



Montgomery
County Council

Committee GO

Staff: Robert H. Drummer, Senior Legislative Attorney

Purpose: To introduce agenda item – no vote expected

Keywords: #FairRepresentationMoCo

AGENDA ITEM #3A

November 19, 2019

Introduction

SUBJECT

Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation
Lead Sponsor: Councilmember Hucker

EXPECTED ATTENDEES

None

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

- To introduce Bill – no vote expected

DESCRIPTION/ISSUE

Bill 35-19 would:

- amend the duty of fair representation for a certified representative of County employees;
- authorize a certified representative to impose the reasonable costs of filing a grievance or pursuing arbitration on an employee who does not pay membership dues or the equivalent; and
- permit a certified representative to refuse to file a grievance or pursue arbitration for an employee who does not pay membership dues or the equivalent unless the employee pays the reasonable costs imposed.

SUMMARY OF KEY DISCUSSION POINTS

Should this be left to negotiation with each exclusive representative?

This report contains:


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MEMORANDUM

November 14, 2019

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation

PURPOSE: Introduction – no Council votes required

Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation, sponsored by Lead Sponsor Councilmember Huckler, is scheduled to be introduced on November 19, 2019. A public hearing is tentatively scheduled for December 3, 2019 at 1:30 p.m.¹

Bill 35-19 would:

- amend the duty of fair representation for a certified representative of County employees;
- authorize a certified representative to impose the reasonable costs of filing a grievance or pursuing arbitration on an employee who does not pay membership dues or the equivalent; and
- permit a certified representative to refuse to file a grievance or pursue arbitration for an employee who does not pay membership dues or the equivalent unless the employee pays the reasonable costs imposed.

The Supreme Court, in *Abood v. Detroit Board of Education*, 431 US 209 (1977), upheld a collective bargaining agreement between a union representing teachers and the public school board requiring bargaining unit members to either join the union or pay an equivalent service fee to the union to support its duty to represent all bargaining unit members. The Court rejected a claim that this provision violated the First Amendment rights of employees who do not want to join the union but required the union to reduce the service fee in an amount equal to the cost to express ideological or political views unrelated to collective bargaining.

Forty-one years later, a different Supreme Court overruled *Abood* and held that an agency shop clause in the public sector violated the First Amendment rights of public employees who choose not to join the union in *Janus v. AFSCME*, 138 S.Ct. 2448 (2018). County collective bargaining laws require the exclusive representative to represent all bargaining unit members and permit the union and the employer to negotiate an agency shop provision. The union certified as

¹#FairRepresentationMoCo

the exclusive representative of each County employee bargaining unit has negotiated an agency shop provision that is no longer valid under the *Janus* decision. Bill 35-19 would modify the union's duty of fair representation by permitting the union to refuse to process a grievance or arbitration on behalf of a bargaining unit member who chooses not to pay union dues unless the employee pays the union the reasonable costs to process the grievance or arbitration. Bill 35-19 is patterned after a recent State law making similar modifications to the duty of fair representation for the exclusive representative of M-NCPPC employees. See Chapter 562 of the 2019 Laws of Maryland at ©8-11.

Under the County collective bargaining laws, changes to the statutory duty of fair representation is subject to collective bargaining. If the parties agreed to a change, the Executive would submit the proposed legislation to the Council for its consideration. To date, the Executive has not negotiated any modifications to the duty of fair representation with any of the exclusive representatives as a result of the *Janus* decision.

This packet contains:	<u>Circle #</u>
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Bill No. 35-19
Concerning: Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation
Revised: October 3, 2019 Draft No. 1
Introduced: November 19, 2019
Expires: May 19, 2021
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: _____
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Hucker

AN ACT to:

- (1) amend the duty of fair representation for a certified representative of County employees;
- (2) authorize a certified representative to impose the reasonable costs of filing a grievance or pursuing arbitration on an employee who does not pay membership dues or the equivalent;
- (3) require a certified representative to file a grievance or pursue arbitration for an employee who does not pay membership dues or the equivalent only if the employee pays the reasonable costs imposed; and
- (4) generally amending the duty of fair representation of a certified representative of County employees.

