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September 11, 2008

Alexander L. Cummings
Clerk of the Court
Court of Appeals of Maryland
Courts of Appeals Building
361 Rowe Blvd.
Annapolis, MD 21401

RE: IAFF 1715 et al. v. Mayor and City Council of Cumberland, et al.

Dear Mr. Cummings:

With this cover letter I am filing a petition for a writ of certiorari. This case involves the upcoming November 4, 2008 election. Therefore, Petitioners ask that it be brought to the Court's attention at the earliest possible time.

Very truly yours,
KAHN, SMITH & COLLINS, P.A.

By: 

Francis J. Collins

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2009 a copy of the foregoing was mailed, faxed and emailed to:

David Moore, Esq.
Attorney General Office
200 St. Paul Street
Baltimore, MD 21202
410-576-7906
410-576-6955 (FAX)
dmoore@oag.state.md.
Attorney for the State Board of Elections

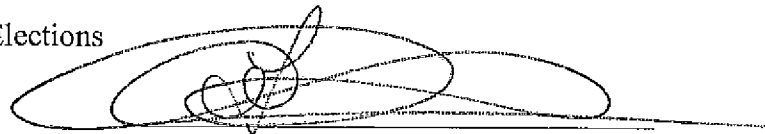
Page 2

September 10, 2008

IAFF 1715 et al. v. Mayor and City Council of Cumberland, et al.

Michael Cohen, Esq.
City of Cumberland
213 Washington Street
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301-724-5205 (FAX)
michaelcohen@atlanticbbn.net
Attorney for the City of Cumberland

Armand Pannone, II, Esq.
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Cumberland, MD 21502
301-759-2930
301-777-5877 (FAX)
ampjr@pennswoods.net
Attorney for Allegany County Board of Elections

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above the name Francis J. Collins, Esq.

Francis J. Collins, Esq.

**In The
Court of Appeals
of
Maryland**

Int'l Assoc. of Fire Fighters, Local 1715,
Cumberland Firefighters
c/o Chuck Koelker, Pres.
816 Hilltop Drive
Cumberland MD 21502

Chuck Koelker
816 Hilltop Drive
Cumberland MD 21502

Steve Grogg
P.O. Box 432
Ridgeley, WV 26753

Jeffrey G. DeHaven
65 LaVale Blvd.
Cumberland, MD 21502

Petitioners

vs.

Case No.:

THE MAYOR AND CITY COUNCIL OF
CUMBERLAND (MARYLAND)
PO Box 1702
Cumberland, Maryland 21501

Allegany County Board of Elections
County Office Building, Suite 405,
701 Kelly Road,
Cumberland, MD 21502 - 3401

Maryland State Board of Elections
c/o Linda H. Lamone, Administrator of Elections
P. O. Box 6486
151 West St., Suite 200
Annapolis, MD 21401 - 0486

Respondents

-o0o-

PETITION FOR WRIT OF CERTIORARI

Petitioners request that the Court of Appeals grant an emergency writ of certiorari in order to correct the decision of the Circuit Court of Allegany County and have a Charter Amendment placed on the Ballot for the November 4, 2008 election and, as reasons, state:

1. On September 10, 2008 is a final judgment since the Circuit Court for Allegany County dismissed Plaintiffs' case and denied them all relief. The Court's decision adjudicates all claims in the action in their entirety. A copy of the Court's decision is attached hereto as Exhibit 8. (Petitioners have retained the original Exhibit numbers from the Court below and added the additional exhibits needed in this Court). The Docket Number is C-08-30649. The case has not been decided by the Court of Special Appeals. However, a notice of appeal was sent to the Circuit Court simultaneously with the filing of this petition for certiorari.

2. The instant case is a suit for a writ of mandamus, emergency injunction, declaratory judgment and other appropriate equitable relief. It relates to a charter amendment that Petitioners seek to have placed on the November 4, 2008 ballot. Therefore, Petitioners seek immediate intervention by the Court of Appeals.

3. If there is any substantial delay in granting Petitioners relief they will suffer irreparable harm. Since this case involves an issue involving elections, and the date for the next general election is November 4, 2008, it is imperative that the Court resolve this case immediately.

4. Petitioners have given actual notice of this petition to all relevant parties and have sent copies of the instant petition to all of the parties below by E-mail, fax and regular U.S. mail.

PARTIES

5. Chuck Koelker, Steven Grogg and Jeffrey DeHaven are employees of the Cumberland Fire Department. The International Association of Fire Fighters, Local 1715 (IAFF 1715) is the collective bargaining representative of the fire fighters and other employees of the Fire Department in the City of Cumberland. Koelker, Grogg and DeHaven are also officers of IAFF 1715. They bring this suit in their individual capacity and as representatives of IAFF 1715.

6. The Mayor and City Council of Cumberland (M&CC) is a municipality under Maryland law. The M&CC constitute the legislative body of that municipality.

7. The Board of Elections of Allegany County has been selected by the M&CC to assist it and to run the elections that take place under the City Charter. Catherine Davis is the Administrator for the Allegany County Board of Elections.

8. The Maryland State Board of Elections oversees the Allegany County Board of Elections and determines the final format of the ballot that is prepared for the November 4, 2008 elections.

STATE LAW AND AMENDMENTS TO MUNICIPAL CHARTERS

9. Maryland State law requires municipal charters to allow for amendment by means of a referendum. A petition for a referendum requires 20% of registered voters to sign a petition to have the Charter Amendment placed on the ballot. Article XI-E, § 4 of the Maryland Constitution states that municipal charters may be amended as follows:

The adoption of a new charter, the amendment of any charter or local laws, or the repeal of any part of a charter or local laws shall be proposed either by a resolution of the legislative body of any such municipal corporation or by a petition containing the signatures of at least five per cent of the registered voters of a municipal corporation and filed with the legislative body of said municipal corporation. The General Assembly shall amplify the provisions of this section by general law in any manner not inconsistent with this Article.

The Maryland General Assembly amplified the Maryland Constitutional provisions with Article 23A, § 14 of the Maryland Code:

(a) Twenty per centum or more of the persons who are qualified to vote in municipal general elections in the particular municipal corporation may initiate a proposed amendment or amendments to the municipal charter, by a petition presented to the legislative body of the municipal corporation, by whatever name known. The petition shall contain the complete and exact wording of the proposed amendment or amendments, and the proposed amendment or amendments shall be prepared in conformity with the several requirements contained in subsections (b) and (c) of § 13 of this subtitle. Each person signing it shall indicate thereon both his name and residence address. Upon receiving the petition, the legislative body is directed to verify that any person who signed it is qualified to vote in municipal general elections, and shall consider the petition as of no effect if it is signed by fewer than twenty

per centum of the persons who are qualified to vote in municipal general elections. If the petition complies with the requirements of this section, the legislative body shall by resolution, passed as in its normal legislative procedure, and not later than sixty days after the petition shall have been presented to it, specify the day and the hours for the election at which the question shall be submitted to the voters of the municipal corporation. This may be at either the next regular municipal general election or at a special election, in the discretion of the legislative body. In the event a special election is designated, it shall be within a period of not less than forty days nor more than sixty days after the final passage of the resolution. In the resolution, the exact wording shall be specified which is to be placed on the ballots or voting machines when the question is submitted to the voters of the municipal corporation.

(b) Provided, however, that if the legislative body shall approve of the amendment or amendments provided for in the petition presented to it under subsection (a) above, it shall have the right by resolution to adopt the amendment or amendments thereby proposed and to proceed thereafter in the same manner as if the amendment or amendments had been initiated by such legislative body and in compliance with the provisions of § 13 of this article. (Emphasis added).

10. A case currently pending before the Court of Appeals, *Jane Doe v. Montgomery County Board of Elections*, involves the issue of how to count the number of eligible voters -- whether to include "inactive voters." The instant case involves a similar issue. The Order by the Court of Appeals in that case does not definitively resolve the issue raised in this case and the Circuit Court's decision in this case may be inconsistent with the Court of Appeals' decision.

11. The Election Law Article of the Maryland Code does not directly apply to referenda amending a municipal charter. Md. Code, Election Law Article, § 1-101(v)(3).

12. The M&CC and the Cumberland Board choose to use the Allegany County Board of Elections to run their elections. However, because the Maryland Election Law is not binding, the M&CC and Cumberland Board are not obligated to comply with the time constraints set forth in the Code of Maryland Regulations or in the Elections Law Article. They are not relieved of their duty to comply with the requirements Article XI-E, § 4 of the State Constitution or Article 23A, § 14 of the Maryland Code. They must timely count the signatures on a petition for a referendum. If the petition is supported by sufficient signatures and is otherwise in proper form, they must place the Charter Amendment on the ballot at the next general election or conduct a special election within 60 days.

13. In the spring of 2008 Petitioners obtained a list of registered voters from the Allegany County Board of Elections. That list, provided to Petitioners on a "CD," stated that there were 11,906 registered voters. Therefore, the petition for referendum needed to have at least 2,381 signatures in support of it (20% of 11,906).

THE PETITION

14. During the spring and summer of 2008 Petitioners collected thousands of signatures in support of a petition to amend the City Charter.

15. That Petition (hereafter referred to as the Charter Amendment) states:

We, the undersigned voters of the City of Cumberland, Maryland, hereby petition to have this amendment of the City Charter submitted to a vote of the registered voters of the City of Cumberland for approval or rejection at the next general election or at a special election called by the City Council.

Proposal

COLLECTIVE BARGAINING AND BINDING ARBITRATION FOR
NON-MANAGEMENT EMPLOYEES OF THE FIRE DEPARTMENT.
[NEW ARTICLE 37A TO THE CHARTER OF THE CITY OF
CUMBERLAND]

NON-MANAGEMENT EMPLOYEES OF THE FIRE DEPARTMENT OF THE CITY OF CUMBERLAND SHALL BE ENTITLED TO DESIGNATE A UNION TO ACT AS THEIR EXCLUSIVE REPRESENTATIVE AND TO ENGAGE IN COLLECTIVE BARGAINING WITH THE CITY REGARDING WAGES, BENEFITS, AND WORKING CONDITIONS. THE CITY COUNCIL SHALL PROVIDE BY ORDINANCE FOR BINDING ARBITRATION WITH THE EXCLUSIVE REPRESENTATIVE IN ORDER TO RESOLVE LABOR DISPUTES. THE ORDINANCE SHALL PROVIDE FOR THE APPOINTMENT OF A NEUTRAL ARBITRATOR, THE FACTORS THAT SHOULD BE CONSIDERED BY THE ARBITRATOR, AND THE PROCEDURES FOR IMPLEMENTING THE ARBITRATOR'S DECISION AS PART OF THE CITY'S BUDGETARY PROCESS. ANY ORDINANCE THAT IS ENACTED SHALL PROHIBIT STRIKES OR WORK STOPPAGES BY THE REPRESENTED EMPLOYEES.

