Exhibit D
Senate Bill 420
2006

SENATE BILL 420

E4 6lr1439

By: **Senators Frosh, Garagiola, Green, and Jimeno**
Introduced and read first time: February 1, 2006
Assigned to: Judicial Proceedings

A BILL ENTITLED

AN ACT concerning

Law Enforcement Officers' Bill of Rights – Hearing Boards – Binding Arbitration

FOR the purpose of repealing prohibitions against making certain actions regarding the formation of a law enforcement officers' hearing board and certain decisions by a hearing board the subject of binding arbitration under certain circumstances; and generally relating to hearing boards for complaints against law enforcement officers.

BY repealing and reenacting, with amendments,
Article – Public Safety
Section 3–107 and 3–108
Annotated Code of Maryland
(2003 Volume and 2005 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Public Safety

3–107.

(a) (1) Except as provided in paragraph (2) of this subsection and § 3–111 of this subtitle, if the investigation or interrogation of a law enforcement officer results in a recommendation of demotion, dismissal, transfer, loss of pay, reassignment, or similar action that is considered punitive, the law enforcement officer is entitled to a hearing on the issues by a hearing board before the law enforcement agency takes that action.

(2) A law enforcement officer who has been convicted of a felony is not entitled to a hearing under this section.

(b) (1) The law enforcement agency shall give notice to the law enforcement officer of the right to a hearing by a hearing board under this section.

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.

(2) The notice required under this subsection shall state the time and place of the hearing and the issues involved.

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

(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) If the chief is the law enforcement officer under investigation, the chief of another law enforcement agency in the State shall function as the law enforcement officer of the same rank on the hearing board.

(ii) If the chief of a State law enforcement agency is under investigation, the Governor shall appoint the chief of another law enforcement agency to function as the law enforcement officer of the same rank on the hearing board.

(iii) If the chief of a law enforcement agency of a county or municipal corporation is under investigation, the official authorized to appoint the chief's successor shall appoint the chief of another law enforcement agency to function as the law enforcement officer of the same rank on the hearing board.

(iv) If the chief of a State law enforcement agency or the chief of a law enforcement agency of a county or municipal corporation is under investigation, the official authorized to appoint the chief's successor, or that official's designee, shall function as the chief for purposes of this subtitle.

(4) (i) 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.

(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.

(iii) The law enforcement agency shall notify the law enforcement officer in writing before a hearing board is formed that the law enforcement officer may elect an alternative method of forming a hearing board if one has been negotiated under this paragraph.

(iv) If the law enforcement officer elects the alternative method, that method shall be used to form the hearing board.

(v) An agency or exclusive collective bargaining representative may not require a law enforcement officer to elect an alternative method of forming a hearing board.

(vi) If the law enforcement officer has been offered summary punishment, an alternative method of forming a hearing board may not be used.

(vii) [This] IF AUTHORIZED BY LOCAL LAW, THIS paragraph is [not] subject to binding arbitration.

(d) (1) In connection with a disciplinary hearing, the chief or hearing board may issue subpoenas to compel the attendance and testimony of witnesses and the production of books, papers, records, and documents as relevant or necessary.

(2) The subpoenas may be served without cost in accordance with the Maryland Rules that relate to service of process issued by a court.

(3) Each party may request the chief or hearing board to issue a subpoena or order under this subtitle.

(4) In case of disobedience or refusal to obey a subpoena served under this subsection, the chief or hearing board may apply without cost to the circuit court of a county where the subpoenaed party resides or conducts business, for an order to compel the attendance and testimony of the witness or the production of the books, papers, records, and documents.

(5) On a finding that the attendance and testimony of the witness or the production of the books, papers, records, and documents is relevant or necessary:

(i) the court may issue without cost an order that requires the attendance and testimony of witnesses or the production of books, papers, records, and documents; and

(ii) failure to obey the order may be punished by the court as contempt.

(e) (1) The hearing shall be conducted by a hearing board.

(2) The hearing board shall give the law enforcement agency and law enforcement officer ample opportunity to present evidence and argument about the issues involved.

(3) The law enforcement agency and law enforcement officer may be represented by counsel.

(4) Each party has the right to cross–examine witnesses who testify and each party may submit rebuttal evidence.

(f) (1) Evidence with probative value that is commonly accepted by reasonable and prudent individuals in the conduct of their affairs is admissible and shall be given probative effect.

