

**MEMORANDUM**

TO: Management and Fiscal Policy Committee

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Worksession:** Bill 2-10, Personnel - Contracts – Retaliation

Bill 2-10, Personnel - Contracts – Retaliation, sponsored by Council Vice President Ervin, Councilmember Andrews, Councilmember Trachtenberg, Council President Floreen, Councilmember Navarro and Councilmember Elrich, was introduced on January 19. A public hearing was held on February 9.

**Background**

Bill 2-10 would prohibit retaliation against a County employee or an employee of a County contractor or subcontractor for disclosing information about illegal or improper action in County government to a County official or employee. The Bill would protect an employee who has a good faith belief the information disclosed is accurate even if it is not.

The Bill would also permit an appeal to the Merit System Protection Board by a County employee who alleges a retaliatory personnel action in violation of this law. Finally, the Bill would require County contracts and subcontracts to specify that an aggrieved employee, as a third-party beneficiary, may by civil action recover compensatory damages, including interest and a reasonable attorney's fee, against the contractor or subcontractor for retaliation in violation of this law.

**Public Hearing**

There were no speakers at the Council's February 9, 2010 public hearing.

**Issues**

**1. What is the Bill's fiscal and economic impact?**

The Bill should not have a significant fiscal impact on the County. The Department of General Services (DGS) may need to expend additional staff time to publicize and implement the new contract requirements, but the additional time should be reduced over time. DGS and the County Attorney's Office may also have to spend some additional time in contract enforcement actions on an intermittent basis. The Bill would remove the Merit System Protection Board (MSPB) authority to investigate retaliation claims, but this function has not been funded in

recent years. On the positive side, the Bill should increase the likelihood that the County will detect illegal or improper actions that result in wasteful spending of scarce County resources. Finally, it is unlikely that the Bill would increase bid prices or County contractor costs. The Office of Management and Budget concluded that the fiscal impact of the Bill was indeterminate. See ©11-12.

## **2. What are the suggested amendments from the County Attorney's Office?**

The Office of the County Attorney (OCA) Bill review memorandum (©13-15) recommended the following amendments:

- (a) The Bill adds a new §11B-36. However, this section already exists in the Code. The new section should be changed to 11B-35A.
- (b) The Bill adds definitions for "Director" and "Contract" that duplicate existing definitions in §§11B-1(d) and (i) and can be removed from the Bill.
- (c) On line 165, change the "who performed" to "that performs or performed." This change would extend coverage to an employee of a contractor who does not actually perform services under the contract. This change is consistent with the intent of the Bill.
- (d) On line 173, add "by the Employer" after the word "action" and again on line 181 after the word "retaliation." This is clarifying language.
- (e) On line 174, move the phrase "to a County official or employee" to line 173 after the word "disclosing." This is clarifying language.
- (f) On line 183, add "covered" after the word "aggrieved." This is clarifying language.
- (g) Add the following definition for "Employer." "*Employer* means a contractor or subcontractor that, through the use of a covered employee, performs or performed services under a County contract."

**Council staff recommendation:** approve all of the amendments recommended by the OCA.

## **3. Should the Director's authority to cancel, terminate, or suspend a contract be limited to situations where a court has issued a final judgment against the contractor in favor of a covered employee for retaliation in violation of the law?**

DGS Director David Dise, in a memorandum dated February 16 (©16) recommended an amendment that would only permit the Director to cancel, terminate, or suspend a contract for violation of this law based upon a final court judgment in favor of a covered employee for retaliation. See Executive Amendment 1 at ©17. Under the Bill, a covered employee would have a cause of action as a third party beneficiary of the County contract to file a civil action for retaliation against his or her employer. Executive Amendment 1 would eliminate the need for

the County to investigate claims of retaliation by a covered employee in order to cancel, terminate, or suspend the contract. The Amendment would permit the Director to act only after a final court judgment. However, a contract may be completed before a covered employee can achieve a final court judgment for illegal retaliation. DGS does not currently have the resources necessary to investigate retaliation claims from covered employees and prosecute these cases in order to cancel, terminate, or suspend a contract. The Amendment would leave this task to the individual covered employee. DGS already has the general authority under its general conditions to terminate a contract for violation of Federal, State, or County laws. **Council staff recommendation:** approve Executive Amendment 1 at ©17.