NOTICE TO SIGNERS: The information you provide on this petition may be used to change your voter registration address. Please print all information other than your signature. P.O. Boxes are not generally valid. By signing this petition, you agree that the above-mentioned charter amendment proposal should be placed on the ballot as a question and that, to the best of your knowledge, you are registered to vote in the State of Maryland and the City of Cumberland and are eligible to have your signature counted for petition purposes.

16. A sample of the petition is attached as Exh. 1.
17. On or about July 25, 2008 Petitioners filed over 3,550 signatures in favor of the above petition. The M&CC counted those signatures and, on or about August 15, 2008, announced that only 2,172 signatures were valid (Exh. 4, 5). On August 18, 2008 Petitioners filed an additional 473 signatures. Assuming the M&CC's counting was correct

with regard to the first set of signatures Petitioners filed 2,645 signatures in favor of the petition.

18. The M&CC contend that there are 12,911 registered voters and that a petition for referendum must be supported by the signatures of 2,582 registered voters. This position is contradicted by the CD given to Petitioners in the spring of 2008. The City contends that the CD only contains a list of "active voters" and that the full list is larger because it contains "inactive voters." Petitioners contend that they were justified in relying on the original list from the Allegany County Board of Elections and that Maryland law does not recognize "inactive voters" for purposes of calculating the number of signatures needed for a referendum petition. Regardless, Petitioners filed signatures of more than 20% of both lists combined.

19. The M&CC have publicly stated that they are opposed to the petition (Exh 3, 5). They also refused to count the additional 473 signatures and refused to pass a resolution to have the Charter Amendment placed on the November 4 ballot or to call a special election on the Charter Amendment (Exh. 3, 5).

20. The M&CC have taken the position that they do not have to count all of the signatures because approximately 473 of the signatures were filed with the City Clerk on August 18, 2008 and the remainder of the signatures were filed a few weeks earlier on July 25, 2008. The M&CC contend that the filing of the signatures on two separate days results in them being treated as two separate petitions and, therefore, neither petition has sufficient

signatures (Exh. 5). The Circuit Court for Allegany County agreed with this position and dismissed Petitioner's case.

21. Petitioners contend that this is plainly illegal and that the Charter Amendment must be presented to the voters. Petitioners contend that the M&CC have no discretion in this matter and that they must be compelled to comply with State law.

22. In the Circuit Court, Petitioners sought a declaratory judgment that, in order to support the referendum petition, Petitioners were entitled to rely upon the list of registered voters supplied by the Allegany County Board of Elections and that they needed 2,381 signatures to have the Charter Amendment placed on the ballot. The Circuit Court agreed with Petitioner's contention regarding the number of signatures needed. However, the Circuit Court held that Petitioners could not supplement the original filing and that each set of petitions should be treated separately. In short, the Circuit Court held that a petitioner must start the signature gathering process all over again if the first set of signatures is determined to be less than 20%. The Circuit Court denied Petitioners the opportunity to supplement their petition with additional signatures.

23. Petitioners sought a declaratory judgment that a petition for referendum may be filed and supported by signatures delivered to the Cumberland City Clerk on more than one day.

24. Petitioners now seek a declaratory judgment that the M&CC must immediately count the second set of signatures (delivered on August 18, 2008) and that when counting

both sets of signatures, if it appears that a total of more than 2,381 voters signed the petition, pass a resolution to have the Charter Amendment placed on the November 4, 2008 ballot. Alternatively, if the M&CC chooses to conduct a special election, or if the Charter Amendment otherwise cannot be placed on the November 4, ballot, that the M&CC must schedule a special election within 60 days as required by Md. Code, Art. 23A, § 14.

25. The affidavit of Chuck Koelker, Exh. 7, was attached to the complaint to verify the allegations of this complaint. A hearing was conducted by the Circuit Court for Allegany County. At that hearing nearly all of the evidence was presented by stipulation. Only Catherine Davis, the Administrator for the Allegany County Board of Elections was called as a live witness. She testified regarding the differences between “active” voters and “inactive voters.” Essentially, she explained that inactive voters are not on the active list but that, if they sign a petition or fill out a form at the time of the election, they will be allowed to vote and be moved to the list of active voters. Her testimony will not likely be determinative of this case. Rather, the Court of Appeals can review this case based on the record below without requiring or needing a transcript.

PRAYERS FOR RELIEF

WHEREFORE, Petitioners pray that this Court issue a writ of certiorari and DECLARE, ADJUDGE AND DECREE that:

A. The Circuit Court's Order dated September 10, 2008 is reversed and that the M&CC is ORDERED to count the signatures submitted on August 18, 2008.

B. Petitioners may support a petition for referendum with signatures submitted on more than one date.

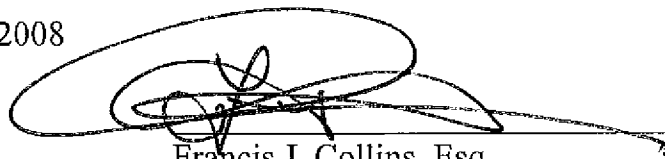
C. Petitioners must support the referendum petition with at least 2,381 signatures (20% of Cumberland voters identified by the Allegany County Board of Elections).

D. If, after the City Clerk finishes counting the signatures, it appears that the petition is supported by the signatures of more than 2,381 registered Cumberland voters, the M&CC is required to pass a resolution that the Petition for fire fighter binding arbitration be placed on the November 4, 2008 ballot or pass a resolution that the City conduct a special election within 60 days.

E. If the M&CC decide to place the Charter Amendment on the ballot for the November 4, 2008 election, the Cumberland Board of Election Supervisors, Catherine Davis and the Boards of Elections for Allegany County and the State of Maryland are required to place the Charter Amendment related to fire fighter binding arbitration on the November 4, 2008 ballot.

F. The Petitioners further pray the Court to grant or award such other and further relief as justice and equity may require, including attorney's fees and costs.

DATED: September 11th, 2008



Francis J. Collins, Esq.
KAHN, SMITH & COLLINS, P.A.
201 North Charles Street - 10th Floor
Baltimore, Maryland 21201
(410) 244 1010

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on Sept 11, 2008 a copy of the foregoing was mailed and faxed and e-mailed to:

David Moore, Esq.
Office of the Attorney General
200 St. Paul Street
Baltimore, MD 21202
410-576-7906
410-576-6955 (FAX)
dmoore@oag.state.md.us
Attorney for the State Board of Elections

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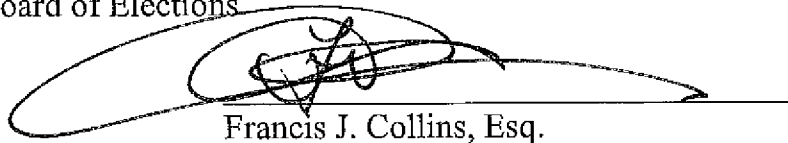

Francis J. Collins, Esq.

Exhibit list

- Exh. 1: Sample Charter Amendment Petition
- Exh. 2: Correspondence of 7/23/08 to City Attorney, Michael Cohen
- Exh. 3: Newspaper articles published in Cumberland regarding petition
- Exh. 4: Press Release from City of Cumberland regarding signatures
- Exh. 5: Emails between Petitioners' attorney, Francis Collins and Michael Cohen
- Exh. 6: Copy of CD given to IAFF 1715 by the Allegany County Bd. of Elections
- Exh. 7: Affidavit verifying complaint by Chuck Koelker
- Exh. 8: Circuit Court Order dated Sept. 10, 2008
- Exh. 9: Copy of Plaintiff's Complaint
- Exh. 10: Motion for Summary Judgment by Plaintiffs
- Exh. 11: Motion for Summary Judgment by Defendant, City of Cumberland
- Exh. 12: Motion to Dismiss by State Board of Elections
- Exh. 13: Notice of Appeal in Court of Special Appeals

City of Cumberland (Maryland) Charter Amendment Petition

We, the undersigned voters of the City of Cumberland, Maryland, hereby petition to have this amendment of the City Charter submitted to a vote of the registered voters of the City of Cumberland for approval or rejection at the next general election or at a special election called by the City Council.

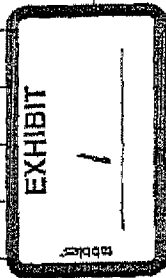
Proposal

COLLECTIVE BARGAINING AND BINDING ARBITRATION FOR NON-MANAGEMENT EMPLOYEES OF THE FIRE DEPARTMENT. (NEW ARTICLE 37A TO THE CHARTER OF THE CITY OF CUMBERLAND)

NON-MANAGEMENT EMPLOYEES OF THE FIRE DEPARTMENT OF THE CITY OF CUMBERLAND SHALL BE ENTITLED TO DESIGNATE A UNION TO ACT AS THEIR EXCLUSIVE REPRESENTATIVE AND TO ENGAGE IN COLLECTIVE BARGAINING WITH THE CITY REGARDING WAGES, BENEFITS, AND WORKING CONDITIONS. THE CITY COUNCIL SHALL PROVIDE BY ORDINANCE FOR BINDING ARBITRATION WITH THE EXCLUSIVE REPRESENTATIVE IN ORDER TO RESOLVE LABOR DISPUTES. THE ORDINANCE SHALL PROVIDE FOR THE APPOINTMENT OF A NEUTRAL ARBITRATOR, THE FACTORS THAT SHOULD BE CONSIDERED BY THE ARBITRATOR, AND THE PROCEDURES FOR IMPLEMENTING THE ARBITRATOR'S DECISION AS PART OF THE CITY'S BUDGETARY PROCESS. ANY ORDINANCE THAT IS ENACTED SHALL PROHIBIT STRIKES OR WORK STOPPAGES BY THE REPRESENTED EMPLOYEES.

NOTICE TO SIGNERS: The information you provide on this petition may be used to change your voter registration address. Please print all information other than your signature. P.O. Boxes are not generally valid. By signing this petition, you agree that the above-mentioned charter amendment proposal should be placed on the ballot as a questions and that, to the best of your knowledge, you are registered to vote in the State of Maryland and the City of Cumberland and are eligible to have your signature counted for petition purposes.

