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HB 1554

March 10, 2020

TO: Members of the House Appropriations Committee

FROM: Nicholas Blendy, Deputy Director of Government Relations

RE: House Bill 1554 - Baltimore City - Police Department - Collective Bargaining and Arbitration

POSITION: OPPOSE

Chair McIntosh, Vice-Chair Jackson, and Members of the Committee, please be advised that the Baltimore City Administration (BCA) **opposes** House Bill (HB) 1554.

HB 1554 is broadly written to expand the terms and conditions of employment that would become subject to binding interest arbitration. This includes both “Financial Terms of Employment” – wages, salaries, longevity, shift differential, bonuses, if applicable, leave with monetary value, specialty pay, acting out of title pay, educational incentives, or any other item having monetary value¹—and so-called “Other Terms of Employment”—pensions or any benefit that is to be paid on or after an employee’s retirement or termination of employment, and all other terms and conditions of employment, such as, but not limited to, job security, disciplinary procedures, investigations and actions, promotions, deployment or scheduling, including eligibility and assignment to details and positions, loss of leave as provided in the General Orders, or issues relating to eligibility for overtime compensation. HB 1554 makes clear that “Other Terms of Employment” includes “working conditions listed in a memorandum of understanding between the City and Police Officers of Baltimore City.” The bill does not enumerate or define which working conditions in the memorandum of understanding (“MOU”) come within HB 1554’s scope. Together, the Bill refers to these Financial

¹ Under current law, set forth in Section 16-8A of the Public Local Laws, the City/BPD and FOP must proceed to binding arbitration only on matters of “direct compensation,” which are limited to wages, salaries, longevity, shift differential, bonuses if applicable, and leave with monetary value. Md. Pub. Loc. Law § 16-8A(b)(3).

Terms and the Other Terms as “Terms of Employment,” all of which are subject to binding interest arbitration.

Introduction:

The BCA opposes HB 1554 due to its anticipated adverse impact on the operations and fiscal state of the City and the Baltimore Police Department (“BPD” or “the Department”). The bill would bring all terms and conditions of employment, including certain management rights and non-mandatory subjects of bargaining, under a binding interest arbitration process, rather than leaving to arms-length collective bargaining such matters, as is the current state of the law. In addition, the BCA’s Finance Department reviewed this bill with an eye towards understanding the potential fiscal impact and opposes the bill in light of City’s fiscal posture and the bill’s likely increase on personnel and operating costs.

At the highest level, binding interest arbitration in the City of Baltimore would take away from the Department and its leadership a myriad of important decisions on issues of critical importance to the state of policing in the City, such as scheduling, staffing, deployment, and discipline. Rather than leaving these issues in the hands of the bargaining teams, with extensive experience and knowledge about policing, the Bill would place these decisions in the hands of an arbitrator. This single decision-maker would have far less intimate knowledge of policing, little to no vested interest in the City and its citizens, and no accountability to the public. He or she would wield the power to issue final and binding decisions, where no appeals are allowed, which constitute a mandate to the Mayor, Board of Estimates, and City Council to implement the decision.

The BCA respectfully submit that these weighty decisions belong in the hands of the knowledgeable and vested bargaining parties, allowing those parties to retain the necessary direction and discretion over the outcome of such important issues.

Analysis:

BCA’s objections to the overly broad and potentially adverse impact of HB 1554 are thoroughly and more specifically outlined below:

A. **HB 1554 Overrides the City/BPD’s Management Rights and the Baltimore City Code**

Article 12 of the Baltimore City Code enumerates specific management rights reserved to the City, including: the right to set standards of service; exercise control and direction over its organization and operations; direct its employees; hire, promote, transfer, assign, or retain employees; establish reasonable work rules; and suspend, demote, discharge, or taken any other appropriate disciplinary action. Baltimore City Code, Art. 12, § 3-2. These management rights are deemed part of every MOU negotiated by the parties, and any MOU is subject to the terms of the Charter and

ordinances concerning salaries, hours or work, fringe benefits, pensions, and other conditions of employment. Baltimore City Code, Art. 12, § 3-2.