#### **4. Should a County employee or a covered employee of a contractor be protected against retaliation for disclosing information about illegal or improper actions to Federal or State officials?**

The Bill would limit protection to a covered employee who discloses information to a County official or employee. The Bill would not protect a County employee or a covered employee from retaliation for disclosing information to a Federal or State official. Other “whistleblower laws” around the nation have taken different approaches to this issue.<sup>1</sup>

Both the Federal Whistleblower Law protecting Federal employees at 5 USC §2302 (b)(8) and the State Whistleblower Law protecting State Executive Branch employees at §5-305 of the State Personnel and Pensions Article<sup>2</sup> are silent as to whom the protected disclosure must be made. However, this statutory omission in both the Federal law and the State law has been interpreted to require a protected disclosure to be made to a higher authority in a position to correct the alleged wrongdoing. See *Hooven-Lewis v. Caldera*, 249 F.3d 259, 276 (4th Cir. 2001); *DNR v. Heller*, 391 Md. 148 (2006).

State whistleblower laws differ on the appropriate recipient of the whistleblower’s report. Some require that the report be made to an external government agency, some require an internal report to a supervisor or senior executive, and some cover a report to either. An external reporting requirement has the advantage of providing a public accounting of private wrongdoing. The disadvantage of an external reporting requirement is that it may discourage reports when employees are most comfortable with reporting to a supervisor or senior executive. An internal reporting requirement gives an employer the opportunity for self-correction without the expense and publicity of a public investigation, but it may discourage reports where the company culture discourages dissent. An internal reporting requirement may also encourage a quick fix at the expense of third parties that may have suffered damages due to the wrongdoing.

##### **A. County employees**

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<sup>1</sup> A recent survey of various Federal and State whistleblower laws can be found in *96 Calif. L. Rev. 1633* (Gerard Sinzduk 2008).

<sup>2</sup> Maryland has a comprehensive whistleblower law protecting employees working in the Executive Branch of State government. Maryland does not have a comprehensive whistleblower law protecting private sector employees. Maryland law does protect certain private sector workers from retaliation for reporting violations of laws governing medical care, occupational health, and fair employment.

Bill 2-10 would protect a County employee who reports illegal or improper actions to a County official or employee. This limitation covers both internal reporting and some types of external reporting. For example, a report to the Inspector General would be external reporting. A report to the employee's supervisor would be covered internal reporting. However, the Bill would not protect a County employee from retaliation for reporting illegal or improper action to a State or Federal official. Adding further protection for County employees would be consistent with the goal of the Bill to encourage detection of illegal or improper County actions. **Council staff recommendation:** amend the Bill to add protection for a County employee who reports illegal or improper action to a State or Federal official as follows:

*Amend lines 51-57 as follows:*

(B) [who discloses] disclosing, to a Federal, State, or County official or employee, information concerning illegal or improper action in [county] County government ~~[[to a County official or employee]]~~ with a reasonable good-faith belief that [such disclosures are true and] the information disclosed is accurate [shall be protected under procedures authorized herein from any retaliatory or coercive personnel action].

*Amend lines 172-175 as follows:*

(b) Policy. A covered employee must not be subjected to a personnel action for disclosing, to a Federal, State, or County official or employee, information involving the solicitation, award, administration, or performance of any contract ~~[[to a County official or employee]]~~ that the employee reasonably believes is:

## **B. Covered employee of a County contractor**

A report of illegal or improper action to a County official or employee by a covered employee of a County contractor is an external report to a government official. The Bill would not protect a covered employee of a contractor from retaliation for making an internal report to a supervisor or executive of the contractor.<sup>3</sup> The County has a strong interest in making sure that a report from a covered employee of a County contractor is disclosed to the County so that the County can investigate and possibly remedy the problem. An internal report to a company executive is unlikely to provide the County with timely notice of the improper conduct. Similarly, a report by a covered employee to a Federal or State official may not be reported to the County in a timely manner. The underlying purpose of providing a covered employee protection from retaliation is to detect improper action. **Council staff recommendation:** do not modify the protection from retaliation in the Bill for a covered employee of a County contractor.

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<sup>3</sup> An at-will employee of a contractor who is fired for a report of improper action that is not protected by County law may still have a cause of action for wrongful discharge under Maryland common law. See *Wholey v. Sears*, 370 Md. 38 (2002).

