PS/GO Item 1
July 14, 2011
Worksession

M E M O R A N D U M

July 12, 2011

TO: Public Safety/Government Operations and Fiscal Policy Committee

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: **Worksession:** Bill 18-11, Police Labor Relations – Duty to Bargain

Bill 18-11, Police Labor Relations – Duty to Bargain, sponsored by the Council President on recommendation of the Organizational Reform Commission, was introduced on June 14, 2011. A public hearing was held on July 12.

Bill 18-11 would make the scope of bargaining with the certified representative of police employees consistent with the scope of bargaining with unions representing other County employees. The Council delayed introducing this Bill until after finalizing the FY12 Budget because these process changes, if enacted, could not take effect until collective bargaining for FY13 begins in the fall.

Background

In its report to the Council dated January 31, 2011, the Organizational Reform Commission (ORC), in ***Recommendation #21,*** recommended amending the Police Labor Relations Law to make the scope of bargaining with the certified representative of police employees consistent with the scope of bargaining with unions representing other County employees.

The full text of the recommendation is below.

The Erosion of Management Rights

The Police Collective Bargaining law establishes the scope of collective bargaining in County Code §33-80. Similar to the collective bargaining laws for Fire and general County employees, the Police Collective Bargaining law requires the Executive to bargain over wages, benefits, and working conditions. Section 33-80(b) also establishes a list of "Employer rights" that the Executive does not need to bargain. However, unlike the collective bargaining laws for Fire and general County employees, §33-80(a)(7) requires the Executive to bargain over the "effect on employees of the employer's exercise of rights listed in subsection (b)." This provision is

generally referred to as "effects bargaining." For example, §33-80(b)(3) grants the Executive the employer's right to "determine the services to be rendered and the operations to be performed." However, under effects bargaining the Executive would have to bargain with the union over the effect on employees of the Executive's decision to modify the services performed. In practice, "effects bargaining" has become the exception that makes most management decisions subject to bargaining.

"Effects bargaining" has hampered the ability of the Police Department to issue directives to govern how police officers must operate. For example, several years ago, the Police Department had to bargain with the FOP over a directive to implement the new computerized police report writing system. This bargaining delayed the implementation of a new system that County management established to improve efficiency. The FOP has recently delayed the implementation of all directives by refusing to respond to them.

- ***We recommend amending §33-80(a)(7) to make the scope of bargaining consistent with the scope of bargaining in the collective bargaining laws for Fire and general County employees.***

Executive's Response

In a memorandum to the Council President dated February 21, 2011, the Executive responded to each of the 28 recommendations in the ORC report. The Executive did not take a position on this recommendation. He stated:

21. Make the scope of bargaining consistent for all County agencies.

The ORC report includes several recommendations concerning the collective bargaining process. Since we are in the midst of bargaining with all three of our employee unions, I do not think it is appropriate to comment on the Commission's recommendations at this time.

Bill 18-11, sponsored by the Council President on recommendation of the ORC would implement ORC Recommendations #21.

Public Hearing

The Council held a spirited public hearing with 5 speakers on July 12, 2011. Vernon Ricks, Co-Chair of the Organizational Reform Commission (©34-35) and Joan Fidler, President of the Montgomery County Taxpayers League (©39) supported the Bill as a change that would promote greater efficiency in the management of the Police Department and reduce operating costs. John Sparks, President of the IAFF Local 1664 (©36-38) and Marc Zifcak, President of the FOP Lodge 35 (©40-58) each opposed the Bill. Police Chief Thomas Manger testified that the Bill would greatly enhance his ability to manage the Department more efficiently within the confines of the duty to bargain over wages, benefits, working conditions, grievance process, and health and safety issues. The Chief described several examples of how effects bargaining

prevented him from exercising a management right in a timely manner. Some of these examples were described by the Chief in his responses to questions from Council staff attached at ©29-33. The Chief also discussed the difference between exercising a management right affecting FOP members and exercising a similar management right affecting civilian employees in the Police Department under the collective bargaining law for general County employees. Mr. Zifcak provided a brief explanation of the FOP position on each of the examples discussed by the Chief. Mr. Zifcak strongly disagreed with the Chief's description of the issues. The Councilmembers anticipate additional discussion on these issues at the PS/GO Committee worksession scheduled for July 14. Finally, MCGEO President Gino Renne provided his explanation of how "effects bargaining" works under the collective bargaining law for general County employees during his testimony on a related Bill.

Issues

1. What is the legislative history of the "effects bargaining" provision?

Charter §510, adopted by the voters in the 1980 general election, requires the Council to enact a law providing for "collective bargaining with binding arbitration" with a representative of County police officers. Bill 71-81, enacted by the Council on April 6, 1982, established the Police Labor Relations Law (PLRL). The Bill, as introduced, was the product of negotiations between County Executive Gilchrist and representatives of the Fraternal Order of Police (FOP). The "effects bargaining" provision was added to the Bill at a Council Committee worksession.[1]

The April 6, 1982 Council meeting minutes described the debate over "effects bargaining."[2] Personnel Director Hilliard explained that the decision to exercise a management right was not subject to bargaining, but that the method of implementing it would be subject to bargaining. The example discussed was the decision to lay off employees. The decision to lay off employees would not be bargained, but the decision as to whom to lay off first would be. Councilmember Fosler disagreed with this interpretation of "effects bargaining" and provided the following legislative history:

> [T]he Council defines 'effect' [referring to the "effect on employees of the employer's exercise of rights'] in a restrictive sense. The word shall not be used as a way of initiating collective bargaining over any items that are employer rights. If the interpretation is expanded, the Council will have to consider amendments to the law. (Minutes at p. 3866 at ©10)

Councilmember Scull moved to delete "effects bargaining," but the motion failed by a vote of 3-2. (Minutes at pp. 3867-3868 at ©11-12)

Charter §511, adopted by the voters in the 1984 general election, authorized the Council to enact a collective bargaining law for general County employees with arbitration or other

[1] See the 2008 Office of Legislative Oversight Report on the History of the Collective Bargaining laws in Montgomery County, pp. 46-58. The report is available at:
http://www.montgomerycountymd.gov/content/council/olo/reports.pdf/2009-5.pdf

[2] April 6, 1982 Council Legislative Minutes at pp. 3864-3868 at ©8-12.

impasse resolution procedures. Bill 19-86, enacted by the Council on June 24, 1986, established collective bargaining for general County employees. The Bill, as introduced, permitted bargaining over the "amelioration of the effect on employees when the exercise of employer rights ... causes a loss of existing jobs in the unit." Municipal and County Government Employees Organization (MCGEO) representatives objected to this language and requested an amendment to include the full "effects bargaining" established in the Police Labor Relations Law.[3] County Executive Gilchrist supported the narrower language in the Bill. James Torgesen of the Personnel Office explained, "that the broader language was included in the police law because, when it was written, management was unaware of the potential impact of 'effects' bargaining..."[4] The Council enacted the Bill without the broader "effects bargaining" provision.

Charter §510A, adopted by the voters in the 1984 general election, required the Council to enact a collective bargaining law with binding arbitration for fire fighters. Fire fighters had been previously added as a separate bargaining unit to the general County employee collective bargaining law. Bill 21-96, enacted on July 23, 1996, established a separate collective bargaining law with binding arbitration for fire fighters. The final law contains the same narrow "effects" bargaining that was in the law for general County employees. The legislative history of Bill 21-96 does not contain a debate over this provision.

"Effects bargaining" also became an issue during the Council's consideration of Bill 10-00, enacted on June 6, 2000.[5] Bill 10-00, as introduced, would have expanded collective bargaining rights under the Police Labor Relations Law to police sergeants and created a separate bargaining unit for sergeants. County Executive Duncan proposed 3 primary amendments to the Bill:

1. add a separate bargaining unit for police lieutenants and captains in addition to the separate unit for sergeants;
2. remove lieutenants and captains from the bargaining unit if their primary duty assignment involved human resources, internal affairs, legal, labor relations, or policy development and compliance; and
3. eliminate "effects bargaining" for the police supervisors bargaining unit.

Labor/Employee Relations Manager James Torgesen explained the request to eliminate "effects bargaining" for the new police sergeants unit:

> The duty to bargain the "effects" of an exercise of any of the statutorily defined Employer rights creates restrictions and delays on the Employer's ability to act in the management arena. An example of "effects" bargaining may be seen through the impact on frequently utilized management prerogatives such as the transfer, assignment and scheduling of employees. The use of these management rights is critical to the ability of the Police Department to operate in an efficient and effective manner in the delivery of police services. Before management may proceed to initiate a change in how employees are transferred, scheduled or assigned, the effect of the changes on employees may be subject to bargaining.

[3] April 22, 1986 Public Hearing Transcript, p. 10 at ©13-14.
[4] June 5, 1986 Council Legislative Minutes, pp. 3-4 at ©15-17.
[5] See the 2008 OLO Report at pp. 133-139.

> Consequently, appropriate notice and opportunity to bargain must be extended to the exclusive representative. The result of any "effects" bargaining may place other limitations on management's ability to act such as a notice requirement, waiting period, opportunity for comment, compensation, etc. before a schedule change or transfer may occur. See April 7, 2000 Torgesen memo, p. 3 at ©20.

FOP Lodge 35 President Walter Bader submitted a comprehensive written rebuttal to the Executive Branch complaints about "effects bargaining." See Mr. Bader's June 2, 2000 letter at ©21-28. Mr. Bader argued that "effects bargaining" is a "bedrock" concept of American labor law that would inevitably exist even if the Police Labor Relations Law did not expressly include it.[6] Mr. Bader also disputed the Executive's argument that "effects bargaining" resulted in the delayed implementation of most administrative directives.

Bill 10-00, enacted on June 6, 2000, added police sergeants to the existing bargaining unit and left "effects bargaining" unchanged.

2. Do collective bargaining laws for public employees in other Maryland jurisdictions contain an "effects bargaining" provision?

Council staff surveyed collective bargaining laws for State and County employees in surrounding Maryland jurisdictions. The overwhelming majority of collective bargaining laws do not contain an "effects bargaining" provision. Although an "effects bargaining" provision is not unique to the Police Labor Relations Law, it is found only in State laws governing collective bargaining with employees of the Washington Suburban Sanitary Commission (Public Utilities Art. §18-207(a)(7)), the Maryland National Capital Park and Planning Commission (Art. 28 §112.1(j)),[7] and the Montgomery County Housing Opportunities Commission (Housing and Community Development Art. §16-308(a)(6)).

"Effects bargaining" is not provided in the collective bargaining laws covering County employees in Frederick, Harford, Howard, Baltimore, Prince George's, and Anne Arundel Counties or for Baltimore City employees. Neither the collective bargaining law covering State Executive Branch employees (State Personnel and Pensions Art. §3-502) nor the statewide collective bargaining laws covering certificated (Education Art. §6-408) and non-certificated public school employees (Education Art. §6-510) contain an "effects bargaining" provision.

3. How has "effects bargaining" worked under the Police Labor Relations Law?

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[6] Mr. Bader cites *First National Maintenance Corp. v. NLRB*, 452 US 666 (1981) as legal support for his contention. However, the Supreme Court holding in this case was that an employer did not have to bargain with the union over its decision to shut down one location and dismiss all of its employees working at that location. The language quoted by Mr. Bader was not integral to the holding and was simply a passing reference. We would note that Bill 18-11, as introduced, is consistent with the dicta in this case since it would continue to require the Executive to bargain over the amelioration of the effects of its exercise of a management right that resulted in a loss of bargaining unit jobs.

[7] Effects bargaining exists for general employees under Art. 28-112.1(j), but not for police officers under Art. 28 §5-114.1.

The Police Chief's answers to questions about "effects bargaining" are at ©29-33. Categorizing issues between the exercise of a management right and a mandatory topic of bargaining is often difficult and subject to reasonable debate. Under the PLRL, a dispute over the category a specific issue falls into must be resolved by the Permanent Umpire and a reviewing court. These case by case administrative and judicial decisions would normally create a body of law that the parties can refer to when new disputes arise over the duty to bargain over a specific topic. However, under "effects bargaining," management must bargain over the effect on employees of its exercise of a management right. Therefore, there is no reason for the parties to distinguish between the duty to bargain over an issue as an effect of the exercise of a management right or as a mandatory topic of bargaining.

The Chief provided the following examples of Police Department initiatives that could fall under effects bargaining:

1. PacketWriter
2. Mobile Automatic Fingerprint Identification System (AFIS)
3. Automatic Vehicle Locator (AVL)
4. E-citation
5. Holsters
6. Rifle sights
7. Standard Operating Procedures (SOP)
8. Administrative Directives
9. Trainer/Trainee relationships
10. Mandatory use of email
11. Proficiency advancements and time in grade
12. Uniforms at In-service training
13. Personal Patrol Vehicle (PPV) assignment
14. Evidence technician work hours
15. MC Time/Telestaff

The Chief estimated that bargaining to resolution over a minor issue can normally require between 2 weeks and 90 days without impasse arbitration. Impasse arbitration would normally require an additional 2 to 3 months. A more significant matter can take up to 2 years to resolve.

