

MEMORANDUM

November 18, 2020

TO: Government Operations and Fiscal Policy Committee

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: Bill 43-20, Non-merit Employees – Merit System Employees – Severance Pay - Limited

PURPOSE: Worksession – Committee to make recommendations on Bill

Expected attendees:

Berke Attila, Human Resources Director

Bill 43-20, Non-merit Employees – Merit System Employees – Severance Pay - Limited, sponsored by Lead Sponsor Councilmember Friedson and Co-Sponsors Councilmember Rice, Council President Katz, Councilmembers Glass, Navarro and Council Vice President Hucker, was introduced on September 29, 2020. A public hearing was held on October 20 at which the lone speaker, Berke Attila testified on behalf of the County Executive.¹

Bill 43-20 would prohibit severance pay for a County employee unless authorized by law. The general limitation in Bill 43-20 would expressly exclude:

- (1) the payout of unused leave at termination of employment;
- (2) a discontinued retirement pension authorized under Section 33-45(d); or
- (3) severance pay under Sections 33-139 and 33-140.

Bill 43-20 would also prohibit all severance pay for an employee who admits to or is found to have violated the Ethics Law in the 12 months prior to separation from County employment.

In past years, some employees received severance payments as they left County employment under an unregulated and undisclosed manner. Bill 43-20 is intended to end this process and require any severance payments to be made in an open and equitable manner. Lead Sponsor Councilmember Friedson explained his reasons for introducing Bill 43-20 at ©5.

¹#SeveringSeverance

Public Hearing

The lone speaker, Human Resources Director Berke Attila, speaking on behalf of the Executive supported the Bill if it is amended (©18). Mr. Attila noted that the County needs to be able to attract and retain superior talent and argued that the ability to provide severance pay for non-merit employees is important.

Issues

1. Would the application of the Bill to existing employment contracts providing for severance pay violate the U.S. Constitution's Contract Clause?

It is important to note that the Contract Clause issue only applies to the transition clause and not the substance of the Bill. Bill 43-20 would apply to any County employee who separates from County employment on or after the date the Act takes effect. The County Attorney's Office (OCA) concluded that to the extent the Bill applies retroactively to invalidate an existing agreement, the Bill is likely to violate Article I, §10, clause 1 of the United States Constitution by impairing the obligation of contracts (©8-10). However, this conclusion relies on the assumption that there are County employees who have a reasonable expectation of receiving severance payments upon separation that is not expressly authorized in law. Council staff does not know if there are County employees in that position.²

Article I, §10, clause 1 provides that "No State shall pass any Law impairing the Obligations of Contracts..." As the OCA opinion pointed out, the Contract Clause does not prohibit governments from impairing contracts; it limits a government's right to do so. We agree with the statement of the law described by the OCA but would emphasize that the application of the Contract Clause depends on the facts. The 3-part test was described by the Court in *Baltimore Teachers Union v. Mayor and City Council*, 6 F.3d 1012 (4th Cir. 1993). A Court must look at: (1) whether there has been an impairment of a contract; (2) whether the impairment was substantial; and (3) if so, whether the impairment was nonetheless a legitimate exercise of the police power. See also, *FOP Lodge 89 v. Prince George's County*, 608 F. 3d 183 (4th Cir 2010).

It is not clear if the transition clause would impair any employment contracts because we do not have copies of the employment contracts for department heads and other non-merit employees. We understand that there may have been employment contracts with some non-merit employees under the former administration, but there may not be any similar contracts with non-merit employees hired by the current administration. The *Separation Benefits for Appointed Executive Branch Department Directors and Question A's*, attached as ©14-15, describes additional severance pay under paragraph 1 **subject to the Executive's discretion**. It is doubtful that a Court would find that the elimination of this discretion by County law would be an impairment of a contract and certainly not a substantial impairment of a contract. An appointee under this policy could not have a reasonable expectation that the employee is entitled to this discretionary severance pay upon leaving County

² Bill 42-20, also scheduled for a worksession on November 23, would require the Executive to disclose each employment contract with a non-merit employee to the Council.

service. It is also unreasonable to assume that an appointee relied on this discretionary severance pay upon appointment in order to accept the position.

However, there may be holdover non-merit employees with a different severance pay clause in their employment contract. Without seeing these contracts, if they exist, it is impossible to predict if a Court would conclude that the application of Bill 43-20 to these contracts would violate the Contract Clause.

It also must be noted that Bill 43-20 does not prohibit all severance pay. It merely requires the severance pay to be authorized by law. It is entirely possible that the Executive may propose a bill to provide additional severance pay that the Council enacts that substantially replaces any reasonable expectation of severance pay under existing contractual agreements.

2. The County Attorney's Recommended Amendment.

The OCA Bill review memorandum also recommended that the Bill be amended to include a discontinued service pension for an elected or appointed member under the defined benefit retirement plan codified at Code §33-45(e). This provision provides:

- (e) *Discontinued service benefits of elected and appointed members.*
 - (1) If an elected or appointed member with 10 or more years of credited service, is not reappointed or reelected, the member may opt to:
 - (A) receive a pension immediately, if the member enrolled or reenrolled before January 22, 1974; or
 - (B) receive a pension at age 60, if the member enrolled or reenrolled on or after January 22, 1974.