By amending

Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-78, 33-104, and 33-150

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 33-78, 33-104, and 33-150 are amended as follows:**

2 **33-78. Employee rights.**

3 (a) Employees shall have the right:

4 (1) To form, join, support, contribute to, or participate in, or to refrain
5 from forming, joining, supporting, contributing to, or participating
6 in, any employee organization or its lawful activities; and

7 (2) To be fairly represented by their certified representative, if any.

8 (b) The employer must extend to the certified representative the exclusive
9 right to represent the employees for the purposes of collective bargaining,
10 including the orderly processing and settlement of grievances as agreed
11 by the parties.

12 (c) Except as provide in subsections (e) and (f), a [A] certified representative
13 must serve as the bargaining agent for all employees and must represent
14 fairly and without discrimination all employees without regard to whether
15 the employees are members of the employee organization, pay dues or
16 other contributions to it, or participate in its affairs. [However, it is not a
17 violation of this duty for a certified representative to seek enforcement of
18 an agency shop provision in a valid collective bargaining agreement.]

19 (d) The right of the certified representative to receive membership dues
20 deductions [or agency shop provisions shall] must be determined through
21 negotiations, unless the authority to negotiate such provisions has been
22 suspended under section 33-84. No collective bargaining agreement may
23 include a provision requiring membership in, participation in the affairs
24 of, or contributions to an employee organization [other than an agency
25 shop provision].

26 (e) A certified representative may require an employee who does not pay
27 membership dues or equivalent fees to pay:

28 (1) the reasonable costs and fees, including expenses for staff time and
 29 materials, arbitrator fees, and related attorney's fees, for filing a
 30 grievance or arbitrating a matter that arises under a collective
 31 bargaining agreement brought by the certified representative at the
 32 request of the employee; and

33 (2) any anticipated proportional costs and fees before a grievance is
 34 filed or arbitration is pursued.

35 (f) If an employee fails to pay the reasonable costs to file a grievance or
 36 pursue arbitration imposed under subsection (e), the certified
 37 representative may refuse to file the grievance or pursue arbitration on
 38 behalf of the employee. A dispute concerning the reasonableness of the
 39 fees imposed by the certified representative under subsection (e) may be
 40 submitted to the permanent umpire as a prohibited practice under Section
 41 33-82.

42 **33-104. Employee rights.**

43 (a) Employees have the right to:

44 (1) Form, join, support, contribute to, or participate in, or to refrain
 45 from forming, joining, supporting, contributing to, or participating
 46 in, any employee organization or its lawful activities; and

47 (2) Be represented fairly by their certified representative, if any.

48 (b) The employer has the duty to extend to the certified representative the
 49 exclusive right to represent the employees for the purposes of collective
 50 bargaining, including the orderly processing and settlement of grievances
 51 as agreed by the parties in accordance with this article.

52 (c) Except as provide in subsections (e) and (f), a [A] certified representative
 53 serves as the exclusive bargaining agent for all employees in the unit for
 54 which it is certified and has the duty to represent fairly and without

55 discrimination all employees in the unit without regard to whether the
 56 employees are members of the employee organization, pay dues or other
 57 contributions to it, or participate in its affairs. [However, it is not a
 58 violation of this duty for a certified representative to seek enforcement of
 59 an agency shop provision in a valid collective bargaining agreement.]

60 (d) The right of a certified representative to receive voluntary dues or service
 61 fee deductions [or agency shop provisions shall] must be determined
 62 through negotiations, unless the authority to negotiate these provisions
 63 has been suspended under this article. A collective bargaining agreement
 64 may not include a provision requiring membership in, participation in the
 65 affairs of, or contributions to an employee organization [other than an
 66 agency shop provision].

