

**IN THE  
COURT OF APPEALS OF MARYLAND**

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Petition No. \_\_\_\_\_

**SEPTEMBER TERM, 2014**

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**BALTIMORE COUNTY, MARYLAND**

**Petitioner**

v.

**BALTIMORE COUNTY FRATERNAL ORDER  
OF POLICE, LODGE NO. 4**

**Respondent**

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**PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF SPECIAL APPEALS**

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Baltimore County, Maryland (the County), pursuant to Maryland Rules 8-302 and 8-303, respectfully petitions this Court to issue a Writ of Certiorari to the Court of Special Appeals to review three judgment Orders of the Circuit Court for Baltimore County in *Baltimore County v. Baltimore County Fraternal Order of Police, Lodge No. 4*, No. 03-C-08-008643 (Finifter, J.) These Orders, and a related Show Cause Order threatening to incarcerate three public officials, coerced illegal payments to satisfy an arbitration award in violation of clear public policy as delineated in the Baltimore County Charter, the Baltimore County Code, controlling case law, and the

separation of powers doctrine.

The first Order was entered on November 5, 2013 and required the County to “reset the retiree health insurance split for each affected retiree to that in place at the time of his or her retirement” (Add. 29-30). The second Order was docketed on March 6, 2014 and entered a judgment in favor of Baltimore County Fraternal Order of Police, Lodge No. 4 (FOP) against Baltimore County in the amount of \$1,413,120.81 (Add. 44). The third Order, dated April 17, 2014 and styled “Amended Judgment,” entered a judgment in favor of FOP against the County in the amount of \$1,626,576.28 (Add. 48-49). A related Show Cause Order for Contempt was docketed on April 15, 2014 and threatened to incarcerate the County Executive, the County Administrative Officer and the County Budget Director (Add. 46-47). These Orders were entered even though it was undisputed that (a) there had never been an appropriation to pay for the reset or the judgments and that (b) the budgets adopted by the County Council in its Annual Budget and Appropriation Ordinance for FY2008 to FY 2015 contained provision for the reduced health care subsidy rates, but not the so-called vested subsidy rates for FOP retirees. The County filed timely notices of appeal with respect each of the three Orders.

These three Orders adjudicated all claims in this action in their entirety and the rights and liabilities of all parties to the action. The related Show Cause Order for Contempt also sought to incarcerate three public officials who were not even parties to

the action.

The three Orders were consolidated on appeal in the Court of Special Appeals as No. 1904, September Term, 2013, and No. 99, September Term, 2014 (E. 807-809). On December 17, 2014, the Court of Special Appeals affirmed the Circuit Court Orders. *Baltimore County v. Baltimore County Fraternal Order of Police, Lodge No. 4*, \_\_\_\_ Md. App. \_\_\_\_, 2014 WL 7182348 (Add.64-108). It issued its Mandate on January 16, 2015 (Add.109).

### **QUESTION PRESENTED**

**Whether public policy, as clearly delineated in the Baltimore County Charter, the Baltimore County Code, controlling Maryland case law, and the separation of powers doctrine, provides an exception to the enforcement of the arbitration award in this case?**

### **REVIEW IS DESIREABLE AND IN THE PUBLIC INTEREST**

Review of the enforcement of these Orders is desirable and in the public interest under the public policy exception to the enforcement of arbitration awards.

First, this is not a dispute between private parties, but one involving a large Charter County and public funds. It is quintessentially a matter of public interest.

Second, the public policy embodied in the County's executive budget system confirms the principle that the expenditure of public funds in Baltimore County must ultimately be approved in a disciplined and orderly manner in a budget ordinance or in a supplemental appropriation by the members of the Baltimore County Council, who are the elected representatives of the County's taxpayers. The controlling case law

cited in the next section of this Petition confirms this principle. At its core, this principle is a variation on the Revolutionary War slogan of "No taxation without representation." In this case, that principle could be expressed somewhat differently as "No spending without representation." Or put more bluntly, "No spending by judicial fiat."

Third, allowing the judicially-coerced enforcement of the arbitration award in this case without a budgetary enactment or supplemental appropriation by the County Council violates the positive laws and case law precedents listed in the next section and undermines the integrity of the executive budget system, as well as years of determined effort by the County to spend taxpayer dollars lawfully and wisely.

Fourth, while this Court has determined that the FOP retirees had a vested right to reduced health care subsidies, it has not examined the important question of whether that right is enforceable. The past and ongoing unlawful damage to the public coffers resulting from the Orders in this case provides a sound basis for this Court to examine whether to except that vested right from enforcement as a matter of public policy.

Finally, the County believes that such an examination will lead the Court to conclude that it has the duty to uphold public policy and the rule of law as clearly delineated in the County Charter, the County Code, controlling case law, and the separation of powers doctrine.