	DATE	PRINT FULL NAME	VOTER REGISTRATION ADDRESS	CITY/ZIP	DATE OF BIRTH	SIGNATURE
1						
2						
3						
4						
5						



FOR ELECTION BOARD USE ONLY

Total Number of Signatures:	
Number of Invalidated Signatures:	
Number of Valid Signatures:	
Endorsed By:	

Circulator's Printed Name

Residence Address

_____ State _____ Zip

Telephone Number

CIRCULATOR'S AFFIDAVIT

Under the penalties of perjury, I swear (or affirm): (a) I was at least 18 years old when each signature was obtained; (b) the information given to the left identifying me is true and correct; (c) I personally observed each signer as he or she signed this page; and, (d) to the best of my knowledge and belief, (i) all signatures on this page are genuine, and (ii) all signers are registered voters of the State of Maryland and the City of Cumberland, Maryland.

Circulator's Signature

Date

KSC KAHN
SMITH &
COLLINS, P.A.

Attorneys At Law

201 North Charles Street • 10th Floor
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July 23, 2008

Joel A. Smith
Andrew H. Kahn
Francis J. Collins
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Keith J. Zimmerman
Lois Penner McEride
Linda D. McKeegan
Darragh (Jack) Inman

Sender's email address:
fjcollins@kahnsmith.com

City of Cumberland Attorney
Michael Scott Cohen, Esquire
213 Washington Street
Cumberland, MD 21502

Faxed to: 1-301-724-5205

RE: Referendum Petition

Dear Mr. Cohen,

As you know, the IATF 1715 has been gathering signatures for an amendment to the Charter of the City of Cumberland. It now appears that sufficient signatures have been gathered for the referendum to be placed on the ballot this November. I hope to have the petitions delivered to the City Council this week. Please verify that the proper person to accept the paperwork is the Clerk for the City of Cumberland, Margie Erich. I have attached a sample of the petition for your review.

I have been informed that the County Board of Elections requires that all issues subject to referendum be submitted to it before August 18, 2008. It is my understanding that the City Council must pass a resolution to place the issue on the ballot. If the City intends on counting the signatures to verify that there are the requisite 20%, please make arrangements to have the signatures verified in a timely fashion and to have the City Council pass the resolution in time to comply with the County Election Board's requirements.


You previously raised issues about legality of the contents of the petition. If you intend on pursuing that, I ask that the two processes be handled separately. That is, the verification of signatures and resolution should be done simultaneously with any protest regarding the contents of the petition. As I previously wrote to you, I still think that the parties ought to wait until after the election to challenge the merits of the referendum. Obviously, if the issue does not pass, there will be no need for a legal battle.



Page 2
July 23, 2008
Colien, Michael

If you need anything further from me, please call at your earliest convenience. My cell phone number is 443-604-8175. If you do not reach me at the office you should feel free to call me any time about this issue.

Very truly yours,
KAIN, SMITH & COLLINS, P.A.

A handwritten signature in black ink, appearing to be "Francis J. Collins", written over a large, loopy flourish that extends across the width of the signature area.

By: 
Francis J. Collins

FJC/mtf
Enclosures

cc: Catherine O. Davis, Election Director for Allegany County
701 Kelly Road, Suite 213
Cumberland MD 21502-3401

City of Cumberland (Maryland) Charter Amendment Petition

We, the undersigned voters of the City of Cumberland, Maryland, hereby petition to have this amendment of the City Charter submitted to a vote of the registered voters of the City of Cumberland for approval or rejection at the next general election or at a special election called by the City Council.

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Circulator's Printed Name

Residence Address

City State Zip

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CIRCULATOR'S AFFIDAVIT

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Circulator's Signature

Date



City firefighters seek binding arbitration, possible referendum

Maria Smith
Cumberland Times-News

*IAFF 1715
Referendum*

— CUMBERLAND - The city's firefighters would like binding arbitration to become part of their contract negotiations and they're seeking the public's help, possibly in the upcoming general election.

The union, however, may not have a valid legal standing to place such a referendum on the ballot.

Members of the International Association of Fire Fighters Local 1715 are gathering the required signatures for the petition while the city is preparing to seek a declaratory judgment in Allegany County Circuit Court.

City Administrator Jeff Repp said the matter is expected to be filed in court in the next week or so. The move asks a judge to determine if Local 1715's petition, before it becomes a referendum, is valid according to state law.

Repp said the union asked the city to examine the petition about a month ago. The city, he said, responded that it did not believe the petition was legal or valid. He said the city has not heard back from Local 1715; therefore, a declaratory judgment is being sought.

Chuck Koelker, Local 1715 president, said the idea essentially would force both sides to come to an agreement before reaching arbitration.

Before the union and city enter into binding arbitration, though, negotiations must reach a point where they're "considered at an impasse." Both sides then need to determine that an agreement cannot be reached, and that arbitration will be sought.

The issue came about following a nearly yearlong attempt to finalize a contract with the union and city recently. The previous contract expired in July 2007 and negotiations began in the spring of last year.

A nonbinding, fact-finding mission was conducted Nov. 15 after those negotiations deadlocked and mediation failed.

Because the fact-finding process was not binding, both sides continued to work toward an agreement.

It wasn't until April 15 that city officials approved an agreement for fiscal 2008-2010 retroactive to July 1, 2007.

With binding arbitration, the matter could have been settled last July or August, Koelker said.

During binding arbitration, both sides present their final requests or offers and the arbitrator must pick one or the other for each issue.

"It forces you to make a legitimate offer," Koelker said.

City Clerk Sharon Clark said before a referendum can appear on a ballot, a petition with signatures from 20 percent of the city's registered voters must be presented. That petition, if valid, then is given to the clerk for review and verification.

Clark said a referendum can appear on the upcoming election ballot, be voted on during a special election or held for the next election. The general election is set for Nov. 4.

Koelker said the referendum, if approved, would prevent firefighters from striking and instead, would require them to work under provisions of the previous contract.

In the case of binding arbitration, Koelker said city residents wouldn't see a tax increase if the arbitrator rules in favor of the union.

"Nobody in the state of Maryland ever had their taxes raised because a city lost a binding arbitration case," Koelker said.

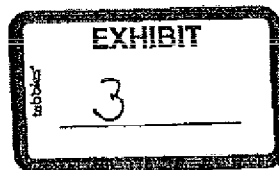
Local 1715 is picking up any costs associated with the possible referendum and has been assisted by F.J. Collins of Kahn Smith & Collins, a Baltimore law firm that represented the union during the recent contract negotiations.

Koelker said the association has begun collecting signatures, primarily through city firefighters, their families and friends.

For more information, call (301) 784-1715. Information is expected to be posted on the Web site, www.iafflocal1715.com.

Contact Maria Smith at msmith@times-news.com.

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City controls fate of firefighters referendum

Michael A. Sawyers
Cumberland Times-News

July 31, 2008 08:27 am

— CUMBERLAND □ By simply following the law, city officials, if they choose, will be able to keep the public from deciding whether Cumberland's firefighters should have access to binding arbitration in contract matters.

At the public meeting of the mayor and council Tuesday, petitions containing about 3,600 signatures were presented by Chuck Koelker, president of Local 1715, International Association of Fire Fighters, in an attempt to have the public vote on the issue in November's general election.

□The board of elections needs the signatures certified by Aug. 18 so the question can be put on the ballot, □ Koelker said. □We believe we have more than the 2,100 or so signatures that are required to force a referendum vote.□

Tuesday, however, City Attorney Michael Scott Cohen said state law allows the city 60 days to qualify the signatures as being valid, moving that determination well past Aug. 18, thus eliminating the issue for the upcoming general election.

The firefighters seek binding arbitration to avoid prolonged periods of work without an approved contract. Mayor Lee Fiedler does not.

□Binding arbitration will take the decision out of Cumberland, □ Fiedler said Wednesday. □The way we do it now has worked for years and it holds the firemen and the city accountable. Residents know who to blame or who to applaud that way. Binding arbitration takes away the ability of the citizens in a community to create their own future.□

Koelker thinks the city will use the full time period allowed for certification of signatures as a way to □drag their feet,□ thus keeping the vote away from the citizens.

□We think the citizens would vote for what we want, but really, that□s the only way we're going to get binding arbitration. The city isn't going to give it to us.□

Koelker said other Maryland fire departments have binding arbitration, but seldom use it. □Knowing it□s out there makes the two sides come together, because nobody ever knows how the arbiter will decide,□ he said.

Koelker said Montgomery County has had binding arbitration since 1993 and used it once. Baltimore County has had it since 2002 and not used it, he said.

Koelker said that if the matter does not make it to the November ballot that the only alternatives remaining for the union will be legal ones.

The existing contract expires in the summer of 2010.

Contact Michael A. Sawyers at msawyers@times-news.com.

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City council ready to fight firefighters' arbitration request

From Staff Reports
Cumberland Times-News

August 01, 2008 09:09 am

— CUMBERLAND □ The city clerk of Cumberland has begun verifying signatures on a petition seeking binding arbitration for the Local 1715, International Association of Fire Fighters.

The firefighters presented the petition with 3,548 signatures in an attempt to have the public vote on the issue in November's general election.

The firefighters seek binding arbitration to avoid prolonged periods of work without an approved contract. The mayor and City Council, however, do not support the practice of binding arbitration.

□ A majority of the City Council has expressed their adamant opposition to this issue, and if the requisite number of signatures is verified by the city clerk, the council plans to vigorously contest this charter amendment whenever it is placed on the ballot for consideration, □ City Administrator Jeff Repp said in a press release.

For the petition to be valid, 2,582 of the signatures submitted must be those of voters who are qualified to vote in city elections. The city has 12,911 registered voters and 20 percent of those voters are needed to initiate an amendment to the city's charter by petition.

Allegany County's board of elections needs the signatures certified by Aug. 18 to place the question on the ballot.

After the petition was presented to city officials at their Tuesday public meeting, City Attorney Michael Scott Cohen said state law allows 60 days to qualify the signatures as being valid.

Mayor Lee Fiedler said on Wednesday that binding arbitration would take the decision on the firefighter contracts out of the community. The current practice of contract negotiation holds both the firefighters and the city accountable, Fiedler said.

The existing firefighter contract expires in two years.

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Petition drive falls short for Cumberland firefighters

Michael A. Sawyers
Cumberland Times-News

August 18, 2008 09:00 am

— CUMBERLAND □ The president of Cumberland's firefighters union said Saturday evening that city officials changed the rules when they claimed Friday that the union had not obtained enough valid voter signatures to force a public referendum about how their contracts are negotiated. The firefighters seek binding arbitration, while the mayor and council oppose that negotiating mechanism. Chuck Koelker, Local 1715, International Association of Fire Fighters, said union members believed that they needed a minimum of 2,160 valid signatures, 20 percent of the city's voters, as verified by county election officials.

