

BEFORE THE LABOR RELATIONS ADMINISTRATOR
MONTGOMERY COUNTY, MARYLAND

UNITED FOOD AND COMMERCIAL	*	
WORKERS, LOCAL 1994, MUNICIPAL AND	*	
COUNTY GOVERNMENT EMPLOYEE	*	
ORGANIZATION (Union)	*	
	*	
Charging Party	*	LRA Case
	*	No. 11-109-06
MONTGOMERY COUNTY, MARYLAND (County)	*	
	*	
Respondent/Employer	*	

**DECISION AND AWARD CONCERNING CHARGES
OF PROHIBITED PRACTICES**

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Introduction

The matter before the Labor Relations Administrator (LRA) involves charges by the Union that the County committed Prohibited Practices by refusing to bargain on several topics during the parties' collective bargaining in 2010-11. Hearings were held on this matter on June 22, 2011 and August 16, 2011, at which time transcripts were made covering three County witnesses and two Union witnesses. Five joint exhibits, twelve County exhibits, and six Union exhibits were accepted into the record.

With the LRA agreement, the due date for filing briefs was delayed several times during late summer and fall. Both briefs were received by November 7, 2011.

Section 33-103 (a) (5) and 33-109 (d) County Code authorizes the LRA to investigate, hear and determine charges of Prohibited Practices brought by a certified union representative or the employer.

Section 33-1-3 (a) (8) of the County Code authorizes the LRA to "determine any issue regarding the negotiability of any collective bargaining proposal."

Background

The parties involved in this matter have had a series of collective bargaining agreements (CBA), which drew their authority from State law and the County Labor Code. Their current CBA resulted from bargaining beginning late Fall 2010 and concluding in early 2011. During that bargaining, the Union made eight proposals to the County, on which the County refused to bargain because they believed that those proposals were non-negotiable subjects of bargaining as provided in County Labor Code.

The parties' bargaining ended without an agreement, triggering the Labor Code impasse process, and effectively ending bargaining in February 2011. The Union filed the charge giving rise to the instant case on March 10, 2011.

Issues Before the LRA

1. Did the County commit a prohibited practice by not informing the Union of its position regarding "non-negotiable" items until four days before the scheduled labor code impasse procedure began in February 2011, and if so, what shall the remedy be?
2. Did the County violate the Collective Bargaining Law Sec. 33-107(a)(b) by refusing to negotiate over eight mandatory subjects of bargaining with the Union, and if so, what shall the remedy be?

The Positions of the Parties on Issue Number One

Union Position on Issue Number One

On December 10, 2010, the Union presented its bargaining proposals to the County. The Union President testified that he asked the County to indicate if any of the Union proposals were considered non-negotiable by the County. The parties negotiated from December 10, 2010 until February without the County identifying any Union proposal they believed to be non-negotiable. The Union President very intentionally made this request because the County in the past had not revealed its non-negotiability position until near the beginning of the impasse procedure.

In the most recent term bargaining (2009-10), LRA Andrew Strongin concluded that the County had committed a prohibited practice by not announcing its position on negotiability until the Union had concluded its presentation in the interest arbitration hearing.

In the instant case on February 11, 2011, the County delivered to the Union a "Declaration of Non-negotiability 2010-2011 CBA Term Negotiations." February

11, 2011 was four days before the start of the impasse procedure. Such a delay impacts the Union's ability to bargain an entire package because these items were left open until the 11th hour while the County pressured the Union for significant economic concessions. Thus the Union was unable to negotiate with full knowledge of what they were able to bargain on and what they could not until after the direct bargaining period had ended.

County Position on Issue Number One

The County brief of 86 pages plus 2.5 inches of appendixes made no compelling justification for its delay in providing the Union with the County's view on non-negotiable issues.

Both hearing days provided testimony on this issue. August 16, 2011 testimony by Mr. Adler (pages 30 – 34) indicated several reasons why the County was unable to present the written document that set out their position on non-negotiable subjects until February 11, 2011. The core negotiators for the County were involved in negotiations with three other bargaining units during the same period, including: the FOP, the Firefighters, and the Volunteer Firefighters. The County lawyer assigned to prepare the County document on non-negotiability, William Snoddy, was involved in three of the four negotiations occurring during the same time period, including the MEGEO negotiations.