<u>This packet contains:</u>	<u>Circle #</u>
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Executive Amendment 1	17

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Bill No. 2-10  
Concerning: Personnel, Contracts -  
Retaliation  
Revised: January 13, 2010 Draft No. 5  
Introduced: January 19, 2010  
Expires: July 19, 2011  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Council Vice President Ervin, Councilmember Andrews, Councilmember Trachtenberg,  
Council President Floreen, Councilmember Navarro and Councilmember Elrich

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**AN ACT** to:

- (1) provide an appeal to the Merit System Protection Board by certain employees who allege retaliation for certain actions;
- (2) prohibit retaliation against a County employee or an employee of certain contractors or subcontractors for disclosing certain information; and
- (3) generally amend the law regarding retaliation for disclosure of illegal or improper actions in County government.

By amending

Montgomery County Code  
Chapter 2, Administration.  
Section 2-151.  
Chapter 33, Personnel and Human Resources  
Sections 33-10, 33-13A, and 33-17

By adding

Montgomery County Code  
Chapter 11B, Contracts and Procurement  
Section 11B-36

**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 2-151, 33-10, 33-13A, and 33-17 are amended as follows:**

**2-151. Inspector General**

\* \* \*

(1) *Access to information.*

\* \* \*

(5) An employee of the County government or any instrumentality of the County, and an employee of any contractor or subcontractor with the County or any instrumentality of the County, must not be retaliated against or penalized, or threatened with retaliation or penalty, for providing information to, cooperating with, or in any way assisting the Inspector General in connection with any activity of that Office under this Section.

\* \* \*

**33-10. Disclosure of illegal or improper actions in [county] County government; protection for merit system employees against retaliation or coercion [for disclosing illegal or improper actions in county government; prohibited practices; complaint procedures; investigations; penalties;] appeals.**

(a) *Disclosure of illegal or improper actions.*

(1) Employees should report illegal or improper actions in County government.

(2) Employees should first report illegal or improper actions to the individual responsible for corrective action. That person may be anyone from the employee's immediate supervisor [up] to [and including] the County Executive, or for legislative branch employees, the County Council.

[(3) In unusual circumstances, or if a retaliatory action or coercion

28 has taken place, the employee may file a report directly with  
 29 either the Board or the Ethics Commission. Unless expressly  
 30 authorized by Section 19A-10, the identity of both the  
 31 employee filing a report and the county employee or official  
 32 who is the subject of this report must be kept confidential  
 33 unless waived in writing by each party, respectively. The Board  
 34 or the Ethics Commission must refer the report to the  
 35 government agency, including the Board or the Ethics  
 36 Commission, that is responsible for addressing the unlawful  
 37 conduct raised in the report. That government agency must then  
 38 conduct an inquiry.]

39 (b) *Protection for employees.*

40 (1) A personnel action is an act or omission by a supervisor which  
 41 has a significant adverse impact on the employee, or a change  
 42 in the employee's duties or responsibilities which is inconsistent  
 43 with the employee's grade and salary. A personnel action does  
 44 not include an act or omission by a supervisor that is not subject  
 45 to review by the Merit Systems Protection Board under Section  
 46 33-12.

47 (2) [Any] A merit system employee must not be subjected to a  
 48 personnel action in retaliation for:

49 (A) [who refuses] refusing to obey an instruction involving  
 50 an illegal or improper action; or

51 (B) [who discloses] disclosing information concerning illegal  
 52 or improper action in [county] County government to a  
 53 County official or employee with a reasonable good-faith  
 54 belief that [such disclosures are true and] the information

55                    disclosed is accurate [shall be protected under procedures  
56                    authorized herein from any retaliatory or coercive  
57                    personnel action].

58                    (3) This [provision] subsection does not [extend protection to]  
59                    protect a merit system employee [upon a determination that] if  
60                    the:

61                    (A) [(1) The] employee's actions were frivolous,  
62                    unreasonable, and without foundation, even though not  
63                    brought in bad faith;

64                    (B) [(2) The] employee, without good cause, [failed to] did  
65                    not comply with [administrative] applicable regulations  
66                    concerning the making of such disclosures; or

67                    (C) [(3) The] employee was the subject of an otherwise  
68                    proper personnel [actions] action that would have been  
69                    taken regardless of the employee's disclosure of  
70                    information concerning illegal or improper action in  
71                    County government [taken for disciplinary reasons and  
72                    not for retaliatory purposes prohibited by this section].

