



OFFICE OF THE COUNTY ATTORNEY

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MEMORANDUM

TO: Karen Orlansky
Office of Legislative Oversight

FROM: Amy Moskowitz *AM/EBZ*
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Edward B. Lattner *Edward B. Lattner*
Chief, Division of Human Resources & Appeals

VIA: Marc. P. Hansen *Marc Hansen*
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DATE: October 28, 2010

RE: **Council Authority to Modify Employee Compensation and Benefits**

Due to a structural budget deficit, your office is exploring options to suggest to the County Council on reducing the deficit. Specifically, you asked our office to address whether the County Council may change employees' compensation and benefits, including changes to retirement and health benefits, for both active employees and retirees.

Summary

In general, because retirement benefits are set forth in the County Code, they are contractual obligations protected by the Contract Clause of the United States Constitution. Retirement benefits contained in current collective bargaining agreements may also have Contract Clause protection. The Council may make a retroactive modification that causes a substantial impairment in retirement benefits only if the modification is reasonable and necessary to serve an important public purpose. The Council can avoid any Contract Clause issues by only making prospective changes that do not affect accrued retirement benefits.

In contrast to retirement benefits, the Council has more flexibility in making changes to health benefits because those benefits are not required by County law. The Council resolutions that address retiree health coverage do not create an interest protected by the Contract Clause

because they do not promise any particular level of benefit or subsidy and, unlike the retirement law, they do not state that retirees "vest" or that retiree health benefits are an obligation of the County. While certain health benefits for current employees are provided for in collective bargaining agreements (and for retirees in the FOP agreement), the benefits in those agreements, like the benefits in the Council's resolutions, are subject to the Council's decision to annually appropriate sufficient funds to cover the cost of implementing those agreements. The discretionary funding of health benefits stands in marked contrast to the County-mandated funding of retirement benefits, which are held in trust. Thus, even in the face of a multi-year agreement, the Council could decide not to fully fund an agreement in any given fiscal year without violating that agreement or implicating the Contract Clause.

Likewise, the Council enjoys broad discretion in setting salaries for each upcoming fiscal year, unfettered by either the Contract Clause or the applicable collective bargaining agreements. The Council cannot promise salaries beyond the current fiscal year because the Charter restricts Council from appropriating funds beyond the current fiscal year.

I. THE CONTRACT CLAUSE

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. Is There A Contract And Has The Government Impaired That Contract?

First, the court must determine whether there has been impairment of the contract. This inquiry necessarily requires a determination of whether there is a contractual relationship in the first place. *Allstate Ins. Co. v. Kyong*, 376 Md. 276, 299, 829 A.2d 611, 624 (2003). A contractual relationship can arise either from a contract or even a statute "when the language and circumstances [of the statute] evince a legislative intent to create private rights of a contractual nature enforceable against the [government]." *Andrews v. Anne Arundel County*, 931 F. Supp. 1255, 1260 (1996), *aff'd without opinion*, 114 F.3d 1175, *cert. denied* 522 U.S. 1015 (1997) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 14 (1977)). But there is a strong presumption that statutes do not create contractual rights. *Nat'l R. Passenger Corp. v. Atchison, Topeka & Santa Fe R. Co.*, 470 U.S. 451, 465-66 (1985).

1. Contracts and even statutes can create contractual rights protected under the Contract Clause.

The County's retirement plans are set out in Chapter 33 (Articles III and VIII) of the County Code.¹ "[I]n Maryland, as in most states, public employee pension plans embody contractual rights and duties between and employee and the government as employer under the well-settled Contract Clause analytical approach." *Howell v. Anne Arundel County*, 14 F. Supp. 2d 752, 754 (D. Md. 1998); *Frederick v. Quinn*, 35 Md. App. 626, 629-30, 371 A.2d 724, 726 (1977) (statutory pension rights created a contract for purposes of Contract Clause).

Unlike retirement benefits, health benefits and salaries are not set out in law.² But they are addressed in the collective bargaining agreements, along with retirement benefits. Charter Sections 510, 510A, and 511 state that the County Council shall provide for collective bargaining for police officers, firefighters and general government employees. The three collective bargaining laws, set forth in Articles V, VII and X of Chapter 33 of the County Code, provide that salaries, retirement, and benefits are mandatory subjects of collective bargaining. See County Code Sections 33-80, 33-107, and 33-152. All current collective bargaining agreements contain provisions regarding these items.

