

Committee PS

Staff: Robert H. Drummer, Senior Legislative Attorney

Purpose: To receive testimony – no vote expected

Keywords: #PoliceAccountabilityAct

AGENDA ITEM #6
September 22, 2020
Public Hearing

SUBJECT

Expedited Bill 34-20, Police – Disciplinary Procedures - Police Labor Relations – Duty to Bargain - Amendments

Lead Sponsors: Councilmembers Riemer and Rice

Co-Sponsors: Councilmembers Jawando and Navarro

EXPECTED ATTENDEES

None

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

- Public Hearing – no vote expected.

DESCRIPTION/ISSUE

Expedited Bill 34-20 would amend the disciplinary procedures for County police officers by requiring the use of a traditional hearing board under the Law Enforcement Officers Bill of Rights (LEOBR). The Bill would also require two additional voting public members on a hearing board in a case originating from a citizen complaint alleging an excessive use of force and authorize the Chief of Police to issue a final order on employee discipline based on the recommendations of a hearing board. Finally, the Bill would exclude collective bargaining over the composition of a police hearing board, the right of the Chief to make a final decision on discipline, and the right of the Chief to issue a directive or administrative order implementing an employer right.

SUMMARY OF KEY DISCUSSION POINTS

Would providing the Chief with more authority over police discipline increase police accountability?

This report contains:

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M E M O R A N D U M

September 17, 2020

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: Expedited Bill 34-20, Police – Disciplinary Procedures - Police Labor Relations – Duty to Bargain - Amendments

PURPOSE: Public Hearing – no Council votes required

Expedited Bill 34-20, Police – Disciplinary Procedures - Police Labor Relations – Duty to Bargain - Amendments, sponsored by Lead Sponsors Councilmembers Riemer and Rice, and Co-Sponsors Councilmembers Jawando and Navarro, was introduced on July 21, 2020. A Public Safety Committee worksession is tentatively scheduled for October 1 at 9:30 a.m.¹ Bill 34-20 would be known as the Police Accountability Act.

Expedited Bill 34-20 would amend the disciplinary procedures for County police officers by requiring the use of a traditional hearing board under the Law Enforcement Officers Bill of Rights (LEOBR), codified at §§3-101 to 3-113 of the Public Safety Article of the Annotated Code of Maryland. The Bill would also require two additional voting public members on a hearing board in a case originating from a citizen complaint alleging an excessive use of force and authorize the Chief of Police to issue a final order on employee discipline based on the recommendations of a hearing board. Finally, the Bill would exclude collective bargaining over the composition of a police hearing board, the right of the Chief to make a final decision on discipline, and the right of the Chief to issue a directive or administrative order implementing an employer right.

Background

The LEOBR was enacted by the General Assembly to provide law enforcement officers in Maryland certain procedural rights in disciplinary cases. In 1977, the General Assembly amended the LEOBR to expressly preempt alternate procedures for discipline under local law. One of the mandated uniform procedures was the right to a quasi-judicial hearing before a police trial board composed of three police officers selected by the Chief of Police with at least one officer at the same rank as the subject of the discipline. The General Assembly enacted laws in 1987 and 1988 amending the LEOBR to permit collective bargaining over police disciplinary procedures. The Governor vetoed both bills because it would erode the uniformity of the LEOBR system. In 1989,

¹#PoliceAccountabilityAct

the General Assembly amended the LEOBR to permit collective bargaining for an alternate hearing board and the finality of the board's decision.

In *Moats v. Hagerstown*, 324 MD 519 (1991), the Court of Appeals held that the 1989 amendments to the LEOBR permitted a police officer to choose between the traditional hearing board and a collectively bargained alternate board and permitted finality of the board's decision to be a subject of collective bargaining. In the County, an alternate hearing board was first added to the collective bargaining agreement with the Fraternal Order of Police (FOP) in the agreement that took effect in 1996, but the final decision was still made by the Chief of Police. In 2006, the General Assembly amended the LEOBR again to permit interest arbitration over an alternate hearing board and the finality of the board's decision. The Executive and the FOP bargained to impasse in 2007 and submitted the dispute to final offer by package interest arbitration. The arbitrator selected the FOP's final offer that included making the decision of the alternate hearing board the final agency decision. For example, if the Chief recommends termination and the hearing board sustains the statement of charges against an officer but decides that a suspension is more appropriate, the Chief must accept that decision.