73                    [A "personnel action" shall mean any administrative act or omission which  
74                    has a significant adverse impact upon the employee, or a change in the  
75                    employee's duties or responsibilities inconsistent with the employee's grade  
76                    and salary.]

77                    (c) [*Prohibited practices.* It shall be unlawful for any person to coerce  
78                    any merit system employee into taking an illegal or improper action or  
79                    take any retaliatory action against any merit system employee because  
80                    of that employee's disclosure of information relating to illegal and  
81                    improper action in county government.] Appeal. A merit system

82 employee who alleges that he or she was subjected to a retaliatory  
 83 personnel action in violation of subsection (b) may appeal to the Merit  
 84 System Protection Board under Section 33-12.

85 (d) [*Filing of complaints.* If an employee believes a retaliatory action or  
 86 coercion has taken place or been attempted because of his refusal to  
 87 obey an illegal or improper instruction or disclosure of same, the  
 88 employee may file a written complaint with the board. The complaint  
 89 must be filed within sixty (60) days of the alleged violation or action  
 90 and must contain:]

- 91 [(1) The employee's name and signature;  
 92 (2) The employee's home address and telephone number;  
 93 (3) The name of the individual who allegedly took the action;  
 94 (4) A concise description of the alleged coercion or retaliatory  
 95 action and reasons for believing it to be so. The identity of all  
 96 parties shall be kept confidential unless and until there is a  
 97 finding of probable cause or all parties waive such  
 98 confidentiality in writing.

99 The board may initiate an inquiry of any person suspected of taking  
 100 retaliatory or coercive action, with or without a written complaint  
 101 from an employee.] Decision. The Board must issue a written  
 102 decision, including necessary findings of fact and conclusions of law,  
 103 and may order any remedy authorized by Section 33-14.

104 [(e) *Investigations.* All complaints charging a violation of subsection (c)  
 105 shall be promptly investigated by the board's staff, who shall  
 106 determine whether probable cause exists to believe a violation of that  
 107 subsection has occurred. Should the board's staff determine that the  
 108 subject matter of the complaint involved allegations more properly the

109 subject of an employee grievance or complaint to be filed under the  
110 provisions of the personnel regulations or other laws or regulations,  
111 the complainant shall be so advised and the complaint dismissed; and  
112 the period of limitations for the bringing of such other action shall be  
113 deemed to run from the date of the dismissal. Should the board's staff  
114 determine that no probable cause exists, that determination shall be  
115 final and the complaint dismissed unless board reconsideration is  
116 requested. Should the board's staff determine that probable cause does  
117 exist, the staff shall prepare and cause to be served on the person  
118 believed to have violated subsection (c) a statement of charges fairly  
119 describing the alleged violation and the sanctions sought to be  
120 imposed for such violation. The charges shall then be certified to the  
121 board to schedule and conduct hearings in accordance with the  
122 provisions of this chapter. The case in support of charges shall be  
123 presented by the board's staff.]

124 [(f) *Penalties.* If a county employee is found guilty of coercion,  
125 harassment or retaliation, the merit system protection board may order  
126 the imposition of one (1) or more of the following penalties:

- 127 (1) Any disciplinary action provided for in the personnel  
128 regulations up to and including dismissal;
- 129 (2) A monetary fine in any amount up to two thousand dollars  
130 (\$2,000.00);
- 131 (3) Reimbursement of expenses incurred by all parties;
- 132 (4) Other penalties as may be deemed appropriate and consistent  
133 with the charter and laws of Montgomery County, Maryland.]

134 [(g) *Appeals.* An employee subject to the foregoing penalties based on the  
135 merit system protection board's findings and decision may appeal to a

136 court of competent jurisdiction.]

137 **33-13A. Audits, investigations and inquiries.**

138 \* \* \*

139 There is hereby created the position of special personnel investigator. The  
140 special personnel investigator shall exercise the following powers and perform the  
141 following duties and functions:

142 (a) Investigate any matter referred to him by the merit system protection  
143 board[, including matters arising under section 33-10, in which case  
144 he shall be deemed board staff as provided in section 33-10(e)].

145 \* \* \*

146 **33-17. Prohibited personnel practices; criminal penalty.**

147 \* \* \*

148 (g) A person must not threaten, promise, or take any action against a  
149 County employee to:

150 (1) induce or coerce an employee to take an illegal or improper  
151 action; or

152 (2) retaliate against an employee for disclosing information to a  
153 County official or employee concerning an illegal or improper  
154 action in County government that the employee has a good faith  
155 belief is accurate.

