



**BACKGROUND:** On February 9, 2021, City Council introduced an initial draft of a proposed collective bargaining ordinance for discussion. Council decided to not adopt the ordinance on first reading, and instead provided feedback to staff with the intention of discussing and potentially adopting the updated ordinance at the March 9, 2021 Legislative Meeting. Moreover, Council instructed staff to work with the employee organizations to find mutually agreeable solutions on (1) the scope of bargaining; (2) the number of bargaining units; (3) public safety supervisors excluded from bargaining; (4) procedures relating to selection of the Labor Relations Administrator (LRA); and the (5) resolution of negotiation impasses.

As instructed, staff engaged with the employee organizations on these topics and reached some agreement, although some areas of disagreement between the parties remained. The main areas of disagreement between the parties as of March 9 were on the scope of bargaining, public safety supervisors being excluded from bargaining, and how impasses in negotiations would be resolved between the parties. Of note, the parties did agree on the procedure for the selection of the initial LRA as well as the number of bargaining units, with staff agreeing to split the General Government bargaining unit into two units. Staff and the employee organizations most likely to organize the non-public safety (i.e., General Scale) workforce, the American Federation of State, County and Municipal Employees (AFSCME), have recently reached agreement on how the General Government Unit employees should be grouped into the new bargaining units.

Staff communicated the foregoing areas of agreement and disagreement to Council at the March 9, 2021 Legislative Meeting. Council discussed the proposed ordinance but decided it was not ready for introduction. Instead, Council moved to have the ordinance reconsidered at a Special Legislative Meeting on March 17, 2021. In preparation for this meeting, Council told staff to confer with the employee organizations to attempt to resolve the primary areas of disagreement, namely, the scope of bargaining, supervisor inclusion in public safety bargaining units, and the resolution procedures for negotiation impasses.

At the March 17, 2021 Legislative Meeting, staff conveyed to Council that we were unable to come to an agreement with the employee organizations on the major areas of disagreement. After discussion, Council voted to substitute the proposed ordinance with a separate amended version of the ordinance. Among the amendments included in the substitute ordinance was expanding the scope of bargaining to all terms and conditions of employment (except substantive disciplinary decisions), including public safety supervisors in the public safety bargaining units, and changing the negotiation impasse procedures from mediation to a hybrid mediation/fact-finding model that allows Council to make a final binding decision on the impasses if mediation between the parties is unsuccessful. The introduced ordinance is scheduled for a public hearing, second reading and final consideration at the April 17, 2021 Public Hearing (*See Attachment 1*).

**DISCUSSION:** Part of the purpose of this docket memorandum is to inform City Council to general areas of the introduced ordinance warranting further discussion and potential amendment. Subsection A of this memorandum addresses potential legal issues and unintended legal consequences arising from certain provisions of the introduced ordinance. These issues include the (1) definition of individual "grievances" and resolution of ambiguity surrounding "grievance procedures" versus "labor-management dispute resolution procedures," (2) the restriction of the City's legally exclusive responsibility regarding taxation and budget determination matters, and (3) the modification of the timeline to commence and complete impasse procedures in order to conform to the City's budgetary timeline. These changes have been shown in underline and strikethrough in the attached ordinance (*See Attachment 2*). Note, the attached ordinance also includes a few minor non-substantive changes to address typographical errors found after the ordinance was introduced. These are also shown in underline and strikethrough mode.

Subsection B of the memorandum highlights staff's recommended changes for bargaining unit designation. These changes include the (1) identification of separate public safety supervisor bargaining units to eliminate

potential conflicts of interest arising from inclusion of public safety supervisors in the same bargaining unit as the rank-and-file employees, and (2) the re-grouping and further definition of employees in general government service. These proposed changes are highlighted in the memorandum below but not yet included in the ordinance. AFSCME has agreed to the changes to the definition of employees in general governmental service.

Subsection C of the memorandum alerts Council to an amendment that the employee organizations believe is necessary to create internal consistency within the ordinance. The amendment is to Section 2-5-78(c)(2) and that Section's interaction with the City's rights outlined in Section 2-5-70 of the ordinance. Staff agrees with the employee organizations that these sections are currently inconsistent with each other; however, a slightly modified amendment is proposed by staff than the one proposed by the employee organizations. These proposed changes are highlighted in the memorandum below and are recommended to be included in the proposed ordinance.