□We turned in 3,550 signatures. The city says 2,172 of them are valid. That's close, but it is still more than 2,160,□ Koelker said.

In a press release issued Friday evening, however, City Administrator Jeffrey E. Repp said the firefighters needed 2,582 valid signatures from the 12,911 registered voters in the city. By that count, the union came up 410 signatures short.

Putting pressure on the petition effort was instruction from county election officials that the petition had to be proven valid by Tuesday to qualify for the ballot in November.

Although city officials legally had 60 days to review the signatures, municipal staff pushed forward to meet the deadline, according to Repp.

□The city clerk's office has been working overtime to tabulate the signatures on the petition,□ Repp said in the press release.

Koelker said he thinks that the city may have included the names of residents registered only for Cumberland elections in coming up with the total number of voters. Those names, he believes, would not show up on county rolls provided to firefighters, thus increasing the number of signatures needed to reach the 20 percent level.

Koelker said union members will gather additional signatures until sometime Monday when he will take them to the city leaders for verification, hoping for their cooperation so that he can approach the election board by Tuesday for a decision. He said registered city voters who have not yet signed may call (301) 784-1715 for instructions about where to find a petition.

□We appreciate the city dealing with our original petition in a timely way,□ Koelker said. □They could have drug their feet and killed it.□

Mayor Lee Fiedler said Saturday evening that it is unlikely that any additional signatures turned in Monday will be investigated by city staff.

□They will probably have to start all over again,□ Fiedler said, referring to the firefighters. □It's not a decision I would make. It is something to be dealt with by legal counsel and the city clerk's office.□ Fiedler said as well that the number of voters registered only for city elections is small. □I don't think that would be a large enough number to make up the difference,□ he said.

Contact Michael A. Sawyers at msawyers@times-news.com.

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CITY OF UMBERLAND, MD

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www.ci.cumberland.md.us

Press Release

For Immediate Release

August 15, 2008

MAYOR:
Lee N. Fiedler

COUNCIL:
Floyd S. "Pete" Elliott
Edward C. Hedrick, Jr.
H. "Butch" Hendershot
Mary Beth Pirolozzi

CITY ADMINISTRATOR
Jeffrey E. Repp

CITY SOLICITOR
Michael Scott Cohen

CITY CLERK
Marjorie A. Ehrich

Verification of Signatures on IAFF Petition for Binding Arbitration Yield Insufficient Number to Place Question on November Ballot

The City of Cumberland announced today that the petition seeking binding arbitration for the AFL-CIO, International Association of Firefighters (IAFF) Local # 1715, received in the City Clerk's Office with 3,550 signatures attached, yielded an insufficient number of valid signatures to place on the November ballot.

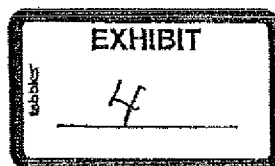
For the petition to be valid, 2,582 of the signatures submitted must have been those of voters who are qualified to vote in City elections. Applicable law provides that in order to initiate an amendment to a municipality's charter by petition, no less than 20% of the voters qualified to vote in the municipality's general elections must sign the petition. At present, there are 12,911 registered voters in the city.

"The City Clerk's Office has been working overtime to tabulate the signatures on the petition to meet an August 18th deadline, which is the last date that the question could be submitted to the State Board of Elections for the November ballot," stated City Administrator Jeffrey E. Repp. "The preliminary count yielded 2,172 valid signatures, 1,366 invalid signatures, and 12 signatures that will be reviewed by legal counsel to determine their eligibility. The vast majority of invalid signatures came from unregistered voters or registered voters who reside outside the city limits. Even with the small number of pending signatures, the 1,366 number of invalid signatures results in the petition being declared invalid since 2,582 signatures are required for the petition to be valid. Upon final review a final total will be released by the Clerk's office."

For additional information, please contact City Administrator Jeff Repp at 301-759-6424.



Member Maryland
Municipal League (MML)



F.J. Collins

From: Michael Scott Cohen [michaelcohen@atlantibbn.net]
Sent: Wednesday, July 30, 2008 11:36 AM
To: F.J. Collins
Cc: Jeff Repp; Kitty Davis
Subject: Re: Petition for Charter Amendment

JournalPM: J

F.J.:

The Mayor and City Council acknowledge they received the Petition on July 25, 2008. As required by Article 23A Section 14, the resolution will be passed no later than 60 days from the date of the receipt of the Petition. The certification of the signatures and the passage of the resolution, if required, will be handled in the ordinary course of the City's business.

Michael

----- Original Message -----

From: F.J. Collins
To: 'Michael Scott Cohen'
Cc: elections@allconet.org
Sent: Tuesday, July 29, 2008 12:20 PM
Subject: Petition for Charter Amendment

Dear Michael:

As you probably already know, on last Friday the petition for a charter amendment was delivered to the City Clerk regarding binding arbitration for firefighters. It is my understanding that it is now incumbent upon the City Council to pass a resolution that places the question on the City Ballot. I spoke to Catherine Davis from the County Elections Board and she would like to be kept informed regarding the progress of this charter amendment so that the deadline of August 18, 2008 is met. Obviously, it would be far cheaper for the City to put this on the November ballot instead of running a special election.

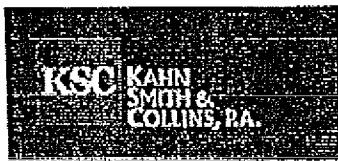
Likewise, please keep me informed of any steps that are, or are not, being taken with regard to this petition. As you know, I am the attorney for the Firefighters and the petitioners and want to make sure that this process goes as smoothly as possible.

--

Very truly yours,

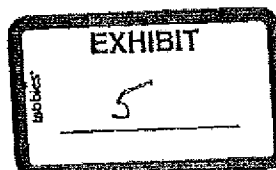
Francis J. Collins, Esq.

reply to: fjcollins@kahnsmith.com



Kahn, Smith & Collins, P.A.

1



201 N. Charles St., 10th Floor
Baltimore, MD 21201
410-244-1010 (w)
410-244-8001 (fax)
888-244-1212 (toll-free)
410-418-4313 (h)
443-604-8175 (cell)

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F.J. Collins

From: Michael Scott Cohen [michaelcohen@atlanticbbn.net]
Sent: Tuesday, August 19, 2008 4:13 PM
To: F.J. Collins
Subject: Re: Firefighter Petition

There is no legal authority in the laws applicable to municipalities that provide for the supplementation of petitions. You generally refer to law which does not apply and does not specifically provide for the supplementation of names to petitions for charter amendments. Do you have anything that specifically applies to municipalities?

----- Original Message -----

From: F.J. Collins
To: 'Michael Scott Cohen'
Sent: Tuesday, August 19, 2008 3:40 PM
Subject: RE: Firefighter Petition

I don't mind disagreeing if you have legal authority upon which you are relying. If, on the other hand, the disagreement is as a result of expediency or because the Mayor and City Council disagree with the merits of our petition, then we need to get past the disagreement without going to court.

F.J. Collins
410-244-1010

Standard request: In an effort to reduce the overwhelming exchange of email, please note that an automatic reply to this message is not requested. Please reply only as needed.

From: Michael Scott Cohen [mailto:michaelcohen@atlanticbbn.net]
Sent: Tuesday, August 19, 2008 3:32 PM
To: F.J. Collins
Subject: Re: Firefighter Petition

Mr. Collins:

The State Elections Code does not apply to municipalities. The provisions relative to elections are found in Article 23A. I will forward your comments to my client, but it appears that you and I simply disagree.

Michael Scott Cohen

----- Original Message -----

From: F.J. Collins
To: 'Michael Scott Cohen'
Cc: 'CHUCK KOELKER'
Sent: Tuesday, August 19, 2008 3:20 PM
Subject: RE: Firefighter Petition

Dear Mr. Cohen:

I strongly disagree with you about having to file all the petition forms on the same day. Indeed, the Maryland elections code specifically contemplates such a procedure. Do you have any legal authority upon which you are relying for the proposition that all of the petition forms must be filed on one day? I could find no such requirement in the State Constitution, the City Charter or the State Elections Code. This is one petition. All of the signatures are on one form and ask for the same thing. We ask that the City verify the signatures immediately.

Otherwise, I will have no alternative but to seek equitable relief from the Court. As I said before, this is only going to delay the inevitable: There will be a vote on this issue. I hope the City will relent and allow the voters to decide rather than usurp the democratic process by placing unnecessary and legally unjustified hurdles in the way. Regardless of how the Mayor and City Council feel about this merits of binding arbitration, they ought to allow the voters to decide. Enough signatures have been collected and the present administration needs to respect the democratic process.

F.J. Collins
410-244-1010

Standard request: In an effort to reduce the overwhelming exchange of email, please note that an automatic reply to this message is not requested. Please reply only as needed.

From: Michael Scott Cohen [mailto:michaelcohen@atlanticbbn.net]
Sent: Monday, August 18, 2008 11:26 AM
To: F.J. Collins
Cc: Jeff Repp; Kitty Davis
Subject: Re: Firefighter Petition

Mr. Collins:

The number 12,911 was procured from a disk provided by the County Board of Elections which was provided shortly after the petition was received. I do not know when you received your list.

The second batch of signatures which was presented earlier today is being deemed to be an entirely new petition. The 472 signatures presented are insufficient as the number of signatures does not amount to 20% of the registered voters. Therefore, verification of the signatures is unnecessary.

The pertinent provisions of Article 23A do not mention providing supplements to petitions. The language speaks in terms of one petition with deadlines starting to run from the date the petition is submitted. I do not think the language can be interpreted to provide that supplements to petitions are permitted at all much less being subject to the same deadlines that applied with respect to the original submissions.

Please direct any further communications regarding this matter to me.

Sincerely,

Michael Scott Cohen

----- Original Message -----
From: F.J. Collins
To: "Michael Scott Cohen"

Cc: 'CHUCK KOELKER'; Catherine Davis
Sent: Monday, August 18, 2008 10:44 AM
Subject: Firefighter Petition

Dear Mr. Cohen:

I've reviewed the Press Release and article in newspaper about the petition for Firefighter arbitration. I am writing in an effort to resolve any outstanding procedural hurdles.

We previously received from the Board of County Elections a list of voters that stated that there are 11,907 voters in the City and a disk was given to us with the names. I am trying to verify these numbers as we speak so if there is any inaccuracy, it is unintentional. The City is now contending that there are 12,911 voters and that we need 2,582 signatures. This is a substantial increase, without any justification or explanation given. For the record, we believe we were entitled to rely on the original list of voters given to us.