(2) The hearing board shall give effect to the rules of privilege recognized by law and shall exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

(3) Each record or document that a party desires to use shall be offered and made a part of the record.

(4) Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(g) (1) The hearing board may take notice of:

(i) judicially cognizable facts; and

(ii) general, technical, or scientific facts within its specialized knowledge.

(2) The hearing board shall:

(i) notify each party of the facts so noticed either before or during the hearing, or by reference in preliminary reports or otherwise; and

(ii) give each party an opportunity and reasonable time to contest the facts so noticed.

(3) The hearing board may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented.

(h) (1) With respect to the subject of a hearing conducted under this subtitle, the chief shall administer oaths or affirmations and examine individuals under oath.

(2) In connection with a disciplinary hearing, the chief or a hearing board may administer oaths.

(i) (1) Witness fees and mileage, if claimed, shall be allowed the same as for testimony in a circuit court.

(2) Witness fees, mileage, and the actual expenses necessarily incurred in securing the attendance of witnesses and their testimony shall be itemized and paid by the law enforcement agency.

(j) An official record, including testimony and exhibits, shall be kept of the hearing.

3–108.

(a) (1) A decision, order, or action taken as a result of a hearing under § 3–107 of this subtitle shall be in writing and accompanied by findings of fact.

(2) The findings of fact shall consist of a concise statement on each issue in the case.

(3) A finding of not guilty terminates the action.

(4) If the hearing board makes a finding of guilt, the hearing board shall:

(i) reconvene the hearing;

(ii) receive evidence; and

(iii) consider the law enforcement officer's past job performance and other relevant information as factors before making recommendations to the chief.

(5) A copy of the decision or order, findings of fact, conclusions, and written recommendations for action shall be delivered or mailed promptly to:

(i) the law enforcement officer or the law enforcement officer's counsel or representative of record; and

(ii) the chief.

(b) (1) After a disciplinary hearing and a finding of guilt, the hearing board may recommend the penalty it considers appropriate under the circumstances, including demotion, dismissal, transfer, loss of pay, reassignment, or other similar action that is considered punitive.

(2) The recommendation of a penalty shall be in writing.

(c) (1) Notwithstanding any other provision of this subtitle, the decision of the hearing board as to findings of fact and any penalty is final if:

(i) a chief is an eyewitness to the incident under investigation; or

(ii) a law enforcement agency or the agency's superior governmental authority has agreed with an exclusive collective bargaining representative recognized or certified under applicable law that the decision is final.

(2) The decision of the hearing board then may be appealed in accordance with § 3–109 of this subtitle.

(3) [Paragraph] IF AUTHORIZED BY LOCAL LAW, PARAGRAPH (1)(ii) of this subsection is [not] subject to binding arbitration.

(d) (1) Within 30 days after receipt of the recommendations of the hearing board, the chief shall:

(i) review the findings, conclusions, and recommendations of the hearing board; and

(ii) issue a final order.

(2) The final order and decision of the chief is binding and then may be appealed in accordance with § 3–109 of this subtitle.

(3) The recommendation of a penalty by the hearing board is not binding on the chief.

(4) The chief shall consider the law enforcement officer's past job performance as a factor before imposing a penalty.

(5) The chief may increase the recommended penalty of the hearing board only if the chief personally:

(i) reviews the entire record of the proceedings of the hearing board;

(ii) meets with the law enforcement officer and allows the law enforcement officer to be heard on the record;

(iii) discloses and provides in writing to the law enforcement officer, at least 10 days before the meeting, any oral or written communication not included in the record of the hearing board on which the decision to consider increasing the penalty is wholly or partly based; and

(iv) states on the record the substantial evidence relied on to support the increase of the recommended penalty.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2006.

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April 28, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor
State of Maryland
State House
100 State Circle
Annapolis, MD 21401

Re: Veto Request - SB 420- Law Enforcement Officers' Bill of Rights- Hearing Boards - Binding Arbitration

Dear Governor Ehrlich:

The Maryland Association of Counties (MACo) respectfully requests that you veto Senate Bill 420. The bill upsets the fair and longstanding balance established by the Law Enforcement Officers' Bill of Rights (LEOBR) between the rights of a law enforcement officer (officer) and the rights of the head of a law enforcement agency (chief) during officer disciplinary proceedings. Its implementation would ultimately erode the authority and accountability of chiefs for officer discipline, denying citizen recourse and citizen confidence in the credibility of law enforcement.

