

**In the Matter of Interest Arbitration  
Between :**

**Montgomery County Maryland  
(Employer)**

**And**

**FOP Lodge 35  
(Union)**

**APPEARANCES:**

For the Employer: William Snoddy, Esq.  
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**Introduction**

The Montgomery County Police Labor Relations Act, Chapter 33, Section 33-81 of the Montgomery County Code (herein after referred to as PLRA) provides that when an impasse has been reached in negotiations, the parties are to submit their final offer, and an Impasse Neutral is to select, as a whole, the “most reasonable” of the two Final Offers.

The parties reached impasse on January 20, 2011, and based on a prior arrangement, the undersigned Impasse Neutral conducted a day of mediation and two days of arbitration during the week of January 23, 2011. Following the County statute, the parties presented testimony, evidence, exhibits and argument. Counsel for each party presented closing arguments in place of briefs on January 28. A transcript made at the hearing was received by the undersigned on February 9, 2011.

A review of Herbert Fishgold’s Opinion and Award (FOP Exh. 4) involving a similar process last year with the same parties shows a clear parallel to this Impasse Neutral’s experience in the instant case. A portion of his thinking is quoted here:

“Much of the hearing was taken up with economic presentations by both sides with regard to the FY 2011 budget deficit, the long range CIP projection, the breakdown of cost, programs, services, and purchases under the tax-supported Operations Budget which funds compensation, and Capital Budget for facilities , which is largely funded by borrowing, with each party seeking to support their respective positions, with FOP pointing to “priorities”, and County pointing to balancing public interest with a deficit budget.

“While these presentations obviously are the type of economic data useful in the context of complete collective bargaining or multi-year considerations of proposed general wage increases, they have a much more limited application in this narrow reopener ---.”

The impasse procedure of the PLRA, amended last year, places a complex series of requirements for the Impasse Neutral to follow in selecting the more reasonable Final Offer.

The amended copy of PLRA presented to the Impasse Neutral was extremely edited with single and double underlining, and single and double parentheses, which denoted language added at various times and the language deleted. Thus making it very difficult to read intelligently. To over come that difficulty, the text is set out below in 12 sequential steps without harming the intent of PLRA:

The Impasse Neutral must first evaluate and give the highest priority to the ability of the County to pay for additional short-term and long-term expenditures by considering:

- 1) the limits on the County’s ability to raise taxes under State law and the County Charter;
- 2) the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a Final Offer; and
- 3) the County’s ability to continue to provide all public service.

After evaluating the County’s ability to pay based on the 1, 2 and 3 above, the impasse neutral may only consider the following in making a decision:

- 4) the interest and welfare of County taxpayers and service recipients;
- 5) past collective bargaining contracts between the parties, including the bargaining history that lead to each contract;
- 6) a comparison of wages, hours, benefits, and conditions of employment of similar employees of other public employers in the Washington Metropolitan Area and in Maryland;
- 7) a comparison of wages, hours, benefits and conditions of employment of other Montgomery County employees;
- 8) wages, benefits, hours and other working conditions of similar employees of private employers in Montgomery County.

The Impasse Neutral must:

- 9) not compromise or alter the final offer that he or she selects;
- 10) select an offer based on the contents of that offer;
- 11) not consider or receive any evidence or argument concerning the history of collective bargaining in this immediate dispute, including offers of settlement not contained in the offers submitted to the impasse neutral;
- 12) consider all previously agreed on items integrated with the specific dispute items to determine the single most reasonable offer.

The 12 items listed above are the PLRA language in the sequence as it appears in the PLRA. The numbering will facilitate easy referencing.

### **The Issue**

The parties have placed before the Impasse Neutral a single issue, which is described as Cash Compensation for police officers covered by the FOP collective bargaining agreement, pursuant to the limited re-opener provision of the MOA that the parties mutually agreed upon in June 2010.

### **The Parties' Final Offers**

The parties' Final Offers are provided below exactly as submitted, including strike-outs and emphasis bolding.

#### **County Final Offer**

##### Article 5 Tech Pay

#### Section C. Multilingual Pay Differential

3. Compensation. Compensation is determined by the officer's certified language level. Compensation is paid for all hours actually worked during a pay period. Officers certified at the basic skill level will receive one dollar per hour for all hours actually worked. Officers certified at the advanced skill level will receive two dollars per hour for all hours actually worked.

Certified Officers will indicate on their time sheets the multilingual skill code ML1 for Basic Skill certification, and ML2 for Advanced Skill certification.