The Chief provided 4 examples where he attempted to exercise a management right to increase department effectiveness and efficiency that was delayed or hindered by effects bargaining. See the response to question 6 at ©32-33. The movement to a mandatory electronic reporting system, PacketWriter, was delayed by 3 years of bargaining. The bargaining over the effects of implementing the Automatic Vehicle Locator system resulted in an agreement prohibiting the use of system data in disciplinary cases against an officer. Finally, the Chief has never been able to require police officers to use email because the parties have been unable to negotiate an agreement on this issue. The use of email remains voluntary. The department must provide officers with printed communications since officers are not required to maintain a County email account.

4. How does "effects bargaining" change the implementation of a management right?

The Police Chief is in a unique position to answer this question. The Police Department consists of both sworn police officers belonging to the police bargaining unit under the PLRL and civilian employees in the SLT/OPT bargaining units under the collective bargaining law for general County employees represented by the Municipal and County Government Employees Organization (MCGEO). The Chief compared the exercise of a management right affecting FOP members with a management right affecting MCGEO members. See response to question 5 at ©31-32. Implementation of an Operational Change for MCGEO members of the Police Department generally takes 3-4 weeks. A similar change in operations can require between several days and 2 years to implement under "effects bargaining" with the FOP.

5. Should the Council enact Bill 18-11?

The broader scope of "effects bargaining" embodied into the PLRL in 1982 was never copied into the next 2 collective bargaining laws enacted by the Council. It appears from the legislative history described above, that this failure to include the broader "effects bargaining" provision in later laws was debated and intentional. County Executive Gilchrist, who supported "effects bargaining" during the debate on the PLRL in 1982, successfully opposed the same provision during the Council debate in 1984. There is no logical reason to require a broader scope of collective bargaining with police officers than other County employees. The Bill creates a reasonable compromise between the broad "effects bargaining" provision and the need to discuss the amelioration of the effects on employees of the exercise of a management right that *results in the loss of bargaining unit jobs.* Implementing a layoff is a critical decision that should involve negotiations with the union over how it will be implemented. Implementing the mandatory use of the County's email system is not. **Council staff recommendation:** approve the Bill as introduced.

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Bill No. 18-11
Concerning: Police Labor Relations – Duty to Bargain
Revised: June 3, 2011 Draft No. 1
Introduced: June 14, 2011
Expires: December 14, 2012
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Council President on the recommendation of the Organizational Reform Commission

AN ACT to:

(1) modify the scope of bargaining with the certified representative of police employees; and

(2) generally amend County collective bargaining laws.

By amending
Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-80 and 33-81

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 33-80 and 33-81 are amended as follows:

33-80. Collective bargaining.

(a) Duty to bargain; matters subject to bargaining. A certified employee organization and the employer must bargain collectively on the following subjects:

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

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

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

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

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

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

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

* * *

33-81. Impasse procedure.

* * *

(b) (1) During the course of collective bargaining, either party may declare an impasse and request the services of the impasse neutral. If the parties have not reached agreement by January 20, an impasse exists.

* * *

(3) If the impasse neutral, in the impasse neutral's sole discretion, finds that the parties are at a bona fide impasse, the impasse neutral [shall] must require each party to submit a final offer which [shall] must consist either of a complete draft of a proposed collective bargaining agreement or a complete package proposal, as the impasse neutral [shall choose] chooses. If only complete package proposals are required, the impasse neutral [shall] must require the parties to submit jointly a memorandum of all items previously agreed upon.

(4) The impasse neutral may, in the impasse neutral's discretion, require the parties to submit evidence or make oral or written argument in support of their proposals. The impasse neutral may hold a hearing for this purpose at a time, date and place selected by the impasse neutral. Said hearing [shall] must not be open to the public.

* * *

(c) An impasse over a reopener matter [or the effects on employees of an exercise of an employers right] must be resolved under the procedures in this subsection. Any other impasse over a matter subject to collective bargaining must be resolved under the impasse procedure in subsections (a) and (b).

(1) [Reopener matters. (A)] If the parties agree in a collective bargaining agreement to bargain over an identified issue on or before a specified date, the parties must bargain under those terms. Each identified issue must be designated as a "reopener matter."

[(B)] 2. When the parties initiate collective bargaining under [subparagraph (A)] paragraph 1, the parties must choose, by agreement or through the processes of the American Arbitration Association, an impasse neutral who agrees to be available for impasse resolution within 30 days.

[(C)] 3. If, after bargaining in good faith, the parties are unable to reach agreement on a reopener matter by the deadline specified in the collective bargaining agreement, either party may declare an impasse.

[(D)] 4. If an impasse is declared under [subparagraph (C)] paragraph 3, the dispute must be submitted to the impasse neutral no later than 10 days after impasse is declared.

[(E)] 5. The impasse neutral must resolve the dispute under the impasse procedure in subsection (b), except that:

[(i)] A. the dates in that subsection do not apply;

[(ii)] B. each party must submit to the impasse neutral a final offer on only the reopener matter; and

[(iii)] C. the impasse neutral must select the most reasonable of the parties' final offers no later than 10 days after the impasse neutral receives the final offers.

[(F)] 6. This subsection applies only if the parties in their collective bargaining agreement have designated:

[(i)] A. the specific reopener matter to be bargained;

[(ii)] B. the date by which bargaining on the reopener matter must begin; and

[(iii)] C. the deadline by which bargaining on the reopener matter must be completed and after which the impasse procedure must be implemented.

[(2) Bargaining over the effects of the exercise of an employer right.]

[(A) If the employer notifies the employee organization that it intends to exercise a right listed in Section 33-80(b), the exercise of which will have an effect on members of the bargaining unit, the parties must choose by agreement or through the process of the American Arbitration Association an impasse neutral who agrees to be available for impasse resolution within 30 days.]

[(B) The parties must engage in good faith bargaining on the effects of the exercise of the employer right. If the parties, after good faith bargaining, are unable to agree on the effect on bargaining unit employees of the employer's exercise of its right, either party may declare an impasse.]

[(C) If the parties bargain to impasse over the effects on employees of an exercise of an employer right that has a demonstrated, significant effect on the safety of the public, the employer may implement its last offer before engaging in the impasse procedure. A party must not exceed a time requirement of the impasse procedure. A party must not use the procedure in this paragraph for a matter that is a mandatory subject of bargaining other than the effects of the exercise of an employer right.]

[(D) The parties must submit the dispute to the impasse neutral no later than 10 days after either party declares an impasse under subparagraph (B).]

[(E) The impasse neutral must resolve the dispute under the impasse procedures in subsection (b), except that:

(i) the dates in that subsection do not apply;

(ii) each party must submit to the impasse neutral a final offer only on the effect on employees of the employer's exercise of its right; and

(iii) the impasse neutral must select the most reasonable of the parties' final offers no later than 10 days after the impasse neutral receives the final offers and, if appropriate, must provide retroactive relief.]

[(F) If the impasse neutral has not issued a decision within 20 days after the impasse neutral receives the parties' final offers, the employer may implement its final offer until the impasse neutral issues a final decision.]

Approved:

Valerie Ervin, President, County Council Date

Approved:

Isiah Leggett, County Executive Date

LEGISLATIVE REQUEST REPORT

Bill 18-11
Police Labor Relations – Duty to Bargain

DESCRIPTION: Bill 18-11 would make the scope of bargaining with the certified representative of police employees consistent with the scope of bargaining with unions representing other County employees.

PROBLEM: The Organizational Reform Commission recommended this change to the Police Labor Relations Law.

GOALS AND OBJECTIVES: To increase the authority of the Chief of Police to exercise management rights.

COORDINATION: County Executive, County Attorney, Human Resources

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Organizational Reform Commission Report.
Robert H. Drummer, Senior Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: Not applicable.

PENALTIES: None.

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Re: Deferral of Bill No. 76-81, Open Meetings for Homeowners Associations

Bill No. 76-81, Open Meetings for Homeowners Associations, was called for final reading. The Council had before it for consideration Draft No. 4, dated March 30, 1982.

Due to lack of time, the Council postponed enactment of Bill No. 76-81, and requested that the Housing Committee meet with interested people to discuss the amendments proposed by the Office of Consumer Affairs.

(The Legislative Session was recessed at 1:10 P.M., and reconvened at 2:30 P.M.)

Re: Enactment of Bill No. 71-81, Collective Bargaining for Police

Bill No. 71-81, Collective Bargaining for Police, was called for final reading. Mr. Hillman, Special Counsel for Labor Relations, appeared before the Council to respond to inquiries.

Mr. Hillman stated that the confusion in the Council's earlier discussion resulted from the fact that Draft No. 4 does not reflect an amendment made by the Council at its last worksession on this bill. Subsection (1), page 20, through subsection (2), page 21, were deleted in their entirety and were included in Draft No. 4 by mistake.

Without objection, the Council agreed to delete all of the language in subsections (1) and (2), pages 20 and 21.

The Council reviewed the remainder of Bill No. 71-81 and raised questions as to the various provisions of the bill.

Councilman Fosler stated that he has had a difference of interpretation with the Executive Branch as to the meaning of the phrase "effect on employees" as used in Section 33-80(a)(7), page 18, as being an item that is subject to collective bargaining as a result of the exercise of an employer's right. Mr. Hilliard would draw a distinction between the decision itself (such as a decision to lay off employees), and the way in which the decision is implemented (which employees to lay off first). The former would be prohibited, but the latter would

be bargainable in Mr. Hilliard's interpretation. However, Councilman Fosler expressed the view that the employer's rights extend to the implementation of the decisions; the "effect" is the consequence of the implementation.

Mr. Hillman stated that he would agree with Councilman Fosler's interpretation. The effect is the consequence to the employees. In a common labor relations situation, an employer would not have to bargain over the decision to shut down a plant, nor the implementation of the shutdown. However, the employer does have a duty to bargain over the effects on employees, such as severence pay and seniority rights.

President Potter expressed the view that a more precise phrase would be "bargain over the amelioration of the effects on employees."

Mr. Hillman expressed the view that the phrase suggested by President Potter is unnecessary because the words that have been used already have well-established meanings.

At the suggestion of President Potter and without objection, the Council restored the word Any in line 4, page 22.

Mr. Hillman responded to questions of Councilmembers concerning provisions that have been deleted from the bill because they have been addressed in other contexts or locations in the bill.

Upon motion of Councilman Fosler, duly seconded and without objection, the Council restored the language of subsection (b)(2), page 19, as follows: (2) To maintain and improve the efficiency and effectiveness of operations;.

After discussion and without objection, the Council inserted the word only after "employees" on line 11, page 18, to clarify that collective bargaining is permitted concerning pension and retirement benefits for active employees only.

During the discussion of the addition of the word "only" on line 11, page 18, the Council considered adding the word to the body of Section 33-80 to clarify that the listing of bargainable items was exclusive. However, after consideration of the fact that some subjects may arise in the future that are not enumerated, the Council added the word "only" on line 11 to clarify that the pensions of already-retired employees are not bargainable.

At the suggestion of President Potter, upon motion of Councilman Gudis, duly seconded and without objection, the Council deleted the word [such] from line 18, page 23, and inserted the words necessary to implement the agreement after the word "action" in the same line.

At the suggestion of President Potter and without objection, the Council deleted the word [most] from line 5, page 25, and inserted in lieu thereof more. The Council also corrected the spelling of the word "empowered" on line 18, page 30.

President Potter requested that the record reflect the intent of the Council that deletion of the section concerning "Use of Official Time" from page 31 does not give employees the right to use official time for union business. Mr. Hillman indicated that this is an item that is left to the bargaining process.

At the suggestion of President Potter and without objection, the Council inserted a comma after the word "interest" on the sixth line of subsection (c), page 32.

(The Council recessed from 3:10 P.M. to 3:30 P.M. to allow Councilmembers an opportunity to read through Bill No. 71-81 in view of the error that had been made in Draft No. 4.)

At the suggestion of Mr. Hillman and without objection, the Council deleted [33-80(c)(2)] from line 30, page 9; line 7, page 10; and line 18, page 11; and deleted the phrase [disagreement over obligation to bargain collectively] from line 1, page 10.

At the suggestion of President Potter and without objection, the Council deleted the word [jointly] from line 23, page 24, and inserted the word jointly after the word "submit" on line 24, page 24.

Councilman Fosler stated that the legislative history of Bill No. 71-81 should be clear that the Council defines "effect" as used in Section 33-80(a)(7) in a restrictive sense. The word shall not be used as a way of initiating collective bargaining over any items that are employer rights. If the interpretation is expanded, the Council will have to consider amendments to the law.

Councilman Scull stated that he agrees with Councilman Fosler's views on the meaning of the word "effect;" however, he does not believe that subsection (7) of Section 33-80(a) is needed. He believes that the language of the subsection is vague and the examples given during the worksession as to problems that might arise were not great enough to justify leaving such vague wording in the law.

Mr. Hillman stated that an employer right is the ability to lay off employees. The union might want to bargain about how to achieve the lay off, such as whether it should be done on the basis of seniority, on the basis of job classification, or by department. Those are the kinds of effects on employees that unions traditionally bargain about, and are the kinds of effects intended by Section 33-80(a)(7). The decisions about whether to lay off and how many employees are to be affected are clearly employer's rights.

Councilman Scull moved, duly seconded, that the Council delete subsection (7) from Section 33-80(a), page 18.