Therefore, during winter 2010-11, with December holiday period and the many meetings required by the four union negotiations, the County did the best they could in providing the non-negotiable information to the Union as early as they were able.

In the June 22, 2011 hearing, a lengthy cross-examination of MCGEO President Renne by County attorney David Stevenson provided additional information on the County position. In negotiations meetings during December and January, the County told the Union with respect to several issues, now the basis of the instant case, that the County viewed them as impinging on management rights. The County assumed that the Union would understand that they meant those issues were therefore, non-negotiable. They believe the Union is being technical in saying the County did not say these issues were non-negotiable.

The Union President countered by asserting the Union wanted a written explanation on each of the issues, like those the County ultimately provided on February 11, 2011. The County acknowledged they understood that, but for the reasons stated above it took the County a long time to complete the task.

Discussion of Issue Number One

LRA Andrew Strongin's prohibited practice award one year earlier dealt with the same issue as the instant case. In the Strongin case, the County provided the

written information in the midst of the impasse process, well after the end of direct bargaining. In the instant case, the County's delivery of the information was only slightly better, at four days before the impasse process began.

Given the warning that Strongin's award provided the County a year earlier, it is note-worthy that the County once again delayed providing the Union the required information until the last minute.

Good faith bargaining requires that bargaining information be provided promptly when requested. The County's delay did place the Union in the unfair position of not having the needed information until direct bargaining had virtually ended. And also, the Union's preparation for the impasses process was made more difficult by late arrival of the February 11th information.

Having gotten a negative LRA award just a year earlier, under very similar circumstances to the instant case, the County should have sought a way to avoid the same prohibited practice charge in the instant case.

Strongin's award on March 1, 2010 was not an easily forgotten event in the lives of the parties because the parties continued to deal with Strongin when the Union sought a remedy from him that would provide attorney fees and allow the Union to submit a new last and best offer to the interest arbitrator. The parties' dealings with Strongin on this matter extended well into March with briefs and conference calls.

The facts surrounding the Strongin award and the County's repeated delay in the instant case strongly suggest that the County was engaged in a tactic to place the Union in a disadvantaged position in relation to both direct bargaining and the interest arbitration.

Positions of the Parties on Relevant Law and Precedent Concerning Eight Subjects Involved in Issue Number Two

In opening statements, testimony and briefs, the parties set out their understanding of the law and precedent regarding the eight subjects, which the County had declared non-negotiable.

Union Position:

The County Labor Code requires bargaining on mandatory subjects, and the topics at issue in this matter are mandatory subjects of bargaining, upon which the County does not have discretion to refuse to bargain. In the past, the County has bargained on some of these subjects, and prior LRA rulings favored the Union position on mandatory bargaining subjects.

The parties have a duty to bargain collectively on a number of subjects, including: “salary and wages, pensions and retirement benefits, other employee benefits such as insurance, leave, holidays and vacation, hours and working conditions, grievances, matters affecting health and safety and the effect on employees when the exercise of employer rights causes a loss of jobs. These broad categories are without limitations.” (Union brief)

“On the other hand, Sec. 33-107(c) of the Collective Bargaining Law provides that collective bargaining agreements ‘must not impair’ certain enumerated Employer rights. As interpreted by different Labor Relations Administrators over the years, these sections of the Collective Bargaining law, read together, require a balance between the broadly defined duty to bargain on the one hand and the more narrowly tailored ‘do not impair’ language regarding employer rights on the other.” (Union brief)

