

MEMORANDUM

Review of the history of “severance pay” for employees of Baltimore County covered by the County’s Executive Benefit Policy.

Page | 1

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This memorandum contains a review of the major provisions of the policy of paying “severance pay” to certain employees in the executive branch of the Baltimore County government as that policy has changed over time. Some of the iterations of the policy are better drafted than others, and I have pointed out ambiguities that make interpretation of some provisions problematic.

Understanding the policy on severance pay requires understanding the policy on vacation leave for the covered employees, because in the past there was a relationship between the payment of severance pay and the amount of unused vacation leave that a covered employee had accrued. Therefore, the memorandum also reviews the history of the policy on vacation leave and how the relationship between the payment of severance pay and the payment for unused vacation leave has changed.

My review is based on Executive Benefit Policies dated 1987, 1995, 2002, 2010, 2012, and 2015 provided to me by County Attorney Michael Field pursuant to a request under the Maryland Public Information Act. He also provided me a copy of an undated policy signed by former County Administrative Officer Merreen Kelly which appears from its substance to predate the 1995 policy, also approved by Mr. Kelly. (Mr. Kelly became CAO in 1991.) Last week I obtained a copy of the most recent policy, signed by County Administrative Officer Fred Homan on July 21, 2017.

1. The **1987** policy was approved by former County Administrative Officer Melvin Cole and provided as follows:

“Severance pay is provided for an Agency Head who involuntarily resigns from County Service or is terminated from service due to reorganization or other circumstances not related to performance. Agency Heads shall be eligible for severance pay which equals 10 days severance pay per year of service up to a maximum of 80 days or accrued vacation days, whichever is greater.”

As to vacation leave:

“Each Agency Head receives 25 days per year vacation leave; provided further, that Agency Heads may accrue up to a maximum of 80 days vacation leave and may receive pay for such vacation days at time of severance.”

Under the 1987 policy persons newly appointed to positions covered by the Executive Benefit Policy who previously had been in the County's classified service (merit system) did not bring their unused vacation leave balances with them from the merit system. Instead, they were paid for that unused vacation leave on the date that they terminated their "Merit System status" and became covered by the Executive Benefit Policy.

2. The **undated policy** approved by Mr. Kelly made no substantive changes to the provisions on vacation leave and severance pay from the policy approved by Mr. Cole in 1987. The overall scheme of the 1987 policy and the undated policy was straightforward in terms of the relationship between unused vacation leave and severance pay, which can be described as follows:

Covered employees who *voluntarily* left County service were paid for the unused vacation leave that they had accrued while they were covered by the policy. Employees who left *involuntarily* were paid "severance pay" in an amount equal to their unused vacation leave, or equal to 10 days of pay for each year of County service up to 80 days, whichever was greater.

3. The policy approved by Mr. Kelly in **1995** made significant changes to the provisions on vacation leave and severance pay. Covered employees no longer were given a specified number of vacation days per year, and they no longer accrued vacation leave. Employees who were in covered positions on the effective date of the policy change (July 13, 1995, according to later policies) had their unused vacation leave balances "frozen" as of December 31, 1994.

Any vacation days that they took after the effective date of the policy were not deducted from these frozen balances. Covered employees were paid for their frozen vacation leave balances when they "voluntarily" left County service as described in the paragraph on "Vacation, Personal and Compensatory Leave."

The 1995 policy also altered the provisions governing the disposition of any unused vacation leave of employees who were newly appointed to positions covered by the Executive Benefit Policy. The policy remained unchanged for employees coming from the executive branch: They were paid for unused vacation leave that they had accrued before being appointed to a covered position.

The policy was changed for employees who had been appointed employees in the legislative branch: They could retain the balance of the unused leave that they had accrued while in the legislative branch, and then receive payment for that leave when they left County service as a covered employee. The reason for the differing treatment is not given. It is worth noting that this is a cost issue, because the rate of payment for unused vacation leave is based on the final salary of an employee, not on the salary at the time the leave was earned.

The 1995 policy changed the language of the “Severance Pay” paragraph to read as follows:

“Upon request, payment will be provided to eligible appointed employees who involuntarily resign, retire or are terminated from service due to reorganization or other circumstances not related to performance. Upon such involuntary resignation, involuntary retirement or termination, appointed employees are eligible, at their option, for severance pay equal to 80 days pay.”

This change added employees “who involuntarily *retire*” to the description of covered employees eligible for severance pay for the first time. It is not clear whether this change in language represented a change in policy or a clarification of existing policy.