Councilman Scull expressed the view that the language of subsection (7) is vague and will raise more problems than it will solve. The employer has certain rights to hire, transfer, assign and schedule employees, and cannot do anything that does not have an effect on employees. He pointed out that establishing a legislative history does not have the force and effect of law; it reflects only the views of Councilmembers. Every word used in labor relations laws is significant. He stated that he has not heard a strong argument for retaining the subsection.

In response to President Potter's suggestion that the phrase "bargain over the amelioration of the effects on employees" be inserted in subsection (7), Mr. Hillman stated that that is largely what the subsection means, but there may be times when the employer does not want to "ameliorate" the effects. An employer may want to bargain and make the effects on employees harsher.

Mr. Katz, representing the Fraternal Order of Police, noted that the Permanent Umpire will make the decision about which items are bargainable and which are not. If the Council does not like his decision, the Council can amend the law.

Councilman Scull's motion failed, Councilmembers Gelman and Scull voting in the affirmative, Councilmembers Potter, Fosler and Crenca voting in the negative, Councilman Gudis not voting and Councilwoman Spector being temporarily absent.

President Potter stated that he voted in the negative because he believes that there is a substantial area of concern. The language may be vague, but he believes that there is a basic advantage in leaving fairly broad what can be negotiated. It would be disadvantageous to both parties if too much is excluded.

Councilman Fosler expressed the view that there are legitimate concerns as to how subsection (7) will be interpreted. One of the key factors in determining whether it will work successfully is how reasonable both parties are and how good the Permanent Umpire is in making his determinations. It is a subject that bears watching to see what develops. It is an item that may require modification in the future.

Upon motion of Councilwoman Crenca, duly seconded and without objection, the Council approved the following amendments as reflected in Draft No. 4 of Bill No. 71-81 (amendments approved by the Council during this Legislative Session are in addition; capital letters indicate language added after introduction and strike-throughs indicate language deleted after introduction of the bill):

MONTGOMERY COUNTY COUNCIL

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PUBLIC HEARING

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April 22, 1986

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Bill 19-86 *
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The hearings were held in the Third Floor Hearing Room, County Office Building, 100 Maryland Avenue, Rockville, Maryland, at 7:30 p.m., William Hanna, President, presiding.

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PRESENT:

WILLIAM HANNA	President
NEAL POTTER	Vice President
SCOTT FOSLER	Member
DAVID SCULL	Member
ESTHER P. GELMAN	Member
MICHAEL GUDIS	Member
ROSE CRENCA	Member

The Executive Branch is opposed to any expansion of the meaning of effects bargaining under Section 107(a)(7). Without careful delineation of of the subject matter in this area, negotiating the effects on employees of management actions can undermine the employer's ability to function.

As an example, management must be in a position to transfer employees based on organizational need, typically, to improve the effectiveness of operations and delivery of services. Under the suggested amendment, management could be precluded from transferring bargaining unit employees until the economic impact of the transfer on employees was negotiated.

The preservation of employer rights is important in assuring that the Government's ability to manage programs and provide services in an efficient and effective manner is not obstructed. The Executive Branch supports the clarification and the elaboration of these rights in contrast to what is currently in the Police law.

In particular, management must have the right to set standards and take advantage of new technology or research which improves the delivery of services. The mechanics of the bargaining process

APPROVED

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Thursday, June 5, 1986 Rockville, Md.

The County Council for Montgomery County, Maryland, convened in the Council Hearing Room, Stella B. Werner Council Office Building, Rockville, Maryland, at 10:15 A.M. on Thursday, June 5, 1986.

PRESENT

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

ABSENT
Scott Fosler

The President in the Chair.

SUBJECT: Executive Regulation No. 145-85, Personnel Regulations

ISSUES DISCUSSED: The memorandum to the Council from Council Staff Director Spengler, dated June 3, 1986, setting forth the issues to be reviewed: the provision in Section 1-13(c) regarding the time frame for which an employee can receive a remedy from the date of filing the action; the position of the Personnel Office that no harm is done to the employee until a decision is made regarding the reclassification request, grievance, or appeal, and, therefore, there is no need for a retroactive provision; the concern of Mr. Thompson, attorney for the Montgomery County Government Employees' Organization (MCGEO) that the provision of Section 1-13 eliminates the retroactive provision for reallocations, which are likely to affect large classes of employees such as the nurses, but retains it for individual position reclassifications; concerns expressed by various Councilmembers that future reclassification/reallocation actions not take as long as it took to reclassify the nurses; the five-year cycle for reclassification reviews and the ability of the Personnel Office to keep up with that schedule; the opinion of Councilmember Gelman that it was inappropriate for the County to appeal a decision of the Merit System Protection Board regarding the reclassification of the nurses, another desire for the County Attorney to brief and consult with the Council before initiating such action; the desire of Councilmember Potter to differentiate in Section 1-13 between those persons who file a request routinely at the beginning of a five-year reclassification review cycle in order to obtain the maximum benefit if their position is reclassified or reallocated upwards, and those cases where retroactivity is justified, and his inability to find the appropriate language to make the

On page 31, lines 13 through 17, delete subsection (d) of Section 6-4, Probationary Period, in its entirety;

Agreed to meet again to review the Personnel Regulations from 1:30 to 4:30 P.M. on June 6 and from 2:00 to 5:00 P.M. on June 19, with the day of June 27 being held for an additional worksession if needed.

(The Council recessed at 12:20 P.M. and reconvened at 2:14 P.M.

SUBJECT: Bill No. 19-86, County Employee Collective Bargaining

ISSUES DISCUSSED: The staff summary, dated June 5, 1986, setting forth issues on the subject continued from the last worksession of May 29, 1986; Issue 4.D. of the summary, Binding Grievance Arbitration; the proposed amendment to pages 19 and 20 of the subject bill that would require binding grievance arbitration for discipline and discharge cases and advisory arbitration for other cases, unless the parties agree that the decision in a particular case will be binding.

ACTION: Agreed to retain the language contained in the bill on pages 19 and 20 regarding binding arbitration.

ISSUES DISCUSSED: Issue 4.E. of the summary, "Effects" Bargaining; the proposed amendment to page 20, lines 4 through 6, that would substitute the broad language from the police collective bargaining law on "effects" bargaining for the language in the bill which confines "effects" bargaining to the exercise of management rights when the exercise of management rights causes the loss of bargaining unit jobs; the County Executive's opposition to the amendment, as set forth on pages three and seven of his memorandum of May 29, 1986; the statement by Mr. Thompson, attorney representing MCGEO (Local 400), that the broader language is usually included in collective bargaining legislation, and is needed in the subject bill; the statement by Mr. Rogers, representing the County Executive, that the amendment should not be included in the bill because it would limit the power of the government to act in emergency and security situations and to make changes within the government involving technology and standards; the statement by Mr. Torgesen, staff of the Personnel Office, that the broader language was included in the police law because, when it was written, management was unaware of the potential impact of "effects" bargaining; the opinion of Mr. Willcox, special attorney, that the inclusion of the amendment could delay the implementation of a government action which might result in litigation; President Hanna's belief that inclusion of the amendment might interfere with the government's ability to implement improvements; Councilmember Potter's suggestion that an amendment might be drafted that would distinguish between actions the government must take in carrying out its responsibilities and actions the government could take to harass employees; Councilmember Potter's belief that a broader definition of "grievance procedure" is needed; the statement by Councilmember Fosler concerning the need for continuous communication between employees and employers when collective bargaining for public employees is initiated to avoid misunderstandings, and his support of the provision

included in the bill on "effects" bargaining; whether a government action resulting in the relocation of an employee's work place should be a subject of collective bargaining; Councilmember Gelman's suggestion that the bill could be amended to provide priority transfer to other County positions for employees who are being relocated similar to the priority granted to County employees who have lost their jobs as a result of a reduction in force action.

ACTION: Agreed to support the language in the subject bill regarding "effects" bargaining (subsection 33-107(7)) unless an acceptable amendment is drafted, as suggested by Councilmember Potter, that would distinguish between employer rights that must be exercised by the government and employer rights that might be exercised by the government as a form of employee harassment.

Adopted the following amendment proposed by Mr. Thompson:

In subsection 33-107(b)(17), after "representative," substitute , for [.] and add unless another date for notification is agreed upon by the parties.

ISSUES DISCUSSED: Issue 6 of the summary, Bargaining Impasse to be Broken with Fact-finding, not Binding Arbitration (Section 33-108); the statement by Mr. Thompson in opposition to the procedure set forth in the subject bill for the submission of the recommendations of the mediator/fact-finder and both negotiating parties to the County Council because he believes negotiators will make a greater effort to reach an agreement on issues if only the report of the mediator/fact-finder is submitted to the Council when the parties fail to reach an agreement; Councilmember Hanna's observation that the subject bill provides that, after the mediator/fact-finder makes recommendations on dispute issues, the parties are permitted to bargain an additional 10 days before the report of the mediator/fact-finder and the position of the two parties are submitted to the Council; the statement by Councilmember Fosler concerning the Personnel Committee's review of this issue, and its support of Section 33-108, as written; Councilmember Scull's concern that the Council's role in the bargaining process under the subject legislation is too broad and should be limited to budgetary and legislative actions; the language in the law (subsection 33-108(k)) which indicates that actions taken by the Council in resolving issues that are in dispute shall not be part of the agreement between parties unless the parties specifically incorporate them in the agreement; Mr. Willcox's suggestion that additional language could be added to indicate that matters that are still in dispute or that do not involve legislation or significant expenditure of capital will not be included in the contract; Councilmember Potter's concern regarding the language in subsection 33-108(i) which indicates that the Council will state its reasons for any intent to reject any part of the items agreed to by the negotiating parties; Mr. Willcox's suggestion that subsection 33-108(i) could be revised for clarification; the need for a technical amendment in the last sentence of 33-108(g).

ACTION: Amended, without objection, subsection 33-108(g), the last sentence, to substitute to which the parties have for [that has been agreed] and to add , after "to."

OFFICE OF HUMAN RESOURCES

Douglas M. Duncan
County Executive

Marta Brito Perez
Director

MEMORANDUM

April 7, 2000

TO: Michael Faden, Senior Legislative Attorney

VIA: Marta Brito Perez, Director, Office of Human Resources

FROM: James E. Torgesen, Labor/Employee Relations Manager

SUBJECT: Bill No. 10-00 - Collective Bargaining -Police Supervisors

You have requested additional explanation and comments from the Executive Branch concerning the amendments affecting collective bargaining rights for police supervisors as proposed by the County Executive. The following is an explanation of the rationale for these amendments addressing the three areas affected; unit structure, position exemptions and scope of bargaining.

Unit Structure

The Police Labor Relations Law, as in each of the other County labor laws, includes as a critical component of the law the definition of a unit of representation for the purpose of collective bargaining. In determining an appropriate unit of representation, labor relations criteria that are commonly used include an evaluation of: the desires of employees, the history of representation, the extent of union organization and community of interest. While all four elements may have impact on unit determination, community of interest is of prime importance. Community of interest generally includes similarities in duties, skills and working conditions.

Desires of employees. To formulate a position on this matter, the Chief of Police met with all supervisors within the Department. Two separate meetings were held, one with sergeants and one with all other supervisors. The Chief concluded from those two meetings that employees in the ranks of sergeant, lieutenant, and captain were interested in having their wages, benefits, and working conditions established through the collective bargaining process.

History of representation. Over the years, various police organizations have represented the interests of police supervisors at all ranks. In the public testimony on the bill, the Fraternal Order of Police (FOP) emphasized its history of individual representation of sergeants. In fact, the FOP has been active in the individual representation of supervisors at all levels. Likewise, the Alliance of Police Supervisors has represented supervisors of all ranks in various capacities.

In the public testimony, the FOP contended that the structure of a separate unit including all three supervisory ranks will have the "unit be represented by a company union." The proposed amendments do nothing to alter the manner in which bargaining unit employees select their chosen representative. The FOP or any other labor organization is free to compete for the representation rights of the bargaining unit. The representative will be determined by a majority of the eligible employees voting. If unit members do not approve of the representation, the law provides a means to change the representative. To suggest that employees would somehow permit an employer-sponsored organization sorely underestimates the intelligence and desire for self determination of the employees involved.

Extent of union organization. Throughout the metropolitan area and Maryland, police supervisors have organized for the purpose of collective bargaining in a number of jurisdictions. The unit structure is mixed. Attached is a chart which provides the jurisdiction, labor organization, unit status, and ranks involved. The public testimony indicated that Prince George's County had one unit that included all police officers through lieutenant. The unit structure in Prince George's County actually provides for a separate unit for supervisors, but for bargaining purposes the supervisors are included under the same labor agreement as the non-supervisory personnel.

Community of interest. The County Executive proposed amendments create a separate supervisory bargaining unit to include sergeants, lieutenants and captains. These three ranks share a primary and common job duty: the responsibility for supervision of police employees and resources. The sergeant has day-to-day responsibility for shift supervision including assigning work, reviewing performance, approving leave, and recommending and approving training. The lieutenant is the principal supervisor of all police patrol shifts and special assignment teams. The captain is the principal supervisor of an operational unit. Included in the supervision at all levels is the responsibility for the administration and enforcement of labor agreements on behalf of the County as the employer. A separate supervisory unit preserves the identity of the supervisory structure.