**A. Amendments to Address Legal Issues and Unintended Legal Consequences of Introduced Ordinance.**

1. *Add language to proposed ordinance distinguishing "Labor-Management Disputes" from "Grievances."*

As noted above, the proposed ordinance expands the scope of bargaining to include, "wages and benefits (as the term benefits is defined herein), hours, and other terms and conditions of employment, *including procedures to resolve employee grievances*, but excluding discipline..." (emphasis added). Staff believes that Council's decision to include grievance procedures as a subject of bargaining may create two unintended consequences in other parts of the ordinance, both of which can be rectified by amendment. The first is creating ambiguity around whether a substantive employment decision will be subject to bargaining. To rectify this potential issue, staff recommends inserting a definition of grievance into the ordinance making clear that only the *procedures* used to challenge an employment decision will be subject to bargaining and not the *substantive* decision itself. In staff's estimation, the grievance definition will help clear up any ambiguity surrounding what aspects of the employment relationship are subject to bargaining and what parts are not subject to bargaining.

The second potential consequence of expanding the scope of bargaining to include the grievance procedure is its overlap with the procedure to resolve "labor-management disputes," the latter of which is set forth in Section 2-5-80 of the introduced ordinance. Because labor-management disputes may involve employment decisions that are also covered by the negotiated grievance procedure, the ordinance currently allows an employee and/or exclusive bargaining agent acting on the employee's or unit's behalf to challenge those decisions using both procedures. For example, the complaining party could use both procedures in situations where the application of a negotiated promotional policy is in dispute either as to a particular complaining employee individually or as to its general interpretation as a contract provision. This creates a scenario where the City could have to defend an employment decision twice - once using the labor-management procedure (dispute over interpretation of policy) and once using the negotiated grievance procedure (dispute over not following an established promotional policy with respect to a particular employee). To prevent this problem, staff proposes inserting a provision into the ordinance requiring the employee to choose which procedure to use when challenging an employment decision. Thus, if the amendment were adopted by Council, then the complaining party must choose either the grievance procedure or the labor-management dispute procedure at the outset, foreclosing the possibility of an employee using a different procedure at a later date as a de facto "appeal" of an adverse ruling.

2. *Add Language to the City's Rights Authority Section making clear that the City's ability to tax*

*and appropriate will not be constrained by a collective bargaining agreement.*

Staff proposes amending the “City’s Rights and Authority” located at 2-5-70(a) of the introduced ordinance. The suggested amendment is to remove Section 2-5-70(a)(10), which provides that the City’s right to tax, budget, and appropriate must be consistent with a collective bargaining agreement. As noted in our previous docket memos, the General Assembly gave localities the inalienable authority to establish a budget and appropriate funds by enacting Code of Virginia § 40.1-57.2(B). And while Section 40.1-57.2(B) would legally supersede any collective bargaining ordinance that purports to constrain that authority, staff believes it would be prudent for Council to remove any ambiguity regarding its budgetary and appropriation authority. In fact, staff proposes making it crystal clear by including this authority directly in the ordinance with the addition of the proposed Subsection (c) to Section 2-5-70.

3. *Change Dates in Impasse Resolution Procedure [at Section 2-5-80(a)(2),(a)(6) and (a)(8)] to conform to bargaining schedule provided in Section 2-5-78 which is timed to meet annual budget development schedule necessary for timely Council approval.*

Staff proposes changing the dates in the above-referenced impasse provision, added on March 17, to conform to the bargaining start date of April 1 provided in Section 2-5-78. The timing set forth in 2-5-78 aims to better ensure completion of the bargaining process by the end of November, in order to include the information in the City Manager's proposed budget for the next fiscal year. The dates currently listed in the ordinance are substantially inconsistent with the City’s budget preparation schedule.