4. Changes made in the **2002** policy approved by former County Administrative Officer John Wasilisin created an ambiguity in the language of the severance pay policy that remains to this day. The language of the “Severance Pay” paragraph was changed to read as follows:

“Upon request, payment will be provided to eligible appointed employees covered by this benefit policy when they leave county service. Appointed employees are eligible for severance pay equal to eight (80) days pay or the balance of accumulated vacation leave, whichever is greater.”

This change eliminated the language that specified who was eligible for severance pay, and that language has not reappeared in the 2010, 2012, 2015 and 2017 policies. Under the normal rules for construing rules and laws, the removal of words limiting eligibility would be presumed to be deliberate and intended to effect a change in eligibility – in other words, eliminating the restriction that only employees who involuntarily left who left County service were eligible for severance pay.

On the other hand, Mr. Wasilisin may have believed that the purpose of “severance pay” was inherent in its name and that no change in policy was intended, and severance pay would remain available only for covered employees who were involuntarily separated. In any case, I do not know how the change in the language has been construed, which is something that an audit would disclose.

The addition of “or the balance of accumulated vacation leave, whichever is greater” to the formula for determining that amount of severance pay may have been added as a hedge against the possibility of a covered employee having accumulated more than 80 days of unused vacation leave in a manner consistent with County policy. Under Maryland law, an employer generally is required to pay an employee for any vacation leave accrued in accordance with the employer’s policy on leave accrual that has not been used prior to termination of employment, regardless of the reason for termination. A succinct explanation of the law is contained on the website of the Maryland Department of Labor, Licensing & Regulation at <https://www.dllr.state.md.us/labor/wagepay/wppayonterm.shtml>.

The reason for the change in the formula is not explained in the policy. There may have one or more employees who carried an unused vacation leave balance forward from the legislative branch or whose accumulation of more than 80 days of leave predated the limit that was in existence since at least 1987, but I am speculating. The implication in the 2017 policy that there are covered employees still accruing vacation leave “notwithstanding” the fact that the 1995 policy ended that practice also may bear on the explanation.

5. The **2010** policy approved by County Administrative Officer Fred Homan made no changes from the 2002 policy approved by Mr. Wasilisin. The **2012** policy approved by Mr. Homan made two changes to the provisions governing the disposition of any unused vacation leave of employees newly appointed to positions covered by the Executive Benefit Policy.

The first change was to eliminate the differing treatment of employees coming from the executive branch and those coming from the legislative branch. The second change was more consequential, and ended the practice of paying employees for the unused vacation leave that they had accumulated before being appointed to a position covered by the Executive Benefit Policy. Instead, they are given “credit” for the unused vacation leave and then paid for it when they leave County service. In effect, their unused vacation leave balances are treated the same as the balances of covered employees that had been frozen as part of the policy change in 1995.

The 2012 policy also made a one-word change to the language of the “Vacation, Personal and Compensatory” paragraph that changed the relationship between severance pay and unused vacation leave that had been in effect since the 1987 policy. By eliminating the word “voluntarily” from that paragraph it no longer is the case that involuntarily separated employees are eligible for compensation under the “Severance Pay” paragraph *in lieu of* being paid for their unused vacation leave under the “Vacation, Personal and Compensatory” paragraph.

Under the 2012 change, involuntarily separated employees are paid for their unused vacation leave balances *and* receive severance pay. The 2012 policy also changed the formula for determining the amount of severance pay, eliminating the language “or the balance of accumulated vacation leave, whichever is greater” that had been added back to the formula in the 2002 policy. The amount of severance pay was again fixed at 80 days pay.

The 2012 change that allows involuntarily separated employees to receive payment for their unused vacation leave in addition to severance pay would have been of potential benefit to Mr. Homan if the position of County Administrative Officer not been removed from the list of covered employees in a change made last week by Mr. Homan. Mr. Homan was hired by the County in 1978 and became a covered employee under the Executive Benefit Policy in 1989 when appointed Budget Director. He presumably was paid for any unused vacation leave that he had accumulated between 1978 and 1989 under the policy that took effect in 1987.

He would then have accrued vacation leave at the rate of 25 days per year from 1989 until the 1995 policy change. At that point, any unused vacation leave accumulated from his appointment in 1989 through the end of 1994 would have been frozen in accordance with the 1995 policy.

Until Mr. Homan changed the policy in 2012, he would have received “severance pay” in the amount of that unused leave balance or 80 days pay, whichever was greater, if he was forced to retire. He would *not* have received a separate payment for his unused vacation leave in addition.