Council staff agrees with this suggestion.

3. Would the Bill damage the ability of the County to recruit non-merit employees?

The Bill does not prohibit additional severance benefits for non-merit employees. It requires any additional severance benefits to be authorized by law. Current law provides some severance benefits for employees under certain circumstances as part of the retirement plans. Code §§33-139 and 33-140 requires the Executive to establish a severance plan for employees in the Retirement Savings Plan (RSP) or the Guaranteed Retirement Income Plan (GRIP). The severance pay plan is described in COMCOR §33.140.01 at ©19-20. Department heads and non-merit employees participate in either the RSP or the GRIP and are eligible for this severance pay.³ Bill 43-20 would apply to any additional discretionary severance pay beyond that required under County law.

³ A department head who is promoted from a public safety position that participates in the defined benefit plan or a department head who began County employment before 1994 may not participate in the RSP or GRIP. However, these employees would be eligible for the discontinued retirement plan under that retirement plan.

At the end of the prior County administration, several non-merit employees who left their positions when Executive Elrich took office received additional severance pay on an ad hoc basis in varying amounts. These payments were made without transparency and without approval of the Council. As Human Resources Director Berke Attila testified, the County needs to attract and retain superior individuals for these non-merit positions. Does an individual who accepts an appointment to a department head or other non-merit position consider discretionary severance pay if they are terminated as a key component of the job? We don't know the answer to this question. However, if the Executive and the Council conclude that additional severance pay is necessary to recruit superior candidates for these positions, a transparent severance pay plan can be enacted in law.

4. Fiscal Impact, Economic Impact, and Racial Equity and Social Justice Impact.

OMB was unable to estimate fiscal impact of the Bill because they do not know how much, if any, severance pay will be saved if the Bill is enacted. (©16-17). OLO expects that the Bill would have an insignificant impact on economic conditions in the County (©6-7). Finally, OLO also expects that the Bill would have a minimal impact on racial equity and social justice (©11-13).

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Bill No. 43-20
Concerning: Non-merit Employees –
Merit System Employees – Severance
Pay - Limited
Revised: 9/29/2020 Draft No. 2
Introduced: September 29, 2020
Expires: March 29, 2022
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Friedson
Co-Sponsors: Councilmember Rice, Council President Katz, Councilmembers Glass and Navarro,
and Council Vice President Hucker

AN ACT to:

- (1) prohibit severance pay for a County employee unless authorized by law;
- (2) prohibit severance pay for certain employees who violate the Ethics Law;
- (3) provide for certain exceptions; and
- (4) generally amend the law governing severance pay for County employees.

By amending

Montgomery County Code
Chapter 1A, Structure of County Government
Section 1A-104

Chapter 33, Personnel and Human Resources
Section 33-140

By adding

Montgomery County Code
Chapter 33, Personnel and Human Resources
Section 33-26

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 1A-104 and 33-140 are amended and Section 33-26 is added**
2 **as follows:**

3 **1A-104. Heads of departments and principal offices; other positions designated**
4 **as non-merit.**

5 * * *

6 (e) *Salaries.* The Executive must design a compensation system to attract
7 and retain highly competent senior leaders as heads of departments and
8 principal offices, and other non-merit employees in the Executive
9 Branch. Each of these employees must be paid a salary within a salary
10 schedule proposed by the Executive and approved by the Council in the
11 Operating Budget of the Montgomery County Government. The salary
12 schedule may contain a provision permitting the Executive to exceed the
13 salary schedule established for a position for an individual employee,
14 subject to Council approval, if the Executive finds that it is necessary to
15 attract or retain a senior leader for a specific position. The Council must
16 establish a salary schedule for non-merit positions in the Legislative
17 Branch as part of the Operating Budget of the Montgomery County
18 Government.

19 (f) Severance pay. The Executive or a Councilmember must not authorize
20 any payment of money or paid administrative leave to a non-merit
21 employee in the Executive Branch or in the Legislative Branch upon
22 separation from County employment unless the payment is expressly
23 authorized by law. The Executive or a Councilmember must not enter
24 into an employment agreement with a non-merit employee that provides
25 for any type of severance pay for an employee who is terminated with or
26 without cause. This subsection must not be interpreted to prohibit:

27 (1) the payout of unused leave at termination of employment:

- 28 (2) a discontinued retirement pension authorized under Section 33-
- 29 45(d); or
- 30 (3) severance pay under Sections 33-139 and 33-140.

31 **33-140. Plan administration.**

32 (a) The County Executive must establish a severance pay plan in Executive
 33 Regulations under method (2). The plan must:

- 34 (1) prohibit severance pay for an employee who admits to or is found
- 35 to have violated the Ethics Law in the 12 months prior to separation
- 36 from County employment; and
- 37 (2) qualify as a severance pay plan under Section 457 of the Internal
 38 Revenue Code.