These management rights are rights vested exclusively with the City/BPD. Put simply, they are *not* mandatory subjects of bargaining, but remain within the City/BPD's prerogative. The scope of issues subject to arbitration under HB 1554 clearly infringes on important and significant management rights, taking them away from the City/BPD and putting them in the hands of an arbitrator. Even more troubling, HB 1554, as drafted, does not enumerate all of the "Terms of Employment" subject to arbitration, but offers only an illustrative list – the definition of "Other Terms of Employment" includes "and all other terms and conditions of employment, such as, but not limited to ..."). Likewise, the bill does not enumerate what other "working conditions listed in [an MOU]" come within its scope. Who knows what other unnamed terms are covered?

To illustrate this tension, the BPD's managerial right to control the organization and operations and direct employees collide head-on with HB 1554's coverage of deployment and assignment to details and positions. Similarly, the managerial right to discipline or discharge conflicts with HB 1554's coverage of disciplinary procedures, investigations and actions. Further, the management right to promote is directly undercut by the inclusion of promotions in HB 1554.

The fact that HB 1554 is not limited to terms and conditions of employment which are *mandatory subjects of bargaining* highlights the over-breadth of the bill. (Emphasis added). The bill also arguably overrides the Baltimore City Code's reservation of management rights to the City, and renders meaningless the management rights clause in the current

B. HB 1554 Undermines the City/BPD's Authority and Accountability for Policing

The breadth of HB 1554 also poses potential operational problems because it takes away from the City/BPD, and places in the hands of an arbitrator, critical issues related to safe and effective policing. When left to the bargaining parties, the City/BPD (and its bargaining partner, the FOP) retain ultimate control over and accountability for the final outcome of the bargaining process. In other words, the final agreement reached is one that both parties molded and agreed to through the give-and-take process of bargaining.

Interest arbitration places these important issues in the hands of a third party – the arbitrator – who may or may not understand the issues or appreciate the impact of the decision he/she is making. Moreover, HB 1554 mandates "baseball arbitration," pursuant to which the arbitrator has no discretion, but must accept one party's proposal or the other's "in its entirety." No compromise or flexibility is allowed. Some issues simply are not suitable for interest arbitration because they are inextricably intertwined with matters of significant public concern that ought to be left to the sound judgment and knowledge of the bargaining parties.

Certain operational issues, such as setting a police schedule, should not be legislatively delivered into the hands of a third party. In the most recent round of bargaining between the City/BPD and the FOP, the parties reached compromise on scheduling – an agreement which fundamentally changed the operation of the BPD with an entirely new schedule. The agreement was able to be reached because both parties selected its most knowledgeable members, along with an outside expert who had previously served in the BPD, and worked together to devise and implement a schedule that would work for both parties. Such issues directly impact the well-being and safety of the City, its citizens and officers alike, such that institutional knowledge and expertise is required when changes are necessary. Collective bargaining places such knowledge and expertise at the center of the process

C. HB 1554 Impedes, or Disables Entirely, BPD’s Ability to Comply with its Consent Decree

The BPD is currently implementing wide-ranging reforms as required by the Consent Decree. Under the oversight of the Federal Court, BPD is required to assess, adapt, and improve its processes in a host of interconnected areas of its operations. This reform process includes both granular requirements and broad changes that, collectively, are calculated to transform the manner in which BPD polices and to rebuild the relationship between the BPD and the community it serves.

Any legislative change that would impair BPD’s ability to make these much-needed changes must be avoided. As a straightforward example, the Consent Decree required the BPD to conduct a comprehensive staffing study to assess staffing levels, to develop a plan that provides for appropriate staffing that meets specific itemized requirements (including adequate supervision, reduced reliance on drafting, and sufficient personnel to engage in problem-oriented policing), and to implement the plan in a manner consistent with available financial resources. Consent Decree, ¶¶ 428-430. If HB 1554 removes from BPD’s control terms of employment such as schedules, and assignments, it will become difficult, if not impossible, for the BPD to implement the staffing plan as required. Further, inability to resolve staffing challenges will have downstream impacts on BPD’s ability to comply with other Consent Decree provisions including those relating to personnel retention, training, and officer wellness. Ultimately, BPD could be rendered unable to develop and implement a community policing model which is both an explicit requirement of the Consent Decree, and an integral element to restoring the relationship between BPD and the community.

