Coalition of Baltimore City Employee Unions

July 5, 2022

Nick J. Mosby, President
and Members of the Baltimore City Council
c/o Nikki Thompson, Director of Legislative Affairs
City Hall, Ste. 400
100 N. Holliday Street
Baltimore, MD 21202

Re: City Council Bill No. 22-0211
City Employees and Retirees Health Care Reform

Dear President Mosby and Members of the City Council:

Our Reasons for this Letter:

This letter follows the favorable vote of the Council's Education, Workforce and Youth Committee on CC Bill No. 22-0211 conducted on June 30, 2022. We urge the full Council to act favorably on the Bill in its present form. We write today to address points raised on behalf of the Law Department by Chief Solicitor, Elena R. DiPietro, by letter dated June 29, 2022 which letter first became available to us on June 30, 2022.

In its letter of June 29, 2022, the Law Department opposes the Bill as it claims that the Bill "goes beyond the scope of authority of the City Council," and "is preempted by State law regarding the disclosure of public documents." Respectfully, that view of the Bill is not correct. The Bill is carefully fashioned to codify a program which the Mayor & City Council has long offered to all active City employees, to City retirees and to their dependents. In successive agreements approved by the Board of Estimates, dating to 2012, the City and the City's Unions have adopted agreed methods to administer the health benefits program, which methods should continue.

CC Bill 22-0211 takes the next step, to adopt as ordinance those agreed methods. As acknowledged by the City's Labor Commissioner in her written testimony on CC Bill 22-0211 submitted on June 27, 2022:

> There is no doubt that the HIC [Health Insurance Committee] has been extremely effective at doing what it was established to do which is to ensure that all parties involved … have a seat at the table where each members' (sic) interests are heard. Ultimately these interests are being heard and continue to have a positive effect on all labor and healthcare plan agreements established through this process.

The Law Department attacks Bill 22-0211 in three ways, under the Express Powers Act, under the City Charter and under the State's Public Information Act. We shall address each argument.

The City Council has Express Power to Legislate on the Health Benefits Program:

Law Department first argues that the City Council is without express power to establish a health benefits program for City employees and retirees, arguing that it cannot find an express reference to that authority either in the Express Powers Act or the City Charter. In that, it is wrong.

Baltimore City is a charter home rule jurisdiction under Article XI–A of the Maryland Constitution. The purpose of Article XI–A is to transfer the General Assembly's power to enact public local laws to Article XI–A home rule jurisdictions, like the City. Under Article XI-A, § 2, the General Assembly is to enact a grant of express powers for Baltimore City and the counties that have adopted home rule charters.

Most, but not all, of the express powers granted by the General Assembly under Article XI–A, § 2, are contained in Article 25A of the Maryland Code concerning home rule counties. For Baltimore City, its express powers also appear in Article II of the Baltimore City Charter.

For present purposes, Article II of the City Charter includes express powers with respect to employee benefits and collective bargaining. Those powers are found in City Charter Article II, Section 55(a), which states in pertinent part that the City "shall have power by ordinance, or such other method as may be provided for in its Charter:

> To provide by ordinance an orderly procedure for participation by municipal employees and their representatives in the formulation of labor relations and personnel policies, recognizing the right of employees to organize and bargain collectively through representatives of their own choosing and generally authorizing the Mayor and City Council of Baltimore to provide for
>
> (1) the manner of establishing units appropriate for collective bargaining and of designating or selecting exclusive bargaining representatives;
>
> (2) the rights of the employer, employees and the employee organization designated as the exclusive representative in an appropriate unit;
>
> (3) the procedure for the negotiation of a collective bargaining agreement with respect to the terms and conditions of employment and the manner for resolution of a negotiation impasse; [and]
>
> (7) other related matters to effectuate the ordinance.'

The references to "labor relations and personnel policies" and "terms and conditions of employment" in Article II, Section 55(a) of the Charter make health benefits and health benefit administration mandatory subjects of collective bargaining under the Charter. See, *Atkinson v. Anne Arundel County,* 236 Md.App. 139, 175 (2018) ("[W]e conclude that 'terms and conditions of employment' is a term of art that includes health insurance benefits.")