39 * * *

40 **33-26. Severance pay limits.**

41 The Executive must not authorize any payment of money or paid administrative
 42 leave to a merit employee upon separation from County employment unless the
 43 payment is expressly authorized by law. This Section must not be interpreted
 44 to prohibit:

- 45 (a) the payout of unused leave at termination of employment;
- 46 (b) a discontinued retirement pension authorized under Section 33-45(d); or
- 47 (c) severance pay under Sections 33-139 and 33-140.

48 **Sec. 2. Transition.**

49 The amendments in Section 1 must apply to any County employee who
 50 separates from County employment on or after the date this Act takes effect.

LEGISLATIVE REQUEST REPORT

Bill 43-20

Non-merit Employees – Merit System Employees – Severance Pay – Limited

DESCRIPTION:	Bill 43-20 would prohibit severance pay for a County employee unless authorized by law, prohibit severance pay for an employee who violates the Ethics Law. Bill 43-20 would expressly exclude: <ol style="list-style-type: none">(1) the payout of unused leave at termination of employment;(2) a discontinued retirement pension authorized under Section 33-45(d); or(3) severance pay under Sections 33-139 and 33-140. The Bill would also prohibit severance pay for an employee who admits to or is found to have violated the Ethics Law in the 12 months prior to separation from County employment.
PROBLEM:	In the past, some employees have received severance pay under an unregulated and undisclosed system.
GOALS AND OBJECTIVES:	Improve transparency in employee compensation.
COORDINATION:	Human Resources, County Attorney, Retirement
FISCAL IMPACT:	Office of Management and Budget
ECONOMIC IMPACT:	OLO
EVALUATION:	To be determined.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Robert H. Drummer, Senior Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	Not applicable.
PENALTIES:	None.



MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

September 22, 2020

FROM: Councilmember Andrew Friedson *Andrew Friedson*
TO: Council colleagues
SUBJECT: Bill 42-20, Public Accountability and County Transparency (PACT) Act
Bill 43-20, Non-merit Employees – Merit System Employees – Severance Pay – Limited

Dear colleagues,

Our only currency in public life is public trust. The residents we're so fortunate to represent deserve and expect County officials to follow the highest ethical standards. The work of local government depends on it. On September 29, I will introduce two bills to strengthen trust, accountability, and transparency in County government by improving the County's Ethics Law, requiring the disclosure of all compensation for County leaders, and ending the practice of discretionary severance pay for public employees.

Bill 42-20, the Public Accountability and County Transparency (PACT) Act, would more effectively guard against County employees using their positions of public service for private gain. The Bill would:

- Define the sale or promotion of intellectual property such as books, videos, and artwork as other employment in County Ethics Law, requiring financial disclosure;
- Prohibit the Chief Administrative Officer from other employment;
- Prohibit a County employee who in the previous year was compensated by a company seeking to do business with the County from participating in any way in that procurement process;
- Require a County employee involved in the procurement process who before the previous year was compensated by a company seeking to do business with the County to disclose that prior relationship to the procurement supervisor;
- Require non-merit employees and elected officials to include in financial disclosures sources of fees of more than \$1,000 in other employment;
- Require the disclosure of proposed contracts for appointed non-merit positions to Council at time of appointment; and
- Require the disclosure of contracts for current non-merit employees in Council-confirmed positions.

Bill 43-20, Non-merit Employees – Merit System Employees – Severance Pay – Limited, would end the practice of using taxpayer dollars to compensate public employees in an unregulated and often undisclosed fashion. The bill would prohibit discretionary severance pay for all County employees and prohibit separation pay for an employee who admits to violating or was found to have violated the Ethics Law in the year prior to separation.

I would welcome your co-sponsorship of this legislation and any questions you may have. Thank you for your consideration and commitment to government accountability and transparency.

STELLA B. WERNER OFFICE BUILDING • 100 MARYLAND AVENUE, 6TH FLOOR, ROCKVILLE, MARYLAND 20850
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Economic Impact Statement

Office of Legislative Oversight

BILL 43-20 **Non-Merit Employees – Merit System Employees – Severance Pay – Limited**

SUMMARY

The Office of Legislative Oversight (OLO) expects Bill 43-20 to have an insignificant impact on economic conditions in Montgomery County.

BACKGROUND

The goal of Bill 43-20 is to enhance transparency in County employee compensation. As Robert Drummer, Senior Legislative Attorney with the Montgomery County Council, writes, “In past years, some employees received severance payments as they left County employment under an unregulated and undisclosed manner. Bill 43-20 is intended to end this process and require any severance payments to be made in an open and equitable manner.”¹ If enacted, the Bill would prohibit severance pay for County employees unless authorized by law and for those employees who violate Ethics law.² The Bill would exclude: “the payout of unused leave at termination of employment,” “a discontinued retirement pension authorized under Section 33-45(d),” and “severance pay under Sections 33-139 and 33-140.”³

METHODOLOGIES, ASSUMPTIONS, AND UNCERTAINTIES

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

VARIABLES

Not applicable.