Similar direct impairments of BPD’s ability to comply with other sections of the Consent Decree could be expected if HB 1554 ties the Department’s hands with respect to promotion, discipline, and the host of other terms and conditions of BPD employment covered by the Bill. In terms of discipline, the Consent Decree mandated that “[t]wo civilian voting members will participate and vote in each disciplinary hearing conducted by BPD, if permitted by law.” Consent Decree, ¶380. Although, the parties reached agreement on this as part of the MOU, the civilian voting trial board members are part of

the “disciplinary procedures,” which are included in “all other terms and conditions of employment” in HB 1554 and thus would be could be subject to binding arbitration.²

D. HB 1554 Threatens to Upset the City’s Delicate Fiscal Balance and Would Allow Arbitration Awards that Reduce Funding for Other Public Services

Baltimore is in a tenuous financial position as an older city with declining population, high service demands, and a low tax base. The City ranks poorly in a variety of social indicators such as crime rates, poverty, chronic illness, and educational achievement, among others, which leads to increasing service demands on the City government. The City ranks at or near the bottom in the State on measures of per capita wealth (as measured by real property values and personal income levels). As such, Baltimore’s tax rates are the highest in the region, which limits the ability to raise additional revenue. This delicate balancing act – between providing services for citizens in need, while seeking to limit the tax burden on residents and business to encourage greater investment – requires financial discipline and diligence.

HB 1554 has the potential to upset this delicate balance by giving an arbitrator the right to impose costs on the City on issues that previously were subject to a collective bargaining process and, thus, remained within the City’s control. In the current arrangement, the City navigates the bargaining process with a clear understanding of the overall financial constraints, and carefully analyzes proposals and counter-proposals for the cost impact. Even subtle changes to items characterized as “Other Terms of Employment” in HB 1554 – scheduling, deployment, leave accruals, and discipline – can levy significant added costs. Putting these decisions in the hands of an arbitrator with “baseball arbitration,” in which the arbitrator must accept one party or the other’s proposal in its entirety, creates an unacceptably high amount of financial risk and uncertainty for the City.

One example – Patrol scheduling – highlights the size of this risk. During the most recent bargaining session, the City and FOP agreed on a new Patrol schedule. As part of those discussions, knowledgeable parties were brought together to evaluate the cost of various schedule options based on current staffing levels, call volumes, and district and sector-level requirements. Projected overtime spending to fully support these schedule options ranged from as low as \$3 million to as high as \$25 million. And, that estimate is for just one of the many as “Other Terms of Employment” that could be decided by an arbitrator. An arbitrator could also impose costs on issues such as pension, discipline, promotions, and deployment, among others. Given the broad powers that HB 1554 would confer upon a single arbitrator and the myriad subjects that could be considered as “Other Terms of Employment,” this Bill could thrust tens of millions of

² In the Consent Decree, ¶480, the City and BPD agreed that “[t]o the extent any state law, local ordinance, or collective bargaining provision conflicts with any provision of this Agreement or impedes its effective implementation, the City and BPD will use its best efforts to advocate to change the law(s), ordinance(s), or collective bargaining provision(s). This Agreement does not alter or affect current CBAs or collective bargaining rights, or state law. If the City and BPD are unable to eliminate conflicts between the provisions of this Agreement and law(s), ordinance(s), or collecting bargaining provision(s), the City and BPD will comply with the Agreement to the extent permissible.”

dollars of additional cost onto the City and put the City's hard-earned fiscal stability at risk.