The same grant of authority appears with respect to retirees in Article II, Sections 24(a), 24(a-1), (25), and (26) of the City Charter, which call on the City to "establish and maintain" systems consisting both of "pensions" and "retirement benefits." The phrase "retirement benefits" supplements the word "pensions" meaning that the Charter reference to "retirement benefits" authorizes the City Council to adopt measures on other benefits in addition to "pensions" for retirees. Accordingly, "retirement benefits" may additionally include health benefits for retirees, their spouses, and dependents. See, *Junek v. St. Mary's Department of Social Services*, 164 Md. 350, 357 (2019) (quoting *Blondell v. Baltimore City Police Department* 241 Md. 680, 691 (1996) (One must "interpret a statute so as to give every word effect, avoiding constructions that render any portion of the language

superfluous or redundant."). See also, *Gillespie v. State*, 370 Md. 219, 222 (2002) (recognizing "long-standing practice of interpreting statutes to give every word effect and to avoid constructions that render any portion of the language superfluous or redundant.").

The City Council has Charter-granted authority to legislate as CC Bill No. 22-0211 proposes.

Application of Surplus Funds Remains Subject to Board of Estimates Approval:

Next, the Law Department asserts that provisions of the Bill which permit the City to earmark surplus funds left over after the payment of all claims (and IBNR) at the end of a benefit year for deposit in the Premium Stabilization Fund are "in conflict with the Charter powers of the Board of Estimates." In that regard, the Law Department overlooks elements of the Bill which appear in Sections 11-11 entitled "Final Accounting" and 11-12 "Premium Stabilization Fund."

Simply put, those sections operate subject or subordinate to the authority of the Board of Estimates. Section 11-11(c) of the Bill contemplates that the Director of Finance and the Union's consultant will meet to review the final accounting of "an excess of revenues over costs." Section 11-12(e) contemplates those disbursements (uses) of the surplus will occur "only if the Board of Estimates approves an application."

Should further clarity be sought, both Sections 11-11 and 11-12 can be easily amended to operate "subject to the authority of the Board of Estimates" consistent with that term as defined in Article I, Section 2(i) of the City Charter. The Coalition would not oppose such an amendment.

The Duty to Bargain is Superior to the Maryland Public Information Act:

Last, the Law Department claims that the parts of Bill 22-0211 which refer to information sharing step over bounds. See, e.g., Bill Sections 11-6 "Requests for Information"; 11-7 "Annual Provider Reports"; 11-8(a) Annual report of "Premiums and Premium Equivalents; 11-10 "Gain and Loss Statement." This argument places the Maryland Public Information Act (the PIA) at issue. In rendering a restrictive view of Bill 22-0211, the Law Department is off the mark. The favored rules of interpretation applied under the PIA flow in the opposite direction.

The dominant policy is that "the provisions of the [PIA] reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information

concerning the operation of government." *A.S. Abell Pub. Co. v. Mezzanote,* 379 M.d 26, 32 (1983).

The text of the PIA declares as its overarching rationale, "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." 10–612(a). Further, in implementation, "unless an unwarranted invasion of the privacy of a person in interest would result, [the Act is to] *be construed in favor of permitting inspection of a public record.*" 10–612(b). (emphasis added). The PIA thus is to stand as an aperture, not a barrier to full and complete disclosure.

The intent of Bill 22-0211 is the same – to open the making and administration of City policy about health benefits to productive review. Indeed, it calls for exchange of information at a level that may not be in archived documents. As the Labor Commissioner has noted in her written testimony on CC Bill No. 22-0211, if enacted, the Bill will recognize as law "[what] has already become Standard Operating Procedure" for the City's health benefits program.

The conflicting policy considerations focused on by the Law Department have been resolved (in the favor of unions) recognized as hornbook law governing collective bargaining, including bargaining over health benefits. In the seminal decision on point, *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court held that the employer's duty to furnish information, like its duty to bargain, "extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement."