Although compensation and benefits are similar to the existing police bargaining unit as the result of "pass through," supervisors have their own salary schedule. Also, although sergeants do work the same shift structure as those whom they supervise, as noted earlier their primary role is one of supervision.

Creating a separate supervisory unit also helps eliminate conflicts of interest that arise when supervisors are placed in the same unit as non-supervisory employees. Supervisors must apply the many provisions of the contract to the employees they supervise. As disagreements arise concerning the application of the contract the interests of the supervisor are blurred if they are covered by the same agreement that they are being required to enforce. For example, in a grievance proceeding, subordinate employees might expect supervisors to act more like employee advocates than representatives of management if both are part of the same unit.

The public testimony stated that the County Executive's proposed amendments are seeking to "drive a wedge" between supervisory and non-supervisory employees. The focus of

the proposed amendments is on the supervisory community of interest. It is the County's position that the proposed unit structure will further identify and preserve this important element within the Police Department.

Position Exemptions

The Executive Branch amendments seek to exempt from coverage employees who perform certain critical functions within the police department impacting labor relations. Supervisory employees in human resources, legal, labor relations, internal affairs, policy development and compliance should be excluded from the bargaining unit. Supervisory personnel in these work units are actively engaged in representing Departmental management interests and or assisting in the formulation of policies which impact areas affecting labor relations.

Scope of Bargaining

The requested amendments preclude bargaining on the "effects" of the Employer's exercise of a management right for the proposed supervisory unit. The duty to bargain the "effects" of an exercise of any of the statutorily defined Employer rights creates restrictions and delays on the Employer's ability to act in the management arena. An example of "effects" bargaining may be seen through the impact on frequently utilized management prerogatives such as the transfer, assignment and scheduling of employees. The use of these management rights is critical to the ability of the Police Department to operate in an efficient and effective manner in the delivery of police services. Before management may proceed to initiate a change in how employees are transferred, scheduled or assigned, the effect of the changes on employees may be subject to bargaining. Consequently, appropriate notice and opportunity to bargain must be extended to the exclusive representative. The result of any "effects" bargaining may place other limitations on management's ability to act such as a notice requirement, waiting period, opportunity for comment, compensation, etc. before a schedule change or transfer may occur. The requested amendments retain the status quo for the non-supervisory bargaining unit and provide, in essence, a scope of bargaining for supervisory employees which is consistent with bargaining rights extended to all other County employees.

In summary, the Executive's proposed amendments provide a reasoned approach to establishing the appropriate collective bargaining unit for supervisors. In particular, we believe that the proposed unit structure will preserve the supervisory community of interest. We look forward to addressing these issues with the Council and employee representatives.

cc: Charles A. Moose, Chief of Police
Bruce Romer, Chief Administrative Officer

Montgomery County Lodge 35, Inc.

June 2, 2000

Honorable Derick Berlage
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Bill 10-00 *Collective Bargaining - Police Sergeants*

Dear Mr. Berlage:

Again, on behalf of Lodge 35 and its members, including police sergeants, I want to thank you and the co-sponsors of Bill 10-00 for supporting the sergeants collective bargaining bill, legislation which you appropriately indicated is long overdue.

As stated in prior correspondence and statements before the MFP Committee, police sergeant collective bargaining is very common in Maryland and throughout the country. Similarly, the inclusion of police sergeants and even lieutenants within the same bargaining unit, or under the same collective bargaining agreement, is an established practice.

Unfortunately, the major issues are being distorted by the irrational objection of the administration to so-called "effects bargaining." This distraction must, we feel, be addressed head-on to avoid future controversy, litigation, and misperception. Moreover, "effects bargaining" has been used as a red herring by our opponents.

The stated purpose of the Police Labor Relations Act ["PLRA"] is "to promote a harmonious, peaceful and cooperative relationship between the county government and its police employees and to protect the public by assuring, at all times, the responsive, orderly and efficient operation of the police department." The law further recognizes that "[s]ince unresolved disputes in the police service are injurious to the public and to police employees as well, adequate means should be provided for preventing such unresolved disputes and for resolving them when they occur." PLRA § 33-75.

We have honored this public policy and, indeed, since April 1982 when the current law was enacted, there have been no job actions by police officers; no picketing; no slowdowns; and no other actions that impaired our ability to serve the public. This is a significant tribute to a thoughtfully crafted law that was the result of hard work by the County Council, the Gilchrist Administration, and Lodge 35.

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Our law was the first collective bargaining law enacted in Montgomery County. It includes specific reference to "effects bargaining." On the other hand, the County Employees and Firefighter laws do not make such specific reference, but those laws do indeed require "effects bargaining."

It is because the older Police law makes specific statutory reference to "effects" that there is been very little litigation or dispute over the issue. In contrast, the newer County Employees law has been clarified through dispute and litigation. Indeed, MCGEO has had to file more Unfair Labor Practices Charges since their law was enacted in 1986 than has the FOP under the PLRA enacted in 1982.

It is in the spirit of resolving this issue here and now, rather than later, that we present the following for Council review and consideration.

EFFECTS BARGAINING

One of the bedrock concepts in American labor relations jurisprudence is "effects bargaining." Effects bargaining is basic to the practice of collective bargaining in practically every jurisdiction. It is a necessary component of the exercise of "management rights" both in the public and private sectors.

The National Labor Relations Board [NLRB] in its landmark decision *Ozark Trailers, Inc.*, 161 NLRB 561, 63 LRRM 1264, 1266 (1966) cited to earlier precedent in defining this concept, and explained that even when an employer is undertaking a managerial decision, such as the decision to completely shut down operations - perhaps the most fundamental management right of all:

> an employer is still under the obligation to notify the union of its intentions so that the union may be given an opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision.

This duty cannot be neatly limited to a specified list of subject areas or scenarios. As Hill and Sinicropi explain in their often-cited text *Management Rights*, (BNA Books, 1989) at p. 412:

> The courts have not limited the scope of effects bargaining to a specific list of subjects. All aspects related to that decision may be encompassed in the broad scope of effects bargaining.

Indeed, as the NLRB has often recognized:

> The effects are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a [management] decision which cannot be revised. An interpretation of the law which carries the obligations to 'effects,' therefore, cannot well stop short of the decision itself which directly affects 'terms and conditions of employment.'

Ozark Trailers, *supra*, at p. 1269. This iron link between the exercise of any management right and the duty to bargain how that exercise is to be effectuated is not set out in the text of the Federal Labor Management Relations Act, 29 U.S.C. §151 *et seq.* (LMRA). The LMRA merely requires that private sector employers "meet at reasonable times and c&a2661H"management rights" and "effects bargaining"

arise inexorably from the process of defining the frontier between what constitutes "wages, hours, and other terms and conditions of employment," and what subjects lie outside the duty to bargain.

The propriety of the concept of "effects bargaining" was approved by the U. S. Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). There, the Court said:

> [B]argaining over the effects of a [managerial] decision must be conducted in a meaningful manner and at a meaningful time....[The union] has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered.

452 U.S. at 682.

The twin concepts of "management rights" and "effects bargaining" have continued to be applied in public sector collective bargaining throughout the United States. Pursuant to the Civil Service Reform Act of 1978, employees of the Federal Government were granted collective bargaining rights. While the parameters of those rights are somewhat different than for the private sector (e.g. Federal employees are not permitted to strike), the basic concepts remain the same. As the U.S. Court of Appeals for the District of Columbia observed in *Dept. of Defense v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982):

> Even with regard to reserved management rights, the Act authorizes collective bargaining over the 'procedures which management officials of the agency will observe in exercising [their] authority....'

Thus, "effects bargaining" is also described as the duty to bargain over the procedures for implementing a managerial decision.

The same concepts have also been applied in Montgomery County collective bargaining laws, whether or not the County statute specifically includes a detailed guide to effects bargaining. The County Collective Bargaining Law, § 33-101, *et seq.*, Mont. Co. Code, 1994, and the Fire and Rescue Collective Bargaining Law, § 33-147, *et seq.*, Mont. Co. Code, 1994, do not include the general reference to effects bargaining found in the County's Police Labor Relations Act at § 33-80(a)(6). Nevertheless, "effects" or "procedural implementation" bargaining have been determined to be a necessary concomitant to the subjects of bargaining outlined in the County Collective Bargaining Law at § 33-107(a).

In *Montgomery County Government v. MCGEO-UFCW Local 400*, Case 90-1, the Montgomery County Labor Relations Administrator (LRA) determined that four bargaining proposals by MCGEO regarding contractual procedural regulation (by the use of seniority) of the County's implementation of the management rights to transfer, promote, fill vacancies, and assign overtime are "legal" proposals under County law. In reaching that decision, the LRA reviewed major precedents in state and local public sector bargaining affirming the concepts of effects bargaining. In that case, even the County conceded some of the basic premises of effects bargaining. The LRA noted:

> In any event, the County's position throughout has been that it is legal and appropriate to entertain and discuss 'seniority' proposals, and to agree to same, when it is 'post-decisional' i.e. after the County decides that services and operating efficiencies are not substantially impaired....
>
> The four proposals as written do not violate the County's prerogatives. The County concedes that the proposals fall within the general definition of 'conditions of employment' under [the statute] ... and since seniority matters are of fundamental concern to employees, the County violated the statute by failing to bargain.

This decision brings us full circle to the premise enunciated by the Supreme Court in *First National Maintenance, supra*: "[The union] has some control over the [managerial] decision...."

As we have referenced, the Police Labor Relations Law includes at Section 33-80(a)(7) the duty to bargain:

> The effect on employees of the employer's exercise of rights enumerated in subsection (b) hereof.
>
> Section 80(b) lists management rights under the PLRA.

Whether or not such a provision were to be included in any collective bargaining legislation covering police supervisors or other County employees not presently covered by a collective bargaining unit, the concept of "effects bargaining" is so deeply ingrained in American labor relations jurisprudence, that any statute directing collective bargaining regarding any subjects traditionally included within the concept "wages, hours, and other terms and conditions of employment" necessarily includes effects bargaining.

During the 18 years of the parties' experience with the PLRA, there have been few if any formal controversies regarding the scope of proper subjects of bargaining. This excellent experience has been fostered by the detailed clarity of the bargaining duty under the PLRA. Removal of the specific reference to effects bargaining from any future law would simply raise the possibility that sergeants, through their union, will have to clarify that such bargaining is required through litigation, such as occurred shortly after the promulgation of the County Collective Bargaining Law in 1996.

LAW SHOULD BE CONSISTENT

A problem with exclusions of specific reference to "effects bargaining" is that two groups of police employees will be bargaining under different statutes. This is akin to a football game where one team plays under NFL rules and the other plays under Canadian Football League [CFL] rules. Clearly, confusion and disputes will result.

Moreover, established legislative terms and understandings will be disputed and a new law will need to be defined through dispute resolution mechanisms and litigation. This is not in the larger interest of the sound public policy articulated at § 33-75.

The PLRA represents a balance of the interests between Management and the Union. American labor law has evolved over scores of years as a result of the struggles of employees to achieve democracy in the workplace on the one hand, and management to hold onto what it perceives as its "prerogatives."

It is out of respect for the manner in which the PLRA was drafted in response to a Citizen Initiative that Lodge 35 has not sought to expand the scope or parameters of the PLRA beyond the inclusion of sergeants under the same law. (We were honest and open with the 1982 Council and Executive, as well as political candidates since that time, that we intended to continue to push for inclusion of sergeants.) Unfortunately, the Duncan Administration has exploited this legislation and the OLO study of the police complaint system to attack an established law.

"EFFECTS BARGAINING" IS WIDELY MISUNDERSTOOD

"Effects bargaining" has been blamed for all sorts of perceived evils unrelated to the concept. Interestingly, the department issues internal directives regularly. Very few of those directives involve bargaining. Those that do, generally address mandatory bargaining, not effects. For instance, directives and policies on arrest procedures, enforcement priorities, district boundaries, crime reporting, selective enforcement, issuance of citations, jurisdiction, department organization, search and seizure, prisoners and fugitives, community services, and public relations rarely result in bargaining of any kind. And when they do, bargaining is limited to small and specific portions that involve working conditions.

Part of the confusion has been the result of Contract Article 61 *Directives and Administrative Procedures*. That Article requires that "[n]egotiable matters pertaining to administrative procedures, department directives, and rules referenced in this agreement . . . are subject to addition, change, amendment, or modification, only after specific notice is provided to the union with an opportunity to bargain and after the parties reach agreement. If no agreement is reached, the addition, change, amendment, or modification shall not be implemented." The Article further provides that

"[c]hanges to directives, rules and procedures not enumerated in th[e] agreement, or the effects on employees of the employer's exercise of a management right as enumerated in Article 42 § A, which involve matters appropriate for collective bargaining will be proposed by the County to the Union for bargaining. Thereafter, and before implementation, bargaining and agreement shall occur. Failing agreement, the dispute will be resolved pursuant to the impasse procedures . . . of Chapter 33, § 33-81(b) of the Montgomery County Code."

This Contract Article simply affords the County flexibility to seek change without waiting for bargaining on a successor (or term) contract. An analogy to the County's budget process might be appropriate.

In March of each year the Executive submits a recommended budget to Council. Council spends considerable time analyzing and questioning the recommendation. By law, a date is set for approval of the budget that becomes effective on July 1.

