Members of the Rapid City Council
Chair, of the Legal and Finance Committee
300 6th Street
Rapid City, South Dakota
57701

I am writing in support of Resolution 2011-128, having spent 35 years developing employment opportunities for People with Severe Disabilities I have seen first hand the contribution they have made to there community and nation. I would like to share some statistics comprised by the 2011 Censes.

- 52.1 million People have some level of disability. They represent 18 percent of our population.

- 35.5 million People have a severe disability. They represent 12 percent of our population.

Comparing this to the Rapid City population of 69200 (2011 census) would indicate that there are a total of 12,456 individuals with some level of disability and 8,304 individuals with a severe disability living in our community.

Employment statistics (2012 Bureau of Labor Statistics) indicate that only 20 % of individuals participate in the work force, compared to 69% of individuals without disabilities. Applied to our community this transforms to only 1,661, individuals with a severe disability are employed. We have a long way to go.

During my career I kept a shell of a turtle on my desk, and when ask why the turtle was there, I would reply that it was a constant reminder to me that anyone could achieve any thing, even a turtle could raise to the top of a desk if it had someone would provide the lift. We all at one time or another need someone to help us achieve our goals and dreams.

When individuals with disabilities are given the opportunity to be employed everyone benefits:

- Tax income increases, employment taxes are paid, purchases are made, homes and apartments our acquired.
- Dependence on Medicare and State support is reduced.
- Turnover is reduced.
- Attendance increases.

To become a contributing member of a community is a dream come true for those that have not had the opportunity. You are asked to increase employment opportunities along with the quality of life for individuals with disabilities, by approving this resolution, you will achieve this goal.

Paul V. Stabile
4802 Powderhorn Drive
Rapid City, South Dakota
57702

MFP ITEM 1
January 26, 2010
Worksession

MEMORANDUM

TO: Management and Fiscal Policy Committee

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: **Worksession**: Bill 46-09, Personnel – Regulations – Persons with Disabilities – Hiring Preference

Bill 46-09, Personnel – Regulations – Persons with Disabilities – Hiring Preference, sponsored by Councilmember Andrews and Council Vice President Ervin, was introduced on December 1. A public hearing was held on January 12.

Bill 46-09 would require the Executive to adopt regulations establishing and maintaining a hiring preference for certain qualified persons with disabilities who apply for an initial appointment to a County merit system position. The preference would only apply to a person who is among the highest rating category in a normal competitive process.

Background

The Office of Legislative Oversight (OLO) issued a report on "Hiring Persons with Disabilities: A Review of County Government Practices" on June 10, 2008.[1] The report found that persons with disabilities face many barriers to employment that prevent them from getting jobs. The report also found that the unemployment rate for persons with disabilities is consistently higher than the unemployment rate for persons without a disability despite studies showing that employees with and without disabilities have comparable performance, longevity rates, and absenteeism rates.

The MFP Committee held 6 worksessions on the OLO report, including several briefings from the Executive Branch on hiring persons with disabilities, since the release of the report in June 2008. On November 23, 2009, the MFP Committee recommended (3-0) establishing a hiring preference for persons with disabilities in County law. On November 24, 2009, the Council endorsed this recommendation in concept.[2] Bill 46-09 would create a hiring preference in County law for the initial appointment of persons with disabilities to County merit system positions as approved in concept by the Council on November 24.

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[1] A copy of the report is available online at: http://www.montgomerycountymd.gov/content/council/olo/reports/pdf/2008-9.pdf .

[2] The Council also referred the question of whether to amend the Charter to establish a special hiring authority for persons with disabilities to the Charter Review Commission at the same meeting.

Bill 46-09 would require the Executive to adopt regulations under Method 1 to implement the hiring preference. This would be consistent with the current statutory scheme for merit system provisions, whereby a general law is enacted and the implementing details are defined in Personnel regulations adopted by the Executive and approved by the Council. Under Method 1, the Council must approve or disapprove the regulation by resolution or ask the Executive to amend it. There are several major issues discussed below that would be resolved by the Personnel regulations.

Public hearing

Each of the 18 speakers at the public hearing on January 12 supported the Bill. Joseph Adler, Director of the Office of Human Resources (OHR) testified in support of the Bill on behalf of the Executive. See ©8-9. Mr. Adler recommended that the Council amend the Bill to clarify the scope of a "person with a disability" and to determine the order of preference along with other existing preferences, such as the veteran's preference. Angela Washington, the County's EEO Officer (©10-13) and representatives of the County Commission on People with Disabilities (©14), the County Commission on Veteran's Affairs (©15), the National Federation of the Blind (©16-17), ARC of Montgomery County (©19), the Maryland State Department of Education, Division of Rehabilitation Services (©20), Potomac Community Resources, Inc. (©21-22), Community Support Services, Inc. (©23), Transition Work Group (©24), the Jewish Community Relations Council, and SEEC all supported the Bill. Aaron Kaufman (©18), Robert Gooding, Liz Weintraub, Sharon Freiman, Jacques Gelin (©25), and Judy Rasmussen (©26) supported the Bill as individuals.

Many of the speakers pointed to the high unemployment and underemployment rate for persons with disabilities as justification for the Bill and urged the County to become a leader in eliminating this disparity. Some of the speakers also advocated for a Charter amendment that would permit a special hiring authority for persons with disabilities.

Issues

1. What is the fiscal and economic impact of the Bill?

The OMB fiscal impact statement (©27) states that "the Bill will not have any material financial or economic impact on the County." The Office of Human Resources (OHR) may have to provide some additional staff time to review and act on applications from candidates for this preference and to educate managers about the new preference. This time should be insignificant.

Since the Bill would only affect the initial appointment of persons with disabilities into County merit system positions, County businesses should not be directly impacted. To the extent that the preference helps to open up a new avenue for persons with disabilities to obtain employment in the County, it could only have a positive impact on economic development in the County.

2. Does the Council have the legal authority to create a hiring preference for persons with disabilities?

The Office of the County Attorney (OCA) recently addressed this issue in a well reasoned legal opinion dated July 29, 2009 attached at ©28-40. Although the OCA opined that a Charter Amendment would be required to create a special hiring authority to noncompetitively appoint persons with disabilities into County merit positions, the OCA determined that the County law could be amended to create a hiring preference for persons with disabilities who are rated in the highest rating category under merit system competition under the current Charter. Council staff agrees with this OCA opinion.

3. Who should be an eligible person with a disability?

Bill 46-09 would require this issue to be resolved by Personnel regulation. The County Attorney's Office recommended that the Bill be amended to resolve this issue in order to provide guidance to the Executive. See ©50-55. There are at least 2 different basic models to consider. First, the Federal Americans with Disabilities Act (ADA), which generally prohibits discrimination in employment on the basis of disability, defines a disability in 42 USC §12201 as:

> (1) *Disability*.--The term "disability" means, with respect to an individual--
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3).
>
> (2) *Major life activities*.--
>
> (A) In general.--For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
>
> (B) Major bodily functions.--For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

This definition is applied by the courts in resolving claims of discrimination on the basis of a disability by an employee or an applicant for employment. The ADA prohibits discrimination, but does not create a preference for hiring persons with disabilities.

The Federal government uses a different definition of a person with a disability under its long established program for hiring persons with disabilities for Federal merit system positions without competition. Under this "Schedule A" hiring authority, an applicant must have mental retardation, a severe physical disability, or a psychiatric disability. The applicant must also have proof of the disability, certification of job readiness, and meet all required qualifications for the position. See, 5 CFR 213.3102(u). Eligibility for noncompetitive appointment under this special hiring authority is more restrictive than the definition of disability under the ADA.

Neither of these definitions of a person with a disability was created for use in a hiring preference under a merit system competition that would be established under Bill 46-09. Council staff found a Montana State law that creates a hiring preference for a person with a disability on initial appointment to a merit position in State or local government employment in Montana. See Montana Code §§39-30-103 *et seq.* at ©41-49. This Montana law requires a public employer to hire a person with a disability for the initial appointment to a merit system position "over any other applicant with *substantially equal qualifications* who is not a preference-eligible applicant." (emphasis added) See §39-30-201 at ©45. An applicant seeking to use this preference must be certified by the Montana Department of Public Health and Human Services. See §39-30-107 at ©43. The Montana Supreme Court called this law a "tie-breaker" preference in *Olson v. State of Montana,* 765 P.2d 171 (Mont. 1988). The Montana law uses a definition of a person with a disability that is similar to the ADA definition. See §39-30-103(4) at ©41.

Mark Maxin, Chair of the County Commission on People with Disabilities submitted additional comments after the public hearing. See ©56-57. Mr. Maxin recommends that the Bill be amended to add a definition of disability that is consistent with the Federal Schedule A definition. However, Mr. Maxin recommends that the outdated term, "mental retardation" be replaced with the term "developmental disability."

The universe of people who may fall into the ADA definition of a person with a disability is significantly larger than the universe of people who fit into the Schedule A definition of a person with a disability. A person with an episodic impairment such as high blood pressure and asthma may be a person with a disability under the ADA. A law prohibiting discrimination on the basis of a disability logically results in a broader definition of disability than a law creating a hiring preference for a person with a disability. The purpose of Bill 46-09 is much closer to the purpose of Schedule A than that of the ADA. **Council staff recommendation:** amend the Bill to define a person with a disability consistent with the Federal Schedule A program and replace "mental retardation" with "developmental disability."

Staff amendment 1:

Amend lines 62-63 as follows:

(1) define a person with a disability [[who is]] eligible for the preference as a person with medical proof of a developmental disability, a severe physical disability, or a psychiatric disability;

4. How should this preference be applied along with other existing preferences?

Bill 46-09 would require this issue to be resolved by Personnel regulation. The Office of the County Attorney recommended that the Bill be amended to resolve this issue to provide guidance to the Executive. See ©54-55. The Personnel regulation creates the following priority at COMCOR §33.07.01.06:

> (a) The OHR Director may establish a priority eligible list to provide priority consideration in the following order to an employee who:
>
> (1) is unable to perform the employee's job because of a disability or injury under the ADA;
>
> (2) is subject to reduction-in-force;
>
> (3) was granted a temporary disability retirement under the Employees Retirement System or an initial or temporary disability benefit of any type under the Retirement Savings Plan but is no longer eligible for such a temporary disability retirement or benefit; or
>
> (4) has veterans credit.

The preference for a person with a disability must be placed within the current order of priority, including a person with a disability who is also eligible for one of the other preferences on the list. The current regulation does not require a manager to select a veteran with a disability over a veteran without a disability who is in the highest rated category.

COMCOR §33.07.01.06-12 established the following qualifications for veteran's credit:

> 6-12. Veterans credit. The OHR Director must give priority consideration to an eligible veteran who applies for initial appointment to a County merit system position and who is rated and placed in the highest rating category on the eligible list. An eligible veteran is an applicant who is a Maryland resident and who:
>
> (a) was a Maryland resident for at least 5 consecutive years immediately before submitting the employment application;
>
> (b) was honorably discharged from a branch of the United States armed services after at least 180 days of active military duty that ended within 5 years of the date of application;
>
> (c) was not granted a normal retirement from the United States armed services;
>
> (d) has not already used veterans credit to receive priority consideration for appointment to a Montgomery County position; and
>
> (e) applied for veterans credit by completing the required form and ensuring that it was received in OHR by the closing date of the announced vacancy.

The goal of Bill 46-09 would best be served by placing a veteran with a disability[3] above a veteran without a disability in the priority list. The placement of a disabled non-veteran over a non-disabled veteran would best serve the goal of Bill 46-09, but at the expense of the State and County law creating the veteran preference.

An additional option for the Committee to resolve the priority of preference between a veteran without a disability and a non-veteran with a disability is to give them each an equal preference. Under an equal preference, the appointing authority could choose either candidate, but each candidate would have a preference over similarly qualified candidates without a preference. The priority placement of a non-veteran with a disability against a veteran without a disability is a policy issue that should be resolved by the Committee. **Council staff recommendation:** amend the Bill to resolve the priority of preferences. The 3 alternatives are set forth in the Staff Amendment 2 at ©58-59.