67 (e) A certified representative may require an employee who does not pay
 68 membership dues or equivalent fees to pay:

69 (1) the reasonable costs and fees, including expenses for staff time and
 70 materials, arbitrator fees, and related attorney's fees, for filing a
 71 grievance or arbitrating a matter that arises under a collective
 72 bargaining agreement brought by the certified representative at the
 73 request of the employee; and

74 (2) any anticipated proportional costs and fees before a grievance is
 75 filed or arbitration is pursued.

76 (f) If an employee fails to pay the reasonable costs to file a grievance or
 77 pursue arbitration imposed under subsection (e), the certified
 78 representative may refuse to file the grievance or pursue arbitration on
 79 behalf of the employee. A dispute concerning the reasonableness of the
 80 fees imposed by the certified representative under subsection (e) may be

81 submitted to the labor relations administrator as a prohibited practice
82 under Section 33-109.

83 **33-150. Employee rights.**

84 (a) Employees have the right to:

85 (1) form, join, support, contribute to, or participate in, or refrain from
86 forming, joining, supporting, contributing to, or participating in,
87 any employee organization or its lawful activities; and

88 (2) be represented fairly by their certified representative, if any.

89 (b) The employer must extend to the certified representative the exclusive
90 right to represent the employees for the purposes of collective bargaining,
91 including the orderly processing and settlement of grievances as agreed
92 by the parties under this Article.

93 (c) Except as provided in subsections (e) and (f), a [A] certified
94 representative serves as the exclusive bargaining agent for all employees
95 in the unit and must represent fairly and without discrimination all
96 employees in the unit without regard to whether the employees are
97 members of the employee organization, pay dues or other contributions
98 to it, or participate in its affairs. [However, it is not a violation of this
99 duty for a certified representative to seek enforcement of an agency shop
100 provision in a valid collective bargaining agreement.]

101 (d) The right of a certified representative to receive voluntary dues or service
102 fee deductions [or agency shop provisions] must be determined through
103 negotiations, unless the authority to negotiate these provisions has been
104 suspended under this Article. [Other than an agency shop provision, a] A
105 collective bargaining agreement must not require membership in,
106 participation in the affairs of, or contributions to an employee
107 organization.

- 108 (e) A certified representative may require an employee who does not pay
109 membership dues or equivalent fees to pay:
- 110 (1) the reasonable costs and fees, including expenses for staff time and
111 materials, arbitrator fees, and related attorney's fees, for filing a
112 grievance or arbitrating a matter that arises under a collective
113 bargaining agreement brought by the certified representative at the
114 request of the employee; and
- 115 (2) any anticipated proportional costs and fees before a grievance is
116 filed or arbitration is pursued.
- 117 (f) If an employee fails to pay the reasonable costs to file a grievance or
118 pursue arbitration imposed under subsection (e), the certified
119 representative may refuse to file the grievance or pursue arbitration on
120 behalf of the employee. A dispute concerning the reasonableness of the
121 fees imposed by the certified representative under subsection (e) may be
122 submitted to the labor relations administrator as a prohibited practice
123 under Section 33-154.

LEGISLATIVE REQUEST REPORT

Bill 35-19

Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation

- DESCRIPTION:** Bill 35-19, Personnel – Collective Bargaining – Certified Representative – Duty of Fair Representation would:
- amend the duty of fair representation for a certified representative of County employees;
 - authorize a certified representative to impose the reasonable costs of filing a grievance or pursuing arbitration on an employee who does not pay membership dues or the equivalent; and
 - require a certified representative to file a grievance or pursue arbitration for an employee who does not pay membership dues or the equivalent only if the employee pays the reasonable costs imposed.
- PROBLEM:** The Supreme Court decision in *Janus v. AFSCME* 138 S.Ct. 2448 (2018) held that the agency shop provisions in each County collective bargaining agreement was invalid.
- GOALS AND OBJECTIVES:** Permit a union to receive payment for filing grievances on behalf of an employee who chooses not to pay union dues.
- COORDINATION:** Chief of Labor Relations, County Attorney
- FISCAL IMPACT:**
- ECONOMIC IMPACT:** To be done.
- EVALUATION:** To be done.
- EXPERIENCE ELSEWHERE:** Maryland has enacted similar laws for certain State employee unions.
- SOURCE OF INFORMATION:** Robert H. Drummer, Senior Legislative Attorney
- APPLICATION WITHIN MUNICIPALITIES:** N/A
- PENALTIES:** N/A

