laws. The General Assembly did not enact a similar law for an exclusive representative of its own State government employees or public school employees. Instead, the General Assembly enacted a law providing the exclusive representative of public school employees access to new employee orientation and a periodic list of contact information for bargaining unit employees (Chapter 29 of the 2018 Laws of Maryland).

Bill 35-19 represents only one possible response to the *Janus* decision. For example, California, Washington, New Jersey, and Massachusetts responded to the *Janus* decision by enacting laws granting the union access to new employee orientation and an updated list of contact information for bargaining unit members. See the National Conference of State Legislatures (NCSL) Report at ©18-20. The agency shop that was held unconstitutional in *Janus* was negotiated by each County employee union and the Executive. Although the Council always retains the right to enact legislation amending the collective bargaining laws on its own motion, the Council may want to permit each union to negotiate a response to the *Janus* decision with the Executive and submit proposed legislation to the Council for its consideration.

The collective bargaining process permits employees to bargain with their employer through a single exclusive representative over certain terms and conditions of employment. It fosters labor peace by providing employees with some control over their employment. The negotiation always involves a search for shared objectives and the inevitable give and take from each side. The Executive is the employer under the County collective bargaining laws. The parties are currently negotiating a new agreement for each bargaining unit. Bill 35-19 would resolve a potential issue outside of the ongoing negotiations.

2. Is Bill 35-19 a reasonable response to the *Janus* decision?

The exclusive representative has a duty to fairly represent all employees in the bargaining unit without regard to union membership. The agency shop provisions held unconstitutional in the *Janus* decision were a solution to the free rider problem. An employee was not required to join the union, but each employee was required to share the cost of the representation by the union. This representation includes bargaining collectively and enforcing the collective bargaining agreement by filing a grievance on behalf of a bargaining unit member.

Bill 35-19 would resolve the free rider problem by permitting the union to impose the cost of filing a grievance on behalf of a bargaining unit member who chooses not to pay union dues or a service fee while continuing to require the union to bargain on behalf of all unit members. If an employee refuses to pay either union dues, service fees, or the costs to file a grievance on behalf of that employee, the union may refuse to file the grievance. A dispute over the reasonableness of

the costs imposed on an employee by the union would be resolved by the independent labor relations administrator or umpire. Bill 35-19 is a reasonable approach to requiring each bargaining unit employee to pay for the union's cost to represent the employee individually. **Committee recommendation (3-0):** enact the Bill as introduced.

This packet contains:

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F:\LAW\BILLS\1935 Personnel - Collective Bargaining - Exclusive Representative\Action Memo.Docx

Bill No. 35-19
Concerning: Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation
Revised: October 3, 2019 Draft No. 2
Introduced: November 25, 2019
Expires: May 19, 2021
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: _____
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Hucker

AN ACT to:

- (1) amend the duty of fair representation for a certified representative of County employees;
- (2) authorize a certified representative to impose the reasonable costs of filing a grievance or pursuing arbitration on an employee who does not pay membership dues or the equivalent;
- (3) require a certified representative to file a grievance or pursue arbitration for an employee who does not pay membership dues or the equivalent only if the employee pays the reasonable costs imposed; and
- (4) generally amending the duty of fair representation of a certified representative of County employees.

By amending

Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-78, 33-104, and 33-150

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

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

1 **Sec. 1. Sections 33-78, 33-104, and 33-150 are amended as follows:**

2 **33-78. Employee rights.**

3 (a) Employees shall have the right:

4 (1) To form, join, support, contribute to, or participate in, or to refrain
5 from forming, joining, supporting, contributing to, or participating
6 in, any employee organization or its lawful activities; and

7 (2) To be fairly represented by their certified representative, if any.

8 (b) The employer must extend to the certified representative the exclusive
9 right to represent the employees for the purposes of collective bargaining,
10 including the orderly processing and settlement of grievances as agreed
11 by the parties.