¹ Memorandum, Bill 43-20, Non-Merit Employees – Merit System Employees – Severance Pay – Limited, September 24, 2020, Montgomery County Council, 1.

² Montgomery County Council, Bill 43-20, Non-Merit Employees – Merit System Employees – Severance Pay – Limited, Introduced on September 29, 2020, Montgomery County, Maryland, 1.

³ Ibid, 2-3.

Economic Impact Statement

Office of Legislative Oversight

IMPACTS

WORKFORCE ▪ TAXATION POLICY ▪ PROPERTY VALUES ▪ INCOMES ▪ OPERATING COSTS ▪ PRIVATE SECTOR CAPITAL INVESTMENT ▪ ECONOMIC DEVELOPMENT ▪ COMPETITIVENESS

Businesses, Non-Profits, Other Private Organizations

OLO believes that Bill 43-20 would have little to no impact on private organizations in the County in terms of the Council's priority indicators, namely workforce, operating costs, capital investments, property values, taxation policy, economic development and competitiveness.⁴

Residents

OLO believes that Bill 43-20 would have little to no impact on County residents in terms of the Council's priority indicators.

WORKS CITED

Drummer, Robert. Memorandum: Bill 43-20, Non-Merit Employees – Merit System Employees – Severance Pay – Limited. September 24, 2020. Montgomery County Council.

Montgomery County Council. Bill 10-19, Legislative Branch – Economic Impact Statements – Amendments. Enacted on July 30, 2019. Montgomery County, Maryland.

Montgomery County Council. Bill 43-20, Non-Merit Employees – Merit System Employees – Severance Pay - Limited. Introduced on September 29, 2020. Montgomery County, Maryland.

CAVEATS

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

CONTRIBUTIONS

Stephen Roblin (OLO) drafted this economic impact statement.

⁴ For the Council's priority indicators, see Montgomery County Council, Bill 10-19 Legislative Branch – Economic Impact Statements – Amendments, Enacted on July 30, 2019, Montgomery County, Maryland, 3.



OFFICE OF THE COUNTY ATTORNEY

Marc Elrich
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

TO: Berke Attila, Director
Office of Human Resources

FROM: Edward B. Lattner, Chief *Edward B. Lattner*
Division of Government Operations

DATE: October 9, 2014

RE: **Bill 43-20, Non-merit Employees - Merit System Employees - Severance Pay - Limited**

Current law, § 1A-104(e) requires the County Executive to propose, and the County Council to approve, a salary schedule for heads of departments, principal offices, and other non-merit employees in the Executive Branch. Bill 43-20 would add a new subsection (f) to prohibit severance pay for a non-merit employee unless authorized by law and prohibit severance pay for certain employees who violate the Ethics Law.

The Bill likely violates the U.S. Constitution's Contract Clause to the extent it would retroactively invalidate any existing contractual agreement an employee has negotiated with the County for severance pay.

Article I, § 10, clause 1 of the United States Constitution provides that "No State shall . . . pass any Law impairing the Obligations of Contracts . . .". It is well settled that, despite the absolutist nature of the Clause, the Constitutional prohibition against impairing the obligation of contracts is not to be read literally. *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 502 (1987). The Contract Clause does not prohibit governments from impairing contracts but limits a government's right to do so.

The courts employ a three-part test for harmonizing the command of the Contract Clause with the necessarily reserved sovereign power of the government to provide for the welfare of its citizens. *Baltimore Teachers Union v. Mayor and City Council*, 6 F.3d 1012, 1015 (4th Cir. 1993). A reviewing court must determine: (1) whether there has been an impairment of the contract; (2) whether that impairment was substantial; and (3) if so, whether the impairment was nonetheless a legitimate exercise of the police power. *FOP Lodge No. 89 v. Prince George's Cty.*, 608 F.3d 183, 188 (4th Cir. 2010).

As to the first factor, impairment, the government does not impair the obligation of contracts merely by breaching one of its contracts or by otherwise modifying its contractual obligation. *Cherry v. Baltimore City*, 762 F.3d 366, 371 (4th Cir. 2014). The line between mere breach and unconstitutional impairment is crossed where the state or local government action forecloses the possibility of damages or an equivalent remedy. *Crosby v. City of Gastonia*, 635 F.3d 634, 642 n.7 (4th Cir. 2011).

In addition, for purposes of the Contract Clause, there is impairment only if the challenged legislative action operates with retrospective or retroactive effect. *Md. State Teachers Assoc. v. Hughes*, 594 F. Supp. 1353, 1360-61 (D. Md. 1984). Legislation with purely prospective effect is not considered an “impairment” within the meaning of the Contract Clause. *Howell v. Anne Arundel Cty.*, 14 F. Supp. 2d 752, 755 (D. Md. 1998).