2. The Contract Clause prohibits only retroactive impairment of contract.

The Contract Clause prohibits only a retroactive impairment of contract, not a prospective impairment.

A very important prerequisite to the applicability of the Contract Clause at all to an asserted impairment of a contract by state legislative action is that the challenged law operate with retrospective, not prospective effect. *Ogden v. Saunders*, 25 U.S. 213, 12 Wheat. 213, 6 L. Ed. 606 (1827). See also *Old Wine in Old Bottles: the Renaissance of the Contract Clause*, (1979) Supreme Court Rev. 95, 99. *United States Trust Co. [v. New Jersey]*, 431 U.S. 1, 52 L. Ed. 2d 92, 97 S. Ct. 1505 (1977)] explicitly restates the existence of statutory retroactivity as a necessary predicate for the applicability of the Contract Clause. *United States Trust Co.*, 431 U.S. at 18 n.15. The opinions in both *United States Trust Co.* and [*Allied Structural Steel Co. v. Spannaus*], 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L. Ed. 2d 727 (1978)] strongly assert that the challenged legislation involved was retroactive and thus, inferentially, impaired the subject contracts. *United States Trust Co.*, 431 U.S. at 14; *Spannaus*, 438 U.S. at 246, 247, 249. No

¹ Charter Section 401 requires that "[t]he Council shall establish by law a system of retirement pay."

² Salaries for the County Executive and Council members being a notable exception.

Supreme Court decision has been found in this court's research which has invalidated a non-retroactive state statute on the basis of the Contract Clause.

Maryland State Teachers Assoc. v. Hughes, 594 F. Supp. 1353, 1360-1361 (D. Md. 1984). See also *American Nat'l Fire Ins. Co. v. Smith Grading & Paving*, 454 S.E.2d 897, 899 n.2 (S.C. 1995) (internal citations omitted) ("The first inquiry of any Contract Clause analysis is whether the state law has operated as a substantial impairment of a contractual relationship. It is a long-held axiom of Contract Clause analysis that there is no impairment where the statute affects only future contracts between private parties. A non-retroactive statute affecting private contracts is, by definition, a statute that affects only future contracts and does not violate the Contract Clause.")

B. The Contract Clause Prohibits Only A Substantial Impairment Of Contract.

Second, 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."

C. The Government May Substantially And Retroactively Impair A Contract If Reasonable And Necessary To Serve A Legitimate Public Purpose.

Finally, 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.

II. ANALYSIS

A. Retirement

1. The County's retirement plans.

Charter Section 401 requires a retirement plan. The County's mandatory retirement plans—the Employees' Retirement System (ERS), a defined benefit plan, and the Retirement Savings Plan (RSP), a defined contribution plan—are set forth in County Code Chapter 33, Articles III and VIII.³ Employees hired before October 1, 1994, and represented public safety employees participate in the ERS. At retirement, participants receive a monthly benefit determined by years of service and average final earnings. Within the ERS, different benefit structures exist for various groups of employees (e.g., fire fighters, police officers, employees hired after 1984 receive decreased benefits at social security normal retirement age). County Code Section 33-40 requires the County to fund retirement benefits on an actuarially determined basis. As required by federal law, the funds are held in trust, established under County Code Section 33-58. The funds become ERS assets, not County assets.

Non public safety employees and unrepresented public safety employees hired after October 1, 1994, chose to participate in either the RSP or the Guaranteed Retirement Income Plan (GRIP), a cash balance plan, established within the ERS. In both plans, each pay period, employees generally contribute 4% percent of their salary and the County contributes 8% percent of their salary (unrepresented public safety employees contributions are different). RSP participants invest the contributions in selected investment options. GRIP participants receive earnings at an annual rate of 7.25%. At retirement or termination of employment RSP and GRIP participants receive the value of their account balance. The County deposits the RSP contributions in a trust, established under County Code Section 33-124.

As established under Maryland case law, the retirement plans in the County Code are contractual benefits protected by the Contract Clause. In addition, County Code Section 33-34 specifically provides Contract Clause-like protection against reduction of pension benefits, precluding modifications that reduce existing benefits except as necessary to maintain the fiscal integrity of the system. County Code Section 33-34, which is part of the ERS, provides in part:

It is the policy of the county to maintain a system of retirement pay and benefits for its employees which is adequately funded and insures employees sufficient income to enjoy during their retirement years. Any modifications to such retirement system shall not reduce the overall value of benefits which existed for members immediately prior to such modifications except that benefits may be reduced if necessary to maintain the fiscal integrity of the system after a finding by the county council that such change is necessary.

2. Case law

Maryland courts have held that pension plan statutes contain contractual rights between

³ The County also offers a voluntary deferred compensation plan under Internal Revenue Code Section 457(b) in Article IX of Chapter 33 of the County Code.

employees and the government protected under the Contract Clause.

Because a Contract Clause issue only exists if the legislation operates retroactively and not prospectively, the court in *Maryland State Teachers Association, Inc. v. Hughes*, 594 F. Supp. (D. Md. 1984) stated that there can be no expectation that pension plans can not be altered as to future benefits to be earned by future service. Likewise, in *Howell v. Anne Arundel County*, 14 F. Supp. 2d 752 (D. Md. 1998) the court recognized that the contract clause only protects against retroactive diminution of vested benefits and no contract clause violation occurs when legislation applies prospectively to non vested plan benefits. In these cases, there was no impairment because a reduced COLA would only apply to benefits earned after the effective date of the legislation. In both case, members would have COLA adjustments calculated under a bifurcated formula. In addition to a reduced COLA, *Hughes* involved a number of prospective changes to the retirement system and also included a bifurcated option under which the formula changed from 1.8% of average final compensation to .8% of average final compensation for years of service earned after the effective date of the legislation.

The retroactive diminution of pension benefits is more likely than not a substantial impairment because individuals plan their lives based on pension benefits. *Andrews v. Anne Arundel County*, 931 F. Supp. 1255 (1996), *aff'd without opinion*, 114 F.3d 1175 (1997), *cert. denied*, 522 U.S. 1015 (1997). But the government can modify pension terms as long as the changes do not adversely affect the benefits, or if adversely affected, are replaced with comparable benefits. *City of Frederick v. Quinn*, 371 A.2d 724 (1977).

If the government makes a substantial retroactive impairment to pension benefits, the court will examine the necessity and reasonableness of the government's decision. The necessity and reasonableness of a particular legislative act is a factual inquiry. In *Baltimore Teachers Union v. Baltimore*, the court held that a salary reduction plan adopted to meet immediate budgetary shortfalls did not violate the Contract Clause. While the court found that the plan was a substantial impairment, it concluded that the City's action was reasonable and necessary. Protecting the City's financial integrity was a significant public purpose justifying city action. Although the *Hughes* court held that the plaintiffs did not suffer any impairment because the changes to the pension plan were prospective, the court discussed whether the changes were reasonable and necessary had there been an impairment. The court concluded that due to the financial circumstances of the pension system and the State, the non drastic nature of the impairment and the unavailability of a more moderate course of action, the changes would be permitted, even if retroactive.

However, in *Andrews v. Anne Arundel County*, 931 F. Supp. 1255 (1996), *aff'd without opinion*, 114 F.3d 1175, *cert. denied*, 522 U.S. 1015 (1997), a case involving retroactive changes to the pension plan, the court did not find the County's action to be reasonable and necessary. Although the County argued the legislation was necessary for the "restoration of the actuarial

soundness" of the plan, the court ruled that the County "has failed to make a sufficient showing that the means which it has adopted to address the problem is the least drastic available." The court also noted that the County acknowledged that an emergency did not exist and that courts have typically upheld "such extreme modifications only in the face of an emergency or temporary situations."

3. Conclusion

If the Council wanted to change retirement benefits, it could modify benefits for new employees or for current employees as to benefits not yet earned (i.e., for future service). This would comply with the Contract Clause and County Code Section 33-34 because the Council would not reduce benefits "earned," only future benefits.⁴

In order to substantially impair the benefits for retirees or current employees who have already earned service, the Council would have to find under Section 33-34 that such modifications were reasonable and necessary to "maintain the fiscal integrity of the system." This also meets the standard established under the Contract Clause (i.e., such a drastic action was necessary and that no less dramatic remedial actions were available).

In addition to the County Code, the collective bargaining agreements contain retirement benefit provisions. These provisions typically call for the County Executive to seek an amendment to Chapter 33 of the County Code to implement the parties' negotiated changes to the retirement law. The Council may either enact the legislation or decline in which case the retirement benefits do not become effective. But even when the Council does enact the requested legislation, the retirement provisions typically remain in the collective bargaining agreements. By retaining this language in a collective bargaining agreement, the parties arguably intend that the benefits remain for the term of the agreement.

It is unclear whether these collective bargaining agreements, independent of Chapter 33, provide an interest protected by the Contract Clause. This office addressed this issue in the context of Bill 45-10, which proposes changes to the disability retirement provisions in the retirement law. As this office noted, the most conservative course of action would make any changes be effective after the dates of the current collective bargaining agreements (i.e., 2011 and 2012). Any changes before then could be subject to the Contract Clause analysis, requiring the County Council to find that any substantial retroactive modifications are necessary and reasonable for the public good. The change must be due to "effects that were unforeseen and unintended by the legislature" with no other less drastic modification available and the County Council cannot achieve its goals without altering the contractual terms.

⁴ Although certain changes are clearly prospective, other changes are more difficult to classify as prospective or retroactive (e.g., increasing years of service for current employees in order to qualify for full benefits at retirement and changes in the cost of living adjustments (COLA)).

B. Health Benefits

1. The County's health plans

While retirement benefits are required under the Charter, there is no such requirement for health benefits. County Code Section 20-37(b) provides the only authority for the County to offer health benefits:

The county is hereby authorized and empowered to adopt or install a plan or system of group health and life insurance and group hospitalization in cooperation with the employees or any portion thereof in any office, agency or branch of the government of the county and with paid employees of quasi-public corporations engaged in the performance of governmental functions, such as fire departments, whenever it may deem such to be advisable in the interest of the health, comfort and welfare of the county.

Unlike retirement benefits, which are provided in the County Code, the County has established health benefits solely through policy, collective bargaining agreements, and the budget. Currently, only the Summary Description formally describes benefits and eligibility. In addition, since 1994, the Summary Description has contained a provision reserving the right to amend plan terms. The Summary Description for active employees and retirees and all health plan communications state:

The County expects to continue the Plan, but it is the County's position that there is no implied contract between employees and the County to do so, and reserves the right at any time and for any reason to amend or terminate the Plan, subject to the County's collective bargaining agreements. The Plan may also be amended by the County at any time, either prospectively or retroactively.

Over the years the County has modified and otherwise made changes to health benefits (e.g., changes in copayments; change in plan structure). This demonstrates that the County has no contractual obligation to provide specific benefits. However, the County has often modified and changed active employee health benefits in conjunction with collective bargaining.

a. active employee health coverage

With regard to active employees, the County offers health coverage to all permanent employees with merit status (as well as appointed and elected officials). The cost sharing arrangement differs depending upon collective bargaining unit and number of hours worked (e.g., represented employees and full time employees hired before 1994 have a cost share of

20%). Through collective bargaining, the collective bargaining units have negotiated certain benefits, most notably the cost sharing arrangement.

b. retiree health coverage

The County offers retiree health coverage to employees who retire at a certain age with a specified number of years of service. The age and service requirement varies (e.g., age 60 with five years of service for non public safety employees). The cost a retiree pays for the health benefit varies with years of service (e.g., a retiree with 15 years of service pays 30%). Employees hired before 1987 can elect a cost share of 20% for the number of years they participated in group insurance and then pay 100% of the cost. In 1986 and 2002-2003, these retirees had the opportunity to change to the lifetime cost share option, which provides for an employee contribution of 30%.

In 1995 and 1998 two County attorney opinions counseled that the County may amend or discontinue retiree health benefits. The opinions stated that no written contract of the County promised retirees specific benefits at a specific cost for a specific duration without modification and that there was no indication that the County intended to create a contract enforceable against the County. A supplemental 1996 County Attorney opinion noted that although the County Code created limited collective bargaining of retiree health benefits, no collective bargaining agreement provided for retiree health benefits.

However, the current FOP collective bargaining agreement sets forth several provisions regarding retiree health benefits. First, the agreement sets forth the cost split described above and also includes a 30% cost for retirees with a service connected disability. Second a surviving spouse, eligible domestic partner and other dependents eligible for coverage at the time of death may continue retiree coverage as if he/she was the retiree until remarriage. Third, the agreement provides that for employees hired before July 1, 2008, eligibility and contributions for retiree health coverage will remain as is, except as modified by a collective bargaining agreement.

Although no legislation for retiree health coverage exists, in 1986, the Council adopted Resolution 10-2233 providing a cost sharing structure for retiree health coverage. The Resolution notes that the County's policy is to provide health benefits for retirees younger than age 65 with the same benefits as active employees and to provide for retirees age 65 or older a "lifetime" Medicare supplemental plan with a \$1,500 stop loss and 80% coinsurance for prescription drugs after a \$25 deductible (subject to cost of living increases). Subsequently, in 2002, the Council adopted Resolution 14-1168 providing retirees whose cost sharing arrangement would end⁵ an option to change to a "lifetime" cost sharing option. The word "lifetime" in these Resolutions

⁵ Employees hired before 1987 can elect to participate in retiree health insurance at a cost share of 20% for the number of years they participated in group insurance; then they would pay 100% of the cost. In 1986, retirees had the opportunity to change to the lifetime cost share option of 30%.

strongly suggests health benefits will be provided indefinitely and could be viewed as a contractual right. However, it is questionable whether the County intended to create a contractual right, especially in the 2002 Resolution which gave retirees an additional benefit after retirement and they did not perform any additional service in exchange for this benefit. The 1998 County attorney opinion rejects the view that any Resolution could become a contract because the Resolutions lack the requirements of legislation. Finally, the Council did not define what health benefits the County would provide and did not state that benefits would remain unchanged.

2. Case law

There are currently no Maryland court cases addressing Contract Clause rights for health care in the government sector. Most government cases, where there are no collective bargaining agreements, have not found any contractual right to retiree health benefits. Because there is usually little or no statutory authority, the courts examine any statutes or documents and have generally held that the statutes and/or document must clearly set forth an explicit contractual intent. Cases where there are collective bargaining agreements have varying results. Like retirement cases, the analysis involves a factual determination.

Some cases address statutes providing for health benefits. The court in *Davis v. Wilson County*, 70 S.W.3d 724 (Tenn. 2002) held that employees do not automatically have a vested interest in welfare plan benefits such as retiree health care benefits absent "clear and express language" in the law indicating such an intent. In addition the Wilson county's statement in its resolution reserving the right to modify or terminate benefits was inconsistent with any intent to vest or guarantee benefits. Similarly, in *Colorado Springs Fire Fighters Ass'n v. City of Colorado Springs*, 784 P.2d 766 (Colo. 1989) retirees believed that an ordinance providing for payment of retiree health insurance costs was a "contractual, quasi-pension benefit" and a subsequent ordinance reducing the benefits was an unconstitutional impairment of the contract. The court found that the ordinance was not a pension benefit, the amount of the City's payment was determined on an annual basis and the cost and design of the program could change. In addition, the retirees' argument of vested rights to health benefits was inconsistent with the City charter which prohibited imposing future liability upon the City, unless prior appropriation was made. The retirees could not have reasonably relied upon such an interpretation of the ordinance.

Some cases addresses collective bargaining agreements providing health benefits. In *Poole v. City of Waterbury*, 831 A.2d 211 (Conn. 2003), the City, while in a financial crisis, entered into a new collective bargaining agreement and replaced an indemnity plan. Retirees argued that they had a vested right under the collective bargaining agreement at the time of retirement. While the court held that the retirees had a vested right to retiree medical benefits generally, they did not have a vested right in the particular benefits provided in an expired collective bargaining agreement. The court would look to whether the benefits provided to retirees were "reasonably commensurate" with the benefits under the collective bargaining

agreement. In discussing whether there should be a presumption in favor of vesting of retiree health benefits like pension benefits, the court compared the inability to predict or control health insurance costs with the more predictable nature of pension benefits. The court stated it would be "counter to all of the parties' interests" to construe the collective bargaining agreements to freeze the health benefits provided at retirement. In contrast to *Poole*, the court in *Roth v. City of Glendale*, 614 N.W.2d 467 (Wis. 2000), interpreted collective bargaining agreements which had provisions for subsidizing retiree health care benefits to presume health benefits vest unless the language of the contract provides otherwise. The health benefits are part of retirement benefits which last beyond the life of the contract, in the absence of contract language or extrinsic evidence demonstrating to the contrary.

3. Conclusion

It is doubtful that the Council resolutions regarding retiree health care benefits provide an interest protected by the Contract Clause. The Maryland Attorney General has concluded that the General Assembly's ability to modify the state's program of retiree health benefits was not limited by the Contract Clause. In 90 Op. Att'y Gen. Md. 195 (2005), the Attorney General examined the State Employee and Retiree Health and Welfare Benefits Program, Md. Code Ann., State Pers. & Pens. § 2-501 et seq., and concluded that it did not create a contractual obligation under the Contract Clause because "it does not purport to promise any particular level of benefits or subsidy to employees." *Id.* at 209.

The benefits and subsidy made available to retirees are keyed to those to which current employees are entitled. The statute does not appear to confer any greater right to benefits and a State subsidy to retirees. Nor is there any clear and express language that vests retirees with benefits. We are not aware of any Maryland cases that hold that State retiree health care benefits authorized by statute generally are a contractual right."

Id. at 209-210. In contrast to the state pension law, the Attorney General noted that the state law regarding retiree health benefits

neither states that a retiree "vests" in Program or subsidy eligibility, nor characterizes any portion of the Program as an "obligation of the State" to retirees. Rather, there is a statutory right, the delineation of which has been largely delegated to the Secretary of [the Department of Budget and Management] and the Governor, and which is subject to change by the General Assembly.

Id. at 217.

The legislatively chosen method of funding retiree health benefits further solidified the

difference between the pension statute and the retiree health benefit statute. The former provided for advance funding of pension benefits, with the creation of a specific fund for each retirement system (made up of government and employee contributions). The funding of the retiree health benefits, with limited exceptions, was left to the Governor's judgment in the proposed annual budget. Although the General Assembly had created special funds to help finance retiree health benefits, the statutes creating those funds did not create any specific obligation to retirees or commit to provide them with health care benefits. *Id.* at 218.⁶ Finally, the materials published to employees and retirees regarding health care benefits explicitly disclaimed any intention to create a contractual obligation to provide health care benefits. *Id.* at 218-19.

The Council's resolutions do not preclude it from making changes to retiree health, especially those employees hired after 1994 because of the disclaimer on all communications. Even for employees hired before 1994, although certain retirees/employees could claim that the Council resolutions create an interest in health benefits protected by the Contract Clause due to the use of the word "lifetime," that claim would be dubious because (a) the County has made many changes to the health plans; (b) the resolutions are not binding law or a contract; and (c) health benefits are subject to annual appropriation. Charter Section 311 restricts the Council from making expenditures beyond funds appropriated. Each year the Council makes appropriations of employee compensation and benefits, including health benefits.

The County's collective bargaining agreements create an interest in health care benefits protected by the Contract Clause only to the extent the County Council adopts those benefits in law. That was the conclusion of the Attorney General in 90 Op. Att'y Gen. Md. 195 (2005) when reviewing state collective bargaining agreements providing for retiree health care benefits. A similar result should apply to the County. The State's collective bargaining law, like the County's collective bargaining law, contemplates that the Governor/County Executive will recommend full funding of all collective bargaining agreements in the annual proposed operating budget.⁷ But, in both the State and the County, the legislature makes the final decision on the budget. Thus, collective bargaining agreements, even multi-year contracts, are subject to annual General Assembly/Council appropriations. Similarly, to the extent the collective bargaining agreements call for legislation (e.g., amendments to the retirement law in Chapter 33), they are dependent upon the legislature to acquiesce to that call. In other words, terms in a collective bargaining agreement that are inconsistent with current law become effective only if the legislature amends the applicable law. *Id.* at 220-21.

⁶ Similarly, the Council created a trust in 2008 to fund retiree health benefits under County Code Section 33-159 in order to benefit from new accounting rules. The County was not required to create the trust, nor is the County required to fund the trust.

⁷ The County Executive is free to recommend a budget to the Council that is in the public's best interest even if the recommendation does not fully fund a collective bargaining agreement.

For retirees with retiree health benefits set forth in a collective bargaining agreement (presently only the FOP), even if that agreement provides interests protected by the Contract Clause, those interests are limited to cost sharing and/or eligibility because those are the only topics addressed in the FOP collective bargaining agreement. The Council faces no barrier to modifying other aspects of retiree health care. And even with regard to modifying cost sharing and/or eligibility, there is a persuasive argument (with which we concur) that retirees can not rely on benefits beyond the current fiscal year because, as noted above, the collective bargaining agreements are subject to annual appropriation by the Council.

Even if certain retirees/employees have an interest in health benefits protected by the Contract Clause due to the resolutions and collective bargaining agreements, as described in the retirement section of this memo, the Council has the legislative power to make necessary and reasonable modifications when justified as described previously under the contract clause analysis. If the Resolutions and collective bargaining agreements could be viewed as a contract, the issue becomes whether any proposed change substantially impairs that contract or whether it reasonably modifies that contract. In addition, the retirees and employees not covered by the collective bargaining agreement would need to prove that they continued to work in exchange for or in reliance of this promise and there would need to be an analysis of the expectations of the promise to determine if there was any substantial impairment of the contract because of changes. Finally, neither the Resolutions nor the collective bargaining agreement clearly state an indication to enter into a binding contract.

C. Salaries

Neither the Contract Clause, nor the collective bargaining agreements themselves, prohibit the imposition of a furlough or reduction-in-force (RIF), whether imposed in the midst of a fiscal year or planned for a future fiscal year, as was done for FY 11. The County Executive may impose a mid-year furlough or RIF because he retains management rights under the collective bargaining laws permitting the imposition of furloughs or RIF's (under certain circumstances). The collective bargaining laws provide that these management rights are a part of every collective bargaining agreement. Thus, the imposition of a mid-year furlough or RIF (under conditions specified in the contract) does not violate the collective bargaining agreement and, accordingly, could not violate the Contract Clause.⁸ *Fraternal Order of Police Lodge No. 89 v. Canales*, 608 F.3d 183 (4th Cir. 2010) (imposition of furloughs during fiscal year did not violate Contract Clause because relevant collective bargaining laws provided that management right to impose furloughs must be read into every collective bargaining agreement). For the same

⁸ The County Executive has an obligation under the Council's collective bargaining laws to negotiate furlough and RIF procedures and a union could grieve that County's failure to follow those procedures in the imposition of a furlough or RIF. In addition, unless the Council provides otherwise in imposing a furlough or RIF, language in a collective bargaining agreement may impede the Executive's ability to implement a Council-planned furlough or RIF, including the realization of anticipated monetary savings underlying the furlough or RIF.

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reasons, a furlough or RIF planned for a future fiscal year does not violate the Contract Clause. In addition, because the Council appropriates salaries on an annual basis (even where a collective bargaining agreement spans more than one fiscal year), a planned furlough or RIF cannot be a retroactive impairment of any collective bargaining agreement.

As noted above, Charter Section 311 restricts the Council from making expenditures beyond funds appropriated. Each year the Council makes appropriations of employee compensation and benefits, including health benefits. Even though a collective bargaining agreement may span more than one year, the collective bargaining laws provide that the Council's appropriation decision is made on a year-by-year basis, as part of the annual operating budget resolution. See §§ 33-80 (FOP), 33-108 (MCGEO), and 33-153 (IAFF).

Similarly, the same logic allows the Council to impose salary reductions for a future fiscal year. But, salary reductions in the midst of a fiscal year would likely be a substantial retroactive impairment of the collective bargaining agreements, permissible only if the reduction was reasonable and necessary to serve an important public purpose.

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