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May 18, 2010

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Re: Senate Bill 1123

Dear Governor O'Malley:

We have reviewed Senate Bill 1123, "Political Subdivisions – Collective Bargaining Agreements – Binding Arbitration" for constitutionality and legal sufficiency. We write to discuss the bill's inconsistency with the Municipal Home Rule Amendment of the Maryland Constitution, but conclude that even if the application of the bill to municipal corporations is unconstitutional, it may be severed from the rest of the bill's effect, leaving the remainder intact. It is further our view that, if the bill is signed, it might not have the anticipated effect of reviving a Wicomico County ordinance recently invalidated by the Court of Special Appeals.

Background

Senate Bill 1123 apparently was introduced in reaction to the February 1, 2010 decision of the Court of Special Appeals in *Wicomico County Fraternal Order of Police v. Wicomico County*, 190 Md. App. 291 (2010). That case involved a challenge to a Wicomico County charter amendment that required the Wicomico County Council to adopt a law providing for collective bargaining with binding arbitration of disputes between the County and the deputies of the Wicomico County Sheriff's Office. After the charter amendment was adopted by the voters of Wicomico County, the County Council passed a law amending the County labor code. While the law provided that the decision of the arbitrator was binding on the County Executive, the Exclusive Representative, and the individual employees, it was not made binding on the County Council. 59-11.H.2. Therefore, the Fraternal Order of Police ("FOP") filed suit, alleging that "the legislation enacted by the Council was unlawful and not in compliance with the Charter Amendment." *Id.* at 296. The FOP specifically argued that the new law did not provide

for binding arbitration because it was not binding on the County Council. The Court did not, however, decide the case on that basis. Instead, the Court concluded that the charter amendment did not "change the form and structure of government," but rather "mandated the enactment of legislation which usurped the Council's legislative discretion with respect to a specific subject matter and a specific group of employees." The Court thus held that the charter amendment "on its face, violated Md. Const., Art. XI-A, § 3, which provides that the law-making power 'shall' be vested in the legislative body." *Id.* at 302-303. The Court further held that "[b]ecause Legislative Bill 2007-03 was mandated by the Charter Amendment, it is invalid." *Id.*

Senate Bill 1123, an emergency bill, retroactively authorizes a county or municipal corporation to adopt a local law or ordinance that allows for binding arbitration to resolve collective bargaining disputes regarding negotiations for wages, benefits, or terms and conditions of employment for employees of the county or municipal corporation. The bill, however, is limited to counties and municipal corporations that have already adopted such laws in that the bill expressly provides that it shall apply only retroactively and may not be applied or interpreted to have any effect on or application to any local law or ordinance that allows for binding arbitration enacted after the bill's effective date. While the bill, as drafted, would have granted the authority to all counties and municipal corporations, both prospectively and retroactively, it was amended during the session's final hours to narrow its scope by only giving retroactive authority to those jurisdictions that had already enacted such a law prior to the effective date of the bill.

Currently, Anne Arundel, Baltimore County, Montgomery, and Prince George's Counties and Baltimore City have collective bargaining that allows for binding arbitration. Additionally, the municipal governments of Ocean City and Elkton provide for collective bargaining with binding arbitration for their police department Ocean City Code § C-1003, Code of the Town of Elkton, Chapter 2.24. The Wicomico County law invalidated by the Court of Special Appeals is the only one of these collective bargaining laws that was enacted to apply to deputy sheriffs.

Analysis

We do not see any constitutional or legal infirmity in the bill as applied to a charter county other than Wicomico County. We explain below our concerns about the bill as applied to municipal governments and Wicomico County.

Municipal Home Rule

Article XI-E § 1 of the Maryland Constitution provides:

> Except as provided elsewhere in this Article, the General Assembly shall not pass any law relating to the incorporation, organization, government, or affairs of ... municipal corporations ... which will be special or local in its terms or in its effect, but the General Assembly shall act in relation to the incorporation, organization, government, or affairs of any such municipal corporation only by general laws which shall in their terms and in their effect apply alike to all municipal corporations in one or more of the classes provided for in Section 2 of this Article.