Under the current FOP Agreement, the alternate hearing board is composed of one officer selected by the Chief, one officer selected by the union, and a neutral labor arbitrator jointly agreed upon by the Chief and the union. In 2016, the General Assembly authorized the addition of up to two voting or nonvoting public members on a traditional hearing board. However, this provision does not apply to a collectively bargained alternate hearing board.

Expedited Bill 34-20 would move the County back to the traditional hearing board authorized by the LEOBR, including the additional public members for a case originating from a citizen complaint alleging excessive force. Under the LEOBR, if the Chief wants to increase the penalty recommended by the hearing board, the Chief must first meet with the officer to hear the officer's position and the Chief must state his or her reasons for increasing the penalty on the record. The final decision would be subject to appeal to the Circuit Court.

The Bill would also prohibit collective bargaining over the right of the Chief to issue a directive or administrative order implementing an employer right. Section 33-80(b) provides that neither the police collective bargaining law, nor any police collective bargaining agreement, shall impair the employer's right and responsibility to take certain actions (e.g., to maintain and improve the efficiency and effectiveness of operations; to determine the services to be rendered and the operations to be performed). However, over the years, the permanent umpires have interpreted this provision to require collective bargaining over implementation of these employer rights. For example, the decision to require body worn cameras is an employer right; but the employer must bargain over the implementation of that decision to require body worn cameras (including the ability to use that video for discipline). Bill 34-20 would amend the law to provide the Chief with the discretion to issue a directive or administrative procedure to implement an employer right without bargaining with the union over implementation.

Councilmembers Riemer and Rice explain their reasons for introducing Bill 34-20 at ©7-8.

This packet contains:

Expedited Bill 34-20

Legislative Request Report

Councilmembers Riemer & Rice Memorandum

Economic Impact statement

Fiscal Impact statement

Circle #

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F:\LAW\BILLS\2034 Police - Collective Bargaining - Discipline\PH Memo.Docx

Expedited Bill No. 34-20
Concerning: Police – Disciplinary
Procedures - Police Labor Relations
– Duty to Bargain - Amendments
Revised: July 30, 2020 Draft No. 6
Introduced: July 21, 2020
Expires: January 21, 2021
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsors: Councilmembers Riemer and Rice
Co-Sponsors: Councilmembers Jawando and Navarro

AN EXPEDITED ACT to:

- (1) amend the disciplinary procedures for a police officer and the membership of a hearing board;
- (2) remove negotiation of an alternative method of forming a hearing board and issuing a directive to implement an employer right from the scope of collective bargaining under the Police Labor Relations Law;
- (3) authorize the Chief of Police to issue a final order on employee discipline based on the recommendations of a hearing board; and
- (4) generally amend the disciplinary procedures for a police officer and the scope of collective bargaining under the Police Labor Relations Law.

By amending

Montgomery County Code
Chapter 33, Personnel and Human Resources
Section 33-80

Montgomery County Code
Chapter 35, Police
Section 35-9

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 33-80 is amended as follows:**

2 **33-80. Collective bargaining.**

3 (a) *Duty to bargain; matters subject to bargaining.* Except as limited in
4 subsections (b) and (c), [A] a certified employee organization and the
5 employer must bargain collectively on the following subjects:

6 (1) Salary and wages, provided, however, that salaries and wages
7 shall be uniform for all employees in the same classification;

8 (2) Pension and retirement benefits for active employees only;

9 (3) Employee benefits such as, but not limited to, insurance, leave,
10 holidays and vacation;

11 (4) Hours and working conditions, including the availability and use
12 of personal patrol vehicles;

13 (5) Provisions for the orderly processing and settlement of
14 grievances concerning the interpretation and implementation of
15 the collective bargaining agreement, which may include binding
16 third party arbitration and provisions for exclusivity of forum;

17 (6) Matters affecting the health and safety of employees; and

18 (7) Amelioration of the effect on employees when the employer's
19 exercise of rights listed in subsection (b) causes a loss of existing
20 jobs in the unit.

21 (b) *Employer rights.* This article and any agreement pursuant hereto shall
22 not impair the right and responsibility of the employer.

23 (1) To determine the overall budget and mission of the employer and
24 any agency of county government;

25 (2) To maintain and improve the efficiency and effectiveness of
26 operations;

- (3) To determine the services to be rendered and the operations to be performed;
- (4) To determine the overall organizational structure, methods, processes, means, job classifications or personnel by which operations are to be conducted and the location of facilities;
- (5) To direct or supervise employees;
- (6) To hire, select and establish the standards governing promotion of employees and to classify positions;
- (7) To relieve employees from duties because of lack of work or funds, or under conditions when the employer determines continued work would be inefficient or nonproductive;
- (8) [To make and enforce rules and regulations not inconsistent with this law or a collective bargaining agreement;
- (9)] To take actions to carry out the mission of government in situations of emergency;
- [(10)] (9) To transfer, assign and schedule employees for any reason.