In the meantime, the City stated that the petitioners were short by 410. Over the weekend, the petitioners collected an additional 472 signatures and delivered them to the City clerk today. Thus, even assuming the City's total voter list is accepted, we are in excess of the 2,582 the City contends are needed.

We ask that you immediately begin checking the additional 472 signatures to verify them. We are very confident of their accuracy and validity.

As I previously wrote, the City has been contending that it faces a deadline of 8/18/08. I disagree for the reasons I previously cited. In short, the City is not bound by the State Election Code and its decision to utilize the County Board of Elections should not inure to the petitioner's detriment. We are asking that the City take every possible step to immediately verify the signatures and place the issue on the ballot in November.

Please call or write with any new information you receive or if you have any questions.

--

Very truly yours,

Francis J. Collins, Esq.

reply to: fjcollins@kahnsmith.com



Kahn, Smith & Collins, P.A.
201 N. Charles St., 10th Floor
Baltimore, MD 21201
410-244-1010 (w)
410-244-8001 (fax)
888-244-1212 (toll-free)
410-418-4313 (h)

443-604-8175 (cell)

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F.J. Collins

From: Michael Scott Cohen [michaelcohen@atlantlobbn.net]
Sent: Tuesday, August 19, 2008 1:48 PM
To: F.J. Collins
Subject: Re: IAFF Petition

As has been explained to me, a voter from whom the County does not have a verified address.

----- Original Message -----

From: F.J. Collins
To: 'Michael Scott Cohen'
Sent: Tuesday, August 19, 2008 1:42 PM
Subject: RE: IAFF Petition

What is an inactive voter?

F.J. Collins
410-244-1010

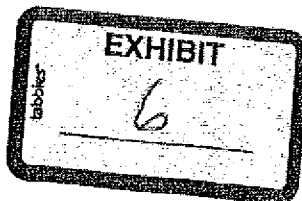
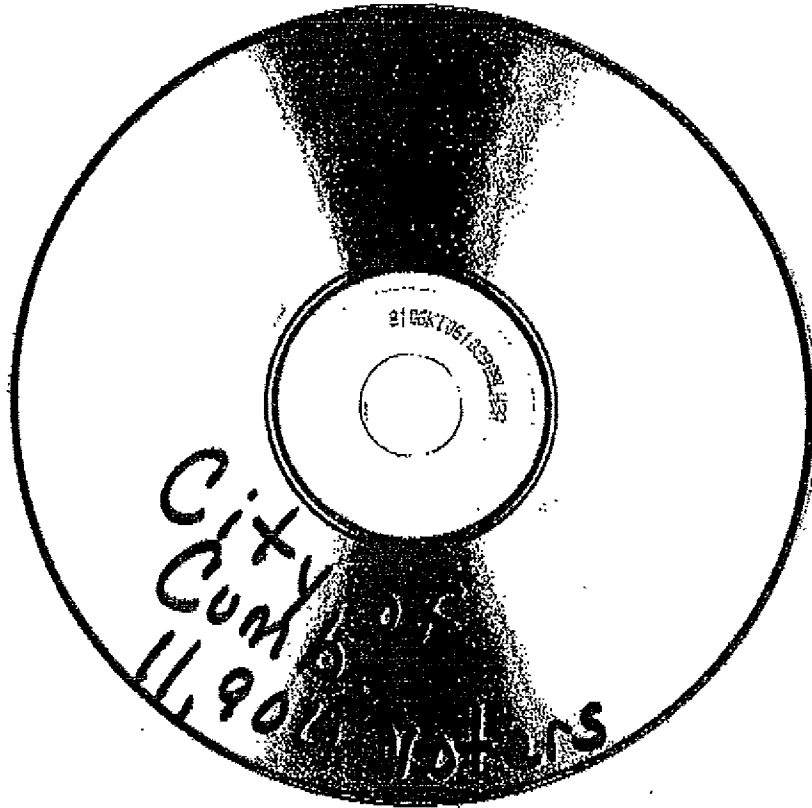
Standard request: In an effort to reduce the overwhelming exchange of email, please note that an automatic reply to this message is not requested. Please reply only as needed.

From: Michael Scott Cohen [mailto:michaelcohen@atlanticbbn.net]
Sent: Monday, August 18, 2008 2:55 PM
To: fjcollins@kahnsmith.com
Cc: Jeff Repp
Subject: IAFF Petition

Mr. Collins:

If you have not already spoken to Kitty Davis regarding this matter, it is my understanding that the list of voters you asked for and received was for active voters only. The list the City received included active and inactive voters as well as three additional voters who are only registered to vote in the City's elections.

Michael Scott Cohen, Esquire
213 Washington Street
Cumberland, MD 21502
(301)724-5200 phone
(301)724-5205 fax



In The
Circuit Court
For
Allegany County

Int'l Assoc. of Fire Fighters, Local 1715,
Cumberland Firefighters, *et al.*

Plaintiffs

vs.

Case No.:

The Mayor and City Council of Cumberland
(Maryland), *et al.*

Defendants

-000-

**AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY AND
PERMANENT INJUNCTION**

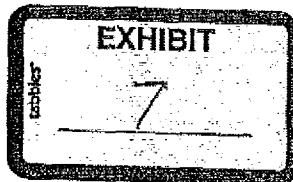
1. My name is Chuck Koelker. I am the president of the International Association of Fire Fighters, Local 1715. I am over the age of 18 and competent to testify.

2. If the Court fails to grant the relief requested in the complaint Plaintiffs will suffer immediate, substantial and irreparable harm. There is no adequate remedy at law since this case involves an issue that must be voted upon by the voters of the City of Cumberland.

3. The factual allegations of the complaint are true and correct to the best of my knowledge, information and belief.



Chuck Koelker



IN THE CIRCUIT COURT FOR ALLEGANY COUNTY, MARYLAND

INT'L ASSOC. OF FIRE FIGHTERS :
LOCAL 1715, CUMBERLAND :
FIREFIGHTERS, et al :

Plaintiffs :

v. : CIVIL ACTION NO. C-08-30649

MAYOR AND CITY COUNCIL OF :
CUMBERLAND, et al :

Defendants :

: : : : : :

MEMORANDUM AND ORDER

Before the Court is the Plaintiffs' ("Firefighters")
Complaint against the Mayor and City Council of Cumberland
("City"), the Cumberland Board of Election Supervisors, the
Allegany County Board of Election Supervisors, and the
Maryland State Board of Elections.

Suit was filed on August 22, 2008. The Firefighters
are seeking a writ of mandamus, a declaratory judgment, and
a preliminary and permanent injunction. Plaintiffs want a
court order, (1) instructing the City to count and verify
the signatures on a certain referendum petition, (2) find
the subject of the petition valid (which the City
disputes), (3) that the City must pass a resolution
submitting the referendum to Cumberland voters at either a
special election or at the November 4, 2008 general



election, and (5) that the pertinent election administrators place the question on the November 4, 2008 general election ballot unless the City opts for a special election.

The parties appeared before the Court on September 9, 2008 to argue whether an immediate order should issue, given the time constraints with the upcoming general election. The issue was taken under advisement. Because of the time constraints, the Court will proceed to its rulings without extensive discussion of the issues.

The following facts are undisputed. The Firefighters seek a Cumberland charter amendment regarding the submission of labor disputes to binding arbitration. Their approach to achieve this is by petitioning the question to referendum. The relevant law on initiation of a referendum is largely contained in Article 23A, Section 114 of the Maryland Code.

On July 25, 2008 Plaintiffs filed 3,550 signatures in favor of the petition. On August 15, 2008, the City announced 2,172 signatures were valid. On August 18, 2008 Plaintiffs filed an additional 472 signatures. The City has not bothered to verify any of those signatures, contending that the second set of signatures constitute a separate

petition and that 472 signatures are not enough to support the call for a referendum.

The law contained in Section 14, supra states that 20% of the persons qualified to vote are needed to initiate a charter amendment referendum. First, there exists a dispute between the Firefighters and the City as to the number of Cumberland voters. There are two types of voters - "active" and "inactive". In Cumberland there are 11,906 registered active voters, but there are an additional 1,005 "inactive" voters. The City contends the Plaintiffs need 20% of the total, i.e. 20% of 12,911, or 2,582 signatures. The Firefighters contend they only need 2,381 signatures (20% of the 11,906 registered active voters). The Court agrees with the Plaintiffs on this point, and finds the petition submitted only needed 2,381 verified signatures.

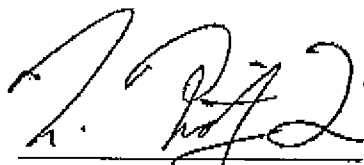
Unfortunately for the Firefighters, the 2,172 qualified signatures submitted with the Petition on July 25 were not enough. And the Court agrees with the City that the petition submitted by Plaintiffs after the August 15 determination by the City that there were insufficient qualified voters on the July 25 petition is not retroactive to the earlier petition. Article 23A, Section 15 states that the City must verify, upon receiving the petition, whether the persons on the petition are qualified. And the

City "...shall consider the petition as of no effect if it is signed by fewer than twenty per centum..".

See also, Gittings v. Bd. of Sup. Of Elections, 38 Md. App. 674 (1978), where the Court of Special Appeals held the trial court had no right to grant voters another opportunity to gather additional signatures after the county board initially determined there were insufficient signatures on a referendum petition. Despite the "understandably disappointing result", *id.*, at 680, to the petitioners, the court has "...no right under the law to grant such a dispensation". *Id.*, at 679.

Because an insufficient number of qualified voters were presented to the City, the other issues will not be considered.

For the foregoing reasons, the City's Motion for Summary Judgment will be GRANTED, and the Boards' of Elections Motions to Dismiss will be GRANTED, this 10th day of September, 2008.


W. TIMOTHY FINAN
Judge

IN THE CIRCUIT COURT FOR ALLEGANY COUNTY, MARYLAND

INT'L ASSOC. OF FIRE FIGHTERS :
LOCAL 1715, CUMBERLAND :
FIREFIGHTERS, et al :

Plaintiffs :

vi. : CIVIL ACTION NO. C-08-30649

MAYOR AND CITY COUNCIL OF :
CUMBERLAND, et al :

Defendants :

: : : : : :

ORDER

The Motions herein having been heard and considered,
it is this 10th day of September, 2008, by the Circuit
Court for Allegany County, Maryland ORDERED,

1. Summary Judgment is hereby entered in favor of the Defendant, The Mayor and City Council of Cumberland, Maryland, and against the Plaintiffs; and
2. The Motions to Dismiss of the State Board of Elections and the Allegany County Board of Elections are GRANTED.