The LEOBR presently requires that claims of officer misconduct be considered by a three person hearing board (board), which is appointed by the chief, with certain qualifications, e.g. appointees must include an officer of the same rank as the charged officer. *Public Safety Article* § 3-107(c)(2). The decision of the hearing board is final as to guilt or innocence, but the chief may, with limited exceptions and qualifications, alter the discipline recommendation of the board. For instance, if the chief chooses to increase the discipline recommendation, the chief must grant the officer an opportunity to be heard and state the evidence upon which the chief relies to increase the recommended discipline. *Id.* at 3-108(d)(5)

The board's composition and whether the board's decision as to discipline is final can be collectively bargained. *Id.* at § 3-107(c)(4)(i) and § 3-108(c)(1)(ii). But, existing law specifically prohibits a dispute during contract negations regarding these two critical components of police discipline from being submitted to binding arbitration. *Id.* at § 3-107(4)(vii) and §4-108(c)(3). This prohibition recognizes the need to ensure the chief and the elected officials who appoint the chief can be held directly accountable for an officer's actions. Citizens expect this accountability as their interest in officer conduct is well recognized, with specific incidents periodically raising great public concern and media attention.

SB 420 rejects this prohibition on binding arbitration of officer discipline related issues. The bill requires that where local law authorizes binding arbitration, binding arbitration must be used when there is a dispute during the collective bargaining process about proposed contract provisions regarding the composition of the hearing board and whether the board's disciplinary recommendation is final. In practice, there will always be binding arbitration since the union will demand finality for the board decision and the chief will reject that demand. Hence, SB 420 would delegate the resolution of this dispute to an arbitrator who has no accountability to citizens.

It is certain that at some point in time an arbitrator will accede to the union demand for board decision finality. This eventuality will occur sooner in those jurisdictions where existing statute requires the arbitrator to consider both the union and management demands as a package, having to accept one or the other in its entirety. In those circumstances, the demand for board finality would be included with unrelated wage and condition of employment demands, with which the arbitrator might agree. But, to accept those demands, the arbitrator would also be acceding to the board finality demand.

This manner of negotiation is now statutorily mandated in the four counties with charter provisions authorizing binding arbitration for officer collective bargaining impasses – Anne Arundel, Baltimore, Montgomery, and Prince George's Counties. *See* Anne Arundel County Code, § 6-4-111(j)(4); Baltimore County Code, § 4-5-505(f)(1); Montgomery County Code, § 33-81(b)(6); and Prince George's County Code, § 13A-111.01. Since the bill's reference to "local law" authorization by definition includes a charter provision, in those four counties SB 420's binding arbitration provisions will apply to collective bargaining after the bill's October 1, 2006 effective date without any further action by those counties.

History establishes the likely success of future efforts to secure similar binding arbitration provisions in the charters of the other charter counties. SB 420's enactment would certainly fuel these efforts. Hence, the bill's enactment could lead to the chiefs who supervise the vast majority of officers in Maryland not having discipline authority over those officers. Even now, SB 420's enactment would mean the chiefs' discipline authority over approximately 5,962 officers, or 56% of all county officers, would be subject to immediate dilution.

Chiefs do not regularly reject the discipline recommendations of boards, applying their discretion judiciously. But, there are circumstances when the penalty recommendation must be rejected. For instance, chiefs have opted to terminate officers, when boards have recommended lesser penalties, when officers have used excessive force, unjustifiably used force, communicated racial slurs, committed perjury, submitted false documents, engaged in substance abuse, or used their officer positions inappropriately for personal gain. *See* Attachment A.

These circumstances document the compelling public policy considerations requiring a chief to retain discipline discretion. Ensuring public confidence in the credibility of law enforcement is a most critical government responsibility. Limitations on a chief's ability to dismiss officers who have lied, used excessive force, or shown racial insensitivity will erode this public confidence. As noted in the attached 1997 *Baltimore Sun* editorial, the "fox guarding the hen house" situation SB 420 furthers would certainly undermine public confidence in government's ability to control police conduct. *See* Attachment B.