156 \* \* \*

157 **Sec. 2. Section 11B-36 is added as follows:**

158 **11B-36. Disclosure of illegal or improper actions.**

159 (a) Definitions. In this Section, the following words have the meaning

160 indicated:

161 Contract means an agreement to which the County is a party for the  
 162 procurement or disposal of goods, services, or construction, including  
 163 any contract modification.

164 Covered employee means an employee of a contractor or subcontractor  
 165 who performed services under a contract subject to this Section.

166 Director means the Director of the Department of General Services or  
 167 the Director's designee.

168 Personnel action means an act or omission by the employer that has a  
 169 significant adverse impact on the employee, or a change in the  
 170 employee's duties or responsibilities which is inconsistent with the  
 171 employee's position and salary.

172 (b) Policy. A covered employee must not be subjected to a personnel  
 173 action for disclosing information involving the solicitation, award,  
 174 administration, or performance of any contract to a County official or  
 175 employee that the employee reasonably believes is:

176 (1) an abuse of authority, gross mismanagement, or gross waste of  
 177 money;

178 (2) a substantial and specific danger to public health or safety; or

179 (3) a violation of law.

180 (c) Each contract must:

181 (1) prohibit retaliation against a covered employee who discloses any  
 182 illegal or improper action described in subsection (b); and

183 (2) specify that an aggrieved employee, as a third-party beneficiary,  
 184 may by civil action recover compensatory damages, including  
 185 interest and a reasonable attorney's fee, against the employer for  
 186 retaliation in violation of this Section.

187 (d) The Director may cancel, terminate, or suspend a contract, in whole or  
188 in part, and declare a contractor or subcontractor ineligible for further  
189 County contracts for non-compliance with this Section. The Director  
190 may impose other appropriate sanctions and remedies as provided in  
191 applicable regulations or by contract. Each Contractor must bind its  
192 subcontractors contractually to comply with this Section.

193 (e) This Section does not prohibit a personnel action against a covered  
194 employee that would have been taken regardless of a disclosure of  
195 information described in subsection (b).

196 *Approved:*

197

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Nancy Floreen, President, County Council

Date

198 *Approved:*

199

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Isiah Leggett, County Executive

Date

200 *This is a correct copy of Council action.*

201

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Linda M. Lauer, Clerk of the Council

Date

## LEGISLATIVE REQUEST REPORT

Bill 2-10, Personnel, Contracts - Retaliation

**DESCRIPTION:** Bill 2-10 would prohibit retaliation against a County employee or an employee of a County contractor or subcontractor for disclosing information to a County official or employee concerning an illegal or improper action in County government that the employee has a good faith belief is accurate. The Bill would also provide a contractual remedy for an employee of a contractor or subcontractor alleging retaliation and permit an appeal to the Merit System Protection Board by a County employee alleging retaliation in violation of the law.

**PROBLEM:** Current County law does not prohibit retaliation against an employee of a County contractor or subcontractor for disclosing information to a County official or employee other than the Office of Legislative Oversight. Although current law prohibits retaliation against a County employee, it does not provide a clear remedy for a County employee or an employee of a contractor or subcontractor who alleges such retaliation.

**GOALS AND OBJECTIVES:** Increase the protection of County employees and employees of County contractors and subcontractors for disclosing information about County waste and fraud.

**COORDINATION:** Inspector General, Merit System Protection Board, Office of Human Resources, Department of General Services

**FISCAL IMPACT:** To be requested.

**ECONOMIC IMPACT:** To be requested.

**EVALUATION:** To be requested.

**EXPERIENCE ELSEWHERE:** Maryland State law and Federal law protect whistleblowers.

**SOURCE OF INFORMATION:** Robert H. Drummer, Senior Legislative Attorney

**APPLICATION WITHIN MUNICIPALITIES:** Not applicable.

**PENALTIES:** Not applicable.



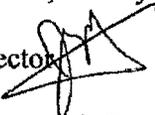
OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett  
County Executive

Joseph F. Beach  
Director

MEMORANDUM

February 25, 2010

TO: Nancy Floreen, President, County Council  
FROM: Joseph F. Beach, Director   
SUBJECT: Council Bill 2-10, Personnel, Contracts - Retaliation

199 FEB 25 11:10:55

FROM: Joseph F. Beach, Director  
TO: Nancy Floreen, President, County Council

The purpose of this memorandum is to transmit a fiscal and economic impact statement to the Council on the subject legislation.