The significance of any financial benefit to him from this change depended on the number of unused vacation leave days that he had, if any, when his balance was frozen as of the end of 1994. As noted above, the rate of payment for unused vacation leave is based on an employee’s final salary. At Mr. Homan’s current salary, \$240,000, each day of unused vacation leave is worth about \$657.50.

The significance of this change also may depend on what Mr. Homan meant in the 2017 policy by his reference to department heads who still are accruing vacation “notwithstanding” the fact that the 1995 policy ended that practice. If there are one or more department heads in that category, they stand to benefit significantly if they are replaced by the next County Executive.

6. The **2015** policy approved by Mr. Homan made only one change from the 2012 policy, but it was a significant one. He changed the amount of severance pay from 80 days pay to an amount based on a sliding scale: Covered employees with up to 20 years of service with the County receive 80 days pay and employees with between 20 and 30 years of service receive 100 days pay. Employees with more than 30 years of service receive 120 days pay.

The 2015 introduced the concept of a sliding scale based on “years of service” without defining whether that meant total years of service with the County or years of service as an appointed employee covered by the Executive Benefit Policy. Based on the context of the 2015 and prior policies, however, I assume it refers to total years of service with the County. If so, that will substantially increase the number of covered employees entitled to severance pay at the highest two tiers if they are involuntarily replaced by the next County Executive.

If years of service refers to total years of service with the County, the financial benefit to Mr. Homan, who has well over 30 years of service, would have been substantial. At his current salary, the increase would have been worth an additional \$26,300 in severance pay.

7. The **2017** policy, signed by Mr. Homan on July 21, 2017, changed the description of the employees covered by the Executive Benefit Policy. The first change is straightforward, eliminating the position of County Administrative Officer from the list of covered employees.

The purpose of the second change to the “Covered Employees” paragraph is not clear at all, and raises a troubling question. The second change excludes from the definition of “Appointed

employee” covered by the policy an “appointed department head who accrues vacation leave, notwithstanding the change in policy provided for under the heading ‘Vacation, Personal and Compensatory Leave’ of this Executive Benefit Policy.” Why is a department head accruing vacation leave?

As described above, department (“Agency”) heads have not accrued vacation leave since the 1995 policy approved by Mr. Kelly. Some department heads may have frozen vacation leave balances payable upon leaving County service but none should be accruing vacation leave under the policies that have been made publicly available.

Conclusion

Severance pay appears to have begun in 1987 as a program intended to make sure that the appointed heads of departments in the executive branch of County government who were forced to resign or who were terminated because of reorganization or other circumstances not related to performance received an amount equal to 10 days of pay for each year of service up to a maximum of 80 days, if that amount was more than the payment for unused vacation leave to which they were entitled. The standard was that an involuntarily separated employee left with a specified minimum amount of money, regardless of source. It is doubtful that the original policy intended that an involuntarily separated employee who was fully eligible to retire on a pension would also receive severance pay.

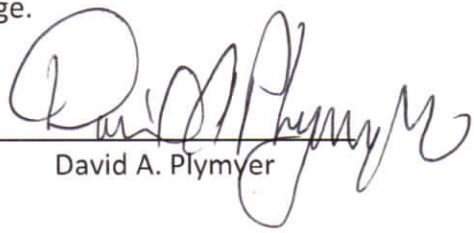
The most significant change came in 2012, when severance pay and payment for unused vacation leave became two entirely separate forms of compensation: An involuntarily separated employee became eligible under the 2012 policy for severance pay as well as for payment for any unused vacation leave.

The history of the payment of severance pay under a succession of Executive Benefit Policies cries out for an audit by the County Auditor, if one has not been done already. Casual draftsmanship in some instances, ambiguities in others, and significant policy changes over time combine to raise an obvious question: Has severance pay policy, regardless of its legality, been consistently and faithfully applied?

As it turns out, severance pay is not the only form of compensation governed by the Executive Benefit Policy that needs to be audited. The reference in the policy approved last week to an “appointed department head who accrues vacation leave, notwithstanding the change in policy provided for under the heading ‘Vacation, Personal and Compensatory Leave’ of this Executive Benefit Policy” is concerning. The “change in policy” described in the “Vacation, Personal and Compensatory” paragraph occurred in 1995 and ended the accrual of vacation leave by department heads.

Why would a current head of a department be accruing vacation leave “notwithstanding” a policy that prohibits it? This change made to the language of the policy, anomalous as it appears to be, is compelling evidence of the need for an audit of the vacation leave balances,

frozen and otherwise, of all employees who were covered by the Executive Benefit Plan prior to this latest change.

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