5. Should the Bill include a statement of findings?

Mr. Maxin recommended that the Bill be amended to include a statement of findings to support the need for a hiring preference for persons with disabilities. See ©56. If the Committee wants to add a statement of findings, Council staff would recommend Staff Amendment 3 at ©60.

[3] A person who qualifies for veteran's credit and has a disability as defined in this law at the time of application would receive this preference, even if the person became disabled after serving in the armed forces.

Bill No. 46-09
Concerning: Personnel – Regulations – Persons with Disabilities – Hiring Preference
Revised: November 25, 2009 Draft No. 4
Introduced: December 1, 2009
Expires: June 1, 2011
Enacted:
Executive:
Effective:
Sunset Date: None
Ch. ____, Laws of Mont. Co. ____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmember Andrews and Council Vice President Ervin

AN ACT to:

(1) require the Executive to adopt regulations establishing and maintaining a hiring preference for certain qualified persons with disabilities who apply for County merit positions;
(2) require the preference to apply to a person who is among the highest rating category in a normal competitive process; and
(3) generally amend the merit system law concerning hiring persons with disabilities and make stylistic and conforming changes to related provisions.

By amending
Montgomery County Code
Chapter 33, Personnel and Human Resources
Section 33-7 and 33-9

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

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

Sec. 1. Sections 33-7 and 33-9 are amended as follows:

33-7. County Executive and Merit System Protection Board responsibilities.

(a) *Generally.* In performing its functions, the Board is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the Board granted herein [shall] must be [fully] exercised by the Board as needed to rectify personnel actions found to be improper. The Board [shall] must comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The Board, subject to the appropriation process, [shall] must [be responsible for establishing] establish its staffing requirements [necessary to properly implement its duties] and [to] define the duties of [such] its staff.

(b) *Personnel regulations.* The County Executive [shall] must adopt personnel regulations under Method (1) [of section 2A-15 of this Code]. The personnel regulations [shall] must provide the framework for:

(1) The classification of all merit system positions in the executive and legislative branches;

(2) Minimum qualifications for merit system positions, methods of determining qualifications and methods of selection for any positions;

(3) Probationary periods, promotions, transfers;

(4) Causes for removal from any merit system position and methods of removal, including demotions, furloughs, and reduction of staff. However, any regulations governing a reduction in staff and employee rights attendant thereto shall be restricted to the respective branch of government in which the employee is employed; in the case of the legislative and judicial branches, this sentence shall apply to employees hired by the legislative and judicial branch, respectively, after August 1, 1983.

(5) Annual, sick and other leave;

(6) Prohibitions against political activity;

(7) Maintenance of personnel records; and

(8) Similar personnel matters as may be provided by law.

(c) *Classification standards*. With respect to classification matters, the County Executive [shall] must provide by personnel regulation, adopted [in the manner specified above] under Method (1), standards for establishing and maintaining a classification plan. These standards may include but are not limited to the following:

(1) The necessary components of class specifications;

(2) Criteria for the establishment of new classes, modification or elimination of existing classes;

(3) Criteria for the assignment of positions to classes;

(4) Kinds of data required to substantiate allocation of positions;

(5) Guidelines for comparing levels of job difficulty and complexity; and

(6) Criteria for the establishment or abolishment of positions.

The Board [shall] must conduct or authorize periodic audits of classification assignments made by the Chief Administrative Officer

and of the general structure and internal consistency of the classification plan, and [shall] must submit audit findings and recommendations to the County Executive and County Council.

(d) *Hiring preference for persons with disabilities.* The Executive must adopt by personnel regulation, under Method (1), standards for establishing and maintaining a preference for the initial appointment of a qualified person with a disability into a merit system position. These standards must:

(1) define a person with a disability who is eligible for the preference;

(2) require medical certification of a qualifying disability;

(3) establish the order of preference in relation to other preferences authorized by law; and

(3) only apply the preference to a person who is among the highest rating category in a normal competitive process.

(e) *Personnel regulation review.* The Merit System Protection Board [shall] must meet and confer with the Chief Administrative Officer and employees and their organizations from time to time to review the need to amend these regulations.

[(e)] (f) *Adjudication.* The Board [shall] must hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

[(f)] (g) *Retirement.* The Board may from time to time prepare and recommend to the Council modifications to the County's system of retirement pay.

[(g)] (h) *Personnel management oversight.* The Board [shall] must review and study the administration of the County classification and retirement plans and other aspects of the merit system and transmit to the Chief Administrative Officer, County Executive and [the] County Council its findings and recommendations. The Board [shall] must conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the County Council. All County agencies, departments and offices and County employees and organizations [thereof shall] must cooperate with the Board and have adequate notice and an opportunity to participate in any such review initiated under this Section.

[(h)] (i) *Publication.* Consistent with the requirements of [the Freedom of Information Act] State law, confidentiality and other provisions of law, the Board [shall] must publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

[(i)] (j) *Public forum.* The Board [shall] must convene at least annually a public forum on personnel management in the County government to examine the implementation of Charter requirements and the merit system law.

33-9. Equal employment opportunity and affirmative action.

(a) *Policy.* [The county's policy shall be to] Except as provided in Section 33-7(d), the County must take all personnel actions on the basis of merit and fitness without regard to political affiliation or non-merit factors, and without regard to other factors as may be provided for in chapter 27, "Human Relations and Civil Liberties," such as sex, marital status, race, religion, national origin, age or [handicap] disability. The

Chief Administrative Officer [shall be responsible for initiating, developing and maintaining] must initiate, develop, and maintain [such] an equal employment opportunity and affirmative action program [as] necessary to ensure that all persons have an equal opportunity to enter and progress in the County's service on the basis of open competition and demonstrated ability. The County Executive [is authorized to issue such] may adopt regulations, [adopted] under Method (1) [of section 2A-15 of this Code], [as necessary] to implement this policy. Such regulations [shall] must provide that an employee whose personal religious beliefs require the abstention from work during certain periods of time may elect to engage in an alternate work schedule in order to meet those religious requirements. The [regulation shall] regulations must [include provision for any] require an employee who elects to work an alternate schedule to [be obligated to] work an equal period of time to that taken off for such religious reasons.

* * *

Approved:

Philip M. Andrews, President, County Council Date

Approved:

Isiah Leggett, County Executive Date

LEGISLATIVE REQUEST REPORT

Bill 46-09, Personnel – Regulations – Persons with Disabilities – Hiring Preference

DESCRIPTION:	Bill 46-09 would require the Executive to adopt regulations establishing and maintaining a hiring preference for certain qualified persons with disabilities who apply for County merit positions. The preference would only apply to a person who is among the highest rating category in a normal competitive process.
PROBLEM:	The Office of Legislative Oversight issued a report on "Hiring Persons with Disabilities: A Review of County Government Practices" on June 10, 2008. The report found that persons with disabilities face many barriers to employment that prevent them from getting jobs. The report also found that the unemployment rate for persons with disabilities is consistently higher than the unemployment rate for persons without a disability despite studies showing that employees with and without disabilities have comparable performance, longevity rates, and absenteeism rates.
GOALS AND OBJECTIVES:	To establish the County as a leader in hiring qualified persons with a disability.
COORDINATION:	Office of Human Resources, County Attorney's Office, Office of Legislative Oversight, Commission on People with Disabilities.
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Robert H. Drummer, Senior Legislative Attorney, 240-777-7895
APPLICATION WITHIN MUNICIPALITIES:	Not applicable.
PENALTIES:	Not applicable.

OFFICE OF HUMAN RESOURCES

Isiah Leggett
County Executive

Joseph Adler
Director

MEMORANDUM

January 12, 2010

TO: Nancy Floreen, President
Montgomery County Council

FROM: Joseph Adler, Director
Office of Human Resources

SUBJECT: Testimony for Public Hearing on Bill 46-09, Personnel Regulations – Persons with Disabilities, Hiring Preference, January 12, 2010

Good evening Council Members, I am Joseph Adler, the Director of the Montgomery County Office of Human Resources, and it is a pleasure for me to appear at this hearing on behalf of County Executive Isiah Leggett, to express the Executive's strong support for Bill 46-09, which would provide a hiring preference for qualified persons with disabilities.

The County Executive is strongly committed to increasing employment opportunities with the County for persons with disabilities. In FY 2008, the Executive, with Council approval, established the Customized Employment Public Intern Project to provide part-time, non-merit County Government jobs for persons with disabilities for a maximum time period of two years. In partnership with TransCen, Inc., a non-profit agency, over 23 interns have worked in six county departments and have gained valuable job skills that will help them move on to future employment opportunities.

In September 2009, the County Executive Leggett created an Interdepartmental Work Group on Hiring Persons with Disabilities to improve the County's ability to provide employment opportunities for persons with disabilities. The Chief Administrative Officer chairs the work group.

In October 2009, the County Executive approved the creation of the Montgomery County QUEST Intern Partnership in collaboration with the Maryland State Department of Education Division of Rehabilitation Services. The collaborative initiative will provide internships for persons with disabilities that offer work experience and job skill development opportunities to help participants obtain gainful employment. The Quest Interns eligible for placement in County departments and agencies include individuals who possess skills that enable them to successfully function at various professional levels. The QUEST initiative will complement the county's Customized Employment Public Intern Project that provides entry-level job training opportunities for persons with disabilities.

(8)

On behalf of the County Executive, I want to acknowledge and thank the members of the County Commission on People with Disabilities and the County Commission on Veterans Affairs that have been working with the Offices of the County Executive and the County Council to improve the lives and well being of the people with disabilities in Montgomery County who look to their leaders in government to help them apply their knowledge, skills and abilities by obtaining gainful employment in the public and private sectors.

The catalyst for the legislation being considered by the Council today is the Office of Legislative Oversight Report titled "Hiring Persons With Disabilities: A Review of County Government Practices," Report Number 2008-9, dated June 10, 2008. The OLO report pointed out that persons with disabilities face many barriers that prevent them from getting jobs. The report contained recommendations "aimed at enhancing the County Government's policies and practices to hiring persons with disabilities."

Individuals with disabilities are an untapped source of excellent applicants that can make outstanding employees. Bill 46-09 presents a win-win situation. It is an opportunity for the County to help qualified persons with disabilities to obtain gainful employment with the County while at the same time providing eager, dedicated and dependable workers to deliver needed services to County residents.

Under this bill, the County Executive would be required to adopt personnel regulations for establishing and maintaining a hiring preference for qualified persons with a disability who apply for an initial appointment to a County merit system position. These regulations would (1) define a person with disability who is eligible for the hiring preference; (2) require medical certification of a qualifying disability; (3) establish the order of preference in relation to other preferences authorized by law; and (4) only apply the preference to a person who is among the highest rating category in a normal competitive process.

The Office of the County Attorney has raised several issues relating to the need for more clarity and specificity in this bill. For example, we need to know who the Council seeks to target with this disability hiring preference. Should "disability" mean a physical or mental impairment that substantially limits one or more major life activities (the definition contained in the Americans with Disabilities Act Amendment Act of 2008) or should the focus be on persons with severe physical or psychiatric disabilities, or people with severe developmental disabilities? At present there is a hiring preference for veterans who are Maryland residents mandated by state law. Should we add a separate hiring preference for disabled veterans? There is also a need for some direction from the Council as to where this new hiring preference for persons with disabilities should fall in the priority consideration pecking order. We look forward to working with the Council to craft clarifying amendments for this bill.

In summary, the County Executive and the Office of Human Resources strongly endorse Bill 46-09 to provide a hiring preference for qualified persons with disabilities as part of the regular competitive merit system hiring process.

ANGELA J. WASHINGTON, EEO OFFICER
OFFICE OF HUMAN RESOURCES
MONTGOMERY COUNTY GOVERNMENT

GOOD EVENING. MY NAME IS ANGELA WASHINGTON AND I SERVE AS MONTGOMERY COUNTY'S EQUAL EMPLOYMENT OPPORTUNITY OFFICER. MY DIVISION IS RESPONSIBLE FOR INVESTIGATING COMPLAINTS OF DISCRIMINATION AND HARASSMENT IN THE COUNTY WORKPLACE CONSISTENT WITH FEDERAL, STATE AND LOCAL DISCRIMINATION LAWS AS WELL AS COUNTY POLICIES AND THE MONTGOMERY COUNTY PERSONNEL REGULATION, SECTION 5.