**LEGISLATION SUMMARY**

The purpose of this legislation is to provide an appeal to the Merit System Protection Board by certain employees who allege retaliation for providing information to, cooperating with, or in any way assisting the Inspector General in connection with any activity of that Office. In addition this legislation prohibits retaliation against a County employee or an employee of certain contractors or subcontractors for disclosing information to a County official or employee concerning an illegal or improper action in County government that the employee has a good faith belief is accurate.

**FISCAL AND ECONOMIC SUMMARY**

The fiscal impact of this legislation on Montgomery County Government is indeterminate at this time. To the extent the law serves as a deterrent, the impact would be minimal; to the extent the law provides an avenue for action, there would be a more significant impact. Greater impact would result from increased administrative processes to address retaliation claims, which could include the need to hire additional staff if the Office of County Attorney could not absorb the additional workload.

The County may cancel or suspend a contract under the legislation. This could have an economic impact on an individual contractor and its employees. That impact is not expected to be significant for the County as a whole, since it is assumed another contractor could perform the work.

Office of the Director

Nancy Floreen, President, County Council  
February 25, 2010  
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The following contributed to and concurred with this analysis: Lori O'Brien, Office of Management and Budget; Karen Federman-Henry, Office of the County Attorney; Michael Coveyou, Department of Finance; and David Platt, Department of Finance.

JFB:lob

- c: Kathleen Boucher, Assistant Chief Administrative Officer
- Dee Gonzalez, Offices of the County Executive
- Marc P. Hansen, Acting County Attorney
- Karen Federman-Henry, Office of the County Attorney
- Michael Coveyou, Department of Finance
- David Platt, Department of Finance
- John Cuff, Office of Management and Budget



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett  
County Executive

Marc P. Hansen  
Acting County Attorney

MEMORANDUM

TO: Kathleen Boucher  
Assistant Chief Administrative Officer

VIA: Marc P. Hansen *Marc P. Hansen*  
Acting County Attorney

FROM: Bernadette Lamson *BLL*  
Associate County Attorney

Richard Melnick *RM*  
Associate County Attorney

DATE: February 3, 2010

RE: Bill 2-10

2010 FEB 03 AM 10:32

You have requested the Office of the County Attorney ("OCA") to provide comments concerning the legality of CB 2-10 (the "Bill"). Although the Bill amends the personnel law and the procurement law, the Bill complies with Montgomery County Code, §2-82(a)(i) because it concerns one subject – whistle blowing. The Bill protects the County's financial well being because it permits individuals working directly for the County or a County contractor to report waste, abuse or wrong doing without fear of retaliation or reprisal. OCA finds the Bill legally sufficient and in proper form.

OCA provides the following comments for each amendment.

**Chapter 33, Personnel**

Currently, § 33-10(d) of the County Code permits a County employee to file a "whistle blower" complaint with the MSPB or the Ethics Commission if the employee is retaliated against for disclosing an illegal or improper act in County government. Section 33-10(e) requires the MSPB to investigate the employee's complaint and determine whether "probable cause exists" to support the employee's claim.

Kathleen Boucher  
Assistant Chief Administrative Officer  
February 4, 2010  
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As written, CB 2-10 removes the MSPB's and Ethics Commission's authority to investigate "whistle blower" complaints filed by employees. Instead, the employee could report fraud, waste or abuse to the Inspector General ("IG") under §2-151(1)(4). If a County employee files a report with the IG or participates in an IG investigation, the Bill protects County employees from retaliatory actions by allowing them to appeal said actions to the MSPB.

### **Chapter 11B, Procurement**

The portions of the Bill related to Chapter 11B prohibit a County contractor or subcontractor from retaliating against, or penalizing, its employee for providing a County official or employee information regarding a contract that the employee "reasonably believes" involves: abuse or gross mismanagement, a substantial and specific public health or safety danger, or a violation of law.

As a preliminary matter, the Bill, at Section 2, purports to add to the Procurement law, in the County Code, a Section "11B-36. Disclosure of illegal or improper actions." However, §11B-36 already exists as "Protests of solicitation and awards." Accordingly, this reference in the Bill would need to be modified in any legislation enacted. The Bill also includes definitions for both "Contract" and "Director," which are redundant to the definitions that already exist in the Procurement law at §§11B-1 (d) & (i), respectively, and should be deleted.