“Interpretation of the statute is necessary where the Union contends that the County must bargain over certain proposals and the County avers that such proposals are “non-negotiable.” As determined by Maryland courts and past Labor Relations Administrators, the question to be answered in cases such as this is whether the disputed proposals predominantly center on matters of direct fundamental concern to employees, and, if so, would bargaining over those items significantly impair management rights. (JX. 5, tab 1, Wage Compression, Case No. 04-109-10 (Strongin 2005), Slip Op. at 14.) As noted in Wage Compression, the challenge is not to find broadly defined areas of Employer-rights “impairment,” but to strike an appropriate and sometimes delicate balance between competing employee and County rights. (Id. at 12.) To find otherwise would allow the employer rights provision to be read so broadly as to render the bargaining obligation of Sec. 33-107(a) virtually meaningless. (Id.) In striking this balance, as noted above, the bargainable subjects listed in Sec. 33-107(a) have been broadly defined, except as explicitly limited by the list of Employer rights set forth in Sec. 33-107(c). (JX. 5, tab 1, Wage Compression, Slip Op. at 10-12 (finding “one must presume that any element of the employment relationship is subject to negotiation unless the law clearly and unequivocally exempts it from bargaining or public policy concerns outweigh employees’ interests”). (Union Brief) The LRA explained the legislative intent underlying such a broad reading in the Wage Compression case:

[T]he theoretical possibility that any proposal on any mandatory subject of bargaining under Sec. 33-107(a) might impair a management right under Sec. 33-107(c) always exists; the LRA cannot conclude that the County Council intends Sec. 33-107(c) to be read so broadly as literally to eviscerate the entirety of the promise of Sec. 33-107(a).

“For these reasons, the management rights clause of the Collective Bargaining Law should be narrowly construed to avoid undermining the law, particularly the duty of the County to negotiate with the Union on matters of fundamental concern

to employees.” (Union brief pp. 9-10)

The eight subjects the Union made proposals on involved very fundamental concerns for the Union and its members, which is central to collective bargaining.

In support of the remedy the Union seeks, the Union Brief (p. 11) quotes LRA Strongin in the Furloughs case:

“A bargaining order requires only that the parties meet in good faith to discuss the issues in dispute. The order does not presuppose any particular outcome, and certainly does not require the Executive to agree to any Union proposal, much less obligate the Executive to exercise his Charter-conferred budgetary authority contrary to his best judgment. As a practical matter in cases such as this ... the Union’s right to bargain ... is limited to the opportunity to ensure that the Executive is mindful of the concerns of the employees’ exclusive bargaining representative, and to the opportunity to suggest alternatives ... It is a right essentially, to attempt to persuade the Executive of the correctness of the Union’s view, or barring that to attempt to reach a mutually agreeable compromise.”

County Position:

The County disagrees with the Union assertion that the County has bargained in the past over many of the topics in the instant case. The County also denies that an earlier LRA ordered the County to bargain on the subjects in dispute.

A County Circuit Court Judge ruled, 15 years ago, that the LRA role was to determine the bargainability of an issue based on the Union’s specific proposal, rather than on a general topic of discussion. An earlier LRA agreed with the court ruling and followed it. In a subsequent Court of Appeals ruling, involving the Firefighters Union, the same conclusion was reached.

The statutory frame-in the County on bargainability is different than the private sector covered by the NLRA. Therefore, the County is only allowed to bargain over issues that the statute specifically states are negotiable. A Court of Appeals ruled on this by stating that the statute must specifically state a topic is negotiable, that bargaining is not allowed when the statute is silent, and that the County may not agree voluntarily to bargain on the subject that is not allowed by statute.

Under NLRA there are three categories on bargaining subjects: mandatory, permissive and prohibited. Whereas, in Maryland there are only two categories: mandatory and prohibited.

Since several issues in the instant case involve working conditions, some frame work is needed to help make a determination on working conditions. A Federal

Court decision in 1981 determined that working conditions can be reasonably divided into three categories. The Maryland Court of Appeals in a Montgomery County Schools case, used the three categories, and the reasoning, set out in the 1981 Federal case.

The Court of Special Appeals, in the Baltimore Firefighters case, followed the reasoning of three categories of working conditions, and it brought in the management rights issue as a second consideration after finding that an issue is bargainable under the statute. Meaning that after finding an issue in the bargainable category, the question is would bargaining impair management rights? An earlier LRA used the two step standard, but he concluded on each working condition that the impairment of management rights was “speculative.”

The parties’ CBA contains a Management Rights clause that limits the scope of what the parties may bargain on.

Discussion of Each of the Union’s Eight Collective Bargaining Proposals under Issue Number Two

What follows for each of the eight Union proposals is the relevant CBA language, the proposed language, and a brief statement of each parties’ position on the negotiability of each proposal.