12 (c) Except as provided in subsections (e) and (f), a [A] certified
13 representative must serve as the bargaining agent for all employees and
14 must represent fairly and without discrimination all employees without
15 regard to whether the employees are members of the employee
16 organization, pay dues or other contributions to it, or participate in its
17 affairs. [However, it is not a violation of this duty for a certified
18 representative to seek enforcement of an agency shop provision in a valid
19 collective bargaining agreement.]

20 (d) The right of the certified representative to receive membership dues
21 deductions [or agency shop provisions shall] must be determined through
22 negotiations, unless the authority to negotiate such provisions has been
23 suspended under section 33-84. No collective bargaining agreement may
24 include a provision requiring membership in, participation in the affairs
25 of, or contributions to an employee organization [other than an agency
26 shop provision].

- 27 (e) A certified representative may require an employee who does not pay
 28 membership dues or equivalent fees to pay:
- 29 (1) the reasonable costs and fees, including expenses for staff time and
 30 materials, arbitrator fees, and related attorney’s fees, for filing a
 31 grievance or arbitrating a matter that arises under a collective
 32 bargaining agreement brought by the certified representative at the
 33 request of the employee; and
- 34 (2) any anticipated proportional costs and fees before a grievance is
 35 filed or arbitration is pursued.
- 36 (f) If an employee fails to pay the reasonable costs to file a grievance or
 37 pursue arbitration imposed under subsection (e), the certified
 38 representative may refuse to file the grievance or pursue arbitration on
 39 behalf of the employee. A dispute concerning the reasonableness of the
 40 fees imposed by the certified representative under subsection (e) may be
 41 submitted to the permanent umpire as a prohibited practice under Section
 42 33-82.

43 **33-104. Employee rights.**

- 44 (a) Employees have the right to:
- 45 (1) Form, join, support, contribute to, or participate in, or to refrain
 46 from forming, joining, supporting, contributing to, or participating
 47 in, any employee organization or its lawful activities; and
- 48 (2) Be represented fairly by their certified representative, if any.
- 49 (b) The employer has the duty to extend to the certified representative the
 50 exclusive right to represent the employees for the purposes of collective
 51 bargaining, including the orderly processing and settlement of grievances
 52 as agreed by the parties in accordance with this article.

- 53 (c) Except as provided in subsections (e) and (f), a [A] certified
 54 representative serves as the exclusive bargaining agent for all employees
 55 in the unit for which it is certified and has the duty to represent fairly and
 56 without discrimination all employees in the unit without regard to
 57 whether the employees are members of the employee organization, pay
 58 dues or other contributions to it, or participate in its affairs. [However, it
 59 is not a violation of this duty for a certified representative to seek
 60 enforcement of an agency shop provision in a valid collective bargaining
 61 agreement.]
- 62 (d) The right of a certified representative to receive voluntary dues or service
 63 fee deductions [or agency shop provisions shall] must be determined
 64 through negotiations, unless the authority to negotiate these provisions
 65 has been suspended under this article. A collective bargaining agreement
 66 may not include a provision requiring membership in, participation in the
 67 affairs of, or contributions to an employee organization [other than an
 68 agency shop provision].
- 69 (e) A certified representative may require an employee who does not pay
 70 membership dues or equivalent fees to pay:
- 71 (1) the reasonable costs and fees, including expenses for staff time and
 72 materials, arbitrator fees, and related attorney's fees, for filing a
 73 grievance or arbitrating a matter that arises under a collective
 74 bargaining agreement brought by the certified representative at the
 75 request of the employee; and
- 76 (2) any anticipated proportional costs and fees before a grievance is
 77 filed or arbitration is pursued.
- 78 (f) If an employee fails to pay the reasonable costs to file a grievance or
 79 pursue arbitration imposed under subsection (e), the certified

80 representative may refuse to file the grievance or pursue arbitration on
 81 behalf of the employee. A dispute concerning the reasonableness of the
 82 fees imposed by the certified representative under subsection (e) may be
 83 submitted to the labor relations administrator as a prohibited practice
 84 under Section 33-109.

85 **33-150. Employee rights.**

86 (a) Employees have the right to:

- 87 (1) form, join, support, contribute to, or participate in, or refrain from
 88 forming, joining, supporting, contributing to, or participating in,
 89 any employee organization or its lawful activities; and
 90 (2) be represented fairly by their certified representative, if any.