(c) *[Exemption] Exemptions from bargaining.*

- (1) An alternative method of forming a hearing board to provide a hearing required by the Law Enforcement Officers' Bill of Rights (LEOBR), as codified in §§3-101 to 3-113 of the Public Safety Article of the Annotated Code of Maryland must not be subject to bargaining.
- (2) The authority of the Chief of Police to issue a final order based on a review of the findings, conclusions, and recommendations of a hearing board under the LEOBR must not be subject to bargaining.

(3) The authority of the Chief of Police to issue a directive or administrative procedure to implement an employer right must not be subject to collective bargaining.

(4) Nothing contained in this [article shall] Article must be construed to limit the discretion of the employer voluntarily to discuss with the representatives of its employees any matter concerning the employer's exercise of any of the enumerated rights set forth in subsection 33-80(b) above, but such matters [shall] must not be subject to bargaining.

* * *

35-9. [Reserved] Police Officer Accountability Act.

(a) Definitions. As used in this Section:

Chief of Police or Chief means the Director of the County Department of Police.

Department means the County Department of Police.

Hearing board or board means a temporary board created to provide a hearing for a police officer under the LEOBR.

Law Enforcement Officers' Bill of Rights or LEOBR means §§3-101 to 3-113 of the Public Safety Article of the Annotated Code of Maryland.

Police officer means a member of the Department who is a law enforcement officer as defined in the LEOBR.

Public member means a member of the public who has received training administered by the Maryland Police Training and Standards Commission, or any successor agency, on the Law Enforcement Officers' Bill of Rights and matters relating to police procedures.

(b) Right to hearing. If a police officer requests a hearing required by the LEOBR, the Chief must appoint the members of the hearing board.

(c) Membership of the board. The Chief must appoint three law enforcement officers from the Department or another law enforcement agency that have had no part in the investigation or interrogation of the police officer who is the subject of the statement of charges. At least one member must be of the same rank as the police officer who is the subject of the statement of charges.

(d) Additional public members.

(1) The Chief must appoint two additional voting public members for each case originating from a citizen complaint alleging an excessive use of force.

(2) The Chief may appoint one or two voting or nonvoting public members for any other case.

(e) Conduct of hearing. The board must conduct the hearing pursuant to the procedural provisions of the LEOBR.

(f) Disposition of administrative action. Within 30 days after receipt of the recommendations of the hearing board, the Chief must:

(1) review the findings, conclusions, and recommendations of the hearing board; and

(2) issue a final order.

Sec. 2. Expedited Effective Date.

The Council declares that this legislation is necessary for the immediate protection of the public interest. This Act takes effect on the date on which it becomes law. Notwithstanding any provision in a collective bargaining agreement executed by the Executive and the exclusive representative under the Police Labor Relations Law, the amendments in Section 1 must apply to any employer action taken after this law takes effect, including issuing a statement of charges against a police officer, a directive, or an administrative order.

LEGISLATIVE REQUEST REPORT

Expedited Bill 34-20

Police – Disciplinary Procedures - Police Labor Relations – Duty to Bargain – Amendments

DESCRIPTION:	Expedited Bill 34-20 would amend the disciplinary procedures for County police officers by requiring the use of a traditional hearing board under the Law Enforcement Officers Bill of Rights (LEOBR). The Bill would also require two additional voting public members on a hearing board in a case originating from a citizen complaint alleging an excessive use of force and authorize the Chief of Police to issue a final order on employee discipline based on the recommendations of a hearing board. Finally, the Bill would exclude collective bargaining over the composition of a police hearing board, the right of the Chief to make a final decision on discipline, and the right of the Chief to issue a directive or administrative order implementing an employer right.
PROBLEM:	Collective bargaining has reduced the Chief's authority over the discipline of police officers.
GOALS AND OBJECTIVES:	Increased police officer accountability.
COORDINATION:	
FISCAL IMPACT:	To be provided.
ECONOMIC IMPACT:	To be provided.
EVALUATION:	To be provided.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Robert H. Drummer, Senior Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	N/A
PENALTIES:	N/A



MONTGOMERY COUNTY COUNCIL

ROCKVILLE, MARYLAND

July 15, 2020

Dear Colleagues:

We recognize that there is a growing rift in America between those charged with enforcing our laws and protecting our lives and property, and the communities those law enforcement officers have pledged to serve. Montgomery County is blessed to have one of the most professional, compassionate, and diligent police forces in the Country, but there are clearly communities here in our County who do not feel the Montgomery County Police Department is devoted to serving them. Several high-profile incidents over the past several years have deepened this divide, even before the murder of George Floyd accelerated the national conversation on the role of police in our communities.