Union Proposal # One: Article 13, 13.1 Work Schedules

The current language of 13.1 is

“The County has the management right to determine the hours when a facility, building, or service shall be in operation or available to County residents, and to determine its staffing needs during those hours of operation. Should the County change work schedules on a division, facility, or program wide basis, the County shall provide advance notice of the scheduling changes to the Union, and upon request, bargain with the Union regarding any bargainable aspects of the implementation of its staffing needs. The County will have no obligation to inform the Union of changes to the schedules of individual bargaining unit members.”

Union proposed language is:

“Changes to bargaining unit members’ work, schedule of hours, including their designated non-schedule days shall be negotiated with the Union. No changes to bargaining unit members work schedules shall be made during the term of this agreement, unless otherwise negotiated and agreed to between the parties, to include discontinuation of compressed schedules and flex time.”

County Response:

In a letter to the Union on February 11, 2011, the County stated: "This proposal is non-negotiable. It impairs the Employer's right to maintain and improve the efficiency and effectiveness of the operation as well as its right to transfer, assign, and schedule employees. These matters are not subject to bargaining under the Collective Bargaining Law. Additionally, the amelioration of the affects of management decisions is not subject to bargaining."

The County brief asserted that the Union proposal "would absolutely forbid the County from changing any work schedules of bargaining unit members during the term of collective bargaining agreement, without the prior approval of the Union."

This Union proposal would "impair" the management right to "schedule" employees. And further, an agreement can be made only if it does not "impair" a management right. Thus making this proposal clearly non-negotiable as contrary to the County Labor code.

The County brief, beginning on page 17, devotes nine pages to discussing LRA Strongin's 2005 Fleet Management Services case, and Umpire Aronin's 1983 FOP case.

Union Response:

This proposal is a matter of direct and fundamental concern to employees, which is proposed as an addition to an existing article in the CBA. The proposal involves the same subject matter as was found to be negotiable by LRA Strongin in the Fleet Management Services case where he stated that the proposal did not impermissibly limit management rights. Strongin explained:

"The (Sec. 33-107c) provision does not forbid agreement from touching upon enumerated management rights; it forbids only those agreements that "impair" such rights, as in "to weaken or damage."

The parties have a long history of bargaining over this subject.

Union Proposal # Two: Article 13, 13.2 (a) Work Day and Work Week

The Current Language which the Union proposed to replace is:

"Whenever practicable, based on work load requirements, 2 consecutive days off shall be granted employees."

The Union proposed language is:

"Two consecutive days off shall be granted bargaining unit employees."

County Response:

In a letter to the Union on February 11, 2011, the County stated: “The Employer declares that this proposal is non-negotiable because it impairs the Employer’s right to maintain and improve the efficiency and effectiveness of operations; to determine the services to be rendered and the operation to be performed; to determine the overall organizational structure, methods, processes, means, and personnel by which operations are to be conducted; and to transfer, assign, and schedule employees.”

Union Response:

The elimination of approximately 700 employees in recent years has required overtime work by the remaining staff. An employee’s home life, health, and safety are enhanced by two consecutive days off. This a subject that the parties have negotiated on before, without a County assertion of management right. This is a matter of direct and fundamental concern to employees, which does not impair management rights.

Union Proposal # Three: Article 21.19 Health Benefit and Reserve

The Union proposes to add 21.19 to Article 21 Benefits. The proposed new language is:

“The County agrees that the Health Benefit Fund and Reserve may only be used for the following purposes:

- (a) Stabilizing health benefit rate increases;
- (b) Absorbing claim losses;
- (c) Holding the County’s contribution to 90% and the employee’s contribution to 10%.”

County Response:

In a letter to the Union on February 11, 2011, the County stated: “The Employer declares that subparts (a) and (b) are not subject to bargaining. It is the Employer’s right to determine the overall budget of the employer. This would include the use of the County government funds.”

Union Response:

The Health Benefit Fund and Reserve was created by negotiations between the parties. These funds pay for negotiated employee benefits. A portion of the Fund comes from employee contributions, therefore, employees have a direct and fundamental concern about the fund and the benefits provided by it. When a surplus existed in the Funds Reserve in the past, the parties have negotiated an

MOU on how the surplus could be used. Past MOU's have been used to give the employees a "premium holiday" during which employees did not pay their normal twelve percent premium for a period of months. The Union proposal seeks to place limits on the use of Reserve funds.