As to the second factor, a contract violation occurs only if the government substantially impairs a party’s right under the contract. Legitimate expectations of the parties determine whether the impairment was substantial. In *Baltimore Teachers Union v. Mayor and City Council*, 6 F.3d 1012 (4th Cir. 1993) the court noted that the Supreme Court provided little guidance as to what constitutes substantial impairment, but assumes that a substantial impairment occurs “where the right abridged was one that induced the parties to contract in the first place or where the impaired right was on which there had been reasonable and especial reliance.” “Total destruction of contractual expectations is not necessary for a finding of substantial impairment.” *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983).

As to the third factor, a government may substantially impair a contract if reasonable and necessary to serve a legitimate public purpose. Reasonableness is determined in light of whether the contract had “effects that were unforeseen and unintended by the legislature”. Necessity means that the government did not have a less drastic modification available and the government could not achieve its goals without altering the contractual terms. Courts generally defer to the government in determining the reasonableness and necessity of a particular measure, unless a government seeks to impair its own contracts. But even where the government acts to impair its own contracts some degree of deference is appropriate. *United States Trust of New York v. New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234. In gauging the substantiality of the impairment, the court also considers whether the particular sector at issue has been regulated in the past. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). For example, in *Baltimore Teachers Union v. Mayor and City Council*, 6 F.3d 1012 (4th Cir. 1993), the court held that a city salary reduction plan adopted to meet immediate budgetary shortfalls was reasonable and necessary and, therefore, did not violate the Contract Clause.

The invalidation of severance agreements proposed by the Bill likely violates the Contract Clause. The Bill clearly operates retroactively and invalidates any pre-existing severance agreement the County has entered into with an employee.

The Supreme Court has upheld state laws that retroactively impaired the contractual obligations when necessary to remedy an important and general social problem. *See, e.g., Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987) (Court upheld state statute that prohibited types of coal mining that would cause substantial damage to a variety of publicly and privately owned properties). But here, the County is acting to invalidate the contract of a limited number of employees. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (Court struck down a state law that required certain employers to increase pension benefits for prior service because, in part, the law was not necessary to remedy an “important and general social problem,” but rather focused on a limited number of employees who “had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans.” *Id.* at 250.) A court would likely conclude that the Bill’s retroactive invalidation of existing severance agreements is not a reasonable and narrowly tailored means of promoting a significant public purpose but rather an attempt by the government to repudiate its obligation to private parties.¹

To avoid the Contract Clause issue, application of the Bill should be prospective only.

Finally, the Council should consider identifying § 33-45(e) in line 29 as an additional law that authorizes a discontinued service pension (specifically for an elected or appointed member of the employee retirement system who “is not reappointed or reelected.”)²

ebl

cc: Robert H. Drummer, Senior Legislative Attorney
Marc P. Hansen, County Attorney
Dale Tibbitts, Special Assistant to the CE
Tammy J. Seymour, OCA

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¹ This situation differs from the one presented by Bill 27-20E, which modified the scope of collective bargaining. First, that Bill did not have a retroactive effect. Second, public sector collective bargaining has always been dependent upon specific authorization in the law.

² County Attorney Marc Hansen has recused himself from this matter and did not participate in the preparation of this memorandum.

Racial Equity and Social Justice (RESJ) Impact Statement

Office of Legislative Oversight

BILL 43-20: NON-MERIT EMPLOYEES - MERIT SYSTEM EMPLOYEES - SEVERANCE PAY - LIMITED

SUMMARY

The Office of Legislative Oversight (OLO) expects Bill 43-20 to have a minimal impact on racial equity and social justice among Montgomery County Government (MCG) employees and the County at large.

BACKGROUND

The County Council introduced Bill 43-20 on September 29, 2020. The bill intends to "end the practice of using taxpayer dollars to compensate public employees in an unregulated and often undisclosed fashion."¹ If enacted, the bill would:

- Prohibit severance pay for a County employee unless authorized by law;
- Prohibit severance pay for certain employees who violate the Ethics Law;
- Provide for certain exceptions; and
- Generally, amend the law governing severance pay for County employees.²

DEMOGRAPHIC DATA

Understanding the impact of Bill 43-20 on racial equity and social justice in the County requires understanding the demographics of the County's workforce as compared to residents. There are four major categories of MCG employees:

- **Seasonal and temporary employees** that include lifeguards, camp counselors, cashiers and front-desk staff. Seasonal employees earn the minimum wage; temporary employees can work for up to 1,040 hours annually.
- **Permanent merit employees** covered by the Merit Protection Board, including administrative support, service/maintenance, technicians, paraprofessionals, protective service workers and professionals.
- **Management Leadership Service employees** that represent the subset of permanent, merit employees that serve as managers and administrators in the Legislative and Executive Branches.
- **Non-merit, appointed employees** who account for the senior-most positions in the Montgomery County government. They include department directors, senior advisors, and confidential aides.

An analysis of data (Table 1) comparing the demographics of County residents to MCG personnel shows that:

- Black employees are over-represented among permanent merit employees and among employees who left County government compared to their residents' share, but they are proportionately represented in the MLS.
- White employees are under-represented among permanent merit employees and among employees who left County government compared to their resident share,³ but over-represented in the MLS.