4. Overtime. Certified officers will be paid overtime on the multilingual differential only for use of the skill during hours subject to overtime pay, ie. in excess of the regular workday or workweek.

5. Transfer. It is recognized that once an employee is designated in a skill level, he/she may be transferred to an assignment where the skill is needed.

**6. For the duration of this agreement, no new officers will be tested for entrance into the multilingual program. In the event that a bargaining unit member leaves the multilingual program during the term of this agreement, the**

**Employer, based upon operational need, may elect to allow a new bargaining unit member into the program to fill the vacant skill set.**

#### Article 28 Service Increments

Section H. Longevity. Effective July 1, 1999, a longevity step will be added to the pay plan at the beginning of year 21 (after 20 years of completed service) equal to a three and one-half percent increase. **Effective July 1, 2011, there will be no new movement to the longevity step of the duration of this agreement.**

**Add as new Section I – Effective July 1, 2011, service increments will be suspended for the duration of this agreement for all qualified bargaining unit members.**

#### Article 31 Reopener

##### Section F. Reopener Matters

Second Year. Reopen for bargaining in the first year of the agreement for 2<sup>nd</sup> year of the contract on or before November 1, 2010 with timetable and impasse procedures set forth in PLRA, Section 33-81 on the following subjects:

1. Cash Compensation for FY 12
2. Whether a third year with a reopener on cash compensation will be added.

**The County proposes not to extend the current agreement for a third year. This effectively ends the current agreement on June 30, 2012 as noted in the County proposal for contract duration in Article 47.**

#### Article 36 Wages

Section A, Wages. Effective July 1, 2007, the salary schedule shall be increased by adding \$3,151 at Step 0, year 1 with increments and promotions for all other steps and pay grades calculated from the new Step 0, Year 1 basis. Increments and longevity shall continue to be calculated as required by Article 28. The percentage increases upon promotion shall continue (up to the maximum for each rank) to be: 5% between PO I and PO II; 5% between PO II and PO III; 5% between PO III and MPO; 10% between MPO and Sergeant; and, subject to Section D, infra, 5% between POC and POI. (Appendix T)

~~Effective the first full pay period following July 1, 2008, each unit member shall receive a wage increase of four (4) percent. Effective the first full pay period following July 1, 2009, each unit member shall receive a wage increase of four and one quarter (4.25) percent.~~  
**Effective the first full pay period following July 1, 2011, each unit member shall receive a wage reduction of five and one half (5.5) percent. Any previously postponed GWA will not be paid in FY12 or any future fiscal year.**

#### Article 47 Duration of Contract

This agreement shall become effective on July 1, 2010 and terminate on June 30, 2012 ~~unless extended to June 30, 2013 pursuant to Article 31 Reopener.~~

## **FOP Final Offer**

### **Article 5 Tech Pay**

Section C. Multilingual Pay Differential.

**Add a new sub-section:**

**6. For FY12, at the County's option, no new officers will be tested for entry in to the Multilingual program.**

### **Article 28 Service Increments**

**Add a new section to Article 28:**

**Section I. FY12 Increment and Longevity Step Increases. For FY 12 only, qualified unit members shall continue to defer one (1) 3.5% step. Qualified unit members shall receive one (1) 3.5% step on their service increment date. Increment and Longevity steps will not be paid if not funded by the County Council.**

### **Article 31 Reopener**

Section F. Reopener Matters.

Second Year. Reopen for bargaining in the first year of the agreement 2<sup>nd</sup> year of the contract on or before November 1, 2010 with timetable and impasse procedures set forth in PLRA, Section 33-81 on the following subjects:

1. Cash Compensation for FY 12
2. Whether a third year with a reopener on cash compensation will be added.

~~Third Year. Reopen for bargaining in the second year of the agreement for 3<sup>rd</sup> year of the contract on or before November 1, 2011 with timetable and impasse procedures set forth in PLRA, Section 33-81 on the subject of Cash Compensation for FY 13.~~

~~If the parties have not reached agreement by January 20 2011, an impasse shall be deemed to exist, and the impasse procedure provided in PLRA Section 33-81 shall be implemented.~~

### **Article 36 Wages**

Section A. Wages. Effective July 1, 2007, the salary schedule shall be increased by adding \$3,151 at Step 0, Year 1 with increments and promotions for all other steps and pay grades calculated from the new Step 0, Year 1 basis. Increments and longevity shall continue to be calculated as required by Article 28. The percentage increase upon promotion shall continue(up to the maximum for each rank) to be: 5% between PO1 and PO11; 5% PO11

and PO111; 5% between PO111 and MPO; 10% between MPO and Sergeant; and, subject to Section D, infra, 5% between POC and PO1. The four and one quarter (4.25) percent wage increase scheduled to take effect in the first full pay period following July 1, 2009 shall be postponed, and shall not be effective during fiscal years 2010, 2011 **and 2012**.