Prior LRA's have held that administration of the Fund is a mandatory subject of bargaining.

Union Proposal # Four: Article 22 Appeal of Transfers

Union Proposal: Change to read:

"The union may appeal an involuntary transfer should an affected bargaining unit member suffer an undue hardship, resulting from the transfer and/or when management fails to demonstrate that the criteria set forth in section 22.2(a)-(h) has not been met." The Labor Code specifically states that management right to transfer employees may not be impaired by CBA.

County Response:

In a letter to the Union on February 11, 2011, the County stated: "This proposal is non-negotiable. First, it misidentifies the terms of Section 22.2(a)-(h) as "criteria." Section 22.2(a)-(h) list reasons for transferring an employee, and it is not all inclusive. Under the Collective Bargaining Law, the Employer's right to transfer is not subject to bargaining." The proposal would impair the management right to effect involuntary transfers.

Union Response:

The parties have bargained on this before, and the proposal involves a matter of direct and fundamental concern to employees. The CBA allows an employee to grieve a transfer under an "arbitrary and capricious" standard. This proposal merely attempts to expand those criteria. The proposal does not impair management rights. The Union made this proposal in earlier term bargaining, and, at the time, the County never raised non-negotiability.

Union Proposal # Five: Article 34 Safety and Health

Union Proposal: Add as new 34.28 Public Health

"Each worksite shall promulgate a public access policy designed to restrict public flow within bargaining unit member work areas. All policies shall be submitted to the parties for review no later than July 2011. If the parties cannot agree on implementation of the recommendation then the impasse procedure contained in the County Collective Bargaining Law shall apply."

County Response:

In a letter to the Union on February 11, 2011, the County stated: "To the extent that this proposal goes beyond addressing the health and safety of employees, it is non-negotiable. The impasse procedure in the Collective Bargaining Law does not apply to this issue. Additionally, the amelioration of the affects of the exercise of an Employer right is not subject to bargaining."

Union Response:

This proposal involves the safety of employees working in areas where inmates are involved. Testimony was presented on the physical dangers these employees face.

Union Proposal # Six: Article 56 Management and Accountability

Union Proposal: Add as new: Supervisor Effectiveness

"On a yearly basis, individual bargaining unit members shall submit, to their Division Chief, an evaluation of their immediate supervisor's effectiveness.

The factors to be evaluated shall include, but not limited to:

1. Leadership;
2. Communication skills;
3. Coaching;
4. Bargaining unit member advocacy;
5. Professionalism;
6. Resourcefulness;
7. Fair and equitable application of rules, procedures and bargaining unit members' rights, privileges and opportunities;
8. Availability;
9. Consistency; and
10. Conflict resolution skills."

County Response:

In a letter to the Union on February 11, 2011, the County stated: "This proposal is non-negotiable. The Employer has the exclusive right to establish employee performance standards and evaluate employees. Moreover, the Employer's relationship with non-bargaining unit members is not subject to bargaining."

Union Response:

In recent years, the parties have bargained on this topic. This proposal does not

limit management rights in any way, The proposal seeks an opportunity for employees to evaluate their supervisors. It places no requirement on the County to do anything other than conduct the survey. If the County chooses to use survey data, to improve managers' performance, an improved work environment would result.

Union Proposal # Seven: Article 59 Harassment, Disparate Treatment and Inappropriate Behavior

Union Proposal: Add following as new:

“The following behavior will not be permitted, tolerated, or condoned by any person charged with supervision of bargaining unit members:

- a. Dishonesty, including providing false information to county management about performance of a bargaining unit member or circulation of private personnel files;
- b. Abusive, threatening, or intimidating behavior, gestures or language;
- c. Physical threats or physical striking of a unit member;
- d. Repeated threats of discipline without counseling, warning, investigation or a progressive disciplinary approach, including untimely discipline;
- e. Inequitable treatment regarding the application of county policies, county rules of this contract;
- f. Disrespect and/or unprofessional treatment of unit members, infractions of this policy are subject to the Grievance Procedure.”