FIRST, I WANT TO THANK YOU FOR THIS OPPORTUNITY TO SPEAK REGARDING THE PENDING BILL 46-09 RELATING TO HIRING PREFERENCES FOR INDIVIDUALS WITH DISABILITIES AND DISABLED VETERANS. I, AS WELL AS MANY OTHERS, DO NOT TAKE THE COUNCIL'S CONSIDERATION OF SUCH ACTION LIGHTLY. TO THE CONTRARY, YOUR MERE CONSIDERATION OF THIS BILL IS BEYOND WHAT MOST OTHER JURISDICTIONS HAVE EVEN CONSIDERED. THIS WOULD SET A NEW STANDARD AS TO HOW LOCAL GOVERNMENT CAN CONSIDER EMPLOYING INDIVIDUALS WITH DISABILTIES INCLUDING DISABLED VETERANS.

TO SAY IT IS IMPACTFUL, DOES NOT APPROPRIATELY SPEAK TO THE WAY SUCH LEGISLATION WILL ULTIMATELY CHANGE THE LIVES OF MANY PEOPLE WHO HAVE NOT BEEN AFFORDED AN OPPORTUNITY THAT MANY

OTHERS SEE AS AN ENTITLEMENT AND SIMPLY TAKE FOR GRANTED. THAT IS-QUITE SIMPLY-GAINFUL EMPLOYMENT.

AS THE EEO OFFICER, I OFTEN HEAR CONVERSATION ABOUT DIVERSITY THAT REMAINS LIMITED TO RACE AND GENDER. BUT DIVERSITY IS FAR MORE INCLUSIVE OF THAT AND NECESSARILY INCLUDES INDIVIDUALS WITH DISABILITIES-A POPULATION OF INDIVDIUALS WHO OFTENTIMES ARE EXCLUDED FROM CONVERATIONS BUT MOST IMPORTANTLY-EXCLUDED FROM REAL ACTION RELATED TO DIVERSITY AND PROACTIVE MEASURES IN THE WORKPLACE.

I ALSO KNOW, FROM ALMOST 15 YEARS OF SERVING AS AN EEO OFFICER IN BOTH THE PUBLIC AND PRIVATE SECTOR, THAT THE EFFECTS OF DISCRIMINATION IN THE WORKPLACE IS NOTHING SHORT OF DEVASTING. IT NOT MERELY DISCRIMINATION THAT OCCURS WITHIN THE WORKPLACE BUT THAT WHICH EXCLUDES OR IMPOSES BARRIERS TO SIMPLY ENTERING IN THE WORKFORCE. THIS IS CRITICAL TO THIS ISSUE TODAY AS INDIVIDUALS WITH DISABILITIES HAVE AN UNPRECEDENTED RATE OF UNEMPLOYMENT OF AT LEAST 70%. THOSE FIGURES DO NOT EVEN TAKE INTO ACCOUNT THE NUMBER OF THOSE INDIVUDALS WHO ARE UNDEREMPLOYED- PERFORMING IN JOBS WHICH ARE WELL BELOW THEIR QUALIFICATIONS, EDUCATIONAL LEVELS OR EXPERTISE.

SIGNIFICANTLY, THIS BILL IS NOT INTENDED TO VIOLATE LAW OR EMPLOY INDIVIDUALS WHO ARE UNQUALIFIED FOR EMPLOYMENT. OFTENTIMES, OPPONENTS ASSUME THAT SUCH PROACTIVE MEASURES ARE MEANS FOR UNQUALIFIED INDIVIDUALS TO ENTER THE WORKFORCE. THIS WAS THE SAME REOCCURING THEME WHEN BOTH WOMEN AND RACIAL MINORITIES ALSO ENTERED THE WORKFORCE WITH OPPOSITION...AND THOSE GROUPS HAVE NOT ONLY ENJOYED BUT EARNED, BY MERIT, UNPRECEDENT SUCCESS IN THE WORKFORCE AT ALL RANKS AND LEVEL-NOT JUST HERE BUT NATIONWIDE.

SIMLARLY-THIS BILL IS INTENDED TO ENSURE THAT QUALIFIED INDIVIDUALS WITH DISABILIITIES ARE AFFORDED AN OPPORTUNITY TO COMPETE FOR POSITIONS-NOT SIMPLY IN ENTRY LEVEL OR COMPLETING MENIAL TASKS BUT AT EVERY LEVEL OF COUNTY GOVERNMENT-PARTICULARLY AT OUR TOP SUPERVISORY AND MANAGEMENT RANKS.

I SIMPLY WANT TO REMIND YOU THAT "DISABILITY"-AS A PROTECTED CLASS, IS A CATEGORY FOR WHICH WE CAN ALL BE A MEMBER-EITHER BY GENETICS, ILLNESS, OR A CONDITION BEYOND OUR CONTROL OR SIMPLY BY A LIFE CHANGING EVENT SUCH AS AN ACCIDENT ON THE WAY TO WORK WHICH MAY RESULT IN OUR <u>INABILITY</u> TO PERFORM AS WE MAY HAVE BEFORE, BUT CERTAINLY DOES NOT DIMINSH ONE'S <u>DESIRE</u> TO WORK.

AGAIN, I THANK YOU FOR TAKING SUCH A BRAVE STEP IN PROPOSING AND SUPPORTING THIS BILL. THE MONTGOMERY COUNTY WORKFORCE CAN ONLY ENHANCED BY YOUR SUPPORT OF THIS MEASURE. THANK YOU, AGAIN.

Montgomery County Commission on People with Disabilities Testimony
Before the Montgomery County Council Supporting Bill 46-09
Mark Maxin, Chair,
January 12, 2010

Good evening, my name is Mark Maxin and I am Chair of the Commission on People with Disabilities. The Commission very much appreciates the desire, vision and courage of the Council to address the critical issue of unemployment of individuals with disabilities that has been an ongoing problem for our County and the nation.

- The Commission strongly supports the County's proposed hiring preference for individuals with targeted disabilities and hopes that the County will mirror the federal government in its definition of disability and certification requirements.
- Such a preference would only apply to individuals with disabilities who the Division of Rehabilitation Services certifies and who meet the definition of 5 C.F.R. 213.3102(u) (1), and who are qualified for the position. Further, this preference will only apply for individuals who apply for a position and after competition, are deemed to be amongst the highest qualified applicants.
- This hiring preference would also apply to disabled war veterans who are certified by the Veterans Administration as having a disability rating of 30% or more.
- This preference would apply to certified applicants for all positions advertised by the County including the wide range of technical and professional positions.
- The Commission agrees that such a hiring preference would not violate the law. Disability is not a suspect or quasi-suspect class and requires only a rational basis for instituting such a hiring preference.
- The rational basis for such a hiring preference for individuals with targeted disabilities is multifaceted and clear.
- **The unemployment rate** of individuals with disabilities is disproportionately high.
    - In Montgomery County, of the 40,000 individuals with disabilities who could work, 43% are unemployed and 31% of working age adults (ages 18-64) with disabilities report that they are unemployed.
    - Councilman Andrews recently reflected that the unemployment and underemployment rate of individuals with disabilities was as high as 70%
- People with disabilities are **disproportionately poor**.
    - Among all adults in our country age 21+, people with disabilities are almost 3 times more likely to be below the Federal Poverty Level (11.4% vs. 3.6%) - The U.S. Census Bureau 2006 American Community Survey.
- The **participation rate** of individuals with disabilities employed in the Montgomery County government is exceptionally low. In the Federal government the participation rate is .94% (less than 1%). In the County, the participation rate is so low they do not even have statistics to measure it.
- Individuals with disabilities face **discrimination** on a daily basis. They are often perceived to be unable to perform when; with or without reasonable accommodations they can do an outstanding job.
    - Exposure to people with disabilities helps to undue the myths, fears and stereotypes that, according to the Supreme Court in Arline v. Nassau County Board of Education, 480 U.S, 273 (1987) can be far more limiting than the underlying medical condition itself.
    - Individuals with disabilities are an **important and untapped resource**.

Thank you for your consideration of this important civil rights/employment law.

Montgomery County Commission on Veterans Affairs
Testimony before the Montgomery County Council
Jerry Godwin, Vice-Chair - Supporting 46-09
January 12, 2010

Good evening. My name is Jerry Godwin and I am the Vice-Chair of the Commission on Veterans Affairs and testifying on their behalf his evening. The Commission very much appreciates the work of the County to address the critical issue of unemployment of individuals with disabilities including the many disabled veterans who are not employed.

- The Commission strongly supports the County's proposed hiring preference for individuals with targeted disabilities. In addition to those certified by DORS, this hiring preference would also apply to disabled war veterans who are certified by the Veterans Administration as having disability rating of 30% or more.

- Here is some information for you to consider in support of this bill. In early 2008, The Community Foundation joined with Montgomery County Executive Isiah Leggett to commission a study to determine the feasibility of a community-based nonprofit response to complement government and national nonprofit efforts to ease the hardships of deployment to Afghanistan and Iraq and post-deployment reintegration for troops and families in the National Capital Region.

- In their report published in October, 2008 they cited the following employment issues regarding veterans: Guard and reserve soldiers may find their former jobs no longer exist, or their employers have downsized, folded, merged or relocated.

- It is "very common" for soldiers to file for bankruptcy following deployments and injuries. Some veterans have fallen into debt waiting for compensation from the VA for their disability claims.

- Because of frustration with government agencies, 77% of veterans say they don't even bother to seek reemployment help.

- 18% of veterans recently back from deployments are unemployed. Of those who do work, 25% earn less than $21,000.

- An estimated 36,967 soldiers have "ever deployed" and an estimated 6,020 are "currently deployed" to Afghanistan and/or Iraq. Of these, 5,320 have "ever deployed" and 931 are "currently deployed" from Montgomery and Prince George's Counties. 3,101 have "ever deployed" and 509 are "currently deployed" from DC. 28,546 have "ever deployed" and 4,580 are "currently deployed" from Northern Virginia.

- There are more than 700 soldiers and 1000 family members who are in the area at any one time by virtue of the specialized care provided by the National Naval Medical Center in Bethesda and Walter Reed Army Medical Center on the border of DC and Silver Spring. The average length of stay for most of the wounded warriors at Walter Reed is more than 380 days.

- The military reports that 208 soldiers from our region have died in the two wars and 1,218 have been wounded in action.

We thank you for your consideration of this important employment bill that could help to bring opportunity to veterans who have unselfishly served our country.

(5)

BILL 46-09

DEBORAH BROWN

My name is Deborah Brown. I live at 11923 Parklawn Drive, Apartment 104, Rockville, MD 20852. I ampresident of the Sligo Creek Chapter, National Federation of the Blind of Maryland.

I am in favor of bill 46-09, and I would like to address some issues to make sure it does what it is intended to do.

Here are my concerns:

1. Once the employee's probationary period is finished, opportunities for advancement, grade increases, awards, and training must be the same as those for other employees.
2. The county must not limit an employee's advancement by purchasing inaccessible equipment. This is a major concern for blind employees. The Siebel software recently purchased by Montgomery County for its 311 service is an example of software that is inaccessible without the payment of $210,000 per employee to make it accessible. Many of the county's online forms are not accessible. If the county says it wants to hire employees with disabilities, it must be committed to buying only accessible software and must not use the taxpayers' money to pay for the mistakes of a software company.
3. If it is necessary to RIF an employee with a disability, that employee should not be considered expendable simply because he or she has not had the proper equipment, training, or opportunity for advancement.
4. The county must support the transportation needs of people with disabilities. The county cannot claim to want to hire people with disabilities and cut bus routes at the same time.
5. Students with disabilities must receive an education that will prepare them to fit into the most qualified category for the job. If they are blind, that means adequate training in Braille, cane travel, and technology.

Councilmember Andrews is to be commended for introducing this bill, and I hope the county will be fully committed to this legislation so that more people with disabilities will become taxpaying citizens.