RESJ Impact Statement

Bill 43-20

- Latinx and especially Asian employees are under-represented among every MCG employee group and among employees who left County government compared to their resident populations.⁴

Table 1: Montgomery County Residents, Government Workforce, and Turnover by Race and Ethnicity

Race and Ethnicity	County Residents	Permanent Merit Employees	Management Leadership Service	Non-Merit (Appointed) Employees	Merit Employee Turnover
White	55%	48%	64%	37%	46%
Black	21%	27%	19%	9%	32%
Latinx	20%	11%	6%	6%	10%
Asian	17%	7%	6%	3%	6%
Other/Non-Reported	11%	8%	5%	46%	6%
Total Number	1,050,688	9,381	396	89	661

Sources: American Community Survey, 2019; Montgomery County Personnel Management Review, 2020; and Montgomery County Office of Human Resources Unpublished Data on Non-Merit Positions, 2020

The over-representation of Black employees among non-managerial positions and the over-representation of White employees among managerial positions are consistent with the occupational segregation that characterizes the U.S. workforce.⁵ It's unclear whether occupational segregation by race and ethnicity characterizes non-merit, appointed positions in the County because nearly half of employees in these positions (46%) did not disclose their race or ethnicity or selected "Other." However, the racial and ethnic makeup of MLS employees suggests that White employees are also over-represented among the 89 non-merit positions that would most be impacted by Bill 43-20 if enacted.

ANTICIPATED RESJ IMPACTS

Montgomery County Employees: Since the racial and ethnic makeup of non-merit employees remains unknown, the RESJ impact of Bill 43-20 remains undetermined. An analysis of MLS demographics, however, suggests that White employees are likely to be disproportionately impacted by the proposed changes to County law under Bill 43-20 because they likely account for a majority of non-merit employees.⁶ Yet, since non-merit employees account for less than one percent of MCG's overall workforce, the overall impact of Bill 43-20 on the MCG workforce is negligible.

METHODOLOGIES, ASSUMPTIONS, AND UNCERTAINTIES

This RESJ impact statement and OLO's analysis relies on several sources of information, including: the American Community Survey;⁷ Montgomery County Management Personnel Management Review;⁸ Montgomery County Non-Merit Demographics;⁹ and OLO economic impact statement Bill 43-20.¹⁰

RESJ Impact Statement

Bill 43-20

RECOMMENDED AMENDMENTS

The County's Racial Equity and Social Justice Act requires OLO to consider whether recommended amendments to bills aimed at narrowing racial and social inequalities are warranted in developing RESJ impact statements.¹¹ If the goal of Bill 43-20 was to limit disparities in permanent employment, OLO could offer such amendments. The purpose of Bill 43-20, however, is not to decrease racial and social inequities in the County. As such, this RESJ impact statement does not offer recommended amendments for Bill 43-20.

CAVEATS

Two caveats to this racial equity and social justice impact statement should be noted. First, predicting the impact of legislation on racial equity and social justice is a challenging, analytical endeavor due to data limitations, uncertainty, and other factors. Second, this RESJ statement is intended to inform the legislative process rather than determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

OLO staffers Dr. Theo Holt and Dr. Elaine Bonner-Tompkins drafted this racial equity and social justice impact statement.

¹ Memorandum, Bill 43-20, Non-Merit Employees – Merit System Employee – Severance Pay – Limited, September 24, 2020, Montgomery County Council.

² Montgomery County Council, Bill 43-20, Non-merit Employees-merit System Employees, Severance Pay-Limited, Introduced on September 29, 2020, Montgomery County, Maryland.

³ White MCG employees, however, are proportionately represented among those leaving County government compared to their share of permanent merit employees (46% v. 48%).

⁴ Latinx MCG employees, however, are proportionately represented among those leaving County government compared to their share of permanent merit employees (10% v. 11%).

⁵ Equitable Growth, U.S. Occupational Segregation by Race, Ethnicity, and Gender, July 2020 <https://equitablegrowth.org/wp-content/uploads/2020/07/063020-occup-seg-fs.pdf>

⁶ Montgomery County Personnel Management Review, April 2020

<https://www.montgomerycountymd.gov/HR/Resources/Files/Classification/Compensation%20Documents/PMR%202020%2004072020.pdf>

⁷ American Community Survey Demographic and Housing Estimates, Montgomery County, Maryland, 2019 (1 Year Estimates) Table DP05 <https://data.census.gov/cedsci/table?q=montgomery%20county%20maryland&tid=ACSDP1Y2019.DP05&hidePreview=true>

⁸ Montgomery County Personnel Management Review, April 2020

⁹ Unpublished data from Office of Human Resources shared with OLO on October 10, 2020

¹⁰ Stephen Roblin, Bill 43-20 Legislative Branch- Economic Impact Statement, Office of Legislative Oversight, October 2020.

¹¹ Montgomery County Council, Bill No. 27-19 Racial Equity and Social Justice, Effective on March 2, 2020, Montgomery County, Maryland.