91 (b) The employer must extend to the certified representative the exclusive
 92 right to represent the employees for the purposes of collective bargaining,
 93 including the orderly processing and settlement of grievances as agreed
 94 by the parties under this Article.

95 (c) Except as provided in subsections (e) and (f), a [A] certified
 96 representative serves as the exclusive bargaining agent for all employees
 97 in the unit and must represent fairly and without discrimination all
 98 employees in the unit without regard to whether the employees are
 99 members of the employee organization, pay dues or other contributions
 100 to it, or participate in its affairs. [However, it is not a violation of this
 101 duty for a certified representative to seek enforcement of an agency shop
 102 provision in a valid collective bargaining agreement.]

103 (d) The right of a certified representative to receive voluntary dues or service
 104 fee deductions [or agency shop provisions] must be determined through
 105 negotiations, unless the authority to negotiate these provisions has been
 106 suspended under this Article. [Other than an agency shop provision, a] A

107 collective bargaining agreement must not require membership in,
108 participation in the affairs of, or contributions to an employee
109 organization.

110 (e) A certified representative may require an employee who does not pay
111 membership dues or equivalent fees to pay:

112 (1) the reasonable costs and fees, including expenses for staff time and
113 materials, arbitrator fees, and related attorney's fees, for filing a
114 grievance or arbitrating a matter that arises under a collective
115 bargaining agreement brought by the certified representative at the
116 request of the employee; and

117 (2) any anticipated proportional costs and fees before a grievance is
118 filed or arbitration is pursued.

119 (f) If an employee fails to pay the reasonable costs to file a grievance or
120 pursue arbitration imposed under subsection (e), the certified
121 representative may refuse to file the grievance or pursue arbitration on
122 behalf of the employee. A dispute concerning the reasonableness of the
123 fees imposed by the certified representative under subsection (e) may be
124 submitted to the labor relations administrator as a prohibited practice
125 under Section 33-154.

LEGISLATIVE REQUEST REPORT

Bill 35-19

Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation

- DESCRIPTION:** Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation would:
- amend the duty of fair representation for a certified representative of County employees;
 - authorize a certified representative to impose the reasonable costs of filing a grievance or pursuing arbitration on an employee who does not pay membership dues or the equivalent; and
 - require a certified representative to file a grievance or pursue arbitration for an employee who does not pay membership dues or the equivalent only if the employee pays the reasonable costs imposed.
- PROBLEM:** The Supreme Court decision in *Janus v. AFSCME* 138 S.Ct. 2448 (2018) held that the agency shop provisions in each County collective bargaining agreement was invalid.
- GOALS AND OBJECTIVES:** Permit a union to receive payment for filing grievances on behalf of an employee who chooses not to pay union dues.
- COORDINATION:** Chief of Labor Relations, County Attorney
- FISCAL IMPACT:**
- ECONOMIC IMPACT:** To be done.
- EVALUATION:** To be done.
- EXPERIENCE ELSEWHERE:** Maryland has enacted similar laws for certain State employee unions.
- SOURCE OF INFORMATION:** Robert H. Drummer, Senior Legislative Attorney
- APPLICATION WITHIN MUNICIPALITIES:** N/A
- PENALTIES:** N/A

Chapter 562

(House Bill 362)

AN ACT concerning

Maryland–National Capital Park and Planning Commission – Collective Bargaining – Exclusive Representative Duty of Fair Representation

MC/PG 109–19

FOR the purpose of altering the duty of an employee organization certified as the exclusive representative of certain employees of the Maryland–National Capital Park and Planning Commission to represent all employees in a certain bargaining unit in a certain manner; authorizing the exclusive representative to require an employee who does not pay certain dues or fees to pay certain costs and fees for filing a certain grievance or arbitrating a certain matter; providing that the failure by the employee to pay certain costs and fees relieves the exclusive representative of certain responsibilities; requiring that a dispute concerning the reasonableness of certain costs and fees be submitted to a certain labor relations administrator in accordance with certain procedures; limiting an exclusive representative’s duty of fair representation owed to certain public employees to certain matters; providing for the construction of certain provisions of this Act; and generally relating to collective bargaining for employees of the Maryland–National Capital Park and Planning Commission.