September 12 2009
Bill 46-09
Aaron M. Kaufman
301 951 3477

Thank you Madam President,

My friends, we are on the cusp of historic inclusion of people with disabilities in our county government's workforce. I want to thank Councilmember Andrews for introducing this landmark legislation. Throughout his 12 year tenure Mr. Andrews has been a great friend to the disability community and to me personally. I also wish to thank Leslie Rubin and Jennifer Renkema for their outstanding report on this matter. The legislation does a great deal to put into practice our common belief that diversity is one of our county's greatest strengths. In Montgomery County 11.4 % of people with disabilities live in poverty, this is 54% higher than for able-bodied individuals. (American Community Survey 2008).

This is a dreadful statistic!

The number one way to mitigate poverty is through employment.

According to the US Census Bureau's 2006 American Community Survey the national unemployment rate for people with disabilities is 62%. This distressing figure is a reflection of the unique workplace challenges faced by people with disabilities. These challenges are ones not confronted by able bodied individuals. This legislation helps level the playing field - it will enable talented individuals who otherwise may be overlooked to work and contribute to our beloved county.

This legislation makes fiscal sense as well. With greater employment more people will be able to contribute to our county's tax base.

To be clear, the Andrews' legislation is not a hand out as it mandates that the applicant must have the skills to do the job before they are hired. In addition the bill provides for a probationary period which allows under-performing workers to be dismissed. Lastly, it does not affect the County's promotion process.

In closing my dear friend the late Jane Lawton began to work on this very issue, 18 years ago in 1992, as a special assistant to County Executive Potter. (According to the OLO report) Let's not let one more day go by before this body strengthens our county government's workforce and recognizes the diversity, backgrounds and unique skills of people with disabilities.

Let today begin a period of equal employment for all!

Thank You!

The Arc of Montgomery County
Testimony by Joyce Taylor, Executive Director
Supporting MC Bill 46-09
January 12, 2010

Good evening. My name is Joyce Taylor and I am the executive director of The Arc of Montgomery County. I am here in support of the proposed Bill 46-09 establishing a hiring preference for certain qualified persons with disabilities who apply for an initial appointment to a County merit system position.

I commend the Council for taking this necessary step in providing a system that will enable county hiring personnel to "level the playing field" so to speak when it comes to enabling people with disabilities to become a visible and productive part of the County's workforce.

It is critical that Montgomery County Government **lead by example** to ensure fair and equal treatment to all persons, regardless of race, color, religion, sex, national origin, age or disability. We are proud of our diversity and must embrace it and encourage full participation in all aspects of life – we have many different skin colors, we speak many languages, we worship many gods, we are employed from age 15 to the end of life, we choose our life partners based on our heart rather than gender. People with disabilities fit into all of these categories.

This is not reverse discrimination as some may assert. As stated previously, this is leveling the playing field for persons with disabilities who are not only qualified for a position for which they apply, but who are, after competition, deemed to be amongst the highest qualified applicants. This action by the County is an **accommodation** that will enable persons with disabilities to meet performance expectations when given the opportunity.

The unemployment rate of individuals with disabilities is disproportionately high. In Montgomery County, 31% of working age adults with disabilities are unemployed. There are many reasons for this high number, however, myths and stigmas remain throughout our society. The County's Legislative Oversight Report from June 2008 states "The research literature documents that persons with disabilities often confront barriers to employment that include employer's presumptions about person's with disabilities, job structure, and the job seeker's personal circumstances. The experience of other public sector employers demonstrates that a highly visible commitment from top management to hiring persons with disabilities is an effective strategy for enhancing a jurisdiction's efforts to reduce these known barriers to employment." (1)

Now, not in a year or 2 or 3, but **now,** is the time for the County to demonstrate that commitment to it's residents and workers.

Thank you for your consideration of this very important bill.

(1) page 90

SHARON JULIUS

PRESENTATION – JANUARY 12, 2010

Public Hearing on Bill 46-09

Good evening. My name is Sharon Julius and I am the Program Manager for Prince George's and Montgomery Counties for the Maryland State Department of Education, Division of Rehabilitation Services. I am here tonight to convey the Division's support of bill 46-09 Personnel – Regulations – Persons with Disabilities – Hiring Preference.

The Division of Rehabilitation Services is a federally/state funded program responsible for assisting individuals with disabilities in obtaining and maintaining employment. In this capacity we are supporting this bill that we believe will increase the employment of individuals with significant disabilities in Montgomery County.

If passed it will be the responsibility of DORS to work collaboratively with County personnel staff and ensure that the most qualified individuals with disabilities are identified and certified for this hiring preference.

While this will be the first such hiring initiative at the county level in Maryland we have met great success in training and certifying individuals with disabilities for Federal employment using the Excepted Service (Schedule A) program. Last year 82 DORS consumers with significant disabilities obtained Federal employment, which was a substantial increase from the 35 hired the previous year. We plan to surpass that accomplishment in 2010.

We hope that this bill is passed so that individuals with disabilities in Montgomery County can become taxpayers and productive members of this community.

Thank you for your time.

Statement of Stephen F. Riley, Executive Director,
Potomac Community Resources, Inc.
Supporting MC Bill 46-09
Montgomery County Council
January 12, 2010

Thank you very much for the opportunity to speak in support of this important legislation, which will open employment opportunities with Montgomery County government for individuals with disabilities.

Potomac Community Resources, Inc. (PCR) is a nonprofit organization in Montgomery County that promotes the full inclusion of individuals with developmental differences into the life of our community. PCR does this by providing innovative therapeutic recreational, social and educational programs for teens and adults with developmental differences and their families in collaboration with faith communities of various denominations, public and independent schools, nonprofit organizations serving persons with disabilities, with agencies of Montgomery County Government, and civic organizations throughout our County. Information about PCR and our programs is attached for your easy reference.

I am also honored to serve on the Montgomery County Commission on People with Disabilities, having been appointed and confirmed in 2009. My testimony reflects my own views, and is not offered on behalf of the Commission.

Whatever can be done to reduce/remove barriers to the employment faced by persons with disabilities in our county should be done, and as soon as possible. Persons with disabilities face discrimination in virtually all aspects of their lives, including access to employment.

They are more likely than persons without disabilities to be unemployed or underemployed, to be poor, and to lack access to recreational and social activities, transportation and housing.

The legislation under consideration would help address these disparities, and thus help improve the quality of life for individuals with disabilities in our County.

Moreover, by opening County employment opportunities to persons with disabilities, the legislation would bring the County Government's policies and practices into line with those of many private sector employers located in Montgomery County that are leaders in this field.

Our county is home to a number of businesses, large and small, in various sectors that have developed and implemented very successful programs that create employment opportunities for persons with disabilities.

I know first-hand the profound positive impact that opening employment opportunities can have on the quality of life of a person with a disability. My daughter, who is a young adult with Down Syndrome, has worked for eight years as a teacher's aide with three and four year olds at Beverly Farms Childrens Center of Montgomery Child Care Association, Inc. Her work provides her, in addition to a regular paycheck, with a sense of self-worth, independence and personal autonomy. She is a contributing and valued member of the professional team at Beverly Farms Children's Center and a diligent and conscientious worker.

Please help others in our County access employment opportunities by enacting the legislation now before you.

Thank you.

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Testimony of Community Support Services, Inc
Presented by Susan Ingram, Executive Director
9075 Comprint Court, Gaithersburg, MD 20877
301-926-2300 ext 208

Community Support Services, Inc. supports Bill 46-09. CSS provides support services to individuals with developmental disabilities to obtain and maintain employment, and we are keenly aware of the many obstacles to employment. Montgomery county government has not been successful in the employment of persons with disabilities. Bill 46-09, which provides for preferential hiring of qualified individuals with disabilities, is a step in the right direction.

The report issued by the Office of Legislative Oversight in June of 2008 states that individuals with disabilities face many challenges around employment. Individuals with disabilities have higher unemployment rates despite equal qualifications and job performance with nondisabled workers. Simply put, when applicants are rated as equally qualified, the applicant without a disability is usually chosen for a given position. This bill would change that practice, and the county would benefit by increasing the diversity of its work force with equally qualified employees.

An additional step which is needed to make a positive impact on the hiring of persons with significant disabilities is a Special Hiring Authority. Positions within county government need to be customized to include tasks which can be performed by people with severe developmental disabilities and established as permanent positions; a special hiring authority would then be necessary to enable the county to hire people with significant disabilities into these positions. The county intern project, now in its third year, has demonstrated that a customized approach to include people with disabilities in the work force is successful within county government. Part time positions needed by several different departments have been established, individuals with disabilities have been employed and county supervisors have reported satisfaction with the work. Because these positions had to be classified as temporary under the current merit system, those individuals who have been successfully employed for two years have now lost their jobs. The county has a golden opportunity, to use the intern project as a means of developing needed part time positions, incorporate the positions which work well into the merit system with appropriate prerequisite requirements and continue to employ people with disabilities for these positions. Bill 46-09 and a Special Hiring Authority would open doors that have been closed too long to people with disabilities.

I urge you to pass bill 46-09, but not to stop there. If you intend to include people with the most significant disabilities in the work force, positions need to be customized and adapted. Private business has found this to be an efficient strategy, and while there is more work to be done ahead of government in utilizing the many talents of our disabled workers, County government has a perfect opportunity to build on a program it had the vision to create three years ago and be a model for our entire community as well as the nation. With appropriate supports, individuals with significant disabilities can be productive, contributing members of our society.

Montgomery County Council Public Hearing
Bill 46-09
Testimony by Transition Work Group
Karen Leggett, Chair
Leggett@comcast.net
301-438-7601 ph

In times of dismal economic news, here is a chance to produce good, strong economic policy with nominal financial implications. Bill 46-09 welcomes to Montgomery County government the many talented people who happen to have disabilities. The Transition Work Group has been advocating long and hard for expanded employment opportunities for this population. We are a group of Montgomery County and Maryland State agency staff, service providers, nonprofit organizations and parents working to improve the transition of young people with disabilities from school to work and independent living.

Montgomery County prides itself on serving an increasingly diverse population. People with disabilities are widely distributed across race, ethnicity, gender, socioeconomic level, sexual orientation and age. Bringing more people with disabilities into county government broadens the range of perspectives, creativity and knowledge that can be used to solve problems and serve residents.

The U.S. Office of Disability Employment Policy says workforce diversity is smart business. It lifts morale and enhances productivity. A recent study by Adecco USA found that the majority of workers thinks a diverse workforce makes their organization more successful, and more than half the respondents said their own productivity improved.

Other surveys have shown repeatedly that employees with disabilities are dedicated and reliable. They had fewer scheduled absences and nearly identical job performance ratings, while differences in the amount of supervision were negligible. Marriott employees hired through the Pathways to Independence Program experienced a 6% turnover rate versus the 52% turnover of the overall workforce at Marriott. Employers using the Job Accommodation Network (JAN) found that half of all accommodations cost less than $50 while 88% cost less than $1,000. And Montgomery County already has a fund to help agencies provide these accommodations.

By enacting Bill 46-09, Montgomery County would be

- tapping an eager and greatly under-used employment resource,
- setting an example for private businesses in Montgomery County and local governments nationwide, and
- helping to destroy myths that currently hinder the employment potential for people with disabilities.

You would also be paving the way for voter consideration of the Charter Amendment which would expand employment opportunities for additional groups of people with disabilities.

We urge you to vote "Yes" on Bill 46-09.

STATEMENT OF JACQUES GELIN
In support of
BILL 46-09, The Disabilities Preference Bill

My name is Jacques Gelin and over 41 years I have resided at 105 South Van Buren Street in Rockville. I testify here in support of Bill 46-09, which would require the Executive to adopt regulations establishing and maintaining a hiring preference for certain qualified persons with disabilities who apply for County merit positions. The preference would apply only to a person who is *already* among the highest rating category in a normal competitive process.

The goal of this bill is to establish the County as a leader in hiring qualified persons with a disability. The impetus of this bill arose in June 2008, when the Office of Legislative Oversight issued a report on "Hiring Persons with Disabilities: A Review of County Government Practices." The report found that persons with disabilities face many barriers to employment that prevent them getting jobs. The report also found that the employment rate for persons with disabilities is consistently higher than the unemployment rate for persons without a disability, despite studies showing that employees with and without disabilities have comparable performance, longevity rates, and absenteeism rates.