W. TIMOTHY FINAN
Judge

In The
Circuit Court
For
Allegany County

Int'l Assoc. of Fire Fighters, Local 1715,
Cumberland Firefighters
c/o Chuck Koelker, Pres.
816 Hilltop Drive
Cumberland MD 21502

Chuck Koelker
816 Hilltop Drive
Cumberland MD 21502

Steve Grogg
P.O. Box 432
Ridgeley, WV 26753

Jeffrey G. DeHaven
65 LaVale Blvd.
Cumberland, MD 21502

Plaintiffs

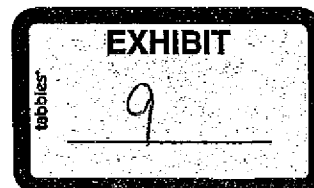
vs.

Case No.:

THE MAYOR AND CITY COUNCIL OF
CUMBERLAND (MARYLAND)
PO Box 1702
Cumberland, Maryland 21501

Serve on:
Jeffrey E. Repp, City Administrator
PO Box 1702
Cumberland, Maryland 21501
1-301-759-6424
jrepp@allconet.org

and



Michael Cohen, City Attorney
213 Washington Street
Cumberland, Maryland 21502-5200
1-301-724-5200
michaelcohen@atlanticbbn.net

and

Sharon Clark
City Clerk
City of Cumberland
P.O. Box 1702
57 North Liberty Street
Cumberland, Maryland 21502
Fax (301) 759-6438
Email: sclark@ci.cumberland.md.us

Cumberland Board of Election Supervisors

John C. Vanetta
Dr. Magno P. Roque, M.D.
Michael Stakem
Russell L. Livengood
Marie L. Neff
City of Cumberland
P.O. Box 1702
57 North Liberty Street
Cumberland, Maryland 21502

Allegany County Board of Elections
County Office Building, Suite 405,
701 Kelly Road,
Cumberland, MD 21502 - 3401

Serve on:
Catherine Davis, Administrator
Allegany County Board of Elections
County Office Building, Suite 213,
701 Kelly Road,
Cumberland, MD 21502 - 3401
(301) 777-5931; fax: (301) 777-2430
e-mail: elections@allconet.org

Maryland State Board of Elections
c/o Linda H. Lamone, Administrator of Elections
P. O. Box 6486
151 West St., Suite 200
Annapolis, MD 21401 - 0486

Serve on:
Joseph Curran
Attorney General for the State of Maryland
200 St. Paul Street
Baltimore Maryland 21202

and

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and

Mark Davis, Esq. Counsel to the State Board of Elections
200 St. Paul Street
Baltimore Maryland 21202

Defendants

-o0o-

**VERIFIED COMPLAINT FOR WRIT OF MANDAMUS,
DECLARATORY JUDGMENT, AND INJUNCTIVE RELIEF**

Plaintiffs, by their undersigned counsel, bring suit for a writ of mandamus, declaratory judgment and injunctive relief against Defendants and allege:

INTRODUCTION

1. The instant case is a suit for a writ of mandamus, emergency injunction, declaratory judgment and other appropriate equitable relief. It relates to a charter

amendment that Plaintiffs seek to have placed on the November 4, 2008 ballot. Therefore, Plaintiffs seek immediate intervention by the Court to resolve this issue.

2. If there is any substantial delay in granting Plaintiffs relief they will suffer irreparable harm. Since this case involves an issue involving elections, and the date for the next general election is November 4, 2008, it is imperative that the Court resolve this case immediately.

3. Plaintiffs have given actual notice of their position to all relevant parties and, prior to seeking this Court's intervention have given copies of this complaint to them. The City Attorney, Michael Cohen, has been aware of Plaintiff's complaint and position since July, 2008 (Exh. 5). Catherine Davis, the Administrator for the Allegany County Board of Elections, has been sent copies of correspondence so that she is familiar with the issues raised in this case (Exh. 2, 5).

PARTIES

4. Chuck Koelker, Steven Grogg and Jeffrey DeHaven are employees of the Cumberland Fire Department. The International Association of Fire Fighters, Local 1715 (IAFF 1715) is the collective bargaining representative of the fire fighters and other employees of the Fire Department in the City of Cumberland. Koelker, Grogg and DeHaven are also officers of IAFF 1715. They bring this suit in their individual capacity and as representatives of IAFF 1715.

5. The Mayor and City Council of Cumberland (M&CC) is a municipality under Maryland law. The M&CC constitute the legislative body of that municipality.

6. The Cumberland Board of Election Supervisors (Cumberland Board), is composed of John C. Vanetta, Magno P. Roque, M.D., Michael Stakem, Russell L. Livengood and Marie L. Neff. The Cumberland Board is created under the Cumberland Charter, § 10. The Cumberland Board has the responsibility of conducting elections in the City of Cumberland.

7. The Board of Elections of Allegany County has been selected by the M&CC to assist it and to run the elections that take place under the City Charter. Catherine Davis is the Administrator for the Allegany County Board of Elections.

8. The Maryland State Board of Elections oversees the Allegany County Board of Elections and determines the final format of the ballot that is prepared for the November 4, 2008 elections.

STATE LAW AND AMENDMENTS TO MUNICIPAL CHARTERS

9. Maryland State law requires municipal charters to allow for amendment by means of a referendum. A petition for a referendum requires 20% of registered voters to sign a petition to have the Charter Amendment placed on the ballot. Article XI-E, § 4 of the Maryland Constitution states that municipal charters may be amended as follows:

The adoption of a new charter, the amendment of any charter or local laws, or the repeal of any part of a charter or local laws shall be proposed either by a resolution of the legislative body of any such municipal corporation or by a petition containing the signatures of at least five per cent of the registered voters of a municipal corporation and filed with the legislative body of said municipal corporation. The General Assembly shall amplify the provisions of this section by general law in any manner not inconsistent with this Article.

10. The Maryland General Assembly amplified the Maryland Constitutional provisions with Article 23A, § 14 of the Maryland Code:

(a) **Twenty per centum or more of the persons who are qualified to vote in municipal general elections in the particular municipal corporation may initiate a proposed amendment or amendments to the municipal charter, by a petition presented to the legislative body of the municipal corporation, by whatever name known. The petition shall contain the complete and exact wording of the proposed amendment or amendments, and the proposed amendment or amendments shall be prepared in conformity with the several requirements contained in subsections (b) and (c) of § 13 of this subtitle. Each person signing it shall indicate thereon both his name and residence address. Upon receiving the petition, the legislative body is directed to verify that any person who signed it is qualified to vote in municipal general elections, and shall consider the petition as of no effect if it is signed by fewer than twenty per centum of the persons who are qualified to vote in municipal general elections. If the petition complies with the requirements of this section, the legislative body shall by resolution, passed as in its normal legislative procedure, and not later than sixty days after the petition shall have been presented to it, specify the day and the hours for the election at which the question shall be submitted to the voters of the municipal corporation. This may be at either the next regular municipal general election or at a special election, in the discretion of the legislative body. In the event a special election is designated, it shall be within a period of not less than forty days nor more than sixty days after the final passage of the resolution. In the resolution, the exact wording shall be specified which is to be placed on the ballots or voting machines when the question is submitted to the voters of the municipal corporation.**

(b) Provided, however, that if the legislative body shall approve of the amendment or amendments provided for in the petition presented to it under subsection (a) above, it shall have the right by resolution to adopt the amendment or amendments thereby proposed and to proceed thereafter in the same manner as if the amendment or amendments had been initiated by such legislative body and in compliance with the provisions of § 13 of this article.

(Emphasis added).

11. The Election Law Article of the Maryland Code does not directly apply to referenda amending a municipal charter. Md. Code, Election Law Article, § 1-101(v)(3).

12. The M&CC and the Cumberland Board choose to use the Allegany County Board of Elections to run their elections. However, because the Maryland Election Law is not binding, the M&CC and Cumberland Board are not obligated to comply with the time constraints set forth in the Code of Maryland Regulations or in the Elections Law Article. They are not relieved of their duty to comply with the requirements Article XI-E, § 4 of the State Constitution or Article 23A, § 14 of the Maryland Code. They must timely count the signatures on a petition for a referendum. If the petition is supported by sufficient signatures and is otherwise in proper form, they must place the Charter Amendment on the ballot at the next general election or conduct a special election within 60 days.

13. In the spring of 2008 Plaintiffs obtained a list of registered voters from the Allegany County Board of Elections. That list, provided to Plaintiffs on a "CD," stated that there were 11,906 registered voters. Therefore, the petition for referendum needed to have at least 2,381 signatures in support of it (20% of 11,906). (See Exh. 6).

THE PETITION

14. During the spring and summer of 2008 Plaintiffs collected thousands of signatures in support of a petition to amend the City Charter.

15. That Petition (hereafter referred to as the Charter Amendment) states:

We, the undersigned voters of the City of Cumberland, Maryland, hereby petition to have this amendment of the City Charter submitted to a vote of the registered voters of the City of Cumberland for approval or rejection at the next general election or at a special election called by the City Council.

Proposal

COLLECTIVE BARGAINING AND BINDING ARBITRATION FOR NON-MANAGEMENT EMPLOYEES OF THE FIRE DEPARTMENT. [NEW ARTICLE 37A TO THE CHARTER OF THE CITY OF CUMBERLAND]

NON-MANAGEMENT EMPLOYEES OF THE FIRE DEPARTMENT OF THE CITY OF CUMBERLAND SHALL BE ENTITLED TO DESIGNATE A UNION TO ACT AS THEIR EXCLUSIVE REPRESENTATIVE AND TO ENGAGE IN COLLECTIVE BARGAINING WITH THE CITY REGARDING WAGES, BENEFITS, AND WORKING CONDITIONS. THE CITY COUNCIL SHALL PROVIDE BY ORDINANCE FOR BINDING ARBITRATION WITH THE EXCLUSIVE REPRESENTATIVE IN ORDER TO RESOLVE LABOR DISPUTES. THE ORDINANCE SHALL PROVIDE FOR THE APPOINTMENT OF A NEUTRAL ARBITRATOR, THE FACTORS THAT SHOULD BE CONSIDERED BY THE ARBITRATOR, AND THE PROCEDURES FOR IMPLEMENTING THE ARBITRATOR'S DECISION AS PART OF THE CITY'S BUDGETARY PROCESS. ANY ORDINANCE THAT IS ENACTED SHALL PROHIBIT STRIKES OR WORK STOPPAGES BY THE REPRESENTED EMPLOYEES.