MCPD Officer Kevin Moris was convicted of assault for kneeling Arnaldo Pesoa in the back of the head while Mr. Pesoa was restrained outside a McDonald's in Aspen Hill. A white MCPD officer used the N-word while conducting a search of four black residents outside a McDonald's in White Oak. And both Robert White and Finan Berhe were killed by MCPD Officers in situations in which mental health professionals may have been able to deescalate dangerous situations.

These incidents are the result of decisions made by individual police officers, but those decisions are heavily influenced by the training and policies they operate under. We are taking strides to improve those policies. We have created a civilian Policing Advisory Commission to conduct a comprehensive review of the way Montgomery County enforces the law in our community. County Executive Elrich has succeeded in getting the union that represents police officers to agree to a new policy that requires officers to intervene when they witness another officer violating procedures or using excessive force. And Bill 27-20, introduced by Councilmembers Jawando, Rice, Navarro, and Albornoz, will greatly strengthen our policies governing the use of force by police.

But none of the content of our policies and procedures will matter if officers are not subject to quick, fair discipline for violating them. Through state law (LEOBR) and the Collective Bargaining Agreement with the County, we have a slow, uncertain, and complex process to discipline officers for violations of Department policies. This must change because we should have a department where the Chief's ability to set a culture and hold officers accountable for meeting high expectations is strong.

Officer Moris was convicted by a jury in December for use of excessive force in July of 2019. Over a year later, he remains on the MCPD payroll awaiting a final determination on his disciplinary charge. Similarly, the officer who used the N-word in White Oak still has not faced official discipline for her actions. We understand that an officer was once on paid administrative leave for four years while waiting for the appeal of their termination to be resolved. The reason these officers have not been held accountable is because we have a disciplinary process that doesn't work.

To strengthen the management of the Police Department and ensure that officers who break the rules face swift, clear consequences, we plan to introduce the Police Accountability Act on Tuesday, July 21. This bill would remove the availability of an “Alternative Hearing Board” and revert internal appeals back to the traditional trial board used by most other Departments in Maryland. It would restore the ability of the Police Chief to make a final determination on disciplinary matters.

To promote transparency and improve community trust over the disciplinary process, the bill would require that the trial board also include two civilian members whenever discipline stems from a civilian complaint alleging excessive force.

The bill would also strengthen Police management’s ability to create and enforce workplace rules and regulations to implement the policy changes we wish to see, by ensuring that when the Chief has an employer right to issue a management directive (for example, body camera use), it is not bargainable. This critical component continues the effort the last Council undertook in partnership with former County Executive Leggett to repeal “effects bargaining.”

We need a strong, well-trained police force to keep us safe, respond to violence, investigate serious crimes, and ensure justice is served. But the police must have the trust of all of our communities to fulfill that mission, and to earn that trust, residents need to know that when a police officer breaks the rules, they are subject to consequences just like the rest of us.

To achieve that goal, we must empower our Chief to set expectations, create a positive culture and hold officers accountable.

We hope you will join us in supporting this important legislation.

Regards,



Hans Riemer
Councilmember (At Large)



Craig Rice
Councilmember (District 2)

Economic Impact Statement

Office of Legislative Oversight

Expedited Bill 34-20

Police – Disciplinary Procedures – Police Labor Relations – Duty to Bargain – Amendments

SUMMARY

Overall, the Office of Legislative Oversight (OLO) expects the enactment of Expedited Bill 34-20 to have an insignificant impact on the Montgomery County economy.

BACKGROUND

The purpose of Expedited Bill 34-20 is to improve police accountability. If enacted, the Bill would change “the disciplinary procedures for County police officers by requiring the use of a traditional hearing board under the Law Enforcement Officers Bill of Rights (LEOBR).” In addition, the Bill would “require two additional voting public members on a hearing board in a case originating from a citizen complaint alleging an excessive use of force and authorize the Chief of Police to issue a final order on employee discipline based on the recommendations of a hearing board.” Lastly, the Bill would limit the scope of collective bargaining under the Police Labor Relations Law. Specifically, it would “exclude collective bargaining over the composition of a police hearing board, the right of the Chief to make a final decision on discipline, and the right of the Chief to issue a directive or administrative order implementing an employer right.”¹

METHODOLOGIES, ASSUMPTIONS and UNCERTAINTIES

No methodologies were used in this statement. The assumptions underlying the claims made in the subsequent sections are based on the judgment of OLO staff.