County Response:

In a letter to the Union on February 11, 2011, the County stated: “This proposal is non-negotiable. The Employer has the exclusive right to establish employee performance standards and to evaluate employees. How the Employer deals with non-bargaining unit members is not subject to bargaining.”

Union Response:

This proposal on Harassment, Disparate Treatment and Inappropriate Behavior involves direct and fundamental concern of employees, and therefore is a mandatory issue of bargaining. The parties have bargained on this subject earlier. For example the CBA contains in Article 52 contains negotiated words involving abusive language.

Union Proposal # Eight Article 60 Layoff and Recall

Union Proposal: Add the following as new:

1. The Director of Human Resources will make every reasonable effort to place bargaining unit members who would be affected by a layoff, in order of their

seniority, into comparable vacancies. When a bargaining unit member is placed in a classification lower than that previously held, he/she shall be placed on the layoff/recall list and shall have precedence for recall from the layoff/recall list to a vacancy in the same group and salary and of the same character and standard of work and shall be recalled in the inverse order of layoff. Where such vacancies exist, bargaining unit members will be required to accept such placement.

2. Layoffs should be made within classification on a County-wide basis in the inverse order of total seniority. Bargaining unit members who are laid off pursuant to paragraph 2 above shall have a right to another job in the County service in accordance with the following procedure, provided that no bargaining unit member with greater seniority is displaced thereby:

a. Displace the least senior bargaining unit member in the next lower class series provided that the bargaining unit member being placed in the lower classification has the ability to do the work. For the purpose of this section, "class series" shall mean a number of classes of positions which are substantially similar as to the types of work involved and differ only in rank as determined by the importance of the duties and degree of responsibility involved and the amount of training and experience required. Such classes constitute a series and each is given a designation by Roman Numerals, beginning with the lowest level as I, next level II, etc. Where classifications have different title code descriptions, they shall not be included within the same class series.

b. Bargaining unit members who are displaced as the result of another bargaining unit member exercising rights under the above procedure shall have the right to exercise their seniority under the same provisions. When displacing a bargaining unit member in a lower classification, the affected bargaining unit member's qualifications, and placement in accordance with seniority, shall be determined by the Department of Human Resources.

c. No bargaining unit member shall be placed into a higher paying classification as a result of this procedure.

d. Bargaining unit members on emergency or temporary appointment or on probation in the affected classifications shall be terminated prior to the layoff of bargaining unit members on regular appointment.

e. Bargaining unit members on layoff shall be recalled to vacancies in the classification previously held in the inverse order of layoff.

County Response:

In a letter to the Union on February 11, 2011, the County stated: "This proposal contains non-negotiable terms. The above proposal impairs the Employer's right

to determine job classifications, and personnel by which operations are to be conducted as well as its right to hire, select, and classify positions.”

Union Response:

The matters in the Union proposal number 8 on Layoff and involves a matter that is of direct and fundamental concern of employees. Given the current economic turn down, this proposal is even more important than usual. The proposal does not limit the management right in layoff and recall, nor does it impair an management right. The proposal merely sets out procedures to follow in layoffs and recalls.

The proposal is similar to the negotiations on RIF procedures which LRA Strongin in 2010 found to be a mandatory subject of bargaining.

The Union and County has negotiated on these subjects in the past.

Finding and Conclusions on Issue Number One

The issue: Did the County commit a prohibited practice by not informing the Union of its position regarding “non-negotiable” items until four days before the scheduled labor codes impasse procedure began in February 2011, and if so, what shall the remedy be?

The Union’s specific requests, based on experience during the prior year’s bargaining, for the County’s position on non-negotiability subjects was not responded to in a timely manner. The County’s claim that such information was shared orally during the course of bargaining is unconvincing given the informality at a bargaining table, and the crucial nature of the information sought.

Decision and Order on Issue Number One

Based on the Labor Relations Administrator’s consideration of the evidence and arguments of the parties, the following Decision and Order are issued:

The County failed to provide the Union with requested information on ‘non-negotiable bargaining subjects, and thus committed a prohibited practice, and therefore, the following remedy is ordered for this violation:

The County is ordered to reach an agreement on the first day of term bargaining with the Union that any reasonable request for bargaining information will be satisfied by the County within two weeks of a formal request.