### **Article 47 Duration of Contract**

This agreement shall become effective on July 1, 2010 and terminate on June 30, 2012, ~~unless extended to June 30, 2013 pursuant to Article 31 Reopener.~~

Although not part of this Final Offer, FOP Lodge 35 offers the Employer the following:

### **Article 36 Wages**

#### Section F. Lateral Entry

3. Notwithstanding the provisions of Section F, for employees hired during Fiscal Years 2011 and 2012, the County at its option may suspend in Fiscal Years 2011 and 2012 only, the requirement that within-grade advancement will be based on one additional 3.5 percent step for each year of qualifying experience.

### **Discussion and Evaluation of Parties Positions**

As cited above, the Impasse Neutral must first evaluate and give the highest priority to the County's ability to pay for additional short and long term expenditures by considering three topics. The parties did not agree on which short and long term expenditures the Impasse Neutral must consider in making a decision. The FOP believes that only expenditures related to the parties' Final Offers are to be considered. The County believes that the Impasse Neutral must consider all expenses of the County.

The PLRA language is not clear on which interpretation is correct. However, of the three topics to consider in assessing expenditures (ability to raise taxes, burden on tax payers, and ability to continue public services) none mentions all County expenditures. One topic (burden on taxpayers) refers to "revenues needed to fund a final offer". Since there is no reference to all County expenditures, this Impasse Neutral will focus only on the expenditures caused by Final Offers.

The FOP suggested that if the Impasse Neutral concludes that only last offer expenditures need be taken into account, the Impasse Neutral might move beyond these first three requirements of the PLRA, because the FOP Final Offer involves no cost increase. In testimony and exhibits, the County reported on their effort to cost-out both final offers. They found that the County Final Offer had a negative cost, or savings of \$6,729,690, and the FOP Final Offer cost \$1,438,560, and with an annualized cost of \$2,124, 430.

### **County Ability to Pay Additional Costs (Items 1, 2, 3)**

The Impasse Neutral must first evaluate and give the highest priority to the ability of the County to pay for additional short-term and long-term expenditures by considering:

1. the limits on the County's ability to raise taxes under State law and the County Charter;
2. the added burden on County taxpayers, if any, resulting from increases in revenues needed to fund a final offer; and
3. the County's ability to continue to provide all public service.

The County's first witness, David Platt, Chief of Commerce in the Department of Finance testified that the County's ability to raise real property tax is limited to the cost of living in the previous year. Since the 2010 the cost of living was 1.70%, the County revenue from real property tax may not exceed 1.70%. The cost of living in 2009 was 0.23%, and in 2008 it was 4.52%.

In FOP cross examination, the witness agreed that the outlook for inflation is positive and that it will impact real property tax revenue positively. Also on cross, the witness admitted the stock market is on the rise, another positive factor.

The FOP argued that Montgomery County's economic data picture is better than the national data presented in County Exhibit 1. For example County unemployment at 5.5% is just over half National unemployment rate. Therefore, the County rate could almost be considered full employment.

Also based on data in County Exhibit 1, the FOP pointed out that County estimates of income taxes and real property taxes show an increase in tax income of \$122 million in 2012 over 2011 or a 3.3% increase. These numbers are a clear sign of the beginning of a recovery from recession.

The County pointed out that the initial estimates the County made on 2011 and 2012 tax income were made when the 2010 budget was approved. Then nine months later in December 2010, new estimate were made for 2011 and 2012. The December 2010 estimates lowered the expected tax income by \$85 million for 2011, and \$73.8 million for 2012.

Therefore, the new tax income estimate for those two years (2011 and 2012) was lowered by nearly \$160. million. These new, greatly lower, tax income estimates, following a nine month period during which signs were pointing to economic recovery, seem inconsistent with County data offered in Co. Exh. No. 1. at p. 13. In an Economic Indicator Dashboard on page 13, the County presents eight indicators with four indicating upward movement, three indicators holding steady, and only one moving down.

The County explanation that "draw downs" justify the December 2010 new lower tax income estimates is unconvincing.