Separation Benefits for Appointed Executive Branch Department Directors and Question A's

1. Discretionary Severance Package

Subject to the County Executive's discretion, unless dismissed for cause, Appointed Officials (Department Directors and Question A's) who are separated from service by an administrative action may receive a severance package, in addition to any normal retirement benefit for which the appointed official may be entitled.

- A. Appointed Department Directors who participate in the Employees' Retirement System (ERS), Retirement Savings Plan (RSP) or Guaranteed Retirement Income Plan (GRIP):
 - **Up to sixteen (16) weeks of additional pay of participant's final earnings**
- B. Question A's who participate in the Employees' Retirement System (ERS), Retirement Savings Plan (RSP) or Guaranteed Retirement Income Plan (GRIP):
 - **Up to twelve (12) weeks of additional pay of participant's final earnings**

2. Non-Discretionary Severance Benefits Related to Retirement Plan Participation

Unless dismissed for cause, Appointed Officials who are participants in the Retirement Savings Plan (RSP) or Guaranteed Retirement Income Plan (GRIP) who are separated from service by an administrative action are entitled to and will receive severance benefits, in accordance with County Code Section 33-139 and COMCOR 33.140.01:

Years of Service	Earned Benefit
0 to 1 year Completed Service	No Benefit
More than 1 to 5 Years' Completed Service	Additional 6 Weeks of Participant's Final Earnings
More than 5 to 7 Years' Completed Service	Additional 8 Weeks of Participant's Final Earnings
More than 7 to 9 Years' Completed Service	Additional 10 Weeks of Participant's Final Earnings
More than 9 Years' Completed Service	Additional 12 Weeks of Participant's Final Earnings

3. Leave Payout

Upon separation from County service, appointed officials who are participants in the Retirement Savings Plan (RSP) or Guaranteed Retirement Income Plan (GRIP) will receive a lump sum payment of a maximum of 600 hours (15 weeks) of unused Paid Time Off (PTO).

Those appointed officials who are members of ERS plan (applicable if hired before October 1, 1994) will receive a lump sum payment for the total accrued annual leave as of the date of separation.

4. Group Health and Life Insurance Continuation

Appointed officials not eligible for group health and life insurance continuation under the current eligibility guidelines stated above, unless administratively dismissed for cause, will be allowed to continue their group health and life insurance with the same employer/employee contribution rates for active employees until they find other employment which provides group health insurance or until twelve (12) months have passed, whichever comes first. After twelve (12) months, the individual will be able to continue group health insurance under COBRA. *Please note: COBRA does not offer a life insurance benefit.*

Note: The County expects to continue the County's Group Insurance Plan, but it is the County's position that there is no implied contract between County employees and the County to do so, and the County reserves the right at any time and for any reason to amend or terminate the County's Group Insurance Plan. The County's Group Insurance Plan may also be amended by the County at any time, either prospectively or retroactively, to conform to the Internal Revenue Code.

Fiscal Impact Statement

Bill 43-20, Non-Merit Employees – Merit System Employees – Severance Pay - Limited

1. Legislative Summary

The proposed legislation would amend the County Code to provide certain limitations and clarifications to severance pay, specifically to prohibit severance pay in circumstances involving ethics violations.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

The proposed legislation prohibits severance pay to employees who admit to or are found to have violated the Ethics Law. Additionally, the proposed legislation prohibits any payment at separation that is not expressly authorized by the law. The County budget does not contain any estimates or presumptions of payout at separation; even if such estimates were made, it would be challenging to estimate how many of those separations would be found to involve Ethics Law violations. As such, this proposed legislation would have no projected fiscal impact to the County's budget, and any potential impact to actual payouts would be indeterminate.

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

See question #2.

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

Not applicable.

5. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

Bill 43-20 does not authorize future spending.

6. An estimate of the staff time needed to implement the bill.

Not applicable.

7. An explanation of how the addition of new staff responsibilities would affect other duties.

Not applicable.

8. An estimate of costs when an additional appropriation is needed.

Not applicable.

9. A description of any variable that could affect revenue and cost estimates.

Not applicable.

10. Ranges of revenue or expenditures that are uncertain or difficult to project.

Not applicable.

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

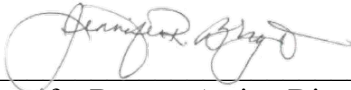
See question #2.

12. Other fiscal impacts or comments.

Not applicable.

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

Corey Orlosky, Office of Management and Budget



Jennifer Bryant, Acting Director
Office of Management and Budget

10/19/20

Date

TESTIMONY ON BEHALF OF COUNTY EXECUTIVE MARC ELRICH

Bill 43-20, Non-merit Employees – Merit System Employees – Severance Pay – Limited

Before the Montgomery County Council

October 20, 2020

Good afternoon Council Members, my name is Berke Attila, Director of the Office of Human Resources. It is a pleasure for me to appear before the Council on behalf of the County Executive to provide testimony on Bill 43-20. County Executive fully supports the intent of this Bill, but would like to suggest few amendments.

