

BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL

DONNA HILL STATON
DEPUTY ATTORNEY GENERAL



THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

November 4, 2016

The Honorable Nathaniel J. McFadden
422 Miller Senate Office Building
Annapolis, Maryland 21401-1991

HR 1016

Dear Senator McFadden:

You have asked for my views on two questions. The first question is whether the Baltimore City Council could enact legislation that would make the composition of police disciplinary boards one of the "exclusive rights" of management and thus not a permissible topic of bargaining.¹ The second question is whether the City's bargaining representative must engage in collective bargaining on the issue of civilian memberships on trial boards.

It is my view that the City Council may not enact legislation to prohibit the City from bargaining on the composition of police boards. The 2016 amendments to the LEOBR make clear that the City bargaining representative may, at his or her option, enter into bargaining on this topic, and the City Council may not pass laws that contravene State law. The City bargaining representative may, however, choose not to bargain on the composition of police boards because the law permits, but does not require, the City bargaining representative to bargain on that topic.

Police Board Composition Under the 2016 LEOBR Amendments

Chapter 519 of 2016, enacted by House Bill 1016, amended Public Safety Article § 3-107(c) in relevant part as follows:

(c) (1) Except as provided in paragraph [(4)](5) of this subsection and in § 3-111 of this subtitle, the hearing board authorized under this section shall consist of at least three VOTING members who:

¹ This question was prompted by a July 17, 2016 Baltimore Sun letter to the editor urging the City Council to end the City's practice of submitting the composition of police boards to collective bargaining. See David A. Plymyer, "The Baltimore City Council should oversee police disciplinary board composition," *Baltimore Sun* (July 17, 2016).

(i) are appointed by the chief and chosen from law enforcement officers within that law enforcement agency, or from law enforcement officers of another law enforcement agency with the approval of the chief of the other agency; and

(ii) have had no part in the investigation or interrogation of the law enforcement officer.

(2) At least one member of the hearing board shall be of the same rank as the law enforcement officer against whom the complaint is filed.

(3) (I) SUBJECT TO SUBPARAGRAPH (II) OF THIS PARAGRAPH, A CHIEF MAY APPOINT, AS A NONVOTING MEMBER OF THE HEARING BOARD, ONE MEMBER OF THE PUBLIC WHO HAS RECEIVED TRAINING ADMINISTERED BY THE MARYLAND POLICE TRAINING AND STANDARDS COMMISSION ON THE LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS AND MATTERS RELATING TO POLICE PROCEDURES.

(II) IF AUTHORIZED BY LOCAL LAW, A HEARING BOARD FORMED UNDER PARAGRAPH (1) OF THIS SUBSECTION MAY INCLUDE UP TO TWO VOTING OR NONVOTING MEMBERS OF THE PUBLIC WHO HAVE RECEIVED TRAINING ADMINISTERED BY THE MARYLAND POLICE TRAINING AND STANDARDS COMMISSION ON THE LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS AND MATTERS RELATING TO POLICE PROCEDURES.

...
[(4)] (5) (i) 1. A law enforcement agency or the agency's superior governmental authority that has recognized and certified an exclusive collective bargaining representative may negotiate with the representative an alternative method of forming a hearing board.

2. A HEARING BOARD FORMED UNDER THIS PARAGRAPH MAY INCLUDE UP TO TWO VOTING OR NONVOTING MEMBERS OF THE PUBLIC, APPOINTED BY THE CHIEF, WHO HAVE RECEIVED TRAINING ADMINISTERED BY THE MARYLAND POLICE TRAINING AND STANDARDS COMMISSION ON THE LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS AND MATTERS RELATING TO POLICE PROCEDURES.

(ii) A law enforcement officer may elect the alternative method of forming a hearing board if:

1. the law enforcement officer works in a law enforcement agency described in subparagraph (i) of this paragraph; and
2. the law enforcement officer is included in the collective bargaining unit.

Under this provision, which took effect October 1, 2016, there are three ways in which citizens may be appointed to serve on a disciplinary board. Under the first option, a police chief – in this case the Police Commissioner – may appoint a member of the public to a hearing board. Under this option, only one citizen may be appointed and may serve only as a nonvoting member. Public Safety Article (“PS”), § 3-107(c)(3)(i).

Under the second option, a county legislative body may pass a local law that allows a chief to appoint up to two members of the public to a hearing board as either voting or nonvoting members. PS § 3-107(c)(3)(ii). This option allows for greater civilian participation, but only if “authorized by local law” and if the chief then acts to appoint members.