Should the Executive desire to amend or supplement the budget after July 1, s/he must follow certain procedures and submit the request to Council. As you well know, certain requests are barred until after January 1. Charter § 307. Emergency appropriations to meet specific circumstances can be made at any time. Charter § 308. In both cases, public notice is required. These charter provisions apply to all county agencies, including public safety.

Council will deliberate and discuss these supplemental budget requests. Year after year, we read of the Executive's expressed frustration with Council for doing its job. Executives have accused Council of micro-managing, interfering, endangering public safety, etc. The rhetoric goes on year after year, budget after budget. Such is the nature of our democratic form of government.

Like the budget process, the term bargaining process takes place at certain times. Contracts last for not less than one, nor more than three years. In November, we commence the process. If no resolution is reached by January 20, impasse reached. All issues must be resolved by February 1 and portions of the Agreement requiring Council action must be submitted as part of the Executive's Recommended Budget. By May 1, the Council must indicate its intent to accept or reject all or any portion of the agreement. If any portion is rejected, the parties enter into a process for resolution. The contract becomes effective on July 1.

Therefore, for purposes of our analogy, term bargaining is like the annual budget process. Interim bargaining under Article 61 and "effects bargaining" is like supplemental budget requests.

Both the budget and bargaining processes require deliberation and review by the parties, neither interferes with the efficient and effective delivery of essential public services. Both are subject to complaints by the Executive!

In this regard, management is critical of Lodge 35 for its thorough analysis of issues submitted for bargaining, saying this is time-consuming. Like legislatures and good business in all segments of our society, all parties have a duty to be thorough. We do not take our obligations lightly.

Another recent management complaint has been the delay in bargaining "effects" and non-effects issues midterm in the contract. Both sides have been responsible for delay in various matters. If this is a concern of either management or the union, either is free to require the other to bargain through established procedures, e.g. Charge of Prohibited Labor Practice.

Penultimately, it must be restated that the Police Complaint Process study that brought this issue to the forefront of attention is mostly unrelated to any collective bargaining. The investigation of most complaints against police officers, and all complaints alleging excessive use of force, is governed by the Law Enforcement Officers' Bill of Rights. Article 27, § 727, *et seq.* of the Annotated Code of Maryland.

That law affords police officers certain procedural rights in investigations, including the right to ten (10) days to obtain representation before being subjected to questioning of the officer concerning his/her conduct. Hence, no matter how serious the allegation, the officer has ten days after notification to make a statement, but management frequently postpones asking for that statement, thereby delaying the process. But, as stated, this is state law, not collective bargaining.

Management complains of this law and says, that because of "effects bargaining" it can't engage in corrective action to prevent inappropriate conduct. Our response is simple: In the very few cases where this has been at issue, we demanded due process for our members and management tried to deny that due process notwithstanding the constitution and Personnel Regulations Section 3.2 *Due Process*. Management can submit a proposal to bargain, but hasn't. To say that "effects bargaining" is at the root of all evil is disingenuous at best. (Even management touts the low number of complaints relative to the amount of police activity.)

I further note that it has been those areas where the LEOBR or an unfettered management right applies that have been the subject of most criticism. The Department of Justice was falsely told by police management that FOP Lodge 35 delayed the disciplinary process and Lodge 35 provided proof that it did not. DoJ found many management, not FOP, deficiencies and the recently signed Agreement with DoJ preserved all contract and PLRA rights while requiring changes in certain management (not FOP) practices.

In sum, this issue has been exploited and misunderstood. Most collective bargaining involves mandatory subjects of bargaining, not "effects." "Effects bargaining" exists even when a statute does not create it, for there is no bright line test to determine if a matter is a mandatory subject of bargaining or an effect of the exercise of a management right.

Our law, unlike the other County bargaining laws, sets forth by statute what others have had to define through litigation. Our job as police officers is a tough one. The public is better served when we negotiate according to statute than when we litigate over it.

Our goal is to avoid continuing controversy, not to create it. We therefore urge Council to include sergeants in the bargaining unit under the law that has existed for 18 years.

We look forward to working with you, the MFP Committee, and full Council on this most important legislation.

Sincerely,

Walter E. Bader
President

Enclosures (Reference material; MCGEO ULP Case 90-1)

cc: Mr. Andrews, Lead, MFP
Mrs. Dacek
Mr. Denis
Mr. Ewing
Mr. Leggett
Mrs. Praisner, Chair, MFP Committee
Mr. Silverman
Mr. Subin, President

Question #1:
Please give examples of issues that could have been the subject of "effects bargaining".

Question #2:
What is a typical timeline for negotiation and impasse procedures?

Question #3
What costs are associated with negotiations and impasse procedures?

Question #4:
The "effects bargaining" provision only applies to the exercise of a management right that has an effect on the members of the bargaining unit. Can you give us an example of a management right that you exercised without bargaining with the FOP because it did not have an effect on the members of the bargaining unit? If so, did the FOP accept this determination? If not, how was the dispute resolved?

Question #5:
Can you compare the exercise of management rights as applied to MCGEO (within MCPD) as compared to the FOP?

Question #6:
Can you give an example of where you exercised a management right to increase effectiveness and efficiency of operations of the Department and the resulting negotiations diminished your ability to hold officers accountable, implement effective policy or provide efficient resources to the public?

Question #7:
This is a committee that recognizes the importance of collective bargaining. If effects' bargaining is eliminated, won't important subjects of bargaining be impacted?

Answers:

Question #1:

Every statutory employer right as defined by statute 33-80 (b) is subject to effects bargaining and is a mandatory subject of bargaining. Some examples are:

- PacketWriter
- Mobil AFIS
- AVL
- E-citation
- Holsters
- Rifle sights
- SOP's
- Directives
- Trainer/Trainee relationships
- Mandatory use of email
- Proficiency advancements and time in grade
- Uniforms at In-Service training
- PPV reassignment
- Evidence Technician work hours
- MC Time/Telestaff

Question #2:

Typically, a minor matter will take between two weeks and 90 days to resolve without any impasse being declared by either party.

A more significant matter (as determined by either party) can take up to two years or more to bargain.

* If impasse is declared an arbitrator must be selected and scheduled. This typically takes at least two months.
* A mediation/arbitration proceeding can take between one and three days.
* The decision may not be rendered for weeks following the proceeding.

Question #3

During bargaining a negotiations team from each party is designated and will vary in size based on the complexity of the issue. The employers team of representatives may also include OHR employees and a member of the County Attorney's office The range of representatives varies between two and five for normal negotiations. All FOP members attending these bargaining sessions are granted administrative leave (if not term bargaining this should be taken from the FOP leave bank).

Arbitrator costs vary and range between $425 - $1,500 per day. This includes the time spent draft their opinion.

Question #4:

- November 2010 Department recognized a personnel shortage of officers in the 3rd District due to various factors including officers deployed on military leave, on light duty or on administrative leave.
- Needed to supplement staffing levels to maintain service to the community and reduce crime.
- November 29 – memo sent out requesting volunteer officers to be temporarily reassigned to the 3rd District.
- No notice was given to the FOP because this was a voluntary program.
- FOP demanded to bargain this matter on Dec 13th.
- Due to the Department's need to address the shortage, planning continued with the officers who volunteered to be transferred to the 3rd District. FOP objected to this action in communication with us on January 14, 2011.
- Communications between the Department and FOP continued while officers began their voluntary redeployments to the 3rd District starting January 30.
- Agreement with FOP was reached on March 4, 2011. By this time, several of the originally transferred officers had completed their assignment and returned to their previous duty assignment.
- MCPD was at risk of being charged with a PPC if no agreement was reached.

Question #5:

MCGEO Process: There are several units within MCPD that are made up of primarily MCGEO members, such as ASD, ECC, Crime Lab and Security. When ECC, a division comprised of primarily MCGEO employees, needs to implement an Operational Change, it is done so immediately and a copy of the change is placed in the MCGEO mailbox for review. If the change is a mandatory subject of bargaining, they discuss it at LMRC and then notice the Union of the proposed change. For example, Management may send a copy of the SOP with the proposed revision(s) to MCGEO and MCGEO has 30 days to respond. They can either accept the changes or inform the Department of clarifications or issues. Once issues are resolved the Department has to send Notice of Implementation to MCGEO – as long as the Union is satisfied with the change, it takes effect. Generally, this procedure takes approximately 3-4 weeks to complete.

Examples:

- 2010 Management exercised its management right to change the operating hours of the Chemistry Lab. The Union was noticed, provided input and the hours were changed.

- 2008 Management exercised its right to change the work schedules and hours of ASD employees. The Union was noticed, provided input and the hours were changed.

FOP Process: In order to exercise a management right, the department's belief is any bargaining deemed necessary would fall under "Effects Bargaining". The department needs to notify the FOP and allow them an opportunity to accept it or demand to bargain. The bargaining process can last days or years.

Examples

- 2011 the Department exercised a restructuring due to budgetary lack of funds. The FOP was notified and quickly agreed to the changes in one day.
- Mobile AFIS devices were bargained beginning in October 2007 and an agreement was reached in March 2008.
- The Department uses SOP's (Standard Operating Procedures) as a management right to establish procedures not covered by its Rules and Regulations under the Department Directive system. The Department entered into bargaining of the 1st District's SOP with the FOP following a Prohibited Practice Charge filed with the Permanent umpire in October 2007 and reached agreement on that one SOP in September 2009.
- The Departments Directive System

Question #6:

PacketWriter

- The Department sought to implement PacketWriter in an effort to improve its efficiency and effectiveness in operations by converting the departments report writing system to an electronic version instead of using paper report forms and mandating that officers use only PacketWriter. The FOP made a demand to bargain PacketWriter in February 2006. An agreement was not reached to mandate PacketWriter use until May 2009. Prior to the May 2009 date, officers were allowed to write reports in either the electronic format or using the old paper forms. This created record keeping challenges and additional costs to the Police Department.

AVL

- The Department sought to implement an Automatic Vehicle Locater system which allows ECC to identify the location of police vehicles equipped with computers. The negotiations resulted in an agreement where data from this system will not be used in any disciplinary action or internal investigation or administrative hearing board proceeding concerning any FOP member.

Email

- The mandatory use of email has been sought by the Department in the past. Negotiations with the FOP resulted in an agreement on email use. However, no agreement for the mandatory use of email has ever been reached and its use

remains voluntary for its members. The Department is still required to provide printed communications with its officers since FOP members are not required to read or maintain an email account with the County.

Question #7:

No, because the County law and the collective bargaining agreement with the FOP requires bargaining over salary, wages, pension benefits, retirement, hours and working conditions, grievance process and health and safety issues. Many aspects of "effects bargaining" are covered under the collective bargaining agreement already.

- directives
- transfers
- promotions
- discipline
- hours and working conditions (scheduling)
- evaluating employees

In addition, the Department and FOP have established joint committees to work on solutions of issues of mutual concern that arise. Examples include

Health and Safety Committee
LMRC
Training Committee
Awards Committee
Collision Review Committee

July 12, 2011

President Ervin:

Vice President Berliner:

Members of the Council and Staff:

My name is Vernon H. Ricks, Jr. I served as co-chair of the Organizational Reform Commission appointed by the Council and Executive, which submitted a report to you on February 1, 2011.

In our report, recommendation # 21 recommended amending §33-80(a)(7) to make the scope of bargaining consistent with the scope of bargaining in the collective bargaining laws for fire and general county employees.

The Erosion of Management Rights

The Police Collective Bargaining law establishes the scope of collective bargaining in County Code §33-80. Similar to the collective bargaining laws for Fire and general County employees, the Police Collective Bargaining law requires the Executive to bargain over wages, benefits, and working conditions. Section 33-80(b) also establishes a list of "Employer rights" that the Executive does not need to bargain. However, unlike the collective bargaining laws for Fire and General County Employees, §33-80(a)(7) requires the Executive to bargain over the "effect on employees of the employer's exercise of rights listed in subsection (b)." This provision is generally referred to as "effects bargaining." For example, §33-80(b)(3) grants the Executive the employer's right to "determine the services to be rendered and the operations to be performed." However, under effects bargaining the Executive would have to bargain with the union over the effect on employees of the Executive's decision to modify the services performed. In practice, "effects bargaining" has become the exception that makes most management decisions subject to bargaining.

"Effects bargaining" has hampered the ability of the Police Department to issue directives to govern how police officers must operate.

As you know, the County's collective bargaining laws outline a list of "employer rights," such as the direction and supervision of employees, types of services provided by the department, hiring practices, budget, position classification, etc. These employer rights are not subject to bargaining, except under the Police Labor Relations Law. For Police only, the Executive must bargain ***any effect on employees*** that the exercise of employer rights may have.

This means that the Directors of every County department other than Police may exercise their employer rights to manage their department and employees without having to take such issues to bargaining. The Police Department, for all practical purposes, ends up bargaining almost every management decision made. One primary concern is the inherent delay caused by the bargaining process. At minimum, anything taken to bargaining takes one or two months to resolve. Many issues take years. Some are never resolved, and those management rights cannot be implemented since the Department and union do not agree on how it should be done. While a delay may not be significant when the issue is something like new police uniforms, it can be significant if it involves changing police assignments to meet identified public safety needs or the introduction of new technology tools that could protect both the police officers and the citizenry at large.