For these reasons, the County respectfully requests the Court to grant the Writ.

**PERTINENT CHARTER, CODE AND CASE LAW PROVISIONS**

1. *Maryland Constitution, Article 8, Declaration of Rights (Separation of Powers)*

2. *Baltimore County Charter:*

Section 709 – Action on the Budget by the County Council (Add.110)  
Section 712 – Supplementary and emergency appropriation (Add. 111)  
Section 715 – Appropriation control and certification of funds (Add. 112)

3. *Baltimore County Code:*

§4-3-501, et seq. – Health Care Review Committee (Add.114)  
§10-1-113 – County Budget (Add. 116)

4. *Fraternal Order of Police, Lodge No. 4 v. Baltimore County*, 340 Md. 157, 164-166 (1995) (“The collective bargaining law thus contemplates that any agreements affecting appropriations are fully subject to the County’s annual budget process”).

5. *Baltimore Teachers Union AFT, Local 340, AFC-CIO v. Mayor and City Council*, 108 Md. App. 167, 204 (1996):

“The obvious import of the Court’s teaching in *FOP* can be summed up as follows: If the final enacted budget contains the agreed upon appropriations from which compensation should have been paid, then the County or City is obligated to pay; but, if the final enacted budget contains less appropriations than were previously agreed upon, then the budget controls and the County or City is only liable up to the amount actually appropriated. In our case, appellant and appellee entered into an agreement for a wage increase, but the money to cover the wage increase was not specifically appropriated in the final enacted budget. Therefore, under *FOP*, there was not a final binding contract under which appellee is liable.”

6. *Mayor & City Council v. AFSCME*, 281 Md. 463, 474 (1977) (MOU provision requiring Board of Estimates to include in Ordinance of

Estimates appropriation for disputed annual increments not authorized).

7. *Fraternal Order of Police Montgomery County Lodge 35 v. Montgomery County*, 437 Md. 618, 620 (2014) (County Council “holds the purse strings (i.e., the actual power) *each* fiscal year when it approves the budget.”).

## STATEMENT OF FACTS

### Nature of the Case

These are consolidated appeals from three Circuit Court orders enforcing an arbitration award in violation of public policy as clearly delineated in the Baltimore County Charter, the Baltimore County Code, controlling case law, and the separation of powers doctrine.

### Phase I-Complaint to Vacate Award

This case has unfolded in two phases. The first phase arose out of an illegitimate and untimely “class” grievance by FOP that resulted in an arbitration award to FOP. The procedural conduit by which the case originally reached the Circuit Court, the Court of Special Appeals, and this Court was the County’s Complaint to Vacate Arbitration Award (E. 932-975). FOP never filed a Counter-Complaint to enforce the award. Rather, on Cross Motions for Summary Judgment, the Circuit Court simply granted summary judgment to FOP (E. 983-99). The Court of Special Appeals reversed the Circuit Court without deciding the nine (9) issues raised by the County in its initial appeal (E. 24-38). In an unprecedented decision

holding that health insurance benefits can vest, this Court reversed the Court of Special Appeals and remanded directly to the Circuit Court (E. 39-59).<sup>1</sup> It denied the County's Motion for Reconsideration, which had requested a remand to the Court of Special Appeals to address the nine unresolved issues (E. 67).

### **Phase II-Motion to Enforce Award/Show Cause Order for Contempt**

Following the remand to the Circuit Court, FOP filed a "Motion to Enforce This Court's Judgment and to Show Cause" (E. 155-236). This would be similar to appellate affirmance of a liability determination and a remand for a determination of damages. Without allowing discovery or even conducting an evidentiary hearing, the Circuit Court granted FOP's Motion to Enforce, ordered a reset of the subsidy rates and entered judgment against the County for \$572,887.10, based on an inadmissible settlement document which was attached to FOP's Motion to Enforce (Add. 16-28).

Apparently recognizing the irregularity of its actions, the Circuit Court subsequently granted in part the County's Motion to Alter or Amend and ordered a "damages hearing" (Add. 29-30). At that hearing, the Circuit Court refused to allow any substantive testimony from the County's witnesses to explain that the award was unenforceable because they could not reset the rates or pay the judgment without violating the County Charter, the County Code, and controlling case law (E. 483-535). The Circuit Court then entered an Order: granting in part and denying in part FOP's

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<sup>1</sup> The County believes that this decision has been called into serious doubt by the Supreme Court's January 26, 2015 unanimous decision in *M&G Polymers USA, LLC v. Tackett*, 2015 WL 303218.