I have a personal reason for supporting hiring preferences for otherwise qualified people. My youngest daughter was learning disabled. Although she could read and write perfectly well, mathematics and even simple arithmetic was something that she could hardly comprehend. Under a federal preferential program – sadly, no longer in existence -- she was hired by a federal agency and for 20 years worked conscientiously and effectively as a clerk. During her career she received numerous awards and commendations.

The kind of preferential program I ask you to support enables fully qualified people to earn their living, maintain their dignity, and become useful members of their community. This bill is fair and this Council should support it.

To: Montgomery County Council

From: Judy Rasmussen, 11909 Coronada Place, Kensington, MD 20895

Re: Support of Bill Number 46-09

As a resident with a disability, living in Montgomery County, I am in support of this bill. For approximately five years in the 1980's, I served on the Employment Committee of the Montgomery County Commission for People with Disabilities. After many, many meetings where we talked about instituting a hiring policy for people with disabilities similar to that of the Federal Government, and nothing ever happened, I confess I gave up.

From 1980 to 1989, I served as a Montgomery County employee in the Office of Landlord Tenant Affairs. During that time, computers and other assistive technology to increase my independence on the job were becoming more easily available. The County purchased for me a Braille printer and software to run it, but I was told I would not be able to use it myself--someone else had to do that. In fact, my supervisor seemed quite angry that the County had purchased it for me.

You are probably thinking that was the 1980's, but we are wiser now and that would never happen. I assure you it continues to happen today. When the County hires people with disabilities, and then purchases inaccessible software precluding an individual from performing the essential functions of the job, we still have a long way to go in helping people with disabilities achieve their full potential in the work place.

I am currently employed as a Rehabilitation Counselor with the Division of Rehabilitation Services (DORS) in Wheaton, MD. It is my job to help people with disabilities obtain the skills they need to return to work and then to find competitive employment. In this capacity, I have used the Schedule A hiring authority to place several people with disabilities in jobs with the Federal Government.

I believe the County can do even better than the Federal Government with implementation of a regulation such as Bill 46-09. I hope you will consider working with agencies such as DORS since we have already pre-screened applicants to verify they have a documented disability and have provided the training needed to help them return to the work force. It isn't enough to have a "feel good" bill. What we need is action on the part of the Council, hiring managers and others in positions of authority to enforce this regulation and to see a significant number of people with disabilities obtain employment with the County.

OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

January 6, 2010

2010 JAN 12 AM 8:17
MONTGOMERY COUNTY COUNCIL

TO: Nancy Floreen, President, County Council

FROM: Joseph F. Beach, Director

SUBJECT: Council Bill 46-09, Personnel – Regulations – Persons with Disabilities – Hiring Preference

The purpose of this memorandum is to transmit a fiscal and economic impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

The proposed bill requires that the Executive adopt regulations establishing and maintaining a hiring preference for certain qualified persons with disabilities who apply for an initial appointment to a County merit system position. Under the bill, the preference would only apply to a person who is among those in the highest rating category in a normal competitive process.

FISCAL AND ECONOMIC SUMMARY

The fiscal impact is indeterminate until the County Executive drafts the regulations establishing the hiring preference and its parameters. Depending on the standards developed, the County could incur programming costs for the online application recruitment system.

The bill will not have any material financial or economic impact on the County.

The following contributed to and concurred with this analysis: Lori O'Brien, Office of Management and Budget, Lenny Moore, Department of Finance, and Melissa Voight-Davis, Office of Human Resources.

JFB:lob

c: Kathleen Boucher, Assistant Chief Administrative Officer
Dee Gonzalez, Offices of the County Executive
Lenny Moore, Department of Finance
Joseph Adler, Director, Office of Human Resources
Melissa Voight-Davis, Office of Human Resources
Lori O'Brien, Office of Management and Budget
John Cuff, Office of Management and Budget

Office of the Director
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OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

MEMORANDUM

TO: Michael Faden, Senior Legislative Attorney
County Council

FROM Marc P. Hansen
Deputy County Attorney

Edward B. Lattner, Chief
Division of Human Resources and Appeals

Anne T. Windle
Associate County Attorney

DATE: July 29, 2009

RE: **Noncompetitive Hiring of Persons with Disabilities**

The County is considering a recommendation to establish a program to hire persons with disabilities on a noncompetitive basis. The County Charter requires that all personnel actions taken under the merit system be "based on demonstrated merit and fitness." Based on the history of this Charter provision, we have concluded that the Charter forbids the use of a noncompetitive hiring process based on an immutable, non-merit factor such as a disability. Although the Charter, forbids the use of a noncompetitive rating process based solely upon an immutable, non-merit factor such as disability, the County Council could amend the County Code to place a person with a disability on a priority eligible list for job applicants, if that person is first placed in the highest rating category through a competitive process.

BACKGROUND

In June of 2008, the Office of Legislative Oversight issued Report Number 2008-9, Hiring Persons with Disabilities: A Review of County Government Practices (OLO Report). The OLO Report notes that "a recurring question during the course of conducting the study was, 'Why doesn't the County Government develop a special hiring authority to hire persons with disabilities into merit system jobs?' " OLO Report at 93. The OLO Report continues, "The model most often suggested for the County Government to follow is the Federal Government's

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Schedule A hiring program, which allows federal agencies to directly hire a person with a disability into a vacant position on a noncompetitive basis. The County Attorney advises that creating this sort of program requires an amendment to the County's Charter." *Id.*[1]

ANALYSIS

I. The Charter requires that the County determine an individual's merit and fitness through a competitive rating process.

The Charter requires that all personnel actions under the merit system be based upon demonstrated merit and fitness. Specifically, Charter § 401 calls upon the County Council to establish by law a merit system for all County employees,[2] which "shall provide the means to recruit, select, develop, and maintain an effective, non-partisan, and responsive work force **with personnel actions based on demonstrated merit and fitness**" (emphasis added).[3] Provisions like Charter § 401 are intended to increase the efficiency of the public service by abolishing the spoils system, providing for appointments on the basis of merit and fitness rather than on political or personal considerations, assuring tenure, and providing opportunity for advancement.[4]

Code § 33-9(a) implements Charter § 401 by providing that "[t]he county's policy shall be to take all personnel actions on the basis of merit and fitness without regard to political affiliation or non-merit factors . . . such as sex, marital status, race, religion, national origin, age or handicap."

What did the Charter intend to achieve by employing the phrase "demonstrated merit and fitness"?[5] To be sure, the language of Charter § 401 is silent with respect to whether competition

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[1] Schedule A permits, but does not require, a hiring manager to select a Schedule A applicant without considering other applicants. "To be hired 'under Schedule A' an applicant must meet the minimum job qualifications, demonstrate job readiness, and provide documentation of 'mental retardation, severe physical disabilities, or psychiatric disabilities.' " OLO Report at 26. Individuals hired pursuant to Schedule A are not initially merit system employees, but may noncompetitively become merit system employees after two years of satisfactory service.

[2] The charter provides that certain high level employees are outside the merit system.

[3] The Charter provides that even probationary, temporary, and term employees, all of whom may be exempted from the merit system, must still be recruited, selected, and promoted by the County on the basis of demonstrated merit and fitness.

[4] *Secretary, Maryland Department of Personnel v. Bender*, 44 Md. App. 714, 411 A.2d 107 (1980), *aff'd*, 290 Md. 345, 430 A.2d 66 (1981).

[5] The cardinal rule of statutory construction is to ascertain and effectuate the intent of the law. *Johnson v.*

must be employed as part of the process of determining an individual's "merit and fitness". Nevertheless, after reviewing the history of Charter § 401 and how the County has implemented the merit system, we have concluded that the phrase "demonstrated merit and fitness" was intended to require open competition as a key component in reaching a determination concerning an individual's fitness for a County position. The history of the merit system created by the Charter, however, also reveals an intent to permit certain narrow exceptions to the competition requirement. But these exceptions were not so broad as to encompass an exemption from competition for a class of individuals defined by an immutable characteristic shared by members of the class, such as the presence of a disability.

A. The County has historically used a competitive rating process to demonstrate merit and fitness in all personnel actions.

In 1945 the General Assembly established a "civil service" system for the County.[6] Prior to 1945 the County operated under a "spoils system".[7] In 1948 the County adopted a Charter Home Rule form of government under Article XI-A of the Maryland Constitution. The 1948 Charter reflected the "informed consensus" to end the "spoils system" by adopting "strict personnel practices."[8]

The 1948 Charter used general, non-specific language to implement this policy goal of creating a civil service system. Article V, Sec. 1, b., merely required the Personnel Board to adopt personnel regulations that addressed "minimum qualifications for any such positions, methods of determining such qualifications, and methods of selection for any such positions."

The County's personnel law gave definition to the principles of a civil service system that was intended to be created by the 1948 Charter and it did so by requiring the use of a competitive rating process to determine merit and fitness. The personnel law generally required, subject to certain narrow exceptions, an open competitive examination process to determine job qualifications of an individual. The 1950 County Code required the Personnel Board to prepare examinations to establish lists of individuals eligible to hold a County position. The examination was required to be "competitive, free, and open to **all** persons" subject to the authority of the Personnel Board to place limitation as to "age, sex, health, physical condition, moral character and "**performance** of the duties" of the position to be filled.[9] (Emphasis added) The implication

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Mayor and City Council of Baltimore City, 387 Md. 1 (2005).

[6] 1980 Report of the Charter Review Commission, p. 10.

[7] *Id.*

[8] *Id.* at 11.

[9] 1950 County Code, § 150-12 a.

of this provision is clear: consideration of an individual's immutable characteristics that were unrelated to the ability of the applicant to perform the job was not permitted.[10]

The current Charter was approved by the voters in 1968, and created an Executive Branch of government headed by an elected County Executive. The 1948 Charter provisions regarding the personnel system were transplanted "virtually intact" into the 1968 Charter.[11] The County personnel law implementing the 1968 Charter remained largely unchanged from the 1950 personnel law regarding the requirement to use competitive examinations, except that the Code provided, pursuant to the new Charter, that the Chief Administrative Officer would implement the merit system in place of the Personnel Board. The implication regarding the prohibition against considering characteristics of an individual unrelated to the potential to perform job duties found in the 1950 Code was made, at least in part, explicit in the 1972 Code which explicitly prohibited discrimination on the basis of "race, creed, color, or national origin."[12]

The 1972 Code made the County's use of a competitive rating process even more apparent. Section 33-5(l) of the 1972 Code provided "for the appointment, advancement and retention of employees on the basis of merit and fitness to be ascertained in most cases by competitive examination without regard to race, religion or political affiliation." Section 33-10(d) of the 1972 Code provides: "As a general policy, entrance and promotional examinations to establish or re-establish a list of eligible applicants or promotional candidates shall be administered on a competitive basis."

In 1980 the Charter was amended placing more explicit language in the Charter regarding the nature of the merit system. This language, which remains in the current Charter, states,

> The merit system shall provide the means to recruit, select, develop, and maintain an effective, non-partisan, and responsive work force with personnel actions based on demonstrated merit and fitness.

The current Code and personnel practice implements this Charter language through the use of open competition. For example, § 33-5(b)(2) states that "the recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills, including the full and open consideration of qualified applicants for initial appointments."

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[10] That which necessarily is implied in a law is as a much a part of the law as that which is expressed. *Stanford v. Maryland Police Training and Correctional Commission*, 346 Md. 374 (1997).

[11] 1980 Report of the Charter Review Commission, p. 11.

[12] 1972 County Code § 33-9 (i).