Article XI-E, § 2 requires the General Assembly, by law, to classify all municipalities by grouping them into not more than four classes based on population. In fulfilling this duty, the General Assembly has provided that all municipalities are in a single class. Article 23A, § 10. Thus, an enactment of the General Assembly must normally apply alike to all municipal corporations.

As introduced, SB 1123 would have authorized all counties and municipalities to adopt local laws on collective bargaining that allows for binding arbitration, and included a provision to also make the bill retroactive. Thus, if the bill had passed in its original form, it clearly would have applied alike to all municipalities. The "retroactive only" application of SB 1123, as amended, however, forecloses any authority to a municipal corporation that has not enacted collective bargaining with binding arbitration before the bill's effective date, thereby creating two classes of municipalities: those that enacted such a law prior to the effective date and those that did not. Thus, in our view, the bill results in an impermissible classification of municipal corporations inconsistent with the municipal home rule amendment of the Maryland Constitution.[1] *Mayor and Alderman of Annapolis v. Wimbleton*, 52 Md. 256, 267-68 (1982) (general law applicable to only two municipalities violates uniformity provision of Art. XI-E, § 1).

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[1] Md. Const. Art. XI-F similarly requires the General Assembly to treat the same all code home rule counties within a class. We are not aware of any code home rule county that has adopted a collective bargaining law that allows for binding arbitration. Thus, it may be said that Md. Const. Art. XI-F is not implicated by the passage of SB 1123.

That notwithstanding, we find that the authority granted to municipal corporations in SB 1123 is severable from the authority granted to the charter counties. The test for severability is whether the legislative body would have enacted the statute or ordinance if it knew that part of the enactment was invalid, *Davis v. State*, 294 Md. 370, 383 (1982); *City of Baltimore v. Stuyvesant Ins. Co.*, 226 Md. 379, 390-91 (1961), or "what would have been the intent of the legislative body, if it had known that the statute could be only partially effective." *Turner v. State*, 299 Md. 565, 576 (1984). There is a strong presumption that a legislative body generally intends its enactments to be severed if possible. *O.C. Taxpayers v. Ocean City*, 280 Md. 585, 600 (1977). Moreover, Article 1, § 23 of the Annotated Code specifically provides:

> The provisions of all statutes ... are severable unless the statute specifically provides that its provisions are not severable. The finding by a court that some provision of a statute is unconstitutional and void does not affect the validity of the remaining portions of that statute, unless the court finds that the remaining provisions alone are incomplete and incapable of being executed in accordance with the legislative intent.

"Even though constitutional and unconstitutional provisions of a law are contained in the same section, the entire section or enactment is not invalid unless the provisions are essentially and inseparably connected in substance." *Davidson v. Miller*, 276 Md. 54, 83 (1975). That is not the case with SB 1123.

That the original bill was drafted to Article 24 ("Political Subdivisions"), which applies to all counties and municipalities instead of separately to Article 23A ("Municipal Corporations"), Article 25 ("Commission Counties"); Article 25A ("Charter Counties"), and Article 25B ("Code Counties") was a matter of drafting choice. It could just as easily and perhaps more clearly have been drafted to each applicable article. Each of the provisions of a bill drafted to two or more of those articles would have been separate in both form and substance. Had SB 1123 been drafted in that manner, there would be no question that the section drafted to Article 23A would be severable. Thus, in our view, application of SB 1123 to municipal corporations[2] may be severed from the remainder of the application of SB 1123, notwithstanding that the bill was originally drafted to a single section of the Code and ultimately enacted as a single uncodified provision.

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[2] And code home rule counties for the reasons explained in Note 1.