## **B. Recommended Amendments to the Introduced Ordinance Addressing Bargaining Unit Designations.**

1. *Add a Supervisor’s bargaining unit for public safety supervisors in the Fire and Police Departments.*

Staff proposes that Council discuss and consider adopting an amendment to the ordinance further defining the public safety bargaining units. The suggested amendment is to create two additional bargaining units for public safety supervisors called the “Police Supervisory” unit and the “Fire and Emergency Medical Services Supervisory” unit, which would cover Sergeants and Lieutenants for the Police Department and Lieutenants and Captains for the Fire Department, respectively. Staff recommends enacting separate bargaining units for public safety supervisors to help alleviate potential conflicts of interest arising from including supervisors in the same bargaining unit as rank-and-file public safety employees, which is what the ordinance currently proposes to do as a result of Council’s March 17 action allowing public safety supervisors to collectively bargain. Consequently, staff recommends breaking public safety employees into the following four bargaining units:

(a) Police: The police employees' bargaining unit shall consist of all sworn uniformed employees of the Police Department, except those excluded by definition in Sec. 2-5-68;

(b) Police Supervisory: The police supervisory bargaining unit shall consist of all sworn uniformed and non-uniformed employees of the Police Department at the rank of sergeant and lieutenant.

(c) Fire and Emergency Medical Services: The fire and emergency medical services employees' bargaining unit shall consist of the uniformed fire employees, including fire marshals, except those excluded by

definition in Sec. 2-5-68;

- (d) Fire and Emergency Medical Services Supervisory: The fire and emergency medical services employees' supervisory bargaining unit shall consist of all sworn, uniformed employees of the fire and emergency medical services department at the rank of lieutenant and captain.

If such an amendment were adopted by Council, the approximate number of employees in each bargaining unit would be as follows:

Unit	Employees (estimated)
Police Unit	244
Police Supervisory Unit	62
Fire and Emergency Medical Services Unit	206
Fire and Emergency Medical Services Supervisory Unit	57

The suggested amendment reflects changes that the employee organizations involved with organizing the Fire and Police Departments had previously recommended so staff anticipates concurrence with the amendments.

- 2. *Change the proposed administrative and clerical bargaining unit to administrative and technical bargaining unit.*

Another amendment to the introduced ordinance staff recommends is to change the “Administrative and Clerical” unit to the “Administrative and Technical” unit for general scale employees. Under this scenario, professional employees would remain in their own bargaining unit called the “Professional” unit. So, if this amendment were adopted, the general scale employees would be grouped into the following bargaining units:

- (e) Labor & Trades: Those eligible classes of employees associated with maintenance and skilled crafts, i.e., job classes of workers performing duties that result directly in the comfort and convenience of the general public, or contribute to the maintenance of capital assets, land and infrastructure of the city, except those excluded by definition in Sec. 2-5-68.
- (f) Professional: Those non-supervisory and non-managerial employees within the definition of "professional employee" as set forth in Sec. 2-5-68.
- (g) Administrative and Technical: Those non-supervisory and non-managerial employees within the definition of "administrative employee" or who perform office support work and who are not confidential employees excluded from collective bargaining within the definition set forth in Sec. 2-5-68.

Moreover, the approximate number of employees in each unit would be as follows:

<b>Unit</b>	<b>Employees (estimated)</b>
Administrative and Technical Unit	625
Professional Unit	237
Labor and Trades Unit	252

Staff recommends this change, following further evaluation of workforce classifications, because it believes that administrative and technical employees are more similarly situated to each other than those employees who are considered professional. For example, the ordinance requires that professional employees be exempt under the Fair Labor Standards Act to be considered “professional” whereas administrative and technical employees do not have to be exempt under the FLSA. Professional employees are also more easily distinguishable from other employees due to the level of schooling required and the general consensus that such employees work in learned professions such as medicine, law, accounting, and engineering. AFSCME has recently indicated that it agrees with this delineation of General Scale employees.

**C. Employee Organization’s Suggested Amendment that Staff Agrees with in Principle.**

Since the March 17, 2021 Special Legislative Meeting, the employee organizations have proposed an amendment to the introduced ordinance that staff agrees with in principle. The amendment is to Section 2-5-78 (c)(2), which outlines situations where it will not be considered “bad faith” for the City to not respond to the employee organizations’ collective bargaining proposals. As currently written, Section 2-5-78(c)(2) states that it will not be considered bad faith for the City to decline to respond to any proposal impairing, restricting, or delegating the City’s rights enumerated in Section 2-5-70 of the ordinance. But, as noted above, the ordinance as introduced on March 17 now provides that the City’s rights in Section 2-5-70(a) must be exercised in a manner consistent with a collective bargaining agreement. The employee organizations correctly note that there is now an internal inconsistency between Section 2-5-78(c)(2) and Section 2-5-70(a) of the ordinance.