Discuss and Findings on Issue Number Two

The Issue: Did the County violate the Collective Bargaining Law Sec. 33-107(a)(b) by refusing to negotiate over eight mandatory subjects of bargaining with the Union, and if so, what shall the remedy be?

The NLRA allows more wide-open bargaining opportunities with these three categories of bargaining subjects:

1. Mandatory subjects upon which the parties must bargain;
2. Permissive subjects upon which the parties may bargain if they are both willing; and
3. Prohibited subjects upon which the parties may not bargain.

The Montgomery County Labor Code limits bargaining opportunities by providing for only mandatory and prohibited subjects of bargaining. While the number of mandatory subjects upon which both parties must bargaining is extensive, the prohibition of bargaining subjects is a restriction on the relationship.

A cooperative labor management relationship operating under the NLRB can engage in many examples of permissive bargaining because it is allowed, and because as the parties' trust grows they develop a partner like relationship.

It is unfortunate that permissive bargaining is not allowed in Montgomery County; it is unfortunate for both the Union and the County. But this is their circumstance: Subjects on which they must bargain, and subjects on which that may not bargain.

This second issue involves a Union charge that the County has refused to bargain on eight subjects that the Union believes are mandatory subjects of bargaining, and therefore, the County must bargain on them. The County has admitted they did refuse to bargain on all eight subjects, and gave their reasons for refusing.

Summarized above on pages 4 through 7 are the parties' positions on the refusal to bargain charge under the heading of: "Positions of the Parties on Relevant Law and Precedent Concerning Eight Subjects Involved in Issue Number Two."

A discussion of those positions follows:

The Union's position is much more compatible with what is being called the new normal in today's collective bargaining. The significant shift in the economy over the past few years has produced a new normal in many areas of society. In collective bargaining, the old collective bargaining normal is gone, and while we might hope for its return, it will not reappear in the foreseeable future.

Successful collective bargaining of the future will rely on a cooperative approach in labor-management relations, including interest-based bargaining and

mediation of grievances. The parties are already using grievance mediation, and in their current term bargaining, they are experimenting with interest-based bargaining.

In applying the labor code and LRA rulings over the years, the Union recognizes the need for striking a balance between the broadly defined duty to bargain and the narrowly tailored 'do not impair' language regarding management rights. Another way of stating that need for balance is this question: If a union proposal is based predominately on matters of direct and fundamental concern for employees could bargaining on it significantly, impair management rights?

Without this difficult balance, bargaining on any mandatory subject might be viewed by the County, or found by an LRA, to impair management rights. Carried to an extreme, impairment could eviscerate most subjects of bargaining. The claiming of an impairment is easy, proving an impairment is more difficult. One LRA called such County claims of impairment "speculative."

The Union Brief stated several times that bargaining does not mean agreeing with a Union proposal, but it does mean exchanging views and the other dynamics of bargaining.

The County position is more akin to the old normal collective bargaining, marked by traditional-adversarial bargaining, lawyer driven definitions and decision making, the use of court and LRA decisions and precedent, traditional thinking that lacks flexibility and the welcoming of new ideas.

The delaying tactics to frustrate the Union's ability to bargain, discussed above under issue number one, are a prime example of the old normal.

The County persists in its effort to limit and narrow the subjects upon which the Union may bargain. Here are four examples used in the County brief:

A 15 year old County Circuit Court decision directed an LRA when determining negotiability to look at the specific Union proposal and not at a general topic of discussion.

County Labor Code does not allow permissive bargaining, only mandatory and prohibited bargaining. And where the Labor Code is silent on a subject bargaining is not allowed.

A 1981 Federal Court identified three categories for considering bargaining on 'working conditions.' The Maryland Court of Appeals adopted that categorization, but did not include the permissive category.

A Court of Special Appeals adopted the three categories of 'working conditions' in determining bargainability. When a topic is found to be bargainable,

a second test is used to determine whether such bargaining would impair management rights.

These examples demonstrate a mind-set that uses the legal system to restrict or narrow the opportunity for employees to be represented on a range of subjects in collective bargaining. Last year, the Wisconsin Governor and Legislature found an easier and more dramatic way to achieve this same goal.