Another critical reason for preserving the chief's authority to alter the board's recommendation is to ensure consistent discipline practices. Hearing boards are individually appointed for each incident and do not typically contain the same members. In fact, the required hearing board appointment of an officer of the same rank as the officer before the board ensures appointment variances when multiple officers are charged for the same incident. *Id.* at §3-107(c)(2).

Variances in board composition always make it possible that similar incidents will give rise to different punishment recommendations. The discipline discretion limitation SB 420 proposes would prohibit rectifying these inconsistencies. This prohibition would not only institutionalize a poor management practice but would also pose potential equal protection violations.

SB 420 has a long history, with the General Assembly rejecting provisions seeking to substantively undermine a chief's existing discipline discretion in at least seven bills during the past 14 years. *See* HB 1004 (1992), HB 110 (1993), HB 22 and SB 73 (1994), HB 1296 (1996), HB 1206 (1996), HB 1296 (2000), and HB 1164 (2005). The bills are so familiar that they are typically individually referred to as the "final order bill." No compelling evidence of chief misuse of authority has ever been presented to justify passage of a final order bill.

In written testimony submitted for SB 420, the FOP President erroneously suggests that where binding arbitration is now required the county could enact an ordinance to opt out from SB 420's mandated binding arbitration provisions. FOP representatives emphasized this purported opt out option in oral testimony. As indicated in the attached letters from the Prince George's and Anne Arundel Counties Offices of Law, the suggested opt out is not an option in the four counties where binding arbitration is required by county charter. *See* Attachment C.

The FOP testimony disingenuously understates the bill's implications, stating that it "...is a procedural bill to modernize the LEOBR by simply making it consistent with existing local binding arbitration statutes." This is not the case. The bill is a circuitous and effective mechanism to secure the final order bill that has been consistently rejected. The egregious consequences that would arise from its enactment are certainly clear.

In 1994, you co-sponsored HB 1604, which proposed an enhanced process for an officer when a chief was contemplating increasing the penalty recommended by the board. That same year SB 73 and HB 22 proposed an absolute limit on a chief's ability to increase the board's recommended penalty, i.e. a final order bill. Negotiations between local governments and the Maryland State Lodge of the Fraternal Order of Police (FOP) resulted in the enactment of HB 1604. *See* Chapter 695, Laws of Maryland.

In acknowledging the compromise, the FOP counsel stated in a 1994 letter that "...should this bill be enacted...we do not see the need for any future legislation on this subject, so long as the police chiefs live up to the new language in the law." *See* Attachment D. Subsequent to the 1994 compromise, no evidence has been presented in any bill hearing that the chiefs have not been adhering to their statutory obligations when increasing a board penalty recommendation. So, FOP advocacy for SB 420 should be rejected as inconsistent with the 1994 compromise.

An extensive 1999 University of Maryland Institute for Government Service (IGS) study of Maryland officer disciplinary procedures documents the great protections enjoyed by Maryland's officers. In comparing Maryland's law with other states' laws the study concludes that "....the Maryland law appears to accommodate officers more than any other state law, except possibly that of Rhode Island." *Review of Police Discipline Procedure in Maryland and Other States*; June, 1999 at page v. This conclusion is reached even after acknowledging the LEOBR provisions SB 420 affects, concerning the chief's discretion to appoint the hearing board and increase the discipline recommendation. *See* Attachment E.

MACo recognizes that Maryland's law enforcement officers are dedicated and diligent public servants who are periodically required to risk their lives to protect Maryland citizens. SB 420 is not relevant to these fine officers, but only to the few aberrant officers who need to be appropriately disciplined. Making it more difficult to effectively discipline these aberrant officers certainly demeans the credibility of the decent officers who may be forced to continue to serve with them.

In conclusion, to preserve public confidence in law enforcement MACo joins police chiefs and sheriffs in urging you to veto SB 420. The long-term implications of enacting this bill provide compelling justification for this action.

Thank you for your consideration.