With this in mind, the organizations recommend limiting Section 2-5-78(c)(2) to situations where a proposal impairs, restricts, or delegates an exclusive right of the City. In their opinion, this would include proposals that affect the City’s right to do what is necessary in responding to an emergency, which is outlined in Section 2-5-70(b) of the ordinance. Staff agrees with this change. However, staff would also propose amending Section 2-5-78(c)(2) to include the City’s inalienable right to establish a budget and appropriate funds enumerated in a proposed Section 2-5-70(c) of the ordinance. Thus, staff recommends that Council further amend Section 2-5-78(c)(2) to refer to both Section 2-5-70(b) and (c).

**FISCAL IMPACT:**

1. Cost and Budget Impact

The fiscal impact of a shift to a collective bargaining environment is likely to be material both in the short and long term, as personnel costs comprise some two-thirds of the overall City operating expenses. It is expected that collective bargaining agreements will result in City employee pay and benefits likely being higher than they otherwise would have been absent collective bargaining.

Under the Virginia law that authorizes collective bargaining, an approved collective bargaining agreement is subject to appropriation by the local government governing body. This means that even after a jurisdiction’s

governing body approves a collective bargaining agreement and indicates its good faith intention to fund it, legally that local governing body can later decide (such as in the case of low revenue growth, or a recession, or, using a recent example, a pandemic) to defund all or a portion of the fiscal elements of collective bargaining agreements. It also retains the authority to set and amend the amount that the City General Fund transfers to fund the ACPS operating budget. However, after making a good faith pledge, there will be significant employee and union pressure to maintain it, and it will be politically very difficult for a governing body to reverse that pledge, even in the case of an economic emergency. For example, the unions (using their parent union's national staff) may present their own advocacy analyses of the fiscal situation, arguing that the situation is not as dire or that the City has other options. In the end, while Council retains the legal authority to not fund a collective bargaining agreement, there will be significant pressure on a Council to continue to fund collective bargaining agreements once they are approved even if the City is fiscally under stress.

## 2. Impact on City's Bond Ratings

Bond rating agencies determine the credit rating of jurisdictions using a multitude of factors. A constant in the ratings process is how does a major policy or practice impact costs and does that policy or practice limit a jurisdiction's financial flexibility. The City's financial advisor Davenport & Company LLC was asked about the impact on ratings of collective bargaining and Davenport reported back after consulting with current and former bond rating agency analysts that "collective bargaining is not a credit positive", that it would be considered a "constraining factor" in the determination of a jurisdiction's bond rating, and would be "definitely more limiting on the expenditure side and creates pressures that were not there before". That said, the mere presence of collective bargaining would be highly unlikely to result in a downgrade of a jurisdiction's bond rating, as it is just one of many factors that are utilized to determine bond ratings. There are localities and states with collective bargaining that have AAA ratings.

## 3. Costs of Administration

In addition to the costs described above, there are costs related to the negotiations and the ongoing administration of collective bargaining agreements. These include at least in the first year an added Chief Labor Relations Officer in the City Manager's Office, several positions needed in the Human Resources Department, an additional Assistant City Attorney, funding for the outside neutral Labor Relations Administrator, as well as periodic funding for outside legal and technical assistance. The cost of this is now estimated at approximately \$1,000,000 per year because collective bargaining has been expanded by Council to cover nearly all terms and conditions of employment. In addition, the negotiation and administration of a collective bargaining agreement will draw upon staff resources in many departments (i.e., Office of Management and Budget, Human Resources Department, as well as each department impacted by the issues being bargained or covered in a collective bargaining agreement, etc.). In addition, there will be significant time that union officers and shop stewards will spend (while being paid by the City) on union business such as representing employees.

### **ATTACHMENTS:**

Attachment 1: Ordinance as Introduced by Council on March 17, 2021.

Attachment 2: Introduced Ordinance with proposed legal and clerical changes.

### **STAFF:**

Joanna C. Anderson, City Attorney

Cynthia Hudson, Sands Anderson (outside counsel)

Meghan Roberts, Assistant City Attorney

Steven DiBeneditto, Assistant City Attorney