The County's desire to limit bargaining subjects is, undoubtedly, a strategy induced by the down turn in the economy in recent years, which has replaced the County's strong tax-revenue-income, which for many years made bargaining easier for both sides.

It was during those prosperous years that the Union claimed the County was willing to bargain on some of the eight proposals, which the County now denies they ever bargaining on. The Union offered testimony describing a bargaining history on five of the proposals.

The most compelling evidence on bargaining history involves Union Proposal # Three: Article 21.19 Health Benefit and Reserve. In that case, the Union could point to several years in which the parties signed MOUs that gave employees a premium holiday as a way of reducing an insurance fund that exceeded its necessary balance. Clearly, those MOUs resulted from the parties' bargaining.

The County Collective Bargaining Law at Sec. 33-107(a) provides that the Union and the County have a duty to engage in collective bargaining on a long list of subjects. The law at Sec. 33-107(c) provides that collective bargaining "must not impair" the management rights enumerated in the law. Over the life of the Section 33, court and LRA rulings have interpreted the law to offer guidance on what constitutes impairment of management rights and what does not.

One such LRA ruling provided this useful guidance:

"The (section 33-107(c) provision does not forbid agreements from touching upon enumerated management rights; it forbids only those agreements that 'impair' such rights, as in 'to weaken or damage.'" (Fleet Management Services, LRA Strongin, 2005)

On four of the 8 Union proposals, the County asserted that the proposal would impair a management right and therefore, it was non-negotiable. The County thus asks for a LRA decision that the proposal is non-negotiable. The Union, for its part, urged a finding that the proposal was negotiable. As another LRA had found, an assertion is not proof. To find impairment, the proposal's impact on a clear management right would need to be transparently obvious and beyond any doubt. No such obvious impairment is in the record. One LRA, struggling with this question, found the County's assertion speculative.

The presence of ‘direct and fundamental concerns of employees on any given subject is the basis for requiring bargaining on that topic. (Wage Compression case LRA Strongin 2005). Strongin goes on to say as presented in the Union Brief at page 9: “the challenge is not to find broadly defined areas of Employer-rights impairment, but to strike an appropriate and sometimes delicate balance between competing employee and County rights. To find otherwise would allow the employer rights provision to be read so broadly as to render the bargaining obligation of Sec. 33-107(a) virtually meaningless.”

Strongin goes on to write on the question of impairment of manage rights:

“(T)he theoretical possibility that any proposal on any mandatory subject of bargaining under Sec. 33-107(a) might impair a management right under Sec. 33-107(c) always exists; the LRA cannot conclude that the County Council intends Sec. 33-107(c) to be read so broadly as literally to eviscerate the entirety of the promise of Sec. 33-107(a).”

Without question, all eight Union proposals meet the standard of involving ‘direct and fundamental concerns of employees.’

This is a workable standard for judging whether a proposal is or is not negotiable.

An LRA order to bargain has less impact than the County may imagine, and it certainly is not debilitating to County:

“A bargaining order requires only that the parties meet in good faith to discuss the issues in dispute. ... the Union’s right to bargain ... is limited to the opportunity to ensure that the Executive is mindful of the concerns of the employees’ exclusive bargaining representative, and to the opportunity to suggest alternatives ... It is a right essentially, to attempt to persuade the Executive of the correctness of the Union’s view, or barring that to attempt to reach a mutually agreeable compromise.” (Furloughs case. LRA Strongin 2010)

Hearing from employees in a formal way through collective bargaining can be beneficial to the County, if properly utilized by the County. Then, after hearing and utilizing employee concerns, or not, the County can say ‘no’ to the proposal, if that is their desire.

Decision and Order on Issue Number Two

Based on the Labor Relations Administrator's consideration of the evidence and arguments of the parties, the following Decision and Order are issued:

All eight Union proposals are found to be mandatory subjects of bargaining; and the County did commit a prohibited practice by refusing to bargain on all eight Union proposals, therefore, the following remedy is ordered:

The County is ordered to bargain with the Union on each of the eight Union proposals as soon as the Union requests bargaining on them.

Jerome T. Barrett

Labor Relations Administrator

January, 27, 2012