Reliance upon a competitive rating process to demonstrate merit and fitness is reflected in current personnel practice. The OHR Director first reviews and evaluates all applications to ensure that each applicant is eligible for the announced vacancy; the OHR Director may disqualify, at any point in the hiring process, an applicant who lacks the required minimum qualifications for the position. Montgomery County Personnel Regulations § 6-4(b) (eff. Oct. 21, 2008) ("MCPR"). Then, "[t]he OHR Director must establish a competitive rating process to create an eligible list for employment or promotion . . . ." MCPR § 6-5(a)[13] The focus of this competitive rating process is to determine the relative merit and fitness of the candidates. MCPR § 6-5(b)(2) states that the competitive rating process must result from a job analysis that documents the knowledges, skills, and abilities required to perform essential functions of the job" and must "assess the employee's ability to perform important aspects of the job."

At the conclusion of the rating process, whether making an initial appointment or a promotion, the OHR director must create an eligible list of qualified applicants "grouped in appropriate rating categories." MCPR § 6-9. The appointing department director must fill a vacant position from an eligible list and, "consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category." MCPR § 7-1(a).

Where a priority eligible list exists, the appointing authority must comply with the priority consideration provisions. MCPR § 7-1(b). A priority eligible list is a list of applicants who have priority consideration. MCPR § 1-55. Priority consideration means consideration of an applicant to a vacant position before others are considered. It does not guarantee that the candidate will be selected. MCPR § 1-54.

Given the long and consistent history of the County merit system's use of competition, we conclude that the Charter intended to establish a personnel system that measures "merit and fitness" though the crucible of competition open to all applicants without regard to personal characteristics unrelated to the performance of the position's duties. There are, however, a few, narrow exceptions to this general rule.

B. The County has permitted the use of a noncompetitive rating process only in narrow circumstances.

The County has historically permitted the use of a noncompetitive rating process only in

[13] The need for a competitive rating process is also reflected in the County's equal employment opportunity and affirmative action program. Code § 33-9(a) states that the County's equal employment opportunity and affirmative action program must "ensure all persons an equal opportunity to enter and progress in the county's service **on the basis of open competition and demonstrated ability.** (Emphasis added.)

narrow circumstances. Section 150-12(b) of the 1950 Code authorized the Personnel Board[14] to "give noncompetitive examinations to test fitness for reinstatement, transfer, or promotion when in the Board's opinion competitive examinations are impractical or undesirable." And while the 1972 Code explicitly favored a competitive rating process, it did allow for noncompetitive examinations where a competitive rating process "would not be practical or in the best interest of the county government and its merit system, (for example only one applicant has applied, unskilled laborer positions, development and maintenance of a career service, etc.)." 1972 Code § 33-10(e).

Current personnel practice restricts the use of a noncompetitive rating process to three situations: (A) creation of an eligible list for appointment or promotion to positions involving unskilled manual labor and for other classes of work if a competitive process is impractical (MCPR § 6-7), (B) promotion of an employee who was demoted as a result of a disability or a reduction-in-force (MCPR § 27-2(b)),[15] and (C) certain priority eligible lists that allow an employee to receive priority consideration for another position at or below the grade level of an employee's prior position where an employee has lost his or her job due to circumstances beyond the employee's control (MCPR § 6-10(a)(1) - (3)). In all cases the employee or applicant must be fit for the position sought.

C. Use of a noncompetitive rating process for individuals based upon a non-merit factor such as disability would violate Charter § 401.

As seen the Personnel Regulations permit the use of a noncompetitive rating process in a limited number of circumstances—specific hard-to-fill job classes or current employees (who already obtained their jobs through a competitive rating process) demoted through no fault of their own. The extension of a noncompetitive rating process to persons based solely upon an immutable non-merit factor such as disability is dissimilar from the existing uses of the noncompetitive process permitted under Charter § 401. The use of a noncompetitive rating process in that manner would require an amendment of Charter § 401.

The noncompetitive rating process permitted under MCPR § 6-7 is limited to certain job classes, it does not extend to persons based solely upon an immutable non-merit factor such as disability. MCPR § 6-7 allows the OHR Director to establish an eligible list for employment or promotion on a noncompetitive basis "for positions involving unskilled manual labor and for other classes of work if a competitive process is impractical." In these cases, all applicants who

[14] The Personnel Board was the forerunner of the Merit Board.

[15] These first two situations are addressed in MCPR 6-5(a): "The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a noncompetitive process is appropriate under Section 6-[7] or 27-2(b) of these Regulations." The regulation incorrectly refers to § 6-6. MCPR § 6-7 deals with noncompetitive promotion.

met the minimum qualifications are certified to the eligible list. This noncompetitive rating process is used only where a competitive process is impractical or (e.g., difficult-to-fill or difficult-to-retain job classes), where further screening or competition among applicants is felt unnecessary. For example, this practice has been applied to jobs that require difficult to obtain degrees or licenses, that have a high turnover rate, or for jobs that have salary requirements that are difficult to meet because of market demand and have very few applicants. The noncompetitive rating list contemplated under this section does not benefit a discrete class of individuals but is intended to facilitate and promote the efficient filling of positions to carry out the mission of the County. And selection from a noncompetitively rated eligible list is still based on demonstrated merit and fitness.

Noncompetitive promotion under MCPR § 27-2(b)(2) is limited to current employees, individuals who already obtained their jobs through a competitive rating process. This provision allows a department director to noncompetitively promote a current employee who was demoted as the result of disability or reduction in force, or who was reclassified or reallocated downward, if the employee is promoted to a position at the same or a lower grade that the employee previously held, meets the job requirements for the position, passes any required physical examination, and applies for the promotion within five years of demotion, reclassification or reallocation. Further, the employee's noncompetitive promotion must be approved by the department director, is the prerogative of management, and denial of a noncompetitive promotion may not be appealed or grieved. In other words, an employee can only be noncompetitively promoted to a position for which the employee is qualified and which is comparable in grade to the position the employee originally achieved through competition and demonstrating merit and fitness.

Lastly, priority consideration through a priority eligible list under MCPR §§ 6-10(a)(1)-(3) is limited to current employees who already obtained their jobs through a competitive rating process but, through no fault of their own, are facing loss of their position. These employees receive priority consideration for positions at or below the grade level of their previous positions. This group is limited to employees who are unable to perform job functions because of disability, employees affected by reduction in force, and former employees no longer eligible for temporary disability retirement.

II. Alternatively, giving disabled individuals in the highest rating category a preference, similar to the veteran's credit, would require amendment of the Code and Personnel Regulations, but not the Charter.

Although the County cannot extend the noncompetitive rating process to persons based solely upon an immutable non-merit factor such as disability, it can place a person with a disability on a priority eligible list for job applicants, if that person is in the highest rating category after a competitive rating process. This approach is akin to the veteran's credit provided

by MCPR §§ 6-10(a)(4) & 6-12. However, the veteran's preference is mandated by state law. To provide for giving a disabled preference, this office believes that the Council would have to amend Code § 33-9, in addition to the personnel regulations.

The current Code prohibits the placement of a job applicant on a priority eligibility list based solely on the applicant's membership in a group with an immutable characteristic, e.g., race, sex, or disability.[16] Code § 33-9(a) provides in pertinent part:

> The county's policy shall be to take all personnel actions on the basis of merit and fitness without regard to political affiliation or non-merit factors, and without regard to other factors as may be provided for in chapter 27, "Human Relations and Civil Liberties," such as sex, marital status, race, religion, national origin, age or handicap.[17]

Thus, placement of a job applicant on a priority eligibility list solely on the basis of disability would violate the County's own equal employment opportunity statute. This section of the law must be amended to allow the personnel regulations to provide for priority based upon disability.[18]

No charter amendment is required to place persons with a disability on a priority eligible list because the personnel regulations would still require those persons with a disability to compete and demonstrate merit and fitness. Preference statutes such as veteran's acts usually contemplate a competitive process and do not deprive the appointing authority of the ability to judge the relative qualifications of the applicants.[19] As noted earlier, a department director is

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[16] The availability of priority consideration through a priority eligible list for current employees who are disabled satisfies the County's duty of reasonable accommodation under the ADA and therefore does not violate § 33-9(a). *See Scott v. Montgomery County*, 164 F. Supp. 2d 502, 508 (D. Md. 2001) (provision in collective bargaining agreement policy restricting priority consideration to positions at or below employee's current grade meets ADA requirement of reasonable accommodation).

[17] Code § 33-5(b)(6) similarly provides: "All applicants to and employees of the county merit system shall be assured fair treatment without regard to political affiliation or other non-merit factors in all aspects of personnel administration." *See also* MCPR § 5-2(b)(2), which provides that the County must "conduct all employment activities in a manner that ensures equal employment opportunity for all persons without regard to race, color, religion, national origin, ancestry, sex, marital status, age, disability, sexual orientation, or genetic status . . ."

[18] There is no need to amend the County's anti-discrimination law. Recent amendments to the ADA's rules of construction clarify that a non-disabled person may not make a claim of "reverse disability discrimination." "Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability." Pub. Law 110-325, to be codified at 42 U.S.C. § 12201(g) (eff. Jan 1, 2009).

[19] McQuillin, Mun. Corp. § 12.82 (3rd Ed.) (citations omitted); *Cassidy v. Municipal Civil Service Commission of the City of New Rochelle*, 37 N.Y.2d 526 (1975). Laws providing preference to veterans have been

allowed to select anyone in the highest rating category, pursuant to MCPR § 7-1(a). Where a priority eligibility list exists, the appointing authority must comply with the priority consideration provisions. MCPR § 7-1(b).

As previously discussed, the County has permitted the use of a noncompetitive rating process where a competitive process would not be practical so long as the applicant meets the minimum qualifications for the job.[20] For example, an eligible list may be created to fill a position that requires unskilled manual labor without using the competitive rating process; or a noncompetitive eligible list may be created for employees who have lost a County job due to circumstances beyond the employee's control—*e.g.* a reduction-in-force. In those situations where a noncompetitive process would otherwise be permitted, an individual with a disability could be accorded a priority placement preference without having undergone a competitive rating process.

A disability preference similar to the veteran's preference triggers an Equal Protection analysis because people with disabilities would be treated differently than other persons.

III. Since no suspect class is involved, the County need only have a rationale basis for a law which treats individuals with a disability differently.

If the Council chooses to pursue a priority eligible list based upon disability preference, the resulting legislation would create statutory classifications as to County job applicants and employees seeking promotion: those who have a disability and those who do not. The question, then, is whether such a statutory distinction violates the right to equal protection, as guaranteed by the federal and state constitutions.[21]

In reviewing classifications challenged under equal protection guarantees, the court considers the three standards: (1) strict scrutiny, (2) intermediate scrutiny (also been referred to as "heightened scrutiny"), and (3) rational basis. *Jackson v. Dackman*, 181 Md. App. 546, 569, 956 A.2d 861, 874-75 (2008).

First, equal protection analysis requires strict scrutiny of a legislative

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sustained as constitutional. *See Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979), *Keim v. United States*, 177 U.S. 290 (1900).

[20] *See* Subsection I. B., above.

[21] Although the Maryland Constitution lacks an express Equal Protection Clause, Maryland courts have long held that the state's Due Process Clause embodies the concept of equal protection to the same extent as the federal Equal Protection Clause. Because of this, Maryland courts regard federal court equal protection decisions as "practically direct authorities" with regard to the state. *Jackson v. Dackman*, 181 Md. App. 546, 569, 956 A.2d 861, 874-75 (2008).

classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Laws which are subject to this demanding review violate the *equal protection clause* unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.

Second, classifications which have been subjected to a higher degree of scrutiny than the traditional and deferential rational basis test, but which have not been deemed to involve suspect classes or fundamental rights and thus have not been subjected to the strict scrutiny test, are reviewed under intermediate scrutiny. In order to be sustained, this type of classification must serve important governmental objectives and must be substantially related to achievement of those objectives. There is no brightline diagnostic, enunciated by either the Court of Appeals or the U.S. Supreme Court, by which a suspect or quasi-suspect class may be recognized readily. The Court of Appeals, however, has adopted criteria used by the Supreme Court in assessing claims of a new suspect or quasi-suspect classification. They are as follows:

> (1) whether the group of people disadvantaged by a statute display a readily-recognizable, obvious, immutable, or distinguishing characteristics that define the group as a discrete and insular minority;
>
> (2) whether the impacted group is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process; and
>
> (3) whether the class of people singled out is subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities to contribute meaningfully to society.