Effects bargaining may also lead to increased costs in some situations. If the Department wishes to exercise a management right that only impacts some employees and not others, the union may insist that all employees are included. This could lead to increases in such things as tuition assistance or issuing additional equipment.

In some instances, effects bargaining may result in treating employees differently. The Police Department has hundreds of civilian employees who are represented by MCGEO, not FOP. If an MCGEO employee and FOP employee are working side-by-side, performing essentially the same function, they may be treated differently by management – subject to different rules.

Eliminating effects bargaining from the Police Labor Relations Law will not erode the union's ability to bargain mandatory subjects of bargaining, such as wages, benefits, working conditions.

In closing the ORC supports the enactment of Bill 18-11

LOCAL 1664

Montgomery County Career Fire Fighters Ass'n., Inc.

Testimony by John J. Sparks JS
President, IAFF Local 1664
Public Hearing - Bills 18-11, 19-11 & 20-11
July 12, 2011

I am John Sparks, President of the Montgomery County Career Fire Fighters Association, IAFF Local 1664. I am here today to speak in opposition to the three bills that, if adopted, would adversely impact collective bargaining for County employees, while at the same time produce little or no savings for County Government. While the three bills address different aspects of the collective bargaining process, and Bill 18-11 does not directly impact collective bargaining for fire fighters and paramedics, all three bills suffer from a common set of deficiencies.

First, we believe that the Organizational Reform Commission, whose recommendations form the basis of these bills, overstepped its bounds. The original charge given to the ORC did not include consideration of changes to the County's collective bargaining laws; and for good reason. It is our understanding that most members of the ORC had little or no experience in matters pertaining to labor relations and collective bargaining, and the results of their work that are incorporated in these bills demonstrate this lack of experience. Most of the recommended changes to the collective bargaining process contained in these bills are not well thought out and contain serious flaws.

For instance, Bill 19-11, if adopted, would move the date for completing the term bargaining and impasse resolution procedures up two weeks. Yet at the same time, it doesn't move up the start of term bargaining by a similar period of time. More importantly, experience has shown that the County is unable to provide complete and meaningful responses to the Unions' request for financial data until mid-December and perhaps even into January in any given fiscal year. Thus, substantive bargaining over economic proposals cannot occur until that point in time, which would be close to or beyond the early January date that the bill would establish as the point in time that statutory impasse occurs.

Second, Bill 19-11 would require that the Unions' initial proposals on economic items and the County Executive's counter-proposals on those items be made available for public review. This proposed amendment would add no value at all to the collective bargaining process, and in fact, could actually harm the process. We agree with the observation of ORC Commissioner Susan Heltemes that the integrity of the collective bargaining process relies on all persons involved in the negotiations to maintain confidentiality until a final agreement is reached; and that if initial proposals were made public, outside pressures would more often than not lead to breakdowns and stalemates in the bargaining process.

Further, to think that requiring proposals to be made public will influence the parties to moderate their initial offers is simply naïve thinking. In addition, anyone who has participated in

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collective bargaining knows full well that the final outcome in collective bargaining usually bears little resemblance to the initial proposals. This proposed law change would neither generate any savings for the County, nor would it create any improvements to the collective bargaining process.

We do, however, agree with the proposed amendment in Bill 19-11 that would require the County Executive to submit to the Council by March 15 any term of a labor contract which requires an appropriation of funds or change to County law. Such notification should occur at the same time the County Executive submits his proposed operating budget, not two weeks later.

Turning to Bill 20-11, we note, with objection, that the impasse resolution procedure would be changed to prohibit the same individual from serving as both the mediator and impasse arbitrator, as is the case now. In making this recommendation, the ORC commented in its report that the free flow of ideas during mediation is diminished when the mediator also serves as the arbitrator. Speaking from years of experience, I can tell you that just the opposite is true. Having the same individual appointed as both mediator and arbitrator facilitates rather than inhibits the discussion that occurs during mediation, and creates a greater chance of reaching a full or partial agreement prior to arbitration.

Also, there is no doubt that requiring different individuals to serve as mediator and neutral arbitrator would significantly increase the time needed to complete the impasse resolution process. Under the current system, the impasse neutral gains valuable insight as to the purpose, intent and practical application of the parties' contract proposals during mediation. Significant time is saved in a subsequent arbitration proceeding by the impasse neutral having previously gained this understanding. Time that is already at a premium would have to be spent educating a different person serving as the arbitrator as to the context and parameters of the parties' proposals.

Further, the provision of Bill 20-11 that would create a tripartite arbitration board, with the Union and the Employer each appointing a partisan representative, can be summed up best as being nonsensical. In every case, without exception, each partisan member of the arbitration board will vote to select the Last Best Final Offer of the party that appointed him or her. Any information that the neutral arbitrator needs about the Last Best Final Offers is provided during the arbitration hearing. We view this tripartite board proposal as being mere "window dressing" rather than serving any useful purpose.

In addition, the five-member impasse panel that Bill 20-11 would create for the purpose of selecting a neutral arbitrator in the absence of a joint selection by the parties is actually counterproductive. The language of the bill restricts panel eligibility to individuals who are County residents. All affected parties, including County taxpayers, are best served by having arbitrators who have considerable experience in interest arbitration deciding cases of such critical importance. There is simply not a large (i.e., adequate) pool of candidates with the desired qualifications living in Montgomery County. Moreover, it is wrong to think that arbitrators who live in the County are, for that reason, best qualified to understand and resolve issues involving the allocation of County funds.

Finally, Bill 20-11 would amend the County collective bargaining laws by changing the criteria that guide an arbitrator in selecting one of the two competing Last Best Final Offers. More specifically, the bill would add criteria that the Council considered and rejected just six or seven months ago. The criteria that were not adopted were rejected for good reason. They would unfairly tip the impasse resolution scale far in the direction of the County Executive.

Nothing has occurred in the last few months from which to conclude that those rejected criteria should now be adopted. While interest arbitrators selected the Last Best Final Offer of the employee representative in all three cases occurring this past winter, it was not because the existing criteria are deficient or slanted in a way to produce results that are favorable to the employees; it was because, *as the Council quickly recognized*, the Last Best Final Offer that the County Executive submitted in each case contained *extreme* proposals that went far beyond what was necessary to address the County's fiscal problems. The existing criteria in the collective bargaining laws have been written to achieve the desired end result: the selection of the Last Best Final Offer that contains the most fair and balanced resolution to a collective bargaining impasse. Moreover, the Council still serves as the final arbiter on whether the economic provisions of a collective bargaining agreement are put into effect.

We urge the Council to reject the objectionable elements of the bills that have been highlighted herein.

Testimony before County Council
on Bill 18-11, Police Labor Relations - Duty to Bargain
July 12, 2011

Thank you Madam President and members of the Council for this opportunity to testify in support of Bill 18-11, Police Labor Relations - Duty to Bargain. I am Joan Fidler, President of the Montgomery County Taxpayers League. I am here today to commend you for aligning yourself with consistency, fairness and cornmon sense none of which appear to be the underpinnings of effects bargaining.

Bill 18-11 injects reality and balance into the Police Collective Bargaining law. As it stands today, this law requires the Executive to bargain over the "effect on employees of the employer's exercise of rights". Thus before management may proceed to make a change in how employees are transferred, scheduled or reassigned, the **effect** of the changes on employees may require management to bargain with the union. So does this create restrictions in management's ability to implement its decisions? Let me count the ways:

- Past practice has shown that there have been delays in implementation of decisions ranging from 2 months to 2 years. A recent ORC Report stated that the Police Department had to bargain with the union over a directive to implement a new computerized police report writing system. Effects bargaining was invoked and implementation was delayed. In fact, states the Report, the police union has recently delayed the implementation of all directives by refusing to respond to them. Is this the inefficiency we need in these difficult budget times?

- Let us look at costs. If the Police Department wants to distribute equipment to some employees but not to others, effects bargaining may be triggered. If the Police Department and the union do not agree on which employees should receive the equipment, the solution is to issue none of it - feckless, or issue equipment to all - wasteful.

Effects bargaining undermines the ability of the Police Department to manage. At the same time it expands the scope of collective bargaining for the police union. Such an expansive scope is not included in the collective bargaining of other county unions. Nor is it included in the collective bargaining of any other police union in the state of Maryland. Let us be consistent and let us be fair.

If collective bargaining were poetry, effects bargaining would be poetic licence. It is time to scrap effects bargaining. The Taxpayers League urges you to pass this bill.

Thank you.

– Joan Fidler

5

Montgomery County Lodge 35, Inc.

18512 Office Park Drive
Montgomery Village, MD 20886

Phone: (301) 948-4286
Fax: (301) 590-0317

Statement of Fraternal Order of Police,
Montgomery County Lodge 35

Tuesday, July 12, 2011

We are here again because the County clearly wants the priority of County police officers to be fighting for their rights rather than providing services to the public. For shame, because despite years of VOLUNTARY concessions by police officers made during the County's tight fiscal situation, and as the County budget increases, we have to be here to spend our time defending a process that has worked for nearly three decades. It worked up until the day politicians found process under law inconvenient to their purpose.

The County Council has several bills before it. These bills arise from a very questionable set of recommendations in the January 2011 report of the Organizational Review Commission. The most questionable is based on a recommendation on so called "effects bargaining."

The capital budget is in the billions of dollars, yet the commission had some special interest in the collective bargaining process which has worked well for over 28 years. The commission showed no interest in either the very high salaries of non-represented, non-union employees or the means which their salaries and benefits are established. Clearly the commission was carrying water for political interests. This recommendation is outside the scope of the commission's charge and should be dismissed.

Employee contract negotiations are no different than any other negotiations the County engages in for services. The County employs both represented and non-represented employees. It seems odd that the Commission focused on employee contracts for a minority of county-compensated employees. There are 15,000 county employees and 22,000 MCPS employees. There are but 1200 police officers.

The minutes of the commission do not show any detailed discussion of what is called "effects bargaining". Apparently, they did some of their work in secret while maintaining a misperception of openness and transparency. Their work seems more political, and devised in secret without scrutiny or accountability. In its final report, the commission makes conclusions based on either secret conversations that are not documented or were documented and are now withheld from public view. We have filed a complaint with the police department to have them investigate. This is a matter of management's integrity and accountability. [Attached]

Their conclusions are based upon a false premise. Either the commission made up what it asserts to be facts, or someone gave false and misleading information. [See PIA records

request and response, attached] In any event, we met with the commission and were never afforded any opportunity to respond to any allegations or assertions concerning "effects" that were ultimately presented in the final report.

Since there are only two parties to "effects bargaining", it is patently unfair that the commission heard from only one party and never afforded FOP Lodge 35 any opportunity to respond. The commission called its credibility into question through this one-sided approach. Also, clearly, as noted by one commission member, effects bargaining was not within the charge of the commission. For whatever reason, the co-chairs of the commission and a majority of that commission allowed it to be used for political purposes with little or no consideration to fairness, balance, perspective or veracity. We have responded to portions of the commission's report. [Attached]

"Effects bargaining" comes out of a case that was decided by the United States Supreme Court. It is a complex topic, rarely understood by its critics. **Effects bargaining has never had any adverse impact upon our ability to respond to calls for service or to protect the public.** Indeed, we estimate that about 95% of the police department's business is not subject to bargaining and we have no interest in requiring such bargaining. Penultimately, under our law, issues subject to "effects bargaining" are subject to an expedited resolution process. In 2004 we agreed to a law change that sets a very short period to go to impasse and resolve effects matters. Management has rarely, if ever used that process and has no right to complain.

Some, notably Councilmember Phil Andrews, have consistently distorted the facts and been less than candid about effects bargaining. Mr. Andrews uses the in-car video program as an example that he claims makes his point. Assuming, *arguendo*, that in-car video involves effects bargaining, the fact is that the county proposed a **pilot** program. The County began bargaining cameras, and bought them. They were installed in vehicles and operating. Several legal issues arose during discussions as several cameras were field tested. Our chief concern was the wiretap laws and public and officer privacy rights.

The County, not FOP Lodge 35, sought to discontinue discussions. Then Chief Charles Moose contacted us and asked to call off negotiations because the County wanted to return the cameras and use the money for something else. In any bargaining, once a party abandons or withdraws its proposal, the proposal is off the table. Thereafter, we went through several rounds of term negotiations and the County never raised the subject, nor did they pursue it in any other manner until very late in term bargaining in December 2007. The issue was resolved and an agreement signed in 2008. We have testified under oath to the history of this subject. Mr. Andrews' uninformed statements have not been under oath.

We have little interest in most operational policies, such as processing prisoners, opening facilities, determining functions like school resource officers, determining enforcement priorities and the like. To our knowledge we have only been to impasse on one issue, and that was successfully mediated prior to a hearing. Other issues that have successfully bargained and agreements reached include technology changes affecting the way work is done, increasing the

number of supervisors on the midnight shift, and reducing the number of master police officers. There are others.

It is far more likely that inept management and ineffectual leadership hinder police operations. We meet with police management quarterly in a labor relations meeting, we resolve issues in the workplace daily and we have solicited regularly for any outstanding items the County wishes to discuss. [Attached] In fact, most issues arising from operational changes are resolved without controversy. But the issue must be brought to our attention. If there is a problem with police officers checking email, we were not made aware of it until today's newspaper was delivered to our office.