The next County witness, Joseph Beach, was the Director of the Office of Management and Budget. He explained that a budget gap of 300 million dollars presented an over whelming

challenge to the County, its citizens, and services. The budget gap is the difference between total projected resources and the total projected uses.

FOP argued that the budget gap is exaggerated by the County confusing wants and needs, and its failure to set priorities based on real needs. Some building programs are ill advised in the face of budget gaps. Money should be shifted to needs, while wants should be deferred. The counter to that was the operating budget is “not a list of what we would like to do or a wish list. It’s what we feel by law or a policy we’re obligated to do as well.”

The witness explained that the capital budget is not available to supplement the operating budget, since expenditures from the former can only be used to create assets such as buildings and other real property.

In cross examination, the FOP elicited the confirmation that Operating Budget and the Capital Budget, while separate, have movement of money between them. They are not wholly discrete, they interact and affect one another. The example discussed was 73.4 million dollars taken from the Operating Budget and placed in the Capital Budget for capital expenditures, on debt service for example.

Also in cross examination, the FOP elicited the fact that new revenues in 2012 are anticipated to be 5.13% higher than they were in 2008, a significant increase by next year compared with the year the recession started.

The witness testified that the FOP assumption that the County Government can control the school board in terms of teacher wages and other specifics is simply wrong. State law limits County Government influence with concepts such “maintenance of effort.” The Government can seek waivers from the State Board of Education to save some costs, but that path is never assured.

When the County does not fund the MCPS at the “maintenance of effort” level, the State will penalize the County by withholding funds that would otherwise be provided to the County. To avoid that the County can seek a waiver from the State and avoid the penalty. While getting a waiver is not a sure thing, it can provides significant savings to the County. It could be as much as 100 million dollars. The County plans to request a waiver for 2012 once they fail to meet the “maintenance of effort.” If the waiver is granted for 2012, the County would not need to spend \$82 million on “maintenance of effort.”

The burden on tax payers is already very heavy and the property tax constitutes 38% of the County’s tax revenue. There is a legal limit on tax increases, as well as a practical reluctance to raising the property tax rate under present circumstances, in light of tight family and business budgets, which add to taxpayers stress.

The level of State aid to local government is questionable given the 1.5 billion dollar State shortfall anticipated. The budget problem the County faces is not a cyclical problem; it is a structural budget problem, which requires bringing down long term continuing cost increases, such as labor and staffing costs. So wage and benefit reductions are part of the County’s strategy to get the budget under control. The problem is that over the past ten years labor costs have gotten excessive and must be reduced. While labor cost are the

primary problem because they constitute 80% of the operating budget, other cost such as debt service also must be brought under control.

The County has done and will do other things to bring down spending, none of which is easy. Hiring freeze of past years, and wage freezes, furloughs, shortened hours in libraries and recreation centers, cut back on maintenance for facilities, roads and transit have been instituted. And there are more to come.

The FOP believes they have done their part to help the County by repeatedly deferring negotiated pay increases.

Reductions made in 2011 will not be restored, they are the new base, which will be cut farther in 2012. Uncontrollable costs are another problem that makes the County's job of balancing the budget that much harder. For example, K-12 and community college enrollment increases, energy/fuel costs and State shifting costs to local government.

On the latter point of the State shifting costs to local government, the FOP pointed out that no such idea was in the Governor's budget

Increasing real property tax would requires a unanimous vote of the County Council, which seems very unlikely.

The FOP raised questions about the reserve fund in which the County was placing 106.8 million dollars. The witness explained that the County was following its reserve policy, which is to cover costs that are not provided for in other sections of the budget. There are serious risks in not having sufficient reserves set aside. A strong reserve is a good management practice.

The third County Witness, Alexander Espinoza, from the office of management and budget, is the person who testified on the costing of the two Final Offers, discussed above. In cross examining the witness's costing of the FOP Final Offer, the FOP attempted to establish that pay increases provided in the labor agreement, which were deferred by the FOP, and therefore not paid to police officers will be a savings for the County. The witness answered that it would be a cost to the County, but suggesting it wasn't a saving. Cross examination focused on whether lower costs were reflected in the costing process by the fact that retiring police officers are replaced by new officers who are paid lower salaries than the retiree they replaced. A series of witness responses were inconclusive.