Third, in most instances when a governmental classification is attacked on equal protection grounds, the classification is reviewed under the rational basis test. Generally under that test, a court will not overturn the classification unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the governmental actions were irrational. The Supreme Court, in applying this test, has been willing to uphold the constitutionality of an enactment

when 'any state of facts reasonably maybe conceived to justify it.

Jackson v. Dackman, 181 Md. App. at 570-71, 956 A.2d at 875-76 (internal citations and quotations omitted; emphasis in original).

In this case, the two classifications are individuals with a disability seeking appointment or promotion with the County and individuals without a disability seeking appointment or promotion. The Supreme Court has held that the disabled are not a suspect or quasi-suspect class entitled to special protection under the Equal Protection Clause. See *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 442-47, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (concluding that mentally disabled individuals are not a suspect or quasi-suspect class); *Brown v. N.C. Div. of Motor Vehicles*, 166 F. 3d 698, 706 (4th Cir. 1999) (extending *Cleburne* to all disabled individuals). In any event, the legislation to either provide a special hiring authority or a disabled preference benefits rather than burdens people with disabilities.

Looking to the other classification, non-disabled individuals, strict scrutiny would not be proper because legislation providing either a special hiring authority or a disabled preference would neither interfere with a fundamental right nor does it operate to the peculiar disadvantage of a suspect class. First, the Supreme Court's decisions give no support to the proposition that governmental employment is per se a fundamental right. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S. Ct. 2562, 2566-67, 49 L. Ed. 2d 520 (1976). Further, suspect classifications are those based on race or national origin. United States v. Virginia, 518 U.S. 515, 532-35, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Such is not the case here.

Intermediate or heightened scrutiny would also not be appropriate because non-disabled individuals seeking appointment or promotion in the County are also not a quasi-suspect class. The class of non-disabled individuals seeking appointment or promotion using the criteria used by the Supreme Court and adopted by the Maryland Court of Appeals in assessing claims of a new suspect or quasi-suspect classification, described *supra*, fails to show that this classification is quasi-suspect. First, this class does not display "readily-recognizable, obvious, immutable, or distinguishing characteristics that define the group as a discrete and insular minority. In fact, this class is very diverse as to age, sex, race, national origin and other characteristics. Second, this class has been saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection. Finally, this class is not subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities to contribute meaningfully to society. Non-disabled individuals seeking appointment or promotion in the County are neither a suspect class, warranting strict scrutiny, nor a quasi-suspect class, warranting intermediate or heightened scrutiny.

Because strict and intermediate scrutiny are not appropriate in this case, we apply the

rational basis standard of review.

Several Supreme Court cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently, and have applied the rational basis test in each case. *See*, e.g., *New York City Transit Authority v. Beazer*, 440 U.S. 568, 593, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979) (upholding city's exclusion of methadone users from employment under rational-basis review); *Harrah Independent School District v. Martin*, 440 U.S. 194, 199-201, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979) (classification between teachers who had complied with a continuing-education requirement and those who had not is rational and does not violate the Equal Protection Clause); *Massachusetts Board of Retirement v.Murgia*, 427 U.S. 307, 314-317, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976)(upholding a mandatory retirement age--a classification based on age--under rational-basis review).

"Legislative classifications are valid unless they bear no rational relationship to the State's objectives." *Murgia*, 427 U.S. 307, 314, 96 S. Ct. 2562, 49 L. Ed. 2d 520. '[W]here rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' Id. (citation omitted). "The School Board's rule is endowed with a presumption of legislative validity, and the burden is on respondent to show that there is no rational connection between the Board's action and its conceded interest in providing its students with competent, well-trained teachers." *Martin*, 440 U.S. at198, 99 S. Ct. 1062, 59 L. Ed. 2d 248.

Under the rational basis standard, legislation either creating a special hiring authority for the disabled or providing for a disabled preference would not be overturned unless the varying treatment of the two groups, disabled and non-disabled, is so unrelated to legitimate governmental purposes as to be irrational. In this case, the rational basis for a statute permitting different treatment of the two groups is Montgomery County's interest in fostering a more diverse work force by encouraging employment of people with disabilities. Therefore, it is this office's opinion that such legislation would not violate equal protection.

CONCLUSON

The Charter, Code, and personnel regulations require that the County engage in a competitive rating process to determine an individual's merit and fitness for a merit system position. Although these laws countenance a noncompetitive rating process in certain limited circumstances—specific hard-to-fill job classes or current employees (who already obtained their jobs through a competitive rating process) demoted through no fault of their own—those circumstances are dissimilar from the program proposed presented here—noncompetitive hiring of an applicant based solely upon the applicant's disability status. But the County could amend the Code and personnel regulations to provide for placement on a priority eligible list for a

person with a disability, if that person is in the highest rating category after a competitive rating process (or meets minimum job qualifications if a noncompetitive process is otherwise authorized).

Cc: Karen Orlansky, Director, Officer of Legislative Oversight
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Merit System Protection Board
Leon Rodriguez, County Attorney

noncompetitive hiring of disabled person (MPH, EBL2)
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39-30-103. Definitions. For the purposes of this chapter, the following definitions apply:

(1) "Eligible spouse" means the spouse of a person with a disability determined by the department of public health and human services to have a 100% disability and who is unable to use the employment preference because of the person's disability.

(2) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

(i) a department, as defined in 2-15-102, for a position within the executive branch;

(ii) a legislative agency for a position within the legislative branch;

(iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law library, or similar office in a state district court for a position within the judicial branch;

(iv) a city or town for a municipal position, including a city or municipal court position; and

(v) a county for a county position, including a justice's court position.

(b) A personnel action limited to current employees of a specific public entity identified in this subsection (2), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in this subsection (2), or current participants in a federally authorized employment program is not an initial hiring.

(3) (a) "Mental impairment" means:

(i) a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or any other neurologically disabling condition closely related to mental retardation and requiring treatment similar to that required by mentally retarded individuals; or

(ii) an organic or mental impairment that has substantial adverse effects on an individual's cognitive or volitional functions.

(b) The term mental impairment does not include alcoholism or drug addiction and does not include any mental impairment, disease, or defect that has been asserted by the individual claiming the preference as a defense to any criminal charge.

(4) "Person with a disability" means an individual certified by the department of public health and human services to have a physical or mental impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and that limits the individual's ability to obtain, retain, or advance in employment.

(5) "Position" means a position occupied by a permanent or seasonal employee as defined in 2-18-101 for the state or a position occupied by a similar permanent or seasonal employee with a public employer other than the state. However, the term does not include:

(a) a position occupied by a temporary employee as defined in 2-18-101 for the state or a similar temporary employee with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal adviser, court reporter, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government;

(g) engagement as an independent contractor or employment by an independent contractor; or

(41)

(h) a position occupied by a student intern, as defined in 2-18-101.

(6) (a) "Public employer" means:

(i) any department, office, board, bureau, commission, agency, or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(ii) any county, city, or town.

(b) The term does not include a school district, a vocational-technical program, a community college, the board of regents of higher education, the Montana university system, a special purpose district, an authority, or any political subdivision of the state other than a county, city, or town.

(7) "Substantially equal qualifications" means the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons.

History: En. Sec. 3, Ch. 1, Sp. L. 1983; amd. Sec. 34, Ch. 658, L. 1987; amd. Sec. 10, Ch. 646, L. 1989; amd. Sec. 28, Ch. 308, L. 1995; amd. Sec. 62, Ch. 545, L. 1995; amd. Sec. 101, Ch. 546, L. 1995; amd. Sec. 12, Ch. 339, L. 1997; amd. Sec. 34, Ch. 472, L. 1997; amd. Sec. 11, Ch. 75, L. 2005.

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39-30-107. Certification of persons with disabilities. The department of public health and human services shall certify persons with disabilities for the purpose of employment preference as provided in this chapter.

History: En. Sec. 6, Ch. 1, Sp. L. 1983; amd. Sec. 103, Ch. 546, L. 1995; amd. Sec. 36, Ch. 472, L. 1997.

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39-30-108. No application if conflict with federal law. This chapter does not apply to work or positions subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

History: En. Sec. 10, Ch. 1, Sp. L. 1983.

(44)

Montana Code Annotated 2009

39-30-201. Employment preference in initial hiring. (1) (a) Except as provided in 10-2-402, in an initial hiring for a position, if a job applicant who is a person with a disability or eligible spouse meets the eligibility requirements contained in 39-30-202 and claims a preference as required by 39-30-206, a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference-eligible applicant.

(b) In an initial hiring, a public employer shall hire a person with a disability over any other preference-eligible applicant with substantially equal qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in 39-30-103(2)(b) or to any other personnel action that is not an initial hiring.

History: En. Sec. 4, Ch. 1, Sp. L. 1983; amd. Sec. 11, Ch. 646, L. 1989; amd. Sec. 37, Ch. 472, L. 1997.

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39-30-202. Eligibility requirements. An eligible spouse or person with a disability is not entitled to receive employment preference as provided in 39-30-201 unless:

(1) the individual is a United States citizen;

(2) the individual has resided continuously in the state for at least 1 year immediately before applying for employment;

(3) if applying for municipal or county employment, the individual has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and

(4) the individual meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which the individual is applying.

History: En. Sec. 5, Ch. 1, Sp. L. 1983; amd. Sec. 12, Ch. 646, L. 1989; amd. Sec. 38, Ch. 472, L. 1997.

(46)

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39-30-203. Duration of preference. Subject to 39-30-202, a person with a disability or eligible spouse qualifies for employment preference as long as the disabling condition exists.

History: En. Sec. 7, Ch. 1, Sp. L. 1983; amd. Sec. 13, Ch. 646, L. 1989; amd. Sec. 39, Ch. 472, L. 1997.

(47)

Montana Code Annotated 2009

39-30-206. Notice and claim of preference. (1) A public employer shall, by posting or on the application form, give notice of the preferences that this chapter provides in public employment.

(2) A job applicant who believes that the applicant has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim for a position is a complete defense to an action in regard to that position under 39-30-207.

(3) If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each applicant claiming preference.

History: En. Sec. 8(1)-(3), Ch. 1, Sp. L. 1983; amd. Sec. 1509, Ch. 56, L. 2009.

(48)

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39-30-207. Enforcement of preference. (1) An applicant who believes that the applicant has not been accorded the applicant's rights under this chapter may, within 30 days of receipt of the notice of the hiring decision provided for in 39-30-206, submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(2) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the district court in the county in which the applicant's application was received by the public employer. The petition must state facts that on their face entitle the applicant to an employment preference.

(3) (a) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. At the hearing, the public employer has the burden of proving by a preponderance of the evidence that the employer made a reasonable determination pursuant to 39-30-103(7), and the applicant has the burden of proving by a preponderance of the evidence that the applicant is a preference-eligible applicant.

(b) The time to appear provided in subsection (3)(a) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (3)(a), the court may, on motion of one of the parties or on stipulation of all of the parties, grant a continuance.

(c) If the public employer does not carry its burden of proof under subsection (3)(a) and the court finds that the applicant is a preference-eligible applicant, the court shall order the public employer to reopen the selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of this chapter, and a court may not grant any other relief in an action for violation of this chapter.

(4) Failure of an applicant to file a petition under subsection (2) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (1) within 15 days and a petition is filed under subsection (2), the court shall order the public employer to reopen the selection process.

(5) The Montana Rules of Civil Procedure apply to a proceeding under this section to the extent that they do not conflict with this section.

History: En. Sec. 8(4), Ch. 1, Sp. L. 1983; amd. Sec. 14, Ch. 646, L. 1989; amd. Sec. 1510, Ch. 56, L. 2009.

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County Attorney

OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

TO: Joseph Adler, Director
Office of Human Resources

VIA: Marc P. Hansen Marc P. Hansen /tm
Deputy County Attorney

FROM: Anne T. Windle Anne T. Windle
Associate County Attorney

DATE: January 7, 2010

RE: Bill 46-09

Bill 46-09 amends § 33-7 of the Montgomery County Code as follows:

> (d) *Hiring preference for persons with disabilities.* The Executive must adopt by personnel regulation, under Method 1, standards for establishing and maintaining a preference for the initial appointment of a qualified person with a disability into a merit system position. These standards must:
>
> (1) define a person with a disability who is eligible for the preference;
>
> (2) require medical certification of a qualifying disability;
>
> (3) establish the order of preference in relation to other preferences authorized by law; and
>
> (4) only apply the preference to a person who is among the highest rating category in a normal competitive process.