Supplemental Motion to Enforce This Court's Judgment (Corrected Copy); awarding FOP damages in the amount of \$1,413,120.81; denying in a footnote FOP's request for compound prejudgment interest; denying FOP's request for attorneys' fees; vacating the third and fourth paragraphs of its August 28, 2014 Order; and entering judgment in favor of FOP against the County in the amount of \$1,413,120.81, even though there was no evidence that FOP itself had sustained any damages (Add. 44-45). FOP filed a Motion for Reconsideration and the Circuit Court subsequently entered an "Amended Judgment" awarding prejudgment interest for a total judgment for FOP of \$1,626,576.28 (Add. 48-49).

At every turn, the Circuit Court refused to address the merits of the County's legal arguments that the award was unenforceable and it deliberately turned a blind eye to the Charter, the Code, and controlling case law.

Then, in a clear abuse of its power, it entered a Show Cause Order for contempt against the County Executive, the County Administrative Officer and the Budget Director, threatening them with incarceration in order to coerce either an appropriation to pay for the reset and the judgment or an illegal payment from unappropriated funds. Ultimately, the County chose the latter course of action in order to remove the threat of incarceration hanging over the heads of its three top officials and their families.

### **The Course of Proceedings**

#### **A. Initial Proceedings**



The initial proceedings leading to this Court's decision in *Baltimore County FOP, Lodge No. 4 v. Baltimore County*, 429 Md. 533 (2012), are fully set forth in that opinion and in the first opinion of the Court of Special Appeals, *Baltimore County v. Baltimore County Fraternal Order of Police, Lodge No. 4*, No. 1428, September Term 2010 (December 8, 2011).

**B. Post-Remand Enforcement Proceedings**

The enforcement proceedings in Phase II are summarized in the second opinion of the Court of Special Appeals. *Baltimore County v. Baltimore County Fraternal Order of the Police, Lodge No. 4*, \_\_\_ Md. App. \_\_\_, 2014 WL 7182348 (No. 1904 Sept. Term 2013 and No. 99 September Term 2014).

**C. Contempt Proceedings**

On March 31, 2014, FOP filed a second Petition for an Order of Constructive Civil Contempt against Baltimore County, Maryland, Kevin Kamenetz, Keith Dorsey, and Fred Homan. The Petition included a request for incarceration.<sup>2</sup> On April 14, 2014, Judge Finifter signed a Show Cause Order directing Baltimore County, Kevin Kamenetz, Keith Dorsey and Fred Homan to file an Answer to the Petition for Contempt within ten days of receipt of a copy of the Order. It also ordered that each appear before the Court on June 26, 2014 at 9:30 a.m. "for a Hearing on the Petition for Contempt and Show Cause why the Court should not hold each in contempt and/or

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<sup>2</sup>FOP's initial contempt petition was filed on October 4, 2013, but was dismissed by FOP in open court on February 6, 2014 (E. 533, p. 199).

impose sanctions, *including incarceration.*” The Show Cause Order had attached to it a “*Notice to the person alleged to be in contempt of court (Jail Time Requested on Petition)*” (Add. 46-47).

On April 14, 2014, Baltimore County filed its response to the Petition filed by FOP (E. 822-837). On April 28, 2014, it filed its Answer to the Show Cause Order and a Motion to Quash Show Cause Order in part, and to strike individuals therefrom (E. 838-878). On May 28, 2014, the County filed a Supplemental Memorandum in support of its response to FOP’s Motion to Enforce Judgment and for an Order to Show Cause. On May 28, 2014, Judge Finifter denied the Motion to Quash Show Cause Order in part, and strike individuals therefrom (Add. 50). The County then filed three Certifications of Compliance with prior Court Orders on May 30, 2014, June 6, 2014, and June 10, 2014 (Add. 51-62). These Certifications admitted that the reset and payment of the judgments violated the County Charter and reserved all of the County’s legal rights on appeal. On June 13, 2014, Judge Finifter vacated the Show Cause Order and cancelled the hearing scheduled for June 26, 2014 (Add. 63).

#### **Disposition in the Court of Special Appeals**

As noted above, the Court of Special Appeals affirmed the three Circuit Court Orders and declined to review the Show Cause Order for Contempt (Add. 64-108).

## ARGUMENT

**Public policy, as clearly delineated in the Baltimore County Charter, the Baltimore County Code, controlling Maryland case law, and the separation of powers doctrine, provides an exception to the enforcement of the arbitration award in this case.**

FOP's Motion to Enforce should have been denied based on the public policy exception to the enforcement of arbitration awards.