This bill that would add a new subsection (f) to § 1A-104 to prohibit severance pay for a non-merit employee unless authorized by law and prohibit severance pay for certain employees who violate the Ethics Law. The Bill would prohibit all severance pay for an employee who admits to or is found to have violated the Ethics Law in the 12 months prior to separation from County employment. Bill 43-20 amends existing provisions of law, namely, § 1A-104(e) which requires the County Executive to propose, and the County Council to approve, a salary schedule for heads of departments, principal offices, and for other nonmerit employees in the Executive Branch.

While the Bill would prohibit severance pay for a County employee unless authorized by law, this Bill would not prohibit: (1) the payout of unused leave at termination of employment; (2) a discontinued retirement pension authorized under Section 33-45(d); or (3) severance pay under Sections 33-139 and 33-140.

Severance pay for nonmerit employees is currently provided where the employee participated in Retirement Savings Plan or in the Guaranteed Retirement Income Plan. In addition, the County Executive has had the discretion to provide severance pay to appointed officials (either Department Directors or Question A's) who were separated from service by an administrative action.

In responding to the provisions and intent of the Bill, I would note that this County must continue to be able to attract and retain superior talent. How we attract and retain talent is very much based on a set of a policy choices and the economic conditions under which these choices are made can vary somewhat over time.

Therefore, the County Executive would support a provision that allows severance pay under conditions where they are authorized by law and under conditions where discretionary severance pay for nonmerit employees is based on a schedule that has been affirmatively approved by the Council. We believe that there are cases where the Council would agree that it makes sense to provide discretionary severance pay to nonmerit employees.

We look forward to working with the Council on this legislation.

COMCOR 33.140.01 Severance Pay for Certain Participants in the Retirement Savings Plan and the Guaranteed Retirement Income Plan

33.140.01.01 Purpose

1.0 The Severance Pay Plan will pay severance benefits to employees of Montgomery County ("County") and certain employees of participating agencies upon an employee's separation from service pursuant to the terms and conditions of this plan.

33.140.01.02 Definitions

2.0 Final Earnings - The weekly rate of regular earnings of a participant as of the last day of active service.

Participant - Any employee of the County or a participating agency who satisfies the eligibility requirements of the Severance Pay Plan.

Participating Agency - Any agency that participates in the Retirement Savings Plan and the Guaranteed Retirement Income Plan, uses the County payroll system, elects to participate in the Severance Pay Plan, and whose participation is approved by the Chief Administrative Officer.

Regular Earnings - Gross pay for actual hours worked exclusive of overtime. Gross pay must be used to determine benefits even if the County implements a pick-up plan under Section 414 of the Internal Revenue Code. Gross pay must be used to determine benefits even if a participant has agreed to a reduction of earnings under:

- (a) the County's deferred compensation plan under Section 457 of the Internal Revenue Code; or
- (b) any other benefit program sponsored by the County permitted by the Internal Revenue Code.

Separation from service or separated from service - The loss of a participant's job through affirmative administrative action of the County or the participating agency excluding dismissal for cause. Separation from service does not include the voluntary decision by a participant to leave the service of the County or the participating agency.

33.140.01.03 Eligibility

3.0 An employee of the County or of a participating agency is eligible to participate in this plan upon the employee's separation from service if the employee is then a participant in the Retirement Savings Plan or the Guaranteed Retirement Income Plan under Division 1 of Article VIII of Chapter 33 of the County Code.

33.140.01.04 Severance Benefits

4.0 Severance benefits will be paid as follows:

0 to 1 years of service completed	no benefit
over 1 to 5 years of service completed	6 weeks of the participants final earnings
over 5 to 7 years of service completed	8 weeks of the participants final earnings
over 7 to 9 years of service completed	10 weeks of the participants final earnings
over 9 years of service completed	12 weeks of the participants final earnings

33.140.01.05 Distribution of Benefits

5.0 All benefits must be paid on a bi-weekly basis commencing after the participant separates from service with the County or the participating agency. The first payment will be made on the date that the participant would have received payment of regular earnings had the participant not separated from service. The severance benefits must be paid to the participant directly. All federal and state income taxes must be withheld from the severance benefits paid. To the extent that federal or state unemployment taxes apply, they must be withheld from the severance benefits paid.

33.140.01.06 Source of Funds

6.0 The County must pay the benefits under this plan from general assets of the County or the participating agency. Assets of the Retirement Savings Plan or Guaranteed Retirement Income Plan may not be used to pay benefits under this plan. Any participating agency must pay the costs of any benefits and any expenses incurred due to the participation of its employees.

33.140.01.07 Appeals

7.0 An eligible County employee who is denied severance pay may appeal the final decision of the Chief Administrative Officer by noting an appeal to the Merit System Protection Board. All appeals must be in writing and must be filed within 10 working days of the date on which the employee receives the decision. The Merit System Protection Board may overturn the decision of the Chief Administrative Officer only if the Board finds that the decision was arbitrary and capricious.

(Administrative History: Reg. No. 16-09 (Method 2); Dept.: Human Resources; Supersedes Reg. No. 33-95)

See also COMCOR 33.122.01 Participation of Agencies in Retirement Savings Plan Disability Benefits Plan and Severance Pay Plan