VARIABLES

Not applicable

IMPACTS

Businesses, Non-Profits, Other Private Organizations

OLO believes that enacting Expedited Bill 34-20 would have an insignificant impact on private organizations in the County in terms of the Council’s priority indicators, namely workforce, operating costs, property values, capital investment, taxation policy, economic development, and competitiveness.

¹ Montgomery County Council, Expedited Bill 34-20, Police – Disciplinary Procedures – Police Labor Relations – Duty to Bargain – Amendments, Introduced on July 21, 2020, Montgomery County, Maryland, 6.

Economic Impact Statement

Office of Legislative Oversight

Workforce, operating costs, property values, capital investment, taxation policy, economic development, competitiveness, etc.

Residents

Workforce, property values, income, taxation policy, economic development, etc.

OLO believes that enacting Expedited Bill 34-20 would have an insignificant impact on County residents in terms of the Council's priority indicators, namely workforce, property values, income, taxation policy, and economic development.

WORKS CITED

Montgomery County Council. Expedited Bill 34-20, Police – Disciplinary Procedures – Police Labor Relations – Duty to Bargain – Amendments. Introduced on July 21, 2020. Montgomery County, Maryland.

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent the OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

This economic impact statement was drafted by Stephen Roblin (OLO).

Fiscal Impact Statement
Bill 34-20E, Police – Disciplinary Procedures - Police Labor Relations – Duty to Bargain -
Amendments

1. Legislative Summary

Expedited Bill 34-20 would amend the disciplinary procedures for County police officers by requiring the use of a traditional hearing board under the Law Enforcement Officers Bill of Rights (LEOBR). The Bill would also require two additional voting public members on a hearing board in a case originating from a citizen complaint alleging an excessive use of force and authorize the Chief of Police to issue a final order on employee discipline based on the recommendations of a hearing board. Finally, the Bill would exclude collective bargaining over the composition of a police hearing board, the right of the Chief to make a final decision on discipline, and the right of the Chief to issue a directive or administrative order implementing an employer right.

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 elimination of the option for an alternative hearing board would avoid the need to contract with an outside arbitrator. However, savings from this avoided cost are immaterial as County expenditures on alternate hearing board arbitration over the past six years has only totaled approximately \$12,000.

The Bill's creation of two additional public board members could have some minor impact on expenditures since current County policy makes members of a board, committee, or commission eligible to receive mileage reimbursements and dependent care expenses though this impact would be immaterial.

The elimination of the option for an alternate hearing board may decrease the length of time it takes for hearing board matters to be heard, thus reducing the cost associated with placing the accused officer on administrative leave for longer periods of time. It is difficult to estimate the fiscal impact of this change given the uncertainty of this anticipated trend and the multitude of factors influencing the length of the hearing board process.

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

Revenue and expenditure changes from the avoidance of the need to contract with an outside arbitrator and reimbursements for public board members are expected to be immaterial.

Revenue and expenditure changes from a more efficient hearing board process are impossible to estimate accurately at this time.

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

Not applicable.

- 5. An estimate of expenditures related to County's information technology (IT) systems, including Enterprise Resource Planning (ERP) systems.**

Not applicable.

- 6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.**

Bill 34-20 does not authorize future spending.

- 7. An estimate of the staff time needed to implement the bill.**

There is no additional staff time needed to implement the bill.

- 8. An explanation of how the addition of new staff responsibilities would affect other duties.**

There is no impact on current staff responsibilities.

- 9. An estimate of costs when an additional appropriation is needed.**

No additional appropriation is needed to implement Bill 34-20

- 10. A description of any variable that could affect revenue and cost estimates.**

Not applicable.

- 11. Ranges of revenue or expenditures that are uncertain or difficult to project.**

Not applicable.

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

Not applicable.

- 13. Other fiscal impacts or comments.**

Not applicable.

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

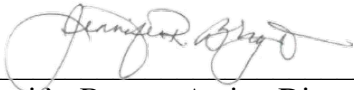
Edward Haenftling Jr., County Attorney's Office

Steven Blivess, Office of Labor Relations

Michael Pratt, Police Department

Neil Shorb, Police Department

Trevor Lobaugh, Office of Management and Budget



Jennifer Bryant, Acting Director
Office of Management and Budget

09/04/20

Date