BY repealing and reenacting, with amendments,
Article – Land Use
Section 16–202 and 16–302
Annotated Code of Maryland
(2012 Volume and 2018 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
That the Laws of Maryland read as follows:

Article – Land Use

16–202.

(a) The Commission shall recognize the right of an employee organization, certified under this subtitle as the exclusive representative of a bargaining unit, to represent the employees in the bargaining unit in collective bargaining and in the settlement of grievances.

(b) An employee organization certified as the exclusive representative of a bargaining unit shall:

(1) serve as the sole bargaining agent for the unit in collective bargaining;
and

(2) **EXCEPT AS PROVIDED IN SUBSECTION (D) OF THIS SECTION,** represent all employees in the bargaining unit fairly[,] **AND** without discrimination[, and without regard to whether an employee is a member of the employee organization].

(c) An employee organization meets the requirements of subsection (b)(2) of this section if the employee organization's actions with respect to employees [who are members of the employee organization and employees who are not members of the employee organization] **IN THE BARGAINING UNIT** are not arbitrary, discriminatory, or in bad faith.

(D) (1) THE EXCLUSIVE REPRESENTATIVE MAY REQUIRE AN EMPLOYEE WHO DOES NOT PAY MEMBERSHIP DUES OR EQUIVALENT FEES TO PAY:

(I) THE REASONABLE COSTS AND FEES, INCLUDING EXPENSES FOR STAFF TIME AND MATERIALS, ARBITRATOR FEES, AND RELATED ATTORNEY'S FEES, FOR FILING A GRIEVANCE OR ARBITRATING A MATTER THAT ARISES UNDER A COLLECTIVE BARGAINING AGREEMENT NEGOTIATED UNDER THIS SUBTITLE BROUGHT BY THE EXCLUSIVE REPRESENTATIVE AT THE REQUEST OF THE EMPLOYEE; AND

(II) ANY ANTICIPATED PROPORTIONAL COSTS AND FEES BEFORE A GRIEVANCE IS FILED OR ARBITRATION IS PURSUED.

(2) FAILURE BY THE EMPLOYEE TO PAY THE COSTS AND FEES REQUIRED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL RELIEVE THE EXCLUSIVE REPRESENTATIVE OF ANY FURTHER RESPONSIBILITY TO THE EMPLOYEE.

(3) A DISPUTE CONCERNING THE REASONABLENESS OF THE COSTS AND FEES IMPOSED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL BE SUBMITTED TO THE LABOR RELATIONS ADMINISTRATOR IN ACCORDANCE WITH THE PROCEDURES ESTABLISHED UNDER § 16-218 OF THIS SUBTITLE FOR UNFAIR LABOR PRACTICES.

(E) (1) AN EXCLUSIVE REPRESENTATIVE'S DUTY OF FAIR REPRESENTATION OWED TO A PUBLIC EMPLOYEE WHO IS IN THE BARGAINING UNIT SHALL BE LIMITED TO THE NEGOTIATION AND ENFORCEMENT OF THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT WITH THE PUBLIC EMPLOYER.

(2) NOTHING IN THIS SUBSECTION MAY BE CONSTRUED TO LIMIT AN EMPLOYEE ORGANIZATION FROM PROVIDING ONLY TO THE ORGANIZATION'S

MEMBERS LEGAL, ECONOMIC, OR JOB-RELATED SERVICES OR BENEFITS OUTSIDE THE COLLECTIVE BARGAINING AGREEMENT.

16-302.

(a) The Commission shall recognize the right of an employee organization, certified under this subtitle as the exclusive representative of the bargaining unit, to represent the employees in the bargaining unit in collective bargaining and in the settlement of grievances.

(b) An employee organization certified as the exclusive representative of a bargaining unit shall:

(1) serve as the sole bargaining agent for the bargaining unit in collective bargaining; and

(2) EXCEPT AS PROVIDED IN SUBSECTION (C) OF THIS SECTION, represent all employees in the bargaining unit fairly[,] AND without discrimination[, and without regard to whether an employee is a member of the employee organization].

