

MEMORANDUM

The purpose of this memorandum is to summarize the reasons that an audit of the now-defunct Baltimore County Executive Benefit Policy is required to determine if an admitted irregularity in the administration of the policy resulted in 1) the accrual of vacation leave by employees not entitled to such accrual under the policy, and 2) the payment for unused vacation leave upon the termination of employment that had been accrued in violation of the policy – in other words, a misappropriation of County funds.

- On July 21, 2017, County Administrative Officer Fred Homan, in an apparent response to public criticism, amended the Executive Benefit Policy to remove his own position from the scope of the policy. He also added language amending the scope of the policy to exclude *“an appointed department head who accrues vacation leave, notwithstanding the change in policy provided for under the heading ‘Vacation, Personal and Compensatory Leave’ of this Executive Benefit Policy.”* [Emphasis added.]

Here’s the problem with that second change: There wasn’t supposed to be an appointed department head who was accruing vacation leave. The “change in policy” to which the amendment referred is the one that took place in 1995 and ended the accrual of vacation leave by department heads as of the end of 1994.

The change made to the policy by Mr. Homan on July 21st was a tacit admission that one or more department heads were accruing vacation leave at the time despite the fact the policy expressly prohibited it, and had prohibited it for the past 22 years. Why else would he have added that language? It does not mean that he was responsible for the violation of the policy, but it does indicate that he was aware of it.

- The tacit admission by Mr. Homan that one or more current employees covered by the policy were accruing vacation leave in violation of the policy raises the question whether one or more *former* employees also were allowed to do so and, upon leaving County service, therefore were paid for unused leave accrued after December 31, 1994 in violation of the policy.
- Employees are paid for unused vacation leave at their rate of pay upon termination from employment, not at their rate of pay at the time the leave was earned. Consequently, payment for unused vacation leave to a veteran, high-ranking County employee can range into the tens of thousands of dollars. If multiple employees were paid for unused vacation leave in violation of the policy, the amount at issue could be in the hundreds of thousands of dollars.
- If an audit determines that one or more former department heads or other employees covered by the policy were paid for vacation leave accrued after December 31, 1994 in violation of County policy, a criminal investigation will be necessary. It generally is a crime for a County

official to knowingly pay County money to someone who is not entitled to it, and it would be up to the appropriate law enforcement agency to decide whether criminal charges should be filed against an official who approved a payment for unused vacation leave in violation of the Executive Benefit Policy.

RELEVANT HISTORY

- Dating from at least 1987, employees covered by the Executive Benefit Policy who voluntarily left County service were paid for the unused vacation leave that they had accrued while they were covered by the policy up to a maximum of 80 days. Employees who left involuntarily were paid “severance pay” in an amount equal to their unused vacation leave, or equal to 10 days of pay for each year of County service up to 80 days, whichever was greater.
- *In 1995, the policy was changed to eliminate the future accrual of vacation leave by employees covered by the policy.* Employees who were in covered positions on July 13, 1995, the effective date of the policy change, had their unused vacation leave balances “frozen” as of December 31, 1994.

Any vacation days that those took after the effective date of the policy were not deducted from these frozen balances. The employees, however, were paid for their frozen vacation leave balances when they voluntarily left County service.

- The 1995 change also changed the language of the “Severance Pay” provision to read as follows:

“Upon request, payment will be provided to eligible appointed employees who involuntarily resign, retire or are terminated from service due to reorganization or other circumstances not related to performance. Upon such involuntary resignation, involuntary retirement or termination, appointed employees are eligible, at their option, for severance pay equal to 80 days pay.”

The 80 days of severance pay for an involuntarily terminated employee was equal to the maximum number of days of unused vacation leave for which a voluntarily terminated employee could be paid. Consequently, voluntarily terminated employees were paid for the exact amount of unused vacation leave that they had accrued up to a maximum of 80 days; involuntarily terminated employees were given 80 days pay in the form of “severance pay” without regard to their unused vacation leave balances.

- In 2002, the limitation that only employees who were involuntarily terminated from County service were eligible for severance pay was removed from the “Severance Pay” provision and the provision was amended to read as follows:

“Upon request, payment will be provided to eligible appointed employees covered by this benefit policy when they leave county service. Appointed employees are eligible for severance

pay equal to eight (80) days pay or the balance of accumulated vacation leave, whichever is greater.” [As described above, employees covered by the policy were entitled to cash out unused vacation leave accrued before January 1, 1995 when they left County service.]

Because of the 2002 change, all employees covered by the policy became eligible for severance pay, regardless of the reasons for their termination from County service. No contemporaneous written explanation for the change appears to have survived, but in an email to me on March 25, 2017, County Council Chairman Tom Quirk offered the following explanation:

“Thank you for your email to myself and the council. I wanted to research this issue and consult with our legal advisors more before I responded.

Severance pay is an executive prerogative. This is part of separation of powers. I know that the executive department policy is to permit severance pay for all department heads. The reason for this is that the department heads do not earn annual leave or vacation pay, as does every classified employee. Additionally, the department head is subject to removal at any time, whereas the classified employee has the protection of the merit system law. The County Council has a similar severance pay policy for its department heads and for all of the members' legislative aides, all of whom, like the executive department heads, do not earn annual leave or vacation pay.” [Emphasis added.]

In other words (as I understand his explanation), classified (merit) employees earn vacation leave, and at the end of their employment often have unused vacation leave that they can turn into a lump sum payment of cash. Department heads and other employees covered by the Executive Benefit Policy do not accrue vacation leave, and therefore would leave with no cash payout when they left County service, if not for severance pay. I have no reason to believe that Mr. Quirk was aware that at least one appointed department head *was* in fact “earning” vacation leave when he wrote his email.

CONCLUSION

- The rescission of the Executive Benefit Policy by County Executive Kevin Kamenetz on or about July 26, 2017 does not resolve the need for an audit. Pay and personnel records of employees covered by the policy going back to 1995 must be examined. The following questions must be answered, and can only be answered satisfactorily by an audit:

1. How many “exceptions” were made to the prohibition against department heads and other employees covered by the Executive Benefit Policy accruing vacation leave since the prohibition was adopted in 1995? Who authorized the exceptions, and why?
2. Were any former department heads or other employees covered by the policy paid for vacation leave accrued after December 31, 1994? If so, did they also receive severance pay?

3. How many current department heads and other employees covered by the policy were being allowed to accrue vacation leave in violation of the policy? Who authorized them to do so, and why?

- It almost goes without saying that a tacit admission of such a blatant irregularity in the administration of a County policy that involves contingent liabilities in the form of unused vacation leave, and the expenditure of County funds to pay for such leave, demands a compliance audit. For purposes of determining when a compliance audit is necessary, you don't assume that the first termite that you find is the only one in your house. This is especially true where a loss of County funds could have been caused by criminal misconduct.

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