Respectfully yours,

David S. Bliden
Executive Director

Attachments

cc: The Honorable Thomas V. Mike Miller, Jr.
The Honorable Michael E. Busch
The Honorable Brian Frosh
Mr. Kenneth H. Masters
Mr. Alan R. Friedman
Mr. Joseph Getty
Mr. Donald Hogan
Mr. Timothy Perry
Ms. Kristin Jones

Attachment A

Examples of Chief's or Sheriff's Decision Terminating Officer After Hearing Board Recommended a Less Severe Penalty

USE OF FORCE

Baltimore City
September 14, 2000

Charge:	Excessive Force-Off duty Officer hit citizen over the head with a broomstick when he did not acknowledge the officer's request to move his car.
Board's Recommendation:	Thirty days suspension without pay and training on civil rights stop and frisk and assault standards

Baltimore City
April 1 – 3, 2003

Charge:	While in uniform and out of officer's assigned district, officer initiated contact with and assaulted the neighbor of the officer's ex-girlfriend.
Board's Recommendation:	Counseling and Seventy Days Suspension Without Pay

RACIAL MISCONDUCT

Baltimore City
December 9, 2005

Charge:	Referred to two commanders as "white niggers", while off-duty but in the presence of other officers
Board's Recommendation:	Severe Letter of Reprimand, Five Days Loss of Leave (Officer retired in lieu of being terminated)

Howard County
November 8, 1990

Charge:	Improper conduct and harassment, including publicly presenting Nazi-type salutes
Board's Recommendation:	Reduction in rank and suspension

FALSE STATEMENTS/PERJURY/LYING

Baltimore County
January 2006

Charge:	Nine instances of submitting false forms with forged supervisor's signature
Board's Recommendation:	30 days suspension without pay.

Baltimore City
October 9, 2002

Charge:	Failure to Obey an Order by Commanding Officer – False Statement
Board's Recommendation:	Fifty Days Suspension Without Pay

Baltimore City
February 27, 2003

Charge:	Perjury when presenting testimony for the State during domestic violence case
Board's Recommendation:	Middle Letter of Reprimand, Two Days Loss of Leave

Garrett County
April 2001

Charge:	Four instances of submitting false meal receipts for reimbursement
Board's Recommendation:	90-day suspension and reduction in rank

CRIMINAL CONDUCT

Prince George's County
May 2, 2003

Charge:	Use of an illegal/banned drug while on duty.
Board's Recommendation:	Demotion of two ranks

Montgomery County
May 2002

Charge:	Driving under the influence, running a red light, causing a motor vehicle accident, with personal injury, and leaving the scene of the accident.
Board's Recommendation::	160 hours of suspension (4 weeks' pay).

St. Mary's County
May 2004

Charge:	Unauthorized release of valuable building materials seized from a criminal investigation to a family member of the officer.
Board's Recommendation:	Reduction in rank and a 30-day suspension.

March 21, 1997

THE SUN

EDITORIALS

Handcuffing police chiefs

■ **Fox guarding henhouse?:** *House bill ignores public stake in misconduct reviews.*

SUPPORTERS OF House Bill 1172, which would reduce Maryland's police chiefs' power to clean up allegations of police misconduct, contend their proposal is about fairness to officers. But they can't make a case about fairness to the public, whom the police officers serve.

This is a bill written by unions, supported by the Fraternal Order of Police, the United Food and Commercial Workers Union and other labor groups. It would dismantle the current checks and balances in police discipline review. Currently, when an officer is charged with misconduct, the chief must convene a hearing board of three members. One must be the same rank as the officer being investigated. The board's decision on guilt or innocence is binding, but its recommended penalty can be adjusted by the chief.

Under the bill the hearing board's penalty would be binding, or perhaps subject it to binding arbitration. Opponents of the legislation, including the Maryland Chiefs of Police Association and the Sheriffs Association, the Maryland Association of Counties and the Maryland Municipal League, contend that even if police brutality had been videotaped — such as in the Rodney King case — a chief would be powerless to fire those involved if a hearing board decreed a lesser penalty, or none at all.

The public, by and large, trusts its police, and should. But several cases of misconduct last year — from police scalping tickets at Camden Yards to sexual crimes — should give legislators pause. Also, a study of racial disparity in discipline within the Baltimore City police department concluded that while black officers typically serve on boards that review cases involving black officers, white officers often lead these boards. If these boards are made all-powerful, city or county councils might as well not bother calling police chiefs on the carpet to explain apparent injustices. The same goes for the legislature. This bill would affect jurisdictions whose police have collective bargaining, including the Maryland State Police, Baltimore City, most large counties and some towns.

Police officers, indeed, have an enormous stake in how internal discipline is meted out. But H.B. 1172 ignores the public's stake.