The fifth witness for the FOP, Amy McCarthy, is a private economist. During her testimony, she used FOP Exhibit 3 to illustrate her testimony. The chart on page 19 shows the County projection of huge budget gaps for the years 2007 through 2011. Then as each budget years ends, the County achieves a balanced budget. She testified that the County uses these exaggerated budget gap projections to suggest that a particular year will end in a huge debt, but it never does. Her chart suggests that 2011 and 2012 are likely to end the same way. The County has year after year managed to convert what appears to be a huge budget gap into a balanced budget. Repeatedly, the County has exaggerated future expenditures to create the impression of a huge budget gap. This year, they are using the exaggerated budget gap to cut six million dollars from police officers pay.

The chart on page 16 shows various tax rates of all the counties in Maryland. Montgomery County's property rate is substantially below the other jurisdictions, 25% below the average rate. This is caused by the cap on the County's tax rate. The chart also shows that the County's utilities tax and recordation tax are below other jurisdictions' tax rates.

### **Observations on the County's Ability to Pay (Items 1,2, 3)**

Is the huge projected budget gap based on too little tax income or too large anticipated expenditures? The cap on taxes is real, but the size of anticipated expenditures is likely to be smaller, based on FOP exhibit 3.

The County is relatively better off economically than the national economy.

FOP has highlighted some sources of available funds for police compensation. For example a waiver of the maintenance of effort in 2012, raising the utility and recordation taxes.

The County has already made a number of service reductions, which probably has made taxpaying citizens unhappy. But more cuts may be necessary. The County's AAA Bond rating shows the County numbers are sound.

### **Wage Comparisons (Items 6, 7, 8)**

The County's fourth witness, Michael Nodol, is a consultant on finance and management for government organizations. The witness conducted a 79 page study on the bargaining unit, area police compensation, wage trends, economic downturn, recruiting and retention, and the County Final Offer.

FOP cross examination focus only on recruiting and retention. Nothing else in the report was challenged. A brief summary of some key findings:

- Police compensation is among the highest in the region.
- County ranks relatively lower in the region, near mid point on per capita income, median family income, employment level, job creating in past 3 years, owner housing cost, recent home sale price.
- Big wage gains since 2007, move County from 5<sup>th</sup> place to 1<sup>st</sup>.
- More than 3% of local job base eroded.
- 5.5% wage reduction needed in FY 2012 to return to a new normal.
- With wage reduction police will still rank number 2 in region.
- Wage reduction will reduce the need for layoffs and service cuts.

### **Observations on Wage Comparisons:**

Compared with other nearby jurisdictions, the County police enjoys high compensation, while the community they serve has lost some of its prosperous status.

## **Comparison of Two Final Offers (Items 9, 10, 12)**

Below is a side by side comparison of the five articles addressed in the Final Offers:

### **Article 5 Tech Pay:**

Both Offers recognize the need for limiting the expansion of the multilingual program during the term of this agreement.

### **Article 28 Service Increments:**

The County proposes that effective July 1, 2011, for the duration of the agreement, service increments will be suspended and no new movement to the longevity steps will occur.

The FOP proposes to continue to defer one 3.5% step during FY12, and qualified members to get 3.5% on their service increment date.

### **Article 31 Reopener**

The two Offers are identical, except that the County proposes the current agreement end June 30, 2012. This does not represent a disagreement since the parties in Article 47 below agree on date as the end of their current agreement.

### **Article 36 Wages:**

The County proposes a 5.5% wage reduction beginning in July 2011. The County proposes that "any previously postpone GWA will not be paid in FY12 or any future fiscal year."

The FOP proposes to continue to defer the previously deferred 4.25% through 2012.

The FOP included an offer to the County that they labeled "not part of the Final Offer". It will be ignored by the Impasse Neutral.

### **Article 47 Duration of Contract:**

The two Offers propose that their current agreement terminate on June 30, 2012.

### **Observations on the Final Offers ( items 9 and 10):**

The offers are close to agreement or in agreement on 3 of the 5 issues. On the remaining two, the offers are far apart. The FOP offer shows flexibility and is consistent with FOP behavior during the last two years as it continued to defer benefits provided in the parties' agreement. Consistent with its cost cutting efforts and its claim of a seriously out-of balance-budget, the County proposes a significant reduction in wages. Either final Offer will constitute a significant cost to the County. The FOP has argued that either offer will have a negative impact on police officers.

## **Award**

Based on the above discussion, analysis and observations, the Impasse Neutral finds the FOP Final Offer, on the whole, the more reasonable of the two offers.

Jerome T. Barrett, Impasse Neutral

Falls Church, Virginia

February 18, 2011