Chapter 562

(House Bill 362)

AN ACT concerning

Maryland–National Capital Park and Planning Commission – Collective Bargaining – Exclusive Representative Duty of Fair Representation

MC/PG 109–19

FOR the purpose of altering the duty of an employee organization certified as the exclusive representative of certain employees of the Maryland–National Capital Park and Planning Commission to represent all employees in a certain bargaining unit in a certain manner; authorizing the exclusive representative to require an employee who does not pay certain dues or fees to pay certain costs and fees for filing a certain grievance or arbitrating a certain matter; providing that the failure by the employee to pay certain costs and fees relieves the exclusive representative of certain responsibilities; requiring that a dispute concerning the reasonableness of certain costs and fees be submitted to a certain labor relations administrator in accordance with certain procedures; limiting an exclusive representative’s duty of fair representation owed to certain public employees to certain matters; providing for the construction of certain provisions of this Act; and generally relating to collective bargaining for employees of the Maryland–National Capital Park and Planning Commission.

BY repealing and reenacting, with amendments,

Article – Land Use

Section 16–202 and 16–302

Annotated Code of Maryland

(2012 Volume and 2018 Supplement)

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

Article – Land Use

16–202.

(a) The Commission shall recognize the right of an employee organization, certified under this subtitle as the exclusive representative of a bargaining unit, to represent the employees in the bargaining unit in collective bargaining and in the settlement of grievances.

(b) An employee organization certified as the exclusive representative of a bargaining unit shall:

(1) serve as the sole bargaining agent for the unit in collective bargaining;
and

(2) **EXCEPT AS PROVIDED IN SUBSECTION (D) OF THIS SECTION,** represent all employees in the bargaining unit fairly[,] **AND** without discrimination[, and without regard to whether an employee is a member of the employee organization].

(c) An employee organization meets the requirements of subsection (b)(2) of this section if the employee organization's actions with respect to employees [who are members of the employee organization and employees who are not members of the employee organization] **IN THE BARGAINING UNIT** are not arbitrary, discriminatory, or in bad faith.

(D) (1) THE EXCLUSIVE REPRESENTATIVE MAY REQUIRE AN EMPLOYEE WHO DOES NOT PAY MEMBERSHIP DUES OR EQUIVALENT FEES TO PAY:

(I) THE REASONABLE COSTS AND FEES, INCLUDING EXPENSES FOR STAFF TIME AND MATERIALS, ARBITRATOR FEES, AND RELATED ATTORNEY'S FEES, FOR FILING A GRIEVANCE OR ARBITRATING A MATTER THAT ARISES UNDER A COLLECTIVE BARGAINING AGREEMENT NEGOTIATED UNDER THIS SUBTITLE BROUGHT BY THE EXCLUSIVE REPRESENTATIVE AT THE REQUEST OF THE EMPLOYEE; AND

(II) ANY ANTICIPATED PROPORTIONAL COSTS AND FEES BEFORE A GRIEVANCE IS FILED OR ARBITRATION IS PURSUED.

(2) FAILURE BY THE EMPLOYEE TO PAY THE COSTS AND FEES REQUIRED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL RELIEVE THE EXCLUSIVE REPRESENTATIVE OF ANY FURTHER RESPONSIBILITY TO THE EMPLOYEE.

(3) A DISPUTE CONCERNING THE REASONABLENESS OF THE COSTS AND FEES IMPOSED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL BE SUBMITTED TO THE LABOR RELATIONS ADMINISTRATOR IN ACCORDANCE WITH THE PROCEDURES ESTABLISHED UNDER § 16-218 OF THIS SUBTITLE FOR UNFAIR LABOR PRACTICES.