This memo will address each of the proposed standards in turn.

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Defining a Person with a Disability Who is Eligible for the Preference

The primary legal question to be answered is whether Bill 46-09, as written, provide the County Executive with sufficient guidance to draft regulations. I believe the answer is no. It is not clear who the Council intended to benefit with a disability hiring preference. The bill needs to be amended to provide additional guidance as to who is to be considered disabled for the purposes of qualifying for the hiring preference. Specifically, the bill needs to define disability.

Under the Americans with Disabilities Act Amendment Act of 2008, ("ADAAA"), "disability" means a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or, being regarded as having such an impairment. 42 USCS 12102. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Id. Major life activity also includes major bodily functions, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Id. Determination of whether an impairment substantially limits a major life activity is made without regard to the ameliorative effects of mitigating measures. Id. Mitigating measures include: medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications. Id.

An impairment need only substantially limit one major life activity in order to be considered a disability. Id. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Id. The definition of disability is to be construed in favor of broad coverage of individuals. Id.

An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. Id.

The Equal Employment Opportunities Commission ("EEOC") is currently developing regulations to implement the ADAAA. The proposed regulations include examples of impairments that will consistently meet the definition of disability. Included are: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair (a mitigating measure), autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular

dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48441 (2009) (to be codified at 29 C.F.R 1630.2 (j)(5)(i)).

The proposed regulations state, "Because of the certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted quickly and easily, and will consistently result in a determination that the person is substantially limited in a major life activity." Id.

The proposed regulations also provide examples of impairments that may be disabling for some individuals but not for others. Examples are asthma, high blood pressure, learning disability, back orleg impairment, psychiatric impairments such as panic disorder, anxiety disorder, or some forms of depression other than major depression, carpal tunnel syndrome, and hyperthyroidism. Id. at 46422.

In contrast to the detailed definition of disability in the ADAAA, the Office of Personnel Management ("OPM") has taken a different approach in defining who is eligble for non-competitive appointment under Schedule A.

OPM permits non-competitive (Schedule A) appointment of people with mental retardation, severe physical disabilities, or psychiatric disabilities who have documentation of their disability from a licensed medical professional, a licensed vocational rehabilitation specialist; or any Federal or state agency that issues or provides disability benefits, and certification of job readiness. 5 C.F.R. 213.3102(u). The regulation does not define '"severe physical disabilities" on the basis that doing so may limit flexibility and because such a definition or finite list may exclude future conditions from consideration under this authority.' Excepted Service – Appointment of Persons With Disabilities and Career and Career-Conditional Employment, 71 F.R. 42241, 42244 ((2006) (to be codified at 5 C.F.R. 213.3102(u).

While there may be other ways to define disability, these two approaches should be considered in deciding who the Council wants to benefit with a disability hiring preference.

Medical Certification

Medical certification of a disability raises the issue of whether such inquiries are permissible under the ADAAA. In fact, the EEOC has addressed this issue and has found that such inquires are permissible under certain circumstances.

> An employer may ask employees to voluntarily self-identify as individuals with disabilities when the employer is:
>
> - undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities (i.e., the law requires some action to be taken on behalf of such individuals); or,
>
> - *voluntarily* using the information to benefit individuals with disabilities.[79]
>
> If an employer invites employees to voluntarily self-identify in connection with the above-mentioned situations, the employer must indicate clearly and conspicuously on any written questionnaire used for this purpose, or state clearly (if no written questionnaire is used), that: (1) the specific information requested is intended for use solely in connection with its affirmative action obligations or its voluntary affirmative action efforts; and, (2) the specific information is being requested on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the employee to any adverse treatment, and that it will be used only in accordance with the ADA.[80]
>
> In order to invite self-identification for purposes of an affirmative action program that is voluntarily undertaken or undertaken pursuant to a law that encourages (rather than requires) affirmative action, an employer must be taking some action that actually benefits individuals with disabilities. The invitation to self-identify also must be *necessary* in order to provide the benefit.

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, Equal Employment Opportunities Commission, Number 915.002, July 27, 2000.
http://www.eeoc.gov/policy/docs/guidance-inquiries.html#10

In this case, medical certification is required to ensure that an individual has a disability in order to benefit from the disability hiring preference.

Establish the Order of Preference in Relation to Other Preferences Authorized by Law

Bill 46-09, as written, does not provide guidance to the County Executive as to how the Council wants to give preference to people with disabilities in relation to other groups who currently receive priority consideration. The Montgomery County Personnel Regulations ("MCPR") currently provide for priority consideration of certain individuals as follows:

> 6-10. Priority eligible list.
>
> (a) The OHR Director may establish a priority eligible list to provide priority consideration in the following order to an employee who:
>
> (1) is unable to perform the employee's job because of a disability or injury under the ADA;
>
> (2) is subject to reduction-in-force;
>
> (3) was granted a temporary disability retirement under the Employees' Retirement System or an initial or temporary disability benefit of any type under the Retirement Savings Plan but is no longer eligible for such a temporary disability retirement or benefit; or
>
> (4) has veteran's credit.

MCPR § 6-10. Applicants with a qualifying disability will need to be added to this list in some order in relation to others with priority consideration rights. As with veteran's credit, a disability preference would only apply to initial appointments, not current employees seeking transfers or promotions.

The personnel regulations provide that an eligible veteran who is applying for initial appointment and who ranks in the highest rating category must be given priority consideration. MCPR § 6-12. The state law requiring that local jurisdictions grant some type of special credit for veterans provides in part: "The said commission or board shall have the power to determine the nature and extent of the special credit or credits to be allowed such veterans and **may allow a greater credit or credits to disabled veterans than to nondisabled veterans.**" Md. Code Ann., Art. 96 ½ §48 (emphasis added). The County's personnel regulations do not distinguish between disabled and nondisabled veterans, but in light of the County's adoption of a preference of certain people with disabilities, it may be an appropriate time to consider amending the code and regulations to make that distinction. Since both the veteran and disability preference apply only to initial appointments, it needs to be clarified what the order or priority is, as to

nondisabled veterans, disabled veterans, and someone with a disability who is not a veteran. And, how are these three groups to be prioritized in relation to RIFees and other groups who currently have priority consideration?

Apply the Preference to a Person Who is Among the Highest Rating Category in a Normal Competitive Process

The disability preference as proposed retains competition, consistent with merit system principles. However, management control over candidate selection is affected by the preference. MSPR § 7-2 (a) provides "Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category." Priority eligibility lists, when they exist, weaken management's prerogative to select the candidate of choice. This amendment adds one more category to the list of individuals who must receive priority consideration.

I understand that this memorandum was requested in anticipation of a public hearing on Bill 46-09 on January 12. If you have any questions or would like to discuss, please call me at (240) 777-6746.

cc: Kathleen Boucher
Edward B. Lattner

ATW
A09-02094

-----Original Message-----
From: Mark Maxin [mailto:markmaxin5@yahoo.com]
Sent: Wednesday, January 20, 2010 3:47 AM
To: Andrews' Office, Councilmember
Cc: Luecking, Betsy; Drummer, Bob; Adler, Joseph
Subject:

January 20, 2010

Councilmember Andrews

I tried to send this to Duchy and Leslie but it didn't work. Don't know why. Please forward this e-mail to them as well.

Per your request yesterday afternoon I submit the following re: Bill 46-09

The County's Commission on People with Disabilities believe that the hiring preference Bill 46-09 should only apply to individuals with disabilities who the Division of Rehabilitation Services certifies and who meet the definition of 5 C.F..R. 213.3102(u)(1)(although the regulation's term "mental retardation" should be replaced by the term "developmental disability") and who are qualified for the position. This hiring preference would also apply to disabled war veterans who are certified by the Veterans Administration as having a disability rating of 30% or more. Further, this preference will only apply for individuals who apply for a position and after competition, are deemed to be amongst the highest qualified applicants.

The current draft bill's general reference to person's with "certain disabilities" is somewhat misleading. By incorporating instead, the foregoing regulatory definition, the bill would not exclude any disabilities per se, it would however clarify the extent to which they must be disabled to qualify for a preference under this proposed law.

Again, as we have discussed, many high performing, extraordinary persons can have severe disabilities and accomplish amazing things.. The severity of the disability measures the extent to which their major life activity (e.g. walking, seeing, hearing) is affected, not the ability to perform the essential functions of the job. I know we all agree, however, that such persons, with or without reasonable accommodations, can be outstanding employees for this County.

One thing I might suggest. Perhaps we could add some introductory language to the bill which would underscore the Council's firm belief that persons with disabilities are an outstanding untapped resource of outstanding candidates. Further that this bill is necessary to overcome the unfounded myths, fears and stereotypes associated with many disabiliities which has generally manifested itself into a high poverty and unemployment rate, as well as a extremely low participation rate in this County Government.

It is now 3:33 am on wed. morning and I cannot close without saying the following:

It has been an honor and a privilege to serve on the County's Commission on People with Disabilities. It is also an honor to serve such an enlightened Council. Though I have lost some sleep over this Bill I have gained confidence in my government. Thank you all in advance for your leadership in this matter. I look foward to discussing this Bill further during our working group meeting on Thursday.

Mark Maxin
Chair
Montgomery County Commission
on People with Disabilities

STAFF AMENDMENT 2

Alternative 2A

Amend lines 65-66 as follows:

(3) establish the following order of preference [[in relation to other preferences authorized by law]]:

(A) an employee who is unable to perform the employee's job because of a disability or injury under the ADA;

(B) an employee subject to reduction-in-force;

(C) an employee who was granted a temporary disability retirement under the Employees Retirement System or an initial or temporary disability benefit of any type under the Retirement Savings Plan or the Guaranteed Retirement Income Plan but is no longer eligible for such a temporary disability retirement or benefit;

(D) a veteran with a disability;

(E) a non-veteran with a disability;

(F) a veteran without a disability; and

Alternative 2B

Amend lines 65-66 as follows:

(3) establish the following order of preference [[in relation to other preferences authorized by law]]:

(A) an employee who is unable to perform the employee's job because of a disability or injury under the ADA;

(B) an employee subject to reduction-in-force;

(C) an employee who was granted a temporary disability retirement under the Employees Retirement System or an initial or temporary disability benefit of any type under the Retirement Savings Plan or

the Guaranteed Retirement Income Plan but is no longer eligible for such a temporary disability retirement or benefit;

(D) a veteran with a disability;

(E) a veteran without a disability;

(F) a non-veteran with a disability; and

Alternative 2C

Amend lines 65-66 as follows:

(3) establish the following order of preference **[[**in relation to other preferences authorized by law]]**:**

(A) an employee who is unable to perform the employee's job because of a disability or injury under the ADA;

(B) an employee subject to reduction-in-force;

(C) an employee who was granted a temporary disability retirement under the Employees Retirement System or an initial or temporary disability benefit of any type under the Retirement Savings Plan or the Guaranteed Retirement Income Plan but is no longer eligible for such a temporary disability retirement or benefit;

(D) a veteran with a disability;

(E) an equal preference for a veteran without a disability and a non-veteran with a disability; and

Staff Amendment 3

Amend lines 57-61 as follows:

(d) *Hiring preference for persons with disabilities.*

(1) Findings.

(A) Persons with disabilities are an outstanding, untapped resource for outstanding candidates for County employment.

(B) Persons with disabilities suffer from a high unemployment and underemployment rate in the County due to unfounded myths, fears and stereotypes associated with many disabilities.

(C) A hiring preference for persons with disabilities is necessary to remedy past discrimination resulting from these unfounded myths, fears, and stereotypes.

(2) The Executive must adopt by personnel regulation, under Method (1), standards for establishing and maintaining a preference for the initial appointment of a qualified person with a disability into a merit system position. These standards must: