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Members, Baltimore County Council
Hon. Kevin Kamenetz, Baltimore County Executive
400 Washington Avenue
Towson, Maryland 21204

SUBJ: Executive Benefit Policy/Legislative Branch Benefits Policy

Dear Council Members and County Executive Kamenetz:

Some of you may have seen the op ed that I wrote that was published by the *Baltimore Sun* on May 17th. The purpose of this letter is to expand upon specific concerns that I have about certain County practices and, as a citizen of the County, to ask you to resolve them. The issues raised in this letter arise from disclosure that certain County officials and employees receive "severance pay" upon termination of their County employment as a result of the above-referenced "policies."

I initially listed some concerns about the so-called "severance package" paid to former Police Chief Johnson and emailed them to members of the County Council in March. The responses that I received from members of the Council convinced me that there was more than one problem going on, and that one of the major problems is that some members of the County Council fail to understand the responsibility that they have for authorizing and approving the compensation paid to officials and employees of the County, including those in the Executive Branch.

The legal duty and responsibility for establishing the compensation to which officials and employees of the County are entitled for the services that they provide to the County is a legislative function assigned by the County Charter to the County Council. Compensation for service to the County in the form of "severance pay" must be authorized by law, not merely by informal "policy."

Section 505 of the Charter provides that the officers and employees in the administrative services of the Executive Branch "*shall receive such compensation as may from time to time be provided by this Charter or by law.*" (Emphasis added.) As used in Section 505 "law" means an ordinance introduced by a bill that complies with the publication and notice requirements for "local laws" set forth in Article XI-A, Section 3 of the Maryland Constitution and Section 308 of the County Charter.

A “policy” signed by the County Administrative Officer is not law. I did not find an ordinance or even a resolution approving the policy or the entitlement to severance pay that it purportedly establishes; the County Attorney informed me that no such ordinance or resolution exists.

Neither the County Charter nor the County Code confers on either the County Executive or the County Administrative Officer the power to create the right to any form of compensation paid to officers or employees for services rendered to the County. Both the Executive and Legislative Branch policies base the entitlement to severance pay on the length of service rendered.

Severance pay is a form of “delayed” compensation for services rendered paid upon termination of employment. *See Aronson v. Fetridge*, 181 Md. App. 650, 662-664 (Md. App. 2008). In my opinion it is a clear violation of Section 505 of the County Charter to base severance pay for officers or employees in the administrative services on a policy signed by the County Administrative Officer or County Executive rather than on an ordinance passed by the County Council.

Section 505 of the County Charter does not apply to the County Administrative Officer because the County Administrative Officer is not an officer in the administrative services of the Executive Branch as defined in Section 502; the County Administrative Officer is placed in charge of the administrative services by Section 501. The compensation of the County Administrative Officer is governed by Sections 403 and 405 of the County Charter.

The language of Sections 403 and 405 unequivocally establishes that the duty to establish the amount of compensation to be paid to the County Administrative Officer rests exclusively with the County Council and cannot be delegated – and compensation includes any type of compensation, including severance pay. In my opinion it is a clear violation of Sections 403 and 405 of the County Charter to base severance pay for the County Administrative Officer on a policy signed by the County Administrative Officer or County Executive rather than on an ordinance passed by the County Council.

The “Salary” section of the Executive Benefit Policy raises questions about the manner in which the salaries of the covered County officials are determined.

Although my inquiry was focused on the severance pay issue, I am going to make another observation regarding the Executive Benefit Policy. The “Salary” section states that appointed employees “shall receive compensation as determined by the County Executive and the County Administrative Officer.” As noted above, Section 505 states that officers and employees of the administrative services shall receive compensation as provided *by the charter or by law*, not as provided by the County Executive or the County Administrative Officer.

Section 4-2-201 of the County Code incorporates by reference the “Baltimore County Classification and Compensation Plans” and states that they are intended to have the same force and effect of law as if set forth in full in the section. The plans that I found all have to do

with employees in the classified service. What about the exempt service? Section 505 refers to the compensation of employees *and* officers.

My inquiry into the exempt service salary issue is not complete but I haven't found any authority in the County Charter or Code supporting the proposition set forth in the Executive Benefit Policy that "appointed employees" shall have their salaries determined by the County Executive and the County Administrative Officer. For that proposition to be lawful there would have to be an ordinance enacted by the County Council delegating authority under Section 505, much as it has done for employees in the classified service. If that was done, I can't find it.

As an aside, the County Council could not simply turn over the entirety of its authority under Section 505 to the County Executive or County Administrative Officer in order to determine the salaries of appointed officers; that would constitute an abrogation of a duty imposed upon it by the County Charter. As with any other delegation of its law-making powers (especially one not involving the police power) the delegation of authority would have to be accompanied by limits on the discretion to be exercised by the County Executive or the County Administrative Officer under that delegation. For compensation that customarily is done by prescribing salary scales or ranges, such as those for classified service salaries incorporated by reference into Section 4-2-201 of County Code.

To recap, establishing the entitlement to any form of compensation for County employees and the standards to be applied in determining the amounts of the compensation is a legislative function to be exercised by the County Council. Applying those standards (pay scales, ranges, etc.) to specific individuals generally is an administrative function of the Executive Branch.

Finally, the act of appropriating the money for the salaries is insufficient to confer authority on the County Executive to set the amount of public official salaries. The Court of Appeals has held that adoption by a county council is not an exercise of the council's law-making powers and there is a general prohibition against "legislating in the budget." Consequently, if the County Council chooses to confer the power on the County Executive to set the amount of public official salaries it must do so by separate law, not through the budget.