The public policy exception to the enforcement of arbitration awards has been acknowledged in a number of Maryland cases. In *Amalgamated Transit Union, Division 1300 v. Mass Transit Administration*, 305 Md. 380, 389, 504 A.2d 1132, 1136 (1986), the Court of Appeals recognized the public policy exception to the enforcement of a collective bargaining agreement. The public policy which obliges the court to refrain from enforcing a collective bargaining agreement must be "explicit." *Id.* It "must be well-defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general consideration of supposed public interest.'" *Id.*; see also *Prince George's County v. Prince George's County Police Urban Employees Association*, 219 Md. App. 108, 128-134 (2014); *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183 (1983) ("As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy").

In this case, the very clear requirements explicitly stated in the budgetary and

fiscal procedures set forth in Article VII, Sections 709, 712, and 715 of the *Baltimore County Charter*, and in §10-1-113 of the *Baltimore County Code* (Add. 116) constitute the County's executive budget system. As explained by the Court of Appeals and the Court of Special Appeals in the cases cited on page 5-6, *supra*, collective bargaining agreements are fully subject to the County's annual budget process. Section 712 of the Charter (Add. 111) requires a supplemental appropriation by the County Council before funds not included in the budget ordinance Section 709 (Add. 110) can be expended. In addition, Section 715 of the Charter (Add. 112) prohibits the expenditure of unappropriated funds.

The Court of Special Appeals refused to address the substance of the County's argument concerning the public policy exception to the enforcement of the arbitration award based on the law of the case doctrine. It reasoned that the County "could have made" that argument "during the first round of Circuit Court proceedings" (Add. 101). This reasoning is factually and legally incorrect.

The record is clear that the issue of the public policy exception to the enforcement of the award arose after this Court's remand in response to FOP's April 12, 2013 "Motion to Enforce This Court's Judgment" (E. 155-236) The County raised the issue orally at the May 17, 2013 hearing on FOP's Motion to Enforce (E. 295) and in writing in a Supplemental Memorandum submitted on May 28, 2013 with the permission of Judge Finifter following that hearing (E. 316-341).

## Separation of Powers

Article 8 of the Maryland Declaration of Rights states:

[T]he Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

In this case, the Circuit Court recognized that it had no power or authority to enforce the arbitration award by simply ordering the County Executive and the County Council to fund splits different from the splits negotiated by FOP's bargaining agent and enacted into law as part of the subsequent budgets, by ordering the County Executive and County Council to reset the splits in any future budgets, or to "make whole" affected retirees for increased premium amounts not budgeted by the County Executive and the County Council. That is why it issued the Show Cause Order threatening three non-parties with incarceration.

The Show Cause Order threatening incarceration was an unconstitutional exercise of judicial power calculated to coerce an appropriation or illegal payments in violation of the separation of powers doctrine. This violation of another clearly delineated public policy provides an additional basis to apply the public policy exception to the enforceability of the arbitration award. *See Wright v. Wright's Lessee*, 2 Md. 429, 452-453 (1852). This Court has repeatedly held that "Article 8 prohibits the courts from performing non-judicial functions." *Reyes v. Prince George's County*, 281 Md. 279, 295, 380 A.2d 12, 21 (1977); *see, e.g., Duffy v. Conaway*, 295 Md. 242,

254, 455 A.2d 955, 961 (1983) (“[A] court has no jurisdiction to perform a non-judicial function, and any enactment which attempts to confer such a function on a court is unconstitutional.”)

The Court of Special Appeals dismissed this issue as moot, because “the circuit court never ordered the incarceration of any County official.” *Baltimore County v. FOP*, *supra*, 2014 WL 7182348, at \*39 (Add.102).

The mootness doctrine does not apply for three reasons. First, the Circuit Court threatened three public officials with incarceration for refusing to violate the County Charter. That threat alone is sufficient to trigger an examination by this Court of whether the separation of powers doctrine delineates a clear public policy against enforcement of the award by threatening public officials with jail. Second, as discussed above, this case involves “unresolved issues of important public concern that, if decided, will establish a rule for future conduct.” *Hammen v. Baltimore County Police Department*, 373 Md. 440, 449-50 (2003). Third, the separation of powers issue is “capable of repetition, yet evading review.” *Id.* The FY 2013-2014 Budget Message makes it clear that a second round of health care subsidy reductions will take place in FY 2015 (E. 332). Thus, this issue is not only capable of repetition, it is being repeated. FOP actually filed a Request for Status Conference on November 14, 2014 concerning this second round of reductions. The Request was denied as “premature.” (Docket Entry 85).

## CONCLUSION

For all of the above reasons, Baltimore County respectfully requests this Court to grant its Petition for Writ of Certiorari.

MICHAEL E. FIELD  
County Attorney

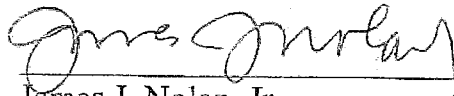


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2015 a copy of the foregoing Petition for Writ of Certiorari was mailed to:

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