Again, contract negotiation with employees is no different than contract negotiation with any other service provider. Public access to proposals during bargaining harms the ability to openly discuss all options. The County does not make public negotiations with Live Nation, Costco, Westfield or other corporations with which it deals. Additionally, the premise that the public has no input in the collective bargaining process is false. The public is at the table. We serve and live in the County.

The commission fails to show that the fair and level playing field established under the Police Labor Relations Article for impasse arbitration is in any way deficient. In recommending a change to the impasse procedure the commission fails to cite one arbitration decision that was unsound. The only fact cited is the number of arbitrations and who prevailed. This is analogous to determining that the rules of baseball must be changed based on the number of time the New York Yankees make it to the World Series. No one has identified any deficiency in the impasse arbitration process other than the FOP has been found to be more reasonable than the County more often than not. We are not surprised by that statistic.

The police officers in Montgomery County want to return to work. Instead, we are called here to address baseless attacks on our rights under law a process that has kept police officers doing what they should be doing: protecting and addressing the public safety concerns of the community.

Law Office of
MARTHA L. HANDMAN, P.C.
17604 Parkridge Drive, Gaithersburg, MD 20878
phone/fax: (301) 990-6539

RECEIVED

June 2, 2011

JUN 02 2011

J. Thomas Manger
Director
Montgomery County Department of Police
2350 Research Blvd.
Rockville, MD 20850

MONTGOMERY COUNTY FOP LODGE 35
LOG#_____

Dear Mr. Manger:

I am requesting an investigation into untruthful statements, misconduct and misrepresentations made in an official capacity to the Montgomery County Organizational Review Commission ("ORC") by representatives of the Montgomery County Department of Police. This is a grave and serious matter.

The Final Report the ORC was issued on January 31, 2011. The report states that bargaining delayed implementation of a new computerized police report writing system. The report also specifically states that FOP Lodge 35 "delayed the implementation of all directives by refusing to respond to them." These verifiable statements of fact are untrue.

Representatives of the Montgomery County Department of Police testified before the ORC. Since the only information available to the ORC regarding effects bargaining between the County's police department and the FOP must have originated from representatives of MCPD, I have reason to believe the statements in the ORC final report are based upon untruthful statements made by department representatives. These misrepresentations are outrageous and an egregious breech of public trust and merit a thorough investigation.

Please inform me of the outcome of your investigation.

If you need additional information, please contact me.

Very truly yours,

Martha L. Handman

Martha L. Handman

DEPARTMENT OF POLICE

[illegible]
[illegible]

[illegible]
[illegible]

June 15, 2011

Martha L. Handman, Attorney at Law
17604 Parkridge Drive
Gaithersburg, Maryland 20878

Dear Ms. Handman:

Thank you for your letter identifying possible untruthful statements by a member of this department. The Organizational Reform Commission's report does state: *The FOP has recently delayed the implementation of all directives by refusing to respond to them.* This statement was not reflected within a quotation nor was it attributed to anyone. The basis for our meeting with the ORC was solely to discuss the possible reorganization of the M-NCCPC Park Police and the Montgomery County Police Department. I did not, nor did any member of my staff, discuss FOP Lodge 35 or any issues regarding directives during our testimony with the ORC.

If a comment were made to the ORC by any member of this Department in respect to FOP Lodge 35, it was not made during any meeting with the ORC and my staff. To be clear, FOP Lodge 35 has, to date, never failed to respond to any directive sent to them for review.

Again, thanks for bringing this matter to my attention. I look forward to working with FOP Lodge 35 on issues related to keeping our officers and community safe.

Sincerely,

J. Thomas Manger
Chief of Police

JTM:mam

Law Office of
MARTHA L. HANDMAN, P.C.
17604 Parkridge Drive, Gaithersburg, MD 20878
phone/fax: (301) 990-6539

March 2, 2011

VIA FACSIMILE & U.S. MAIL

Custodian of Records
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Dear Sir or Madame:

It is my understanding that the Montgomery Council maintains the records of the Organizational Reform Commission ("ORC").

This is a request, on behalf of my client, Fraternal Order of Police, Montgomery County Lodge 35, Inc. ("FOP 35"), pursuant to the Maryland Public Information Act ("PIA") as amended, Annotated Code of Maryland, State Government Article §§ 10-611 *et seq.* In this capacity, I wish to inspect, and copy if I believe it necessary, all the following records in the custody and control of the Montgomery County Council:

> all records relating to any communication regarding collective bargaining or FOP 35 between ORC, its members or staff and Montgomery County Council staff, Montgomery County executive branch personnel, other public officials or organizations, or private individuals or organizations. For purposes of this request "records" includes but is not limited to email, correspondence, recordings, transcripts, documents provided to or reviewed by ORC members or staff, notes of individual ORC members or staff, and notes of conversations and ORC proceedings including but not limited to records of all meetings of ORC "work groups."

If all or any part of this request is denied, please provide me with a written statement of the grounds for the denial citing the law or regulation under which you believe you may deny access. I also request that you inform me of the available remedies for review of the denial.

If you determine that some portions of the requested records are exempt from disclosure, I will expect, as the PIA provides in Section 10-614(b)(3)(iii), that you provide me with "any reasonably severable portion" of the records sought.

I expect all of the records I am seeking to be preserved and that any scheduled destruction be held in abeyance pending final resolution of any issues regarding your compliance with this request for records.

I also anticipate that I will want copies of some or all of the records sought. Therefore, please advise me as to the cost, if any, for obtaining a copy of the records described above.

Please also send me a copy of your fee schedule for obtaining copies of records and a copy of any rules or regulations you have which implement the Public Information Act.

If you are not the custodian of the records requested in this letter, please inform me of the name of the custodian and the location or possible location of these records, if known. Section 10-614(3) of the PIA requires you to provide me with this information within ten working days after you receive this letter.

I look forward to receiving the disclosable records promptly and, in any event, to a decision about all the requested records within thirty days. Please be advised that my client is prepared to pursue available remedies should you fail to respond to this request within the statutory time limits.

If you have any questions regarding this request, please telephone me at the above number.

Very truly yours,

Martha L. Handman

cc: President Zifcak

MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

March 30, 2011

Martha L. Handman
17604 Parkridge Drive
Gaithersburg, MD 20878

Re: MPIA Request dated March 2, 2011

Dear Ms. Handman:

We received your March 2, 2011 letter on behalf of the FOP requesting records under the Maryland Public Information Act (Md. Code, State Gov't (SG) §§ 10-611 to 10-628 (MPIA)). Council staff has collected those records in our custody that are responsive to your specific requests. It is my understanding that the FOP has already been given copies of the minutes for all of the Organizational Reform Commission (ORC) meetings. You may inspect all of the records we have compiled, with the following exceptions:

1. 54 email messages between Council staff and the Organizational Reform Commission (ORC) Commissioners providing draft reports and comments on draft reports. These messages are dated between October 27, 2010 and January 15, 2011.

2. 1 email message between the County Attorney's Office and Council staff dated November 2, 2010 concerning collective bargaining issues.

3. Council staff notes from meetings of the ORC Work Group 3 meetings and the ORC meetings.

4. 9 draft Work Group 3 Reports.

The above documents are not subject to disclosure under the MPIA because they are pre-decisional documents which are protected by legislative and executive privilege, or attorney-client privilege, as part of the "privileged or confidential by law" exception under SG §10-615(1) and because, under the inter- and intra-agency memoranda exemption in SG §10-618(b), disclosing these documents would be contrary to the public interest.

Under SG §10-618, a custodian may deny the right of inspection to certain records if disclosure would be contrary to the "public interest." The Attorney General's Public Information Act Manual noted:

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240/777-7900 • TTY 240/777-7914 • FAX 240/777-7989
WWW.MONTGOMERYCOUNTYMD.GOV

The above documents are not subject to disclosure under the MPIA because they are pre-decisional documents which are protected by legislative and executive privilege, or attorney-client privilege, as part of the "privileged or confidential by law" exception under SG §10-615(1) and because, under the inter- and intra-agency memoranda exemption in SG §10-618(b), disclosing these documents would be contrary to the public interest.

Under SG §10-618, a custodian may deny the right of inspection to certain records if disclosure would be contrary to the "public interest." The Attorney General's Public Information Act Manual noted:

> SG §10-618(b) allows a custodian to deny inspection of "any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit." This exemption "to some extent reflects that part of the executive privilege doctrine encompassing letters, memoranda, or similar internal government documents containing confidential opinions, deliberations, advice or recommendations from one governmental employee or official to another for the purpose of assisting the latter official in the decision-making function." *Office of the Governor v. Washington Post Company*, 360 Md. 520, 551, 759 A. 2d 249 (2000). *See also* 66 *Opinions of the Attorney General* 98 (1981) (executive agency budget recommendations requested by and submitted to the Governor in confidence are subject to executive privilege). This privilege arose from the common law, the rules of evidence, and the discovery rules for civil proceedings. *Stromberg Metal Works, Inc. v. University of Maryland*, 382 Md. 151, 163, 854 A.2d 1220 (2004).
>
> This exception is very close in wording to the FOIA exemption in 5 U.S.C. §552(b)(5), and the case law developed under that exemption is persuasive in interpreting SG §10-618(b). *Stromberg* at 382 Md. 163-64; 58 *Opinions of the Attorney General* 53 (1973). The FOIA exemption is "intended to preserve the process of agency decision-making from the natural muting of free and frank discussion which would occur if each voice of opinion and recommendation could be heard and questioned by the world outside the agency." 1 O'Reilly, *Federal Information Disclosure* §15.01 (3d ed. 2000); *see also Stromberg*, 382 Md. at 164.[1]

In this case, the public interest in protecting the confidentiality of internal deliberations during the legislative process outweighs any public interest in the disclosure of these documents. The consequences of disclosing these documents are serious and negative. Disclosure of these documents would inhibit the free communication of advice and ideas and the "creative debate and discussion" of potential alternative approaches among legislators, their staffs, and those individuals that legislators have called upon to assist them with their decision-making. While the public and affected individuals may be curious about the internal workings between members of legislative bodies, that curiosity cannot outweigh the chilling effect that disclosure would inevitably entail.

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[1] Maryland Public Information Act Manual (11th ed., October 2008) at 38-39.

SG §10-623 specifies the remedies for a person who believes that he or she has been unlawfully denied inspection of a public record. You should consult §10-623 if you believe you have been unlawfully denied inspection of a public record.

To inspect the records that are available to you under the Act, please call Karen Pecoraro at (240) 777-7814 to arrange for a mutually convenient time. You may request copies of these documents at that time. The Council charges a standard fee of $0.10 per page for each copy.

Sincerely,

Robert H. Drummer
Senior Legislative Attorney
240-777-7895

c: Marc Hansen, County Attorney
Steve Farber, Council Staff Director

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Montgomery County Lodge 35, Inc.

February 16, 2011

Valerie Ervin, President
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Re: Montgomery County Organizational Reform Commission Final Report

Dear Ms. Ervin:

Without providing any supporting facts or attribution as to the source of its information, the Montgomery County Organizational Reform Commission ("ORC") made the bald allegation that several years ago effects bargaining delayed the implementation of a computerized police report writing system. ORC Final Report, January 31, 2011, p. 37. The ORC did not ask FOP 35 about this issue. Had it done so, FOP 35 would have provided the following facts which refute the ORC's assertion.

In early February 2006, FOP 35 learned that the County was planning to require members of the FOP bargaining unit to submit reports using a computerized report writing system called PacketWriter. At the time, the County was not ready to implement the requirement. There were technological and reliability problems with PacketWriter, not all officers had been trained to use it, and no manual existed. Employees had the option of using PacketWriter or submitting paper reports.

In recognition of the benefit of union involvement in such matters, Montgomery County law requires the County and the Union to bargain "[t]he effect on employees of the employer's exercise of" a management right. Mont. Co. Code § 33-80(a) (7). If the parties are unable to agree after "good faith bargaining," either party may declare an impasse. Mont. Co. Code § 33-81(2) (B). The parties must submit the dispute to an impasse neutral no later than ten days after either party declares an impasse. Mont. Co. Code § 33-81(2) (D). The County may temporarily implement its final offer if the impasse neutral does not issue a decision within 20 days after receiving the parties' final offers. Mont. Co. Code § 33-81(2) (F)

Although the law requires the County to notify the union that it intends to exercise a management right that will have an effect on members of the bargaining unit, Mont. Co. Code § 33-81(2)(A), the County, in violation of the law, failed to notify FOP 35 of its plans. Concerned about the effects of the County's plan and unaware of its details, FOP 35 sent the County Executive a demand to bargain. (Exhibit 1, February 10, 2006 Demand to Bargain). Although the transition to mandatory use of PacketWriter was a major technological change, as

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is typically the case in effects bargaining, FOP 35 had only a few concerns, i.e. the availability of equipment for employees to access PacketWriter, employee training in the use of PacketWriter, the availability of typing training for employees, the lack of a PacketWriter user's manual, potential occupational injuries, and employee accountability for submitting reports in light of PacketWriter's functionality and reliability problems (e.g. lost reports, missing data, computer freezes, insufficient chargers for mobile computers, and printing problems).