NOTICE TO SIGNERS: The information you provide on this petition may be used to change your voter registration address. Please print all information other than your signature. P.O. Boxes are not generally valid. By signing this petition, you agree that the above-mentioned charter amendment proposal should be placed on the ballot as a question and that, to the best of your knowledge, you are registered to vote in the State of Maryland and the City of Cumberland and are eligible to have your signature counted for petition purposes.

16. A sample of the petition is attached as Exh. 1.

17. On or about July 25, 2008 Plaintiffs filed over 3,550 signatures in favor of the above petition. The M&CC counted those signatures and, on or about August 15, 2008, announced that only 2,172 signatures were valid (Exh. 4, 5). On August 18, 2008 Plaintiffs filed an additional 472 signatures. Assuming the M&CC's counting was correct with regard to the first set of signatures Plaintiffs filed 2,644 signatures in favor of the petition.

18. The M&CC contend that there are 12,911 registered voters and that a petition for referendum must be supported by the signatures of 2,582 registered voters. This position is contradicted by the CD given to Plaintiffs in the spring of 2008. The City contends that the CD only contains a list of "active voters" and that the full list is larger because it contains "inactive voters." Plaintiffs contend that they were justified in relying on the original list from the Allegany County Board of Elections and that Maryland law does not recognize

“inactive voters.” Regardless, Plaintiffs filed signatures of more than 20% of both lists combined.

19. The M&CC have publicly stated that they are opposed to the petition (Exh 3, 5). They have also stated that they do not intend on counting all of the signatures or passing a resolution to have the Charter Amendment placed on the November 4 ballot or to call a special election on the Charter Amendment (Exh. 3, 5).

20. The M&CC have taken the position that they do not have to count all of the signatures because approximately 472 of the signatures were filed with the City Clerk on August 18, 2008 and the remainder of the signatures were filed a few weeks earlier (Exh 5). The M&CC contend that the filing of the signatures on two separate days results in them being treated as two separate petitions and, therefore, neither petition has sufficient signatures (Exh. 5). Plaintiffs contend that this is plainly illegal and that the Charter Amendment must be presented to the voters. Plaintiffs contend that the M&CC have no discretion in this matter and that they must be compelled to comply with State law.

**COUNT I
(REQUEST FOR A DECLARATORY JUDGMENT THAT
THE CITY COUNCIL MUST COUNT ALL THE
SIGNATURES AS PART OF ONE PETITION TO
AMEND THE CITY CHARTER)**

21. Plaintiffs incorporate herein all of the factual allegations stated above.

22. Plaintiffs seek a declaratory judgment that, in order to support the referendum petition, Plaintiffs were entitled to rely upon the list of registered voters supplied by the

Allegany County Board of Elections and that they needed 2,381 signatures to have the Charter Amendment placed on the ballot.

23. Plaintiffs seek a declaratory judgment that a petition for referendum may be filed and supported by signatures delivered to the Cumberland City Clerk on more than one day.

24. Plaintiffs seek a declaratory judgment that the M&CC must immediately count the second set of signatures (delivered on August 18, 2008) and that when counting both sets of signatures, if it appears that a total of more than 2,381 voters signed the petition, pass a resolution to have the Charter Amendment placed on the November 4, 2008 ballot. Alternatively, if the M&CC chooses to conduct a special election, or if the Charter Amendment otherwise cannot be placed on the November 4, ballot, that the M&CC must schedule a special election within 60 days as required by Md. Code, Art. 23A, § 14.

COUNT II

(PETITION FOR WRIT OF MANDAMUS AND/OR EMERGENCY PERMANENT INJUNCTION REQUIRING THE MAYOR AND CITY COUNCIL OF CUMBERLAND TO COUNT THE SIGNATURES ON THE PETITION AND TO PASS A RESOLUTION PLACING THE CHARTER AMENDMENT ON THE NOVEMBER 4, 2008 BALLOT OR TO CONDUCT A SPECIAL ELECTION WITHIN 60 DAYS.)

25. Plaintiffs incorporate herein all of the factual allegations stated above.

26. Plaintiffs request that the Court issue a writ of mandamus requiring the M&CC to pass a resolution for the Charter Amendment related to fire fighter binding arbitration to be voted upon by the voters of Cumberland either at the November 4, 2008 election or by special election conducted on or before December 19, 2008. Under Article 23A, § 14 the

M&CC has up to 60 days to count signatures and then 60 days to conduct a special election. However, counting 472 signatures could be done in a day and there is no practical reason for the M&CC to use all 120 days. For this reason, Plaintiffs contend that the most efficient and inexpensive way of having the Charter Amendment voted on is to have it placed on the ballot of the November 4, 2008 election. Doing so will also put the Charter Amendment before more voters because it is likely that more Cumberland voters will vote in a presidential election than in a special election for one issue related to the City of Cumberland.

27. Plaintiffs request that the Court issue a writ of mandamus requiring the Cumberland Board of Election Supervisors, Catherine Davis, the Allegany County Board of Elections and the Maryland State Board of Elections to place the Charter Amendment on the November 4, 2008 ballot.

28. The affidavit of Chuck Koelker, Exh. 7, is attached to verify the allegations of this complaint.

PRAYERS FOR RELIEF RELATING TO ALL COUNTS

WHEREFORE, Plaintiffs pray that this Court DECLARE, ADJUDGE AND DECREE that:

A. The M&CC is ORDERED to count the signatures submitted on August 18, 2008.

B. Plaintiffs may support a petition for referendum with signatures submitted on more than one date.


C. Plaintiffs must support the referendum petition with at least 2,381 signatures (20% of Cumberland voters identified by the Allegany County Board of Elections).

D. If, after the City Clerk finishes counting the signatures, it appears that the petition is supported by the signatures of more than 2,381 registered Cumberland voters, the M&CC is required to pass a resolution that the Petition for fire fighter binding arbitration be placed on the November 4, 2008 ballot or pass a resolution that the City conduct a special election within 60 days.

E. If the M&CC decide to place the Charter Amendment on the ballot for the November 4, 2008 election, the Cumberland Board of Election Supervisors, Catherine Davis and the Boards of Elections for Allegany County and the State of Maryland are required to place the Charter Amendment related to fire fighter binding arbitration on the November 4, 2008 ballot.

The Plaintiffs further pray the Court to grant or award such other and further relief as justice and equity may require, including attorney's fees and costs.

DATED: August 20, 2008

A large, stylized handwritten signature in black ink, appearing to read 'F. Collins', is written over the printed name and address of Francis V. Collins.

Francis V. Collins, Esq.
KAHN, SMITH & COLLINS, P.A.
201 North Charles Street – 10th Floor
Baltimore, Maryland 21201
(410) 244-1010
Attorneys for Plaintiffs

In The
Circuit Court
For
Allegany County

Int'l Assoc. of Fire Fighters, Local 1715,
Cumberland Firefighters, *et al.*

Plaintiffs

vs.

Case No.: 01-C-08-30647

The Mayor and City Council of Cumberland
(Maryland), *et al.*

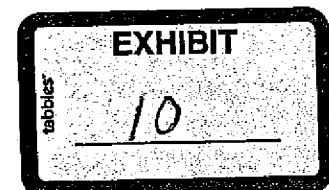
Defendants

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MOTION FOR SUMMARY JUDGMENT


Plaintiffs, by their undersigned attorneys, move for summary judgment and, as reasons, state:

1. The factual allegations of the complaint are incorporated herein by reference.
2. If the Court fails to grant the relief requested in the complaint immediately Plaintiffs will suffer immediate, substantial and irreparable harm.
3. This motion, the complaint and the motion to shorten time have been verified. By the time the Court rules on this motion, Plaintiffs will have given reasonable notice to all of the Defendants of this case.
4. There are no disputes as to material facts.
5. Plaintiffs are entitled to judgment as a matter of law.
6. Plaintiffs are filing herewith a memorandum in support of this motion.



WHEREFORE, Plaintiffs request that the Court conduct an immediate hearing and enter a final judgment in Plaintiffs' favor for the relief requested in the complaint.

KAHN, SMITH & COLLINS, P.A.


By: _____

Francis J. Collins, Esquire
201 North Charles Street, 10th Floor
Baltimore, Maryland 21201
410-244-1010
collins@kahnsmith.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

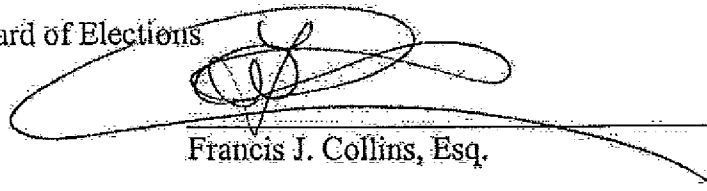
I hereby certify that on Aug 27 2008 a copy of the foregoing was mailed and faxed (where there is a fax number indicated) and emailed (where there is an email address indicated) to:

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Francis J. Collins, Esq.

In The
Circuit Court
For
Allegany County

Int'l Assoc. of Fire Fighters, Local 1715,
Cumberland Firefighters, *et al*,

Plaintiffs

vs.

Case No.: 01-C-08-30647

The Mayor and City Council of Cumberland
(Maryland), *et al*,

Defendants

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MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION¹

The instant case is a suit for a writ of mandamus, emergency injunction, declaratory judgment and other appropriate equitable relief. It relates to a charter amendment that Plaintiffs seek to have placed on the November 4, 2008 ballot. Therefore, Plaintiffs seek immediate intervention by the Court to resolve this issue. If there is any substantial delay in granting Plaintiffs relief they will suffer irreparable harm. Since this case involves an issue involving elections, and the date for the next general election is November 4, 2008, it is imperative that the Court resolve this case immediately. Plaintiffs have given actual notice of their position to all relevant parties and, prior to seeking this Court's intervention, have

¹All references to exhibits and affidavits are to the exhibits attached to the complaint and to the affidavits filed with the complaint.

given copies of this complaint to them. The City Attorney, Michael Cohen, has been aware of Plaintiff's complaint and position since July, 2008 (Exh. 5). Catherine Davis, the Administrator for the Allegany County Board of Elections, has been sent copies of correspondence so that she is familiar with the issues raised in this case (Exh. 2, 5).

PARTIES

Chuck Koelker, Steven Grogg and Jeffrey DeHaven are employees of the Cumberland Fire Department. The International Association of Fire Fighters, Local 1715 (IAFF 1715) is the collective bargaining representative of the fire fighters and other employees of the Fire Department in the City of Cumberland. Koelker, Grogg and DeHaven are also officers of IAFF 1715. They bring this suit in their individual capacity and as representatives of IAFF 1715.