(C) (1) THE EXCLUSIVE REPRESENTATIVE MAY REQUIRE AN EMPLOYEE WHO DOES NOT PAY MEMBERSHIP DUES OR EQUIVALENT FEES TO PAY:

(I) THE REASONABLE COSTS AND FEES, INCLUDING EXPENSES FOR STAFF TIME AND MATERIALS, ARBITRATION FEES, AND RELATED ATTORNEY'S FEES, FOR FILING A GRIEVANCE OR ARBITRATING A MATTER THAT ARISES UNDER A COLLECTIVE BARGAINING AGREEMENT NEGOTIATED UNDER THIS SUBTITLE BROUGHT BY THE EXCLUSIVE REPRESENTATIVE AT THE REQUEST OF THE EMPLOYEE; AND

(II) ANY ANTICIPATED PROPORTIONAL COSTS AND FEES BEFORE A GRIEVANCE IS FILED OR ARBITRATION IS PURSUED.

(2) FAILURE BY THE EMPLOYEE TO PAY THE COSTS AND FEES REQUIRED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL RELIEVE THE EXCLUSIVE REPRESENTATIVE OF ANY FURTHER RESPONSIBILITY TO THE EMPLOYEE.

(3) A DISPUTE CONCERNING THE REASONABLENESS OF THE COSTS AND FEES IMPOSED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL BE SUBMITTED TO THE LABOR RELATIONS ADMINISTRATOR IN ACCORDANCE WITH THE PROCEDURES ESTABLISHED UNDER § 16-317 OF THIS SUBTITLE FOR UNFAIR LABOR PRACTICES.

(D) (1) AN EXCLUSIVE REPRESENTATIVE'S DUTY OF FAIR REPRESENTATION OWED TO A PUBLIC EMPLOYEE WHO IS IN THE BARGAINING UNIT SHALL BE LIMITED TO THE NEGOTIATION AND ENFORCEMENT OF THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT WITH THE PUBLIC EMPLOYER.

(2) NOTHING IN THIS SUBSECTION MAY BE CONSTRUED TO LIMIT AN EMPLOYEE ORGANIZATION FROM PROVIDING ONLY TO THE ORGANIZATION'S MEMBERS LEGAL, ECONOMIC, OR JOB-RELATED SERVICES OR BENEFITS OUTSIDE THE COLLECTIVE BARGAINING AGREEMENT.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2019.

Approved by the Governor, May 13, 2019.



ROCKVILLE, MARYLAND

MEMORANDUM

December 13, 2019

TO: Sidney Katz, President, County Council

FROM: Richard S. Madaleno, Director, Office of Management and Budget *RSM*
Michael Coveyou, Acting Director, Department of Finance *mc*

SUBJECT: FEIS for Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation

Please find attached the Fiscal and Economic Impact Statements for the above-referenced legislation.

RSM:cm

c: Andrew Kleine, Chief Administrative Officer
Fariba Kassiri, Deputy Chief Administrative Officer
Caroline Sturgis, Assistant Chief Administrative Officer
Debbie Spielberg, Special Assistant to the County Executive
Dale Tibbitts, Special Assistant to the County Executive
Lisa Austin, Office of the County Executive
Barry Hudson, Director, Public Information Office
Steven Sluchansky, Chief Labor Officer, Office of Labor Relations
Rob Hagedoorn, Department of Finance
Dennis Hetman, Department of Finance
David Platt, Department of Finance
Monika Coble, Office of Management and Budget
Chrissy Mireles, Office of Management and Budget
Corey Orlosky, Office of Management and Budget

Fiscal Impact Statement
Bill 35-19 Personnel – Collective Bargaining – Certified Representative - Duty of Fair Representation

1. Legislative Summary.

The proposed legislation would amend the County Code to change the duty of fair representation for a certified representative of County employees, authorize a certified representative to impose reasonable costs for grievances on an employee who does not pay membership dues, and permits a certified representative to refuse to file a grievance for an employee who does not pay the imposed reasonable costs.