Under current law, when proceeding to interest arbitration over "direct compensation," the arbitrator is expressly barred from rendering an award that "adversely affect[s] the City's ability to continue to fund other public services generally." Md. Pub. Loc. Law § 16-8A(b)(3)(vi)(2). Remarkably, HB 1554 seeks to eliminate this protection, which would lead to awards that potentially would greatly reduce funding for other services. The City's General Fund budget already is heavily-weighted towards public safety expenditures. Public Safety expenses and fixed costs (which includes required payments for School funding, pension contributions, and health benefits, among others) consume 72% of the budget, leaving the other 28% for all other agencies and services combined. Put another way, the size of the Police budget exceeds the combined budgets of the Departments of Public Works, Library, Health, Housing, Human Services, Recreation and Parks, and Transportation. By giving an arbitrator an opportunity to impose additional costs on the City, with no right of appeal and no stop-gap against infringing other public services, HB 1554 would further crowd out much-needed services and investments in these critical City agencies.

E. HB 1554 Interferes with Legislative Prerogatives over Pension

Pension issues would fall within the purview of HB 1554's arbitration process, as they are enumerated among the "Terms of Employment." Pension issues, however, are the subject of a legislative scheme and are not subjects of bargaining for any City of Baltimore union. Baltimore City Code, Art. 12, § 3-2(c) (expressly subjects collective bargaining agreements to the City's pension ordinance, thus removing pension benefits from the purview of labor negotiations); Baltimore City Code, Art. 22, §§ 29-48; Baltimore City Charter, Art. II, § 24. Under HB 1554, pension benefits would now become subject to collective bargaining, which by definition, means they are subject to revision in every collective bargaining agreement. This would create immeasurable pension liability and uncertainty for the employees of the bargaining unit. Again, this illustrates the over-reaching scope of HB 1554.

F. Interest Arbitration for Police vs. Fire Presents Different and Unique Considerations

The City has heard comparisons made between this bill and the existing law as it relates to Fire arbitration. This bill is considerably broader in terms of the scope of issues purportedly subject to interest arbitration than the Fire arbitration provisions contained in the Baltimore City Charter, Art. II § 55(b). The fire arbitration provisions cover "terms and conditions of employment." "Terms and conditions of employment" are not defined in the Charter, but are understood to refer to those terms and conditions traditionally subject to collective bargaining. In other words, the parties arbitrate over **mandatory subjects of bargaining**. They do not include issues left to managerial rights and discretion. HB 1554 goes well beyond traditional bargaining subjects in its scope, as detailed below, and would trammel the management rights of the BPD.

Additionally, issues related to policing are far different from those of firefighting, especially in the City of Baltimore. Policing in the City of Baltimore requires due consideration of a wide variety of factors that are not relevant when it comes to firefighting, including the civil unrest in the wake of the death of Freddie Gray; the highest murder rate in the United States; loss of trust of the community caused by public examples of corruption and abuse of authority; and the mandates of a federal Consent Decree. These considerations dictate that BPD must retain firm control, through its power to bargain collectively, over how these factors drive the Department's operations.

G. HB 1554's Timing Provisions Conflict with Existing Impasse Procedures

The timing provisions contained in HB 1554 create a tension with the current collective bargaining framework governing negotiations between the parties. Notably, in Article 4(a), HB 1554 preserves the bargaining framework, while also triggering interest arbitration on all issues comprising "Terms of Employment" if no written agreement is reached by March 1 of any year. The Baltimore City Code, however, contains impasse procedures requiring mediation and fact finding, which also are triggered on March 1 if no agreement has been reached. Baltimore City Code, Art. 12, § 5. The March 1 date is important as it was established in the bargaining framework to ensure resolution of any dispute in time to be included in the City's municipal budget.

It makes no sense to have impasse procedures, such as mediation and fact finding, occurring simultaneously with binding arbitration procedures. Binding interest arbitration, if part of the process at all, should be the last step of the collective bargaining process following impasse, mediation, and fact finding.

Conclusion:

For the foregoing reasons, the BCA requests an **unfavorable** report on HB 1554.