(E) (1) AN EXCLUSIVE REPRESENTATIVE'S DUTY OF FAIR REPRESENTATION OWED TO A PUBLIC EMPLOYEE WHO IS IN THE BARGAINING UNIT SHALL BE LIMITED TO THE NEGOTIATION AND ENFORCEMENT OF THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT WITH THE PUBLIC EMPLOYER.

(2) NOTHING IN THIS SUBSECTION MAY BE CONSTRUED TO LIMIT AN EMPLOYEE ORGANIZATION FROM PROVIDING ONLY TO THE ORGANIZATION'S

MEMBERS LEGAL, ECONOMIC, OR JOB-RELATED SERVICES OR BENEFITS OUTSIDE THE COLLECTIVE BARGAINING AGREEMENT.

16-302.

(a) The Commission shall recognize the right of an employee organization, certified under this subtitle as the exclusive representative of the bargaining unit, to represent the employees in the bargaining unit in collective bargaining and in the settlement of grievances.

(b) An employee organization certified as the exclusive representative of a bargaining unit shall:

(1) serve as the sole bargaining agent for the bargaining unit in collective bargaining; and

(2) EXCEPT AS PROVIDED IN SUBSECTION (C) OF THIS SECTION, represent all employees in the bargaining unit fairly[,] AND without discrimination[, and without regard to whether an employee is a member of the employee organization].

(C) (1) THE EXCLUSIVE REPRESENTATIVE MAY REQUIRE AN EMPLOYEE WHO DOES NOT PAY MEMBERSHIP DUES OR EQUIVALENT FEES TO PAY:

(I) THE REASONABLE COSTS AND FEES, INCLUDING EXPENSES FOR STAFF TIME AND MATERIALS, ARBITRATION FEES, AND RELATED ATTORNEY'S FEES, FOR FILING A GRIEVANCE OR ARBITRATING A MATTER THAT ARISES UNDER A COLLECTIVE BARGAINING AGREEMENT NEGOTIATED UNDER THIS SUBTITLE BROUGHT BY THE EXCLUSIVE REPRESENTATIVE AT THE REQUEST OF THE EMPLOYEE; AND

(II) ANY ANTICIPATED PROPORTIONAL COSTS AND FEES BEFORE A GRIEVANCE IS FILED OR ARBITRATION IS PURSUED.

(2) FAILURE BY THE EMPLOYEE TO PAY THE COSTS AND FEES REQUIRED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL RELIEVE THE EXCLUSIVE REPRESENTATIVE OF ANY FURTHER RESPONSIBILITY TO THE EMPLOYEE.

(3) A DISPUTE CONCERNING THE REASONABLENESS OF THE COSTS AND FEES IMPOSED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL BE SUBMITTED TO THE LABOR RELATIONS ADMINISTRATOR IN ACCORDANCE WITH THE PROCEDURES ESTABLISHED UNDER § 16-317 OF THIS SUBTITLE FOR UNFAIR LABOR PRACTICES.

(D) (1) AN EXCLUSIVE REPRESENTATIVE'S DUTY OF FAIR REPRESENTATION OWED TO A PUBLIC EMPLOYEE WHO IS IN THE BARGAINING UNIT SHALL BE LIMITED TO THE NEGOTIATION AND ENFORCEMENT OF THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT WITH THE PUBLIC EMPLOYER.

(2) NOTHING IN THIS SUBSECTION MAY BE CONSTRUED TO LIMIT AN EMPLOYEE ORGANIZATION FROM PROVIDING ONLY TO THE ORGANIZATION'S MEMBERS LEGAL, ECONOMIC, OR JOB-RELATED SERVICES OR BENEFITS OUTSIDE THE COLLECTIVE BARGAINING AGREEMENT.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2019.

Approved by the Governor, May 13, 2019.