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

The proposed legislation allows the certified representatives of certain County employees to impose reasonable costs to perform certain activities on behalf of County employees who have chosen not to pay membership dues to their certified representative. As such, this legislation pertains to transactions that could occur between the certified representatives and County employees, but not County government. Therefore, this proposed legislation would have no projected fiscal impact to the County.

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

See response #2.

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

See response #2.

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

Not applicable.

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

Not applicable.

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

Not applicable.

12. Other fiscal impacts or comments.

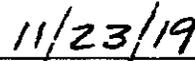
It is unknown whether this proposed legislation would have an impact on the number of grievances filed, but there is an indeterminate cost associated with each grievance. Additionally, Council staff raise the possibility that the proposed legislation could result in the subject being raised in collective bargaining with each Union; it is not anticipated that adding this topic to collective bargaining would have a fiscal impact.

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

Corey Orlosky, Office of Management and Budget



Richard S. Madaleno, Director
Office of Management and Budget



Date

Economic Impact Statement
Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of
Fair Representation

Background:

This legislation would:

- Amend the duty of fair representation for a certified representative of County employees;
- Authorize a certified representative to impose the reasonable costs of filing a grievance or pursuing arbitration on an employee who does not pay membership dues or the equivalent; and
- Permit a certified representative to refuse to file a grievance or pursue arbitration for an employee who does not pay membership dues or the equivalent unless the employee pays the reasonable costs imposed.

Bill 35-19 would permit the union to refuse to process a grievance or arbitration on behalf of an individual who does not pay union dues unless that individual pays the union reasonable costs to process the grievance or arbitration. Bill 35-19 specifies reasonable costs to include expenses for staff time and materials, arbitrator fees, relative attorney's fees, and any anticipated proportional costs and fees before a grievance is filed or arbitration is pursued. If there is a dispute concerning reasonable fees imposed by the certified representative, such a dispute may be submitted to the labor relations administrator as a prohibited practice under Section 33-82 of the County Code.

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

The Department of Finance (Finance) did not make assumptions or use methodologies in the preparation of the economic impact statement. There were no sources of information obtained or used in the preparation of the economic impact statement.

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

There are no variables that could affect the economic impact estimates.

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

Bill 35-19 would have no economic effect on the County's employment, spending, savings, investment, incomes, and property values.

Economic Impact Statement
Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of
Fair Representation

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

This Bill has a financial impact only on an employee who files a grievance or pursues arbitration and who is part of a bargaining unit but does not pay union dues—these instances are estimated to be infrequent, therefore there is no measurable economic impact on Montgomery County.

5. The following contributed to or concurred with this analysis: David Platt and Rob Hagedoorn, Finance.



Michael Coveyou, Acting Director
Department of Finance

12/9/19
Date

UFCW LOCAL 1994

Municipal & County Government Employees Organization

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Testimony of UFCW Local 1994 MCGEO on Council Bill 35-19, Collective Bargaining, Certified Representative, Duty of Fair Representation

UFCW Local 1994 MCGEO SUPPORTS MC-35-19

In June of 2018, the Supreme Court overturned forty years of judicial precedent in Janus v AFSCME. Prior to Janus, non-members were required to pay agency fees for their share of union representation. Since the Janus decision, that is no longer the case.

The overwhelming number of our members have seen Janus for what it is; a concerted right wing and corporate attack on labor meant to deprive unions of the funds necessary to effectively fight for members and all working families. Unfortunately, some workers have either bought the lie or have seen an opportunity to get something for nothing and have opted out of union membership.

Whatever their reason, their choice is not fair to the overwhelming majority who have chosen to stay with the union. In today's post-Janus environment, workers who have chosen to opt out of the union receive 100 percent of the sizeable benefits of collective bargaining while making no contribution to the cost of providing those benefits. Union members are forced to bear the cost of negotiating contracts, administering contracts, handling grievances and arbitrations, and other less formal issues dealt with by the agreement.

Union members should not be forced to subsidize the cost of union representation in grievances and arbitrations for bargaining unit members who choose not to pay dues as well.