Application of SB 1123 to Wicomico County

If SB 1123 is signed into law, there is substantial question as to whether the bill would have any effect on Legislative Bill 2007-03, the Wicomico County ordinance struck down by the decision in *Wicomico County*. For the bill to apply to a particular county or municipal law or ordinance, it would have to: (1) allow for *binding arbitration* to resolve collective bargaining disputes; (2) relate to negotiations for wages, benefits, or terms and conditions of employment for *employees of the county or municipal corporation*; and (3) have been enacted prior to the effective date of the bill.

First, it is not clear that the Wicomico County ordinance would be considered a law "that allows for binding arbitration to resolve collective bargaining disputes." As the Court stated in *Wicomico County*, while the law enacted by the County Council made the arbitrator's decision binding on the County Executive, the exclusive representative, and the individual employees, it was not made binding on the County Council. Indeed, that Legislative Bill 2007-03 was not binding on the County Council was the allegation upon which the litigation was premised. Thus, it is not entirely clear that the Wicomico ordinance will be saved by SB 1123.

Second, there is a question as to whether deputy sheriffs should be considered State or county employees. If the Wicomico County deputy sheriffs are State employees, then SB 1123 would not apply to them. The Court of Appeals has clearly stated that, "under Maryland law, sheriffs are State officials and/or employees" and that "deputies, like sheriffs, are state employees." *Rucker v. Harford County*, 316 Md. 275, 289-91 (1989). The Court also stated, however, that "[t]his conclusion does not mean that, for some purposes and in some contexts, a sheriff may not be treated as a local government employee. In addition to matters relating to the local funding of sheriffs' offices, a sheriff may be given certain benefits given to local government employees." *Id.* at 289. In our view, however, receiving the same or similar benefits as county employees, does not alter the sheriffs' or deputies' status as State employees.

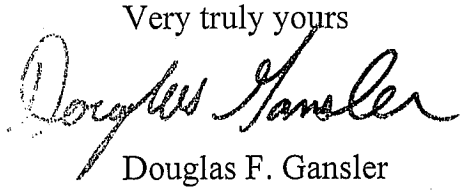
While a deputy's status as a State or county employee for the purpose of application of a collective bargaining law may not be entirely clear from *Rucker*, extensive State law covering the office of sheriff for each county lends weight to the conclusion that they are not county employees, but rather are State employees, only subject to county action as prescribed by State law. Section 2-309 of the Courts and Judicial Proceedings Article ("CJ") includes laws relating to deputies, salaries, equipment, personnel procedures, including collective bargaining and varies considerably from one county to the next. For example, some sheriffs' salaries are set by statute;

others are tied to the salary of other State officials; still others are permitted to be set by the county. Several counties' laws contain specific provisions relating to collective bargaining. *See, e.g.*, CJ § 2-309 (b), (e), (j), (l), and (q). Employees, including deputies, of some sheriffs' offices are explicitly made subject to the county merit system, while others are not. Because of the extensive nature of State law concerning sheriffs' offices and deputies, we cannot say that deputy sheriffs would clearly be considered *employees of the county* for the purpose of applying SB 1123 to the Wicomico County law.

Third, while certainly Wicomico County's law was enacted prior to the effective date of SB 1123, it is not clear that this bill would have the effect of reviving a local bill that was struck down by a ruling of the court. Courts have split over curative statutes which impair court judgments. Sutherland Statutory Construction § 41:16. Some courts hold that the legislature may enact a curative statute although the act renders the final judgment of a court ineffective. Other courts refuse to sustain curative acts which have that effect. *See City of Baltimore v. Horn*, 26 Md. 184 (1867).

While SB 1123 might not revive the Wicomico County ordinance, it would serve to reaffirm the authority of the other charter counties that have enacted laws or ordinances prior to SB 1123's effective date that allow for binding arbitration to resolve collective bargaining disputes regarding negotiations for wages, benefits, or terms and conditions of employment for county employees.

Very truly yours



Douglas F. Gansler
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cc: The Honorable Brian E. Frosh
The Honorable John P. McDonough
Joseph Bryce
Karl Aro