Acme Industrial emphasized the importance of information relevant to a union in its effort to administer an existing contract benefit. *Acme* endorsed the "discovery-type standard" applied by the National Labor Relations Board. An employer's duty to furnish information is broadly applied. It is broadly defined because without information a union would be unable to fulfill its statutory duties as bargaining agent. *Aluminum Ore Co. v. NLRB,* 131 F.2d 485 (1942). Thus, information must be furnished to the union for purposes of representing employees both in negotiations for a future contract and for administration of an existing contract. *J. I. Case Co. V. NLRB*, 253 F.2d 149 (7th Cir.) (1958). An employer's refusal to supply information is as much a violation of the duty to bargain as a failure to meet and confer with the union in good faith. *Curtis – Wright*, 145 NLRB 152 (1963), enforced, 347 F.2d 61 (3rd Cir 1965).

Courts and administrative boards in public sector settings have separately addressed the supposed conflict between duties existing under collective bargaining and public information statues. For example, in Delaware which shares a common border our State,

in *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine School District Board of Education*, DPERB ULP No. 85-06-005 (Feb. 5, 1986), the Delaware Public Employment Relations Board held that "[a] certified exclusive bargaining representative in fulfilling its statutory duty to represent the members of the certified bargaining unit, cannot be considered in the same class as the general public…". *Id.* The obligation to provide information to a union, the PERB held, "is neither prohibited by nor inconsistent with the personal privacy protections of the [State FOIA]." *Id.* at 151-52.

The Delaware PERB again affirmed this principle in *American Federation of State, County and Municipal Employees, Council 81, Local Unions 320 and 1102 v. City of Wilmington, Delaware* DPERB Case NO 10-12-781, 2010 WL 8424716 (Jan. 14, 2010) ("It is well-established in Delaware PERB precedent that there are two independent bases on which an exclusive representative may request information from a public employer…" the FOIA and "an independent duty to provide information that is relevant to the union in carrying out its statutory representational duties and responsibilities which arises under the employer's duty to bargain in good faith.").

Illinois's Educational Labor Relations Board has concluded the same. *See, University Professionals of Illinois, Local 4100,* 31 PERI ¶ 201, 2015 WL 3623606 (2015) ("the University argues that FOIA prohibits it from disclosing the information requested by the Union. However, in this case, the Union does not seek the information through FOIA. Rather, it seeks the information in its role as exclusive bargaining representative under the Illinois Educational Labor Relations Act. Therefore, any prohibitions of the disclosure of information under FOIA do not apply.")

The New Jersey PERC has too. *See County of Morris*, 28 NJPER ¶ 33068, 2002 WL 34677512 (2002) ("Rather, Council 6 seeks this information as the statutory majority representative of a collective negotiations unit of blue and white collar County employees. It seeks this information in the context of its collective negotiations relationship with the County, pursuant to all of the attendant rights and obligations created by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 *et seq*., and applicable caselaw. Accordingly, because the information requested in this matter was not sought pursuant to the Right to Know statute, Executive Order No. 11 does not apply to this circumstance.").

The Michigan Employment Relations Commission reached the same conclusion. *Plymouth-canton Community Schools*, 11 MPER ¶ 29090, 1998 WL 35395070 (1998) ("Because the information request at issue in this case was made pursuant to [Public Employment Relations Act], [FOIA] other statutes are simply irrelevant.").

The information exchange recognized in CC Bill No. 22-0211 stands outside of the Maryland PIA. The Maryland PIA does not limit or otherwise qualify the Union Coalition's right to request, gather and use information about the enumerated aspects of the City's health benefits program.

The Union Coalition's Requests and Conclusion:

If any clarification is warranted, CC Bill No. 22-0211 should be amended by the addition of language to repeal Article 1, Section 50 of the City Code concerning the Baltimore Benefits Commission which is inoperative and which Code sections are without apparent purpose.

Bill No. 22-0211 does not exceed the City Council's authority. To the contrary, it commits the Council (and the City) to endorse as law important steps.

We urge the Council to support, to act favorably on and to pass Bill No. 22—0211. The Coalition's principal contact is Frank Boston. You may reach Mr. Boston and/or his partner Ari Plaut at (410) 323-7090. Thank you.

Respectfully,

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cc: Christopher Shorter, CAO, Office of the Mayor
Deborah F. Moore-Carter, Labor Commissioner