This is a violation of the Principle of Fairness. The act of opting out of the union shifts the burden of costs of representation to members. Forcing them to pay the total freight for these free riders.

Despite the Janus decision, I find it impossible to believe that fairness should be optional, inappropriate or unnecessary. It's costly to the union to represent non-members and the Duty of Fair Representation does not mean that our members should bear the financial burden of representing them in legal settings. The cost of processing a single grievance through arbitration for a non-member, may cost our dues paying members thousands of dollars. The workers who've opted out of paying the union should, at a minimum, be required to pay the reasonable costs of that representation when they ask the union to process a grievance on their behalf.

Allowing Local 1994 the right to recoup some of these expenses helps to protect the union resources provided by our hard working members without disrupting the union's role as exclusive representative. Similar legislation has been passed with bipartisan support in other states, most recently Massachusetts and in Maryland for the Housing Opportunities Commission and the Maryland National Park and Planning Commission here in Maryland. On behalf of our members, we urge you to pass this bill.

VICE PRESIDENTS: FRANK BECKHAM BEVERLY BIERMAN JERRY BONAPARTE MARJORIE BROWN-NELSON MELBA CHAVARRIA JOSEPH DICKSON
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You Have to K

State response to Janus v AFSCME

9/30/2019

Overview

In 2018 the United States Supreme Court ruled in Janus v. AFSCME that public sector employers could not—as a condition of employment—withhold wages of union nonmember employees to pay collective bargaining agency fees to the representative union without affirmative consent from the nonmember employee.



From the Supreme Court's opinion:

"Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed."

The court's assertion that "such a waiver cannot be presumed" has been interpreted by many to mean that the default option (ie. implied action when no preference is indicated by the employee) for nonmembers must be that no agency fees can be

withheld.

Legislative Response

Multiple states have considered legislation related to the practice of public employers withholding fees from the wages of union nonmember employees, to comply with the court's ruling.

Enacted legislation

States seeking to reduce barriers to public sector unionization have passed legislation requiring public employers to allow employee organizations with exclusive representation access to new employee orientations and lists of new hires and current employees with the employees' contact information. California was the first with a bill passed prior to the decision from the Supreme Court. Maryland passed similar legislation for state and higher education employees following the decision. New Jersey, Washington and Massachusetts have also passed similar legislation.

California's AB 1455 also requires employee information records be made public to certain entities including exclusive representatives while also exempting some information from release to other organizations.

Additionally, California's SB 285 prohibits public employers from deterring or discouraging employees from joining or remaining in an employee organization and Hawaii passed a bill affirming the right of the state to deduct union dues pending authorization by the employee.

Finally, Delaware passed legislation limiting the timeframe when a public employee can request membership in a public employee union be revoked.

Failed legislation

Massachusetts considered legislation that would allow public employers to refuse to provide payroll deduction for union membership dues. Tennessee and Maine considered similar legislation.

Illinois also considered legislation that would remove provisions for agency fees and would allow public employees to bargain independently of the unions while New Hampshire proposed legislation that would make collective bargaining agreements requiring dues illegal.

Additionally, Ohio also considered a bill that would remove requirements to join a public employee union.

Pending legislation

16 States are still looking at ways to address the impacts and ramifications of the court's decision.

Oklahoma has pending carryover legislation regarding payroll deductions and elections of employee organizations for public employees while New York is considering legislation to streamline the collection of union membership dues.

Technical Guidance

Outside of legislation jurisdictions in Washington and elsewhere have instituted the practice of notifying nonmember employees of the ruling to explain its implications and offer an opportunity for affirmative consent. Nonpartisan organizations like the Society for Human Resource Management and others have suggested giving clear notice of the ruling to all nonmember employees as a best practice. New York and Vermont have issued guidance on agency compliance with the ruling.

As more states continue to make efforts to comply with the ruling the shifting landscape of public sector unions will continue to evolve.

Loryn Cesario is a policy associate in the Labor, Employment & Retirement Program at NCSL.

Additional Resources

- Janus Decision blog post
- Collective Bargaining Legislation Database
- Right-to-Work Legislation

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