FOP 35's demand letter also asked for County proposals regarding the plans for requiring employees to use PacketWriter. (Exhibit 1, February 10, 2006 Demand to Bargain). Despite this request, prior to the commencement of bargaining, the County provided no information about its plans to implement mandatory use of PacketWriter. Consequently, when the parties met to bargain, they spent much of the time during the first three meetings[1] on background information and information exchange. FOP 35 submitted its first proposals at the second meeting, on May 2, 2006. The County did not present a counterproposal until October 27, 2006. At that time, the County acknowledged that due to the need to resolve technological issues, it had not set an implementation date. (See e.g., Exhibit 2, October 26, 2006 POL.ALL email).

Although PacketWriter functionality and reliability problems continued, in the spring of 2007, FOP 35 and the County began efforts to schedule further PacketWriter effects bargaining as well as dates for mediation and arbitration.[2] On May 9, 2007, the County suggested several dates in June and July for mediation and arbitration. (Exhibit 3, May 9, 2007 email from Labor Relations Manager Sarah Miller). FOP 35 agreed to schedule arbitration and mediation on July 16 and 20, 2007, provided the parties scheduled prior dates for meaningful negotiations. The FOP stated that meaningful negotiations had not occurred because "the parties had met to bargain only three times over a six month period, with much of the time spent on background information and information exchange," and because "there had been significant changes to PacketWriter" since the last meeting in October 2006. (Exhibit 4, May 25, 2007 email from FOP Lodge 35 attorney, Martha L. Handman). The only response FOP 35 received was an email from Assistant County Attorney David Stevenson stating that he would forward the FOP email to the County's labor relations manager. (Exhibit 5, May 25, 2007 email from Assistant County Attorney David Stevenson). Meanwhile, problems with PacketWriter's functionality continued. (See e.g., Exhibit 6, August 3, 2007 email from Cmdr. Darryl McSwain).

[1]The parties met to bargain three times in 2006, on April 5, May 2, and October 27.

[2]During this time period the parties were also bargaining the effects of the Employer's exercise of another management right.

After hearing nothing more from the County about PacketWriter effects bargaining for fifteen months, FOP 35 contacted the County on September 2, 2008 and asked to schedule bargaining. (Exhibit 7, September 2, 2008 email from FOP Lodge 35 attorney, Martha L. Handman). The County agreed that the parties had not completed effects bargaining and made the following suggestion: "I think we need to get our two groups together for a bargaining session at which we try to refamiliarize ourselves with 'where we were' when bargaining tailed off in the spring of 2007, and at which we discuss changes (since spring 2007) in the status of the PacketWriter system, and the practical impact of such changed circumstances." (Exhibit 8, September 16, 2008 email from Assistant County Attorney David Stevenson). The County suggested scheduling bargaining after October 13, 2007. (Exhibit 8, September 16, 2008 email from Assistant County Attorney David Stevenson). FOP 35 responded, suggesting bargaining on October 21 and 29, 2008. (Exhibit 9, September 26, 2008 email from FOP Lodge 35 attorney, Martha L. Handman). On October 3, 2008, the County notified FOP 35 that it did not want to begin bargaining until after November 1, 2008. (Exhibit 10, October 3, 2008 email from FOP Lodge 35 attorney, Martha L. Handman). On October 27, 2008, FOP 35 suggested ten dates for bargaining between November 14 and December 19, 2008. (Exhibit 11, October 27, 2008 email from FOP Lodge 35 attorney, Martha L. Handman). The County replied that it might want to postpone PacketWriter bargaining if the County and the FOP were to begin term bargaining in November. (Exhibit 12, October 27, 2008 email from Assistant County Attorney David Stevenson). Term bargaining began in November, and the County did not pursue bargaining for four months.

Indeed, the County did not contact FOP 35 about PacketWriter bargaining until February 26, 2009. (Exhibit 13, February 26, 2009 email from George Lacy). FOP 35 replied suggesting dates in March. (Exhibit 14, March 9, 2009 email from FOP Lodge 35 attorney, Martha L. Handman). On March 10, the County informed FOP 35 that the target date for implementing mandatory use of PacketWriter was June 1, 2009. On March 16, 2009, the County gave FOP 35 a draft proposal. The parties bargained on March 24, 2008 and April 6, 2008, with FOP 35 giving the County a counter proposal on the latter date. On April 24, 2008, the County submitted a counter proposal, and twelve days later the parties signed an agreement. (Exhibit 15, May 6, 2009 Memorandum of Agreement).

Had the County been ready to require mandatory use of PacketWriter for the submission of reports, it could have declared an impasse once good faith bargaining had occurred, and implemented the requirement within a month. The facts demonstrate that the County was not ready for implementation. Prior to the start of bargaining in April 2006, it failed to inform FOP 35 of its implementation plans. It made its first proposal in late October 2006, but delayed bargaining and setting an implementation date while it resolved technological problems. In May 2007, it failed to respond to FOP 35's suggestion that mediation and arbitration be scheduled in July after meaningful negotiations. In September 2008, after acknowledging that meaningful bargaining had not yet occurred, it postponed PacketWriter effects bargaining until after term

negotiations. Meaningful bargaining did not occur until March 2009, the same month in which the County proposed an implementation date. Less than two months later, the parties reached agreement.

There are great benefits in labor-management cooperation in such matters as the transition to a computerized police report writing system. Not only does FOP 35 fully support technological advances, union involvement enhances the efficiency and effectiveness of important changes as labor and management jointly identify and resolve important issues. Since FOP 35 and the County reached agreement, no significant problems with PacketWriter have been brought to the union's attention. In contrast, the County, acting without union input, has made expensive mistakes, such as paying over $48,000 for up-grading the police department's crime-tracking software without testing whether the new software would work and implementing scheduling and payroll software that has repeatedly calculated work schedules and employee pay incorrectly.

Effects bargaining works. FOP 35 and the County have jointly resolved many issues arising from the County's exercise of its management rights. In addition to PacketWriter, some recent examples include the effects of reducing the number of master police officers, assigning additional sergeants to midnight shifts, changing canine officer work schedules, and standard operating procedures.

Very truly yours,

Martha L. Handman/gm

Martha L. Handman
Lodge Attorney

enc.

cc: The Honorable Isiah Leggett
Vernon H. Ricks, Jr.
Richard Wegman
Scott Fosler
Daniel Hoffman
Len Simon
M. Cristina Echavarren
Joan Fidler
Susan K. Heltemes

Montgomery County Lodge 35, Inc.
April 22, 2011

VIA FACSIMILE & U.S. MAIL

The Honorable Valerie Ervin, President
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Re: Montgomery County Organizational Reform Commission Final Report

Dear Ms. Ervin:

In its Final Report, the Montgomery County Organizational Reform Commission ("ORC") attacked effects bargaining by falsely accusing Fraternal Order of Police, Montgomery County Lodge #35 (FOP 35) of "recently delay[ing] the implementation of all [police department] directives by refusing to respond to them." ORC made this false allegation without providing any supporting facts or attribution as to its source of information and without asking FOP 35 about its validity. Apparently ORC was either very slipshod in its work or more interested in attacking effects bargaining than in obtaining accurate information on which to base its recommendations.

This is not first time the County has attempted to blame FOP 35 for the County's failure pursue implementation of department directives. In fact, in a good faith effort to resolve all outstanding issues, FOP 35 has repeatedly and fruitlessly asked the County to identify all outstanding matters between the parties, including directives. We have documented these communications with the County and are willing to share them should it be necessary.[1]

Not all directives implicate effects bargaining. The collective bargaining agreement specifies the procedures for reviewing directives. It requires the County to send the union draft copies of proposed changes to directives and to categorize whether the subject matter involves a mandatory subject of bargaining, the effects on employees of the exercise of a management right, or a procedural change which involves neither.

By agreement, FOP 35 must notify the County if it disagrees with the categorization within ten (10) business days. If FOP 35 does not respond, the County must follow-up in writing. If FOP 35 fails to respond within ten (10) business days of the follow-up, the failure will

[1]Copies of some of FOP 35's correspondence with the County are enclosed.

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accordance with the Police Labor Relations Act ("PLRA"), Montg. County Code, §§ 33-75 *et seq.*

Mid-term changes to directives involving mandatory subjects of bargaining can be made only if both FOP 35 and the County agree to bargain and then reach agreement. The parties must negotiate all mandatory subjects during term bargaining. Changes involving the effects on employees of the exercise of a management right must be bargained pursuant to Montg. County Code § 33-81. Either the County or FOP 35 can propose the directive for bargaining. If FOP 35 and the County agree that proposed changes involve a procedural matter which is not a mandatory subject of bargaining and does not trigger effects bargaining, no response is required, but the FOP has 21 days to submit comments to the County for consideration. If FOP 35 fails to respond, the County must follow-up in writing to the FOP. The FOP's failure to respond within 14 days of the follow-up waives the FOP's opportunity to submit comments for consideration.

As of October 7, 2010, the County claimed that twelve directives were "at the FOP." Of the twelve, one required no response because FOP 35 and the County agreed that it involved a mandatory subject of bargaining. To date, the County has not asked the FOP to bargain it. Another one of the twelve is a use of force directive. FOP 35 offered on July 21, 2008 and on October 27, 2008, to meet with the County's representatives to discuss it midterm. Some discussions occurred, but further discussions were repeatedly delayed because the County was working on a new draft of the directive. FOP finally received the new draft proposal on February 16, 2011, and six days later, we responded to the County, again offering to meet and discuss the directive with County representatives despite the disagreement over the categorization.[2]

In accordance with the procedures in the collective bargaining agreement, FOP 35 informed the County that it disagrees with the County's categorization of ten of the other directives that the County claimed were "at the FOP."[3] The County categorized two of them as involving the effects of management's exercise of a management right. FOP 35 categorized all ten as involving mandatory subjects of bargaining. To date, the County has not proposed any of them for bargaining or other resolution pursuant to the PLRA.

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[2]The use of force directive which FOP 35 received on February 16, 2011, is the only proposed directive FOP 35 has received from the County since June 16, 2010. Use of force is a fundamental element of officer survival and self-defense and should never be taken lightly.

[3]Two of the proposed directives incorporated agreements between the County and FOP 35 that were contained in the collective bargaining agreement. To avoid confusion and conflict in such cases, FOP 35 has suggested that the County issue the directives as they apply to employees who are not covered by the collective bargaining agreement and refer bargaining unit members to the contract.

The PLRA provides an expedited process for resolving a dispute over the effects on employees of the County's exercise of a management right. The process is triggered by the County notifying the union that it intends to exercise a management right which will have an effect on members of the bargaining unit. If after good faith bargaining, the parties cannot agree, either party may declare an impasse, and the dispute must be submitted to an impasse neutral who must issue his decision within ten days after receiving the parties' final offers. If the effect of the exercise of the management right has "a demonstrated, significant effect on the safety of the public," the County may implement its last offer before engaging in impasse procedure.

The delay in the implementation of directives is due to the County's failure to pursue their implementation after FOP 35 responded to them. If and when the County notifies FOP 35 of its intent to pursue implementation, FOP 35 will continue to fulfill its obligations under the collective bargaining agreement.

Very truly yours,

Martha L. Handman /jmw

Martha L. Handman
Lodge Attorney

enc.

cc: Isiah Leggett
Vernon H. Ricks, Jr.
Richard Wegman
Scott Foster
Daniel Hoffman
Len Simon
M. Cristina Echavarren
Joan Fidler
Susan K. Heltemes

Montgomery County Lodge 35, Inc.

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September 10, 2008

Joseph Adler
Director
Office of Human Resources
Montgomery County Executive Office Building
101 Monroe Street, 7th Floor
Rockville, Maryland 20850

Dear Joe:

On March 20, 2008, in the interest of identifying and promptly resolving outstanding matters, excluding PLP charges and grievances in progress between the union and employer, Fraternal Order of Police, Montgomery County Lodge 35 requested that the employer provide any and all unresolved issues the county believed should be processed or desired to be processed with Lodge 35. This was a good faith request to resolve all outstanding issues. We received your response on April 4, 2008, and have responded to the matters included in that letter.

Again we request from the county any and all outstanding issues and any matter the employer seeks to address which is subject to bargaining, including effects.

We also ask you to identify all, if any, problems or concerns on the part of management regarding bargaining, including effects bargaining, Article 61 issues or any other unresolved matters. If there are any, we would like to identify them, address them and ensure that this process is working. We desire to identify all unresolved issues. In the event there are any issues or problems, it would be helpful if you would provide as much information on them as possible.

Your prompt attention to this matter will be greatly appreciated.

Sincerely,

Marc B. Zifcak

Marc B. Zifcak
President

Montgomery County Lodge 35, Inc.

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September 25, 2009

Joseph Adler
Director
Montgomery County Office of Human Resources
101 Monroe Street, 7th Floor
Rockville, Maryland 20850

Dear Joe:

We have not received a response from you regarding our June 4, 2009 request to identify, and attempt to promptly resolve, outstanding matters, excluding PLP charges and grievances in progress, between the union and employer. We are still awaiting any and all unresolved issues the county believes should be processed, or desires to be processed with Lodge 35, to include any policy and planning issues in the police department the employer wishes to address.

Again, this is a good faith request to resolve all unresolved issues. Your prompt attention to this matter will be greatly appreciated.

Sincerely,

Marc B. Zifcak
President