Regulation of the compensation paid to officials of the Executive Branch through legislation passed by the County Council does not violate the "separation of powers." In fact, the County Council has an affirmative duty to regulate the compensation paid to officials of the Executive Branch.

The Chairman of the County Council stated to me and the members of the County Council in an email: "Severance pay is an executive prerogative. This is part of separation of powers . . . I support the County Executive's decision here and I also believe that this decision is the County Executive's to make and his alone. I think it would be inappropriate for the legislative branch to meddle in executive branch responsibility and duty."

The statement reflects an astounding misunderstanding of the applicable law, including the provisions of the County Charter cited above. As described above, the Charter confers on the County Council the duty to prescribe the compensation for the County Administrative Officer and that duty cannot be delegated. The Charter also confers on the County Council the duty to prescribe the compensation for officers and employees in the administrative services; although that duty may be delegated the delegation must be accompanied by standards sufficient to guide the discretion of the Executive Branch official to whom it has been delegated.

Compensation for service to the County must be based on the charter or law passed by the County Council. There is nothing in the charter or law authorizing severance pay of the type described in the Executive Benefit Policy or delegating authority to the County Executive or County Administrative Officer to create new categories of compensation.

Creating categories of compensation and prescribing limits on that compensation is a *legislative* function, not an “executive prerogative.” Suffice it to say that describing the County Council’s duty to regulate the compensation paid to County officials as “meddling” is the strangest thing that I have ever heard a member of a county council say, and that is saying something.

The County Council lacks the power to formally approve anything, including the Legislative Branch Benefits Policy, simply by having all members sign a document. Formal action by the County Council must be taken by ordinance or resolution. The only reasonable inference is that members of the County Council signed the Legislative Branch Benefits Policy in 2010 rather than approve it by ordinance in order to avoid public notice and a public hearing on the policy.

The Legislative Branch Benefits Policy was signed by seven members of the County Council and dated February 23, 2010. Mr. Peddicord advised me that it was not approved by ordinance or resolution.

Purporting to approve a policy that forms the basis for paying severance pay to appointed Legislative Branch employees by having members of the Council sign the policy does have one advantage, albeit a political one, for members of the County Council: It requires no public notice or hearing and allows it to fly under the public’s radar. The disadvantage is that it has no legal validity.

I find the idea that the County Council can formally approve or adopt anything simply by having members sign a document extraordinary. Instead of taking a public vote on a resolution or ordinance the members get together in a back room and sign a “policy”? In order for the County Council to take any formal action as a body it must do so in the manner set forth in the County Charter and under the *Rules of Procedure for Baltimore County Council*. Nothing permits the County Council to act as a body simply by having the members of the County Council sign a document.

The County Charter does not dictate how compensation for exempt service employees that work for the Legislative Branch shall be determined, nor has the County Council enacted an ordinance on the matter. The Legislative Branch Benefits Policy references other “policies” that apparently establish the salaries of exempt service employees in the Legislative Branch. If the County Council is going to have compensation of its employees determined by policies, then the very least it needs to do is approve those policies by ordinance.

The issuance by the County Administrative Officer of a policy of direct financial benefit to himself requires investigation by the Baltimore County Ethics Commission.

The Executive Benefit Policy was approved by County Administrative Officer Fred Homan on January 7, 2015. The County Administrative Officer is listed as one of the “Covered Employees.” If he retires at his current salary he would be entitled to receive \$75,000 in severance pay under a policy that he approved. That raises obvious questions.

No law compelled him to issue such a policy; in fact, as described above, no law appears to authorize him to do so, particularly as the policy covers items that meet the legal definition of compensation. As to purported application of the policy to the position of County Administrative Officer Mr. Homan knew or should have known that only the County Council has the power to change his compensation. Under those circumstances there must be an investigation by the Baltimore County Ethics Investigation to determine whether Mr. Homan violated the prohibition in Section 7-1-301 of the County Code against participating in a matter in which he had an interest.


Conclusion

By issuing “policies” rather than enacting laws that add severance pay to the already-generous compensation to which appointed County officials are entitled the County not only has exposed itself to criticism for, once again, acting behind closed doors it also has exposed itself to a taxpayer’s suit challenging those policies. The fact that no one within County government seems to have questioned much less challenged the issuance by the County Administrative Officer of a policy from which he stood to gain significant financial benefit points to a complete breakdown in the checks and balances of County government.

Moreover, I don’t know anyone can expect those checks and balances to work when the Chairman of the County Council takes the position that it is none of the Council’s business if the County Administrative Officer or County Executive decides on his own volition to pay severance pay to appointed officials in the Executive Branch when they leave County government. That position reflects such a fundamental misunderstanding of the law that it makes you wonder where he is getting his advice.

The following are specific actions that I believe need to be taken to correct the problems that I have identified:

1. Stop the payment of severance pay under both the Executive Benefit Policy and the Legislative Branch Benefits Policy until such time as the County Council passes a law approving the payment of severance pay.
2. Codify the authority of the County Administrative Officer or County Executive to determine the salaries of officials in the administrative services and set the standards by which such determinations are to be made.
3. At a minimum, approve by law the salaries of Legislative Branch employees that are now determined by "policies" not having the force and effect of law. All compensation and benefits to which officers and employees are entitled as a result of their employment with the County should either be in the County Code or the Personnel Rules, not in "policies" that only are available to the public upon request.
4. Refer the matter of the approval by Mr. Homan of the Executive Benefit Policy to the Ethics Commission for investigation. While any citizen could file a complaint with the Commission it seems to me that elected officials have the primary responsibility for making sure that the conduct of employees complies with the law. The Commission would have to use its power to retain outside counsel to advise it because the County Attorney is a subordinate of the County Administrative Officer.

Sincerely,

David A. Plymyer