The third option available under the legislation is to provide for civilian participation on police disciplinary boards through collective bargaining. Under PS § 3-107(c)(5), a law enforcement agency or its superior governmental authority “may negotiate” a disciplinary board containing “up to two voting or nonvoting members of the public.” If such an alternative board is negotiated, a law enforcement officer “may elect” to proceed before it. PS § 3-107(c)(5)(ii).

Analysis

With this background in mind, I turn now to the specific questions you ask. It is my view that the City Council may not, through the enactment of local legislation, remove the composition of police disciplinary boards from collective bargaining by making it one of the “exclusive rights” of management. Public Safety Article, § 3-107(c)(5)(i)1 provides that “a law enforcement agency or the agency’s superior governmental authority that has recognized and certified an exclusive collective bargaining representative *may negotiate* with the representative an alternative method of forming a hearing board.” (Emphasis added). Because State law permits bargaining on board composition, no local law may prohibit it. See *Talbot County v. Skipper*, 329 Md. 481, 488 (1993) (“A local ordinance is pre-empted by conflict when it prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law.”).

If the City Council wants to take action to advance civilian participation on police disciplinary boards, it may enact a local ordinance authorizing the Commissioner to appoint one or more civilian board members pursuant to PS § 3-107(c)(3)(ii) (the second option listed above).² Again, because State law leaves the appointment up to the Commissioner, the City Council cannot *require* the Commissioner to appoint civilians, but it can *authorize* the Commissioner to do so.³

Finally, while the amendments continue to allow the local bargaining representative to bargain on the topic of hearing board composition, the statute does not require that it do so. House Bill 1016 did not alter that provision. Instead, hearing board composition remains a permissive topic of bargaining, which the government bargaining authority “may negotiate.” PS § 3-107(c)(5)(i)1; *see also* *Montgomery County Educ. Assn., Inc. v. Board of Educ. of Montgomery County*, 311 Md. 303 (1987) (discussing difference between permissive and mandatory topics of bargaining and concluding that statute governing public school collective bargaining, because it used the term “shall,” provided only for mandatory topics); *U.S. Dep’t of Interior, Bureau of Reclamation v. Fed. Labor Relations Auth.*, 23 F.3d 518, 521 (D.C. Cir. 1994) (“So-called ‘permissive subjects,’ in contrast [to mandatory subjects], are those over which the parties *may* bargain, but neither party may lawfully insist upon agreement on such issues as a condition to a labor agreement.” (emphasis in original)).


² Because the Baltimore Police Department is a State agency, the City Council may not enact local ordinances that “conflict, impede, obstruct, hinder or interfere with the powers of the Police Commissioner.” Baltimore City Charter, Art. II, § 27. Although it is not clear that an ordinance giving the Commissioner the *option* to appoint civilian members would “conflict, impede, obstruct, hinder or interfere” with the Commissioner’s powers, any legislation that had such an effect would have to be enacted through a public general law or public local law. The 2016 LEOBR legislation, however, is such a public general law, and because it removed the preemptive effect that the LEOBR otherwise would have had over the appointment of civilian members, *see* PS § 3-102 (preemption provision), 3-107(c)(3)(ii) (allowing for civilian membership), it is best read as affirmatively *authorizing* local jurisdictions to enact local ordinances providing for civilian membership. Any ambiguity on this point is resolved by the legislative history of the 2016 LEOBR amendments, which makes clear that the General Assembly intended to authorize Baltimore City to act on its own. *See* Senate Debate (April 4, 2016) (appearing at 1:38 in the Senate Proceedings 58, Legislative day March 29, 2016).

³ The permissive nature of the authority that the City can grant to the Commissioner is clear from the language of the bill. It says that the Commissioner “may appoint” a member of the public as a nonvoting member, PS § 3-107(c)(3)(i), and that a hearing board formed by the Commissioner “may include” up to two voting or nonvoting members of the public if “authorized by local law,” PS § 3-107(c)(3)(ii). It is well-established that the use of the word “may” typically indicates a permissive, discretionary function. *Spencer v. Maryland Board of Pharmacy*, 380 Md.515, 532 (2004). Similarly, authorization creates a power, while a requirement creates a mandatory duty. *MEDCO v. Montgomery County*, 431 Md. 189, 204-207 (2013).

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For these reasons, it is my view that the City Council could not, by local legislation, prevent collective bargaining concerning the formation of hearing boards. The City Council may, however, enact local legislation authorizing the Commissioner to provide for civilian board membership. If it does so, and if the City's bargaining representative elects not to negotiate on the topic of board composition, it would ultimately be up to the Commissioner to decide whether to appoint one or more civilians as voting or nonvoting civilian members of the police disciplinary board.

Sincerely,



Kathryn M. Rowe
Assistant Attorney General