Additionally, a definition of the term "Employer" would be helpful, to help identify to the reader the entity that must not retaliate against a "covered employee" (i.e. the County's contractor or subcontractor), rather than the County or another entity. As we discussed, today, please note the following suggested modifications to help clarify this and other items in the Bill:

- a. Line 165, under the definition of "Covered employee," after the words "contractor or subcontractor," change the words from "who performed" to "*that performs or performed*" before the word "services," to allow for the present tense, and to be more clear that the reference to performing "services under a contract subject to this section" relates to the contractor, not the employee, if that is the intent.
- b. Line 173, after the word "action," and line 181, after the word "retaliation," add "*by the Employer.*"
- c. Line 173, after the words "for disclosing," move, insert, and add parenthetical commas to the phrase that presently begins at Line 174 stating "*, to a County official or employee,*".

Kathleen Boucher  
Assistant Chief Administrative Officer  
February 4, 2010  
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- d. Line 183, after the word “aggrieved,” add the word “*covered*” before the word “employee,” to be consistent with the defined term
- e. Add, alphabetically, a definition for “*Employer*,” that states “*for purposes of this Section only, means a contractor or subcontractor that, through the use of a covered employee, performs or performed services under a County contract.*”

In the event of non-compliance with the Bill, by a contractor or subcontractor, the Director of General Services, or designee, may: cancel, terminate, or suspend a contract; declare a non-compliant contractor or subcontractor ineligible for future contracts; or, impose other sanctions provided under the contract or regulation. Each contractor must contractually bind its subcontractors to comply with this law. And, each County contract must specify that an aggrieved employee of a County contractor or subcontractor is a third-party beneficiary, who may bring a civil action for retaliation against the employer.

#### **Montgomery County Code, §2-151, Inspector General**

Section 2-151(1)(4) of the County Code directs that fraud, waste and abuse should be reported to the IG. The bill protects County employees and County contractor or subcontractor employees from retaliation or reprisal for providing information to or cooperating with the IG.

If you have any concerns or questions concerning this memorandum please call either Bernadette Lamson (x6742) or Richard Melnick (x6738). Thank you.



DEPARTMENT OF GENERAL SERVICES

Isiah Leggett  
*County Executive*

David E. Dise  
*Director*

MEMORANDUM

TO: Kathleen Boucher  
Assistant Chief Administrative Officer

FROM: David E. Dise, Director <sup>2</sup>   
Department of General Services

DATE: February 16, 2010

SUBJECT: Bill 2-10

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You have requested that the Department of General Services (DGS) propose clarification language for CB 2-10 (the "Bill").

Current law and regulations provide the DGS Director with authority to take action, including contract termination or suspension/debarment of a contractor in the event of contractor waste, fraud, abuse, or other wrongdoings. The Bill would provide the Director with additional authority to act in the event of contractor or subcontractor retaliation against its employee for disclosing illegal or improper actions.

To clarify that this is in addition to current authority, I am proposing the addition of the words, "In addition to other authority of the Director under applicable law," following (d) at the beginning of line 187.

I am also proposing to add language to clarify when the Director may take action against a contractor or subcontractor. Specifically, in line 189, after "County contracts," the proposed change would add, "if a court determines that a contractor or subcontractor retaliates or has retaliated against an aggrieved covered employee in violation of this section, as determined by a court by section (c)(2) above,". While the County may elect to undertake its own investigation(s) as it determines necessary, this addition ensures a definitive finding of retaliation by a court.

For your convenience, accompanying this memorandum is the bill text with the recommended amendments referenced above. If you have any concerns or questions concerning this memorandum please call either Mary Ellen Davis-Martin (7-8151) or me directly (7-6191).

## Executive's Amendment 1

*Amend lines 187-192 as follows:*

- (d) In addition to other authority granted by law, [[The]] the Director may cancel, terminate, or suspend a contract, in whole or in part, and declare a contractor or subcontractor ineligible for further County contracts based upon a final court judgment in favor of a covered employee for retaliation in violation of [[non-compliance with]] this Section. The Director may impose other appropriate sanctions and remedies as provided in applicable regulations or by contract. Each Contractor must bind its subcontractors contractually to comply with this Section.