The Mayor and City Council of Cumberland (M&CC) is a municipality under Maryland law. The M&CC constitute the legislative body of that municipality.

The Cumberland Board of Election Supervisors (Cumberland Board), is composed of John C. Vanetta, Magno P. Roque, M.D., Michael Stakem, Russell L. Livengood and Marie-L. Neff. The Cumberland Board is created under the Cumberland Charter, § 10. The Cumberland Board has the responsibility of conducting elections in the City of Cumberland.

The Board of Elections of Allegany County has been selected by the M&CC to assist it and to run the elections that take place under the City Charter. Catherine Davis is the Administrator for the Allegany County Board of Elections.

The Maryland State Board of Elections oversees the Allegany County Board of Elections and determines the final format of the ballot that is prepared for the November 4, 2008 elections.

STATE LAW AND AMENDMENTS TO MUNICIPAL CHARTERS

Maryland State law requires municipal charters to allow for amendment by means of a referendum. A petition for a referendum requires 20% of registered voters to sign a petition to have the Charter Amendment placed on the ballot. Article XI-E, § 4 of the Maryland Constitution states that municipal charters may be amended as follows:

The adoption of a new charter, the amendment of any charter or local laws, or the repeal of any part of a charter or local laws shall be proposed either by a resolution of the legislative body of any such municipal corporation or by a petition containing the signatures of at least five per cent of the registered voters of a municipal corporation and filed with the legislative body of said municipal corporation. The General Assembly shall amplify the provisions of this section by general law in any manner not inconsistent with this Article.

The Maryland General Assembly amplified the Maryland Constitutional provisions with Article 23A, § 14 of the Maryland Code:

(a) **Twenty per centum or more of the persons who are qualified to vote in municipal general elections in the particular municipal corporation may initiate a proposed amendment or amendments to the municipal charter, by a petition presented to the legislative body of the municipal corporation, by whatever name known. The petition shall contain the complete and exact wording of the proposed amendment or amendments, and the proposed amendment or amendments shall be prepared in conformity with the several requirements contained in subsections (b) and (c) of § 13 of this subtitle. Each person signing it shall indicate thereon both his name and residence address. Upon receiving the petition, the legislative body is directed to verify that any person who signed it is qualified to vote in municipal general elections, and shall consider the petition as of no effect if it is signed by fewer**

than twenty per centum of the persons who are qualified to vote in municipal general elections. If the petition complies with the requirements of this section, the legislative body shall by resolution, passed as in its normal legislative procedure, and not later than sixty days after the petition shall have been presented to it, specify the day and the hours for the election at which the question shall be submitted to the voters of the municipal corporation. This may be at either the next regular municipal general election or at a special election, in the discretion of the legislative body. In the event a special election is designated, it shall be within a period of not less than forty days nor more than sixty days after the final passage of the resolution. In the resolution, the exact wording shall be specified which is to be placed on the ballots or voting machines when the question is submitted to the voters of the municipal corporation.

(b) Provided, however, that if the legislative body shall approve of the amendment or amendments provided for in the petition presented to it under subsection (a) above, it shall have the right by resolution to adopt the amendment or amendments thereby proposed and to proceed thereafter in the same manner as if the amendment or amendments had been initiated by such legislative body and in compliance with the provisions of § 13 of this article.

(Emphasis added).

The Election Law Article of the Maryland Code does not directly apply to referenda amending a municipal charter. Md. Code, Election Law Article, § 1-101(v)(3). The M&CC and the Cumberland Board choose to use the Allegany County Board of Elections to run their elections. However, because the Maryland Election Law is not binding, the M&CC and Cumberland Board are not obligated to comply with the time constraints set forth in the Code of Maryland Regulations or in the Elections Law Article. They are not relieved of their duty to comply with the requirements Article XI-E, § 4 of the State Constitution or Article 23A, § 14 of the Maryland Code. They must timely count the signatures on a petition for a referendum. If the petition is supported by sufficient signatures

and is otherwise in proper form, they must place the Charter Amendment on the ballot at the next general election or conduct a special election within 60 days. In *Ficker v. Denny*, 326 Md. 626, 606 A.2d 1060 (1992) the Court of Appeals held that signers of petitions have the right to expect that petitions for charter amendments, supported by sufficient signatures, will be filed and submitted to the electorate for a vote.

In the spring of 2008 Plaintiffs obtained a list of registered voters from the Allegany County Board of Elections. That list, provided to Plaintiffs on a "CD," stated that there were 11,906 registered voters. Therefore, the petition for referendum needed to have at least 2,381 signatures in support of it (20% of 11,906). (See Exh. 6).

THE PETITION

During the spring and summer of 2008 Plaintiffs collected thousands of signatures in support of a petition to amend the City Charter. That Petition (hereafter referred to as the Charter Amendment) states:

We, the undersigned voters of the City of Cumberland, Maryland, hereby petition to have this amendment of the City Charter submitted to a vote of the registered voters of the City of Cumberland for approval or rejection at the next general election or at a special election called by the City Council.

Proposal

COLLECTIVE BARGAINING AND BINDING ARBITRATION FOR NON-MANAGEMENT EMPLOYEES OF THE FIRE DEPARTMENT. [NEW ARTICLE 37A TO THE CHARTER OF THE CITY OF CUMBERLAND]

NON-MANAGEMENT EMPLOYEES OF THE FIRE DEPARTMENT OF THE CITY OF CUMBERLAND SHALL BE ENTITLED TO DESIGNATE A UNION TO ACT AS THEIR EXCLUSIVE REPRESENTATIVE AND TO ENGAGE IN COLLECTIVE BARGAINING WITH THE CITY REGARDING WAGES, BENEFITS, AND WORKING CONDITIONS. THE CITY COUNCIL SHALL PROVIDE BY ORDINANCE FOR BINDING ARBITRATION WITH THE EXCLUSIVE REPRESENTATIVE IN ORDER TO RESOLVE LABOR DISPUTES. THE ORDINANCE SHALL PROVIDE

FOR THE APPOINTMENT OF A NEUTRAL ARBITRATOR, THE FACTORS THAT SHOULD BE CONSIDERED BY THE ARBITRATOR, AND THE PROCEDURES FOR IMPLEMENTING THE ARBITRATOR'S DECISION AS PART OF THE CITY'S BUDGETARY PROCESS. ANY ORDINANCE THAT IS ENACTED SHALL PROHIBIT STRIKES OR WORK STOPPAGES BY THE REPRESENTED EMPLOYEES.

NOTICE TO SIGNERS: The information you provide on this petition may be used to change your voter registration address. Please print all information other than your signature. P.O. Boxes are not generally valid. By signing this petition, you agree that the above-mentioned charter amendment proposal should be placed on the ballot as a question and that, to the best of your knowledge, you are registered to vote in the State of Maryland and the City of Cumberland and are eligible to have your signature counted for petition purposes.

A sample of the petition is attached as Exh. 1. On or about July 25, 2008 Plaintiffs filed over 3,550 signatures in favor of the above petition. The M&CC counted those signatures and, on or about August 15, 2008, announced that only 2,172 signatures were valid (Exh. 4, 5). On August 18, 2008 Plaintiffs filed an additional 472 signatures. Assuming the M&CC's counting was correct with regard to the first set of signatures Plaintiffs filed 2,644 signatures in favor of the petition.

The M&CC contend that there are 12,911 registered voters and that a petition for referendum must be supported by the signatures of 2,582 registered voters. This position is contradicted by the CD given to Plaintiffs in the spring of 2008. The City contends that the CD only contains a list of "active voters" and that the full list is larger because it contains "inactive voters." Plaintiffs contend that they were justified in relying on the original list from the Allegany County Board of Elections and that Maryland law does not recognize "inactive voters." Regardless, Plaintiffs filed signatures of more than 20% of both lists combined.

The M&CC have publicly stated that they are opposed to the petition (Exh 3, 5). They have also stated that they do not intend on counting all of the signatures or passing a resolution to have the Charter Amendment placed on the November 4 ballot or to call a special election on the Charter Amendment (Exh. 3, 5).

The M&CC have taken the position that they do not have to count all of the signatures because approximately 472 of the signatures were filed with the City Clerk on August 18, 2008 and the remainder of the signatures were filed a few weeks earlier (Exh 5). The M&CC contend that the filing of the signatures on two separate days results in them being treated as two separate petitions and, therefore, neither petition has sufficient signatures (Exh. 5). Plaintiffs contend that this is plainly illegal and that the Charter Amendment must be presented to the voters. Plaintiffs contend that the M&CC have no discretion in this matter and that they must be compelled to comply with State law.

A. THE CITY COUNCIL MUST COUNT ALL THE SIGNATURES AS PART OF ONE PETITION TO AMEND THE CITY CHARTER

Plaintiffs seek a declaratory judgment that, in order to support the referendum petition, Plaintiffs were entitled to rely upon the list of registered voters supplied by the Allegany County Board of Elections and that they needed 2,381 signatures to have the Charter Amendment placed on the ballot.

Plaintiffs seek a declaratory judgment that a petition for referendum may be filed and supported by signatures delivered to the Cumberland City Clerk on more than one day.

Plaintiffs seek a declaratory judgment that the M&CC must immediately count the second set of signatures (delivered on August 18, 2008) and that when counting both sets of signatures, if it appears that a total of more than 2,381 voters signed the petition, pass a resolution to have the Charter Amendment placed on the November 4, 2008 ballot. Alternatively, if the M&CC chooses to conduct a special election, or if the Charter Amendment otherwise cannot be placed on the November 4, ballot, that the M&CC must schedule a special election within 60 days as required by Md. Code, Art. 23A, § 14.

In *Secretary of State v. McLean*, 249 Md. 436, 239 A.2d 919 (1968) the Court of Appeals specifically rejected the contention that all of the signatures had to be filed on the same day. The Court of Appeals affirmed the Circuit Court's decision to issue a writ of mandamus that required the matter to be referred to the voters because two sets of signatures, filed on different days, when added together, exceeded the required number.

B. THE MAYOR AND CITY COUNCIL OF CUMBERLAND MUST PASS A RESOLUTION PLACING THE CHARTER AMENDMENT ON THE NOVEMBER 4, 2008 BALLOT OR CONDUCT A SPECIAL ELECTION WITHIN 60 DAYS.

Plaintiffs request that the Court issue a writ of mandamus requiring the M&CC to pass a resolution for the Charter Amendment related to fire fighter binding arbitration to be voted upon by the voters of Cumberland either at the November 4, 2008 election or by special election conducted on or before December 19, 2008. Under Article 23A, § 14 the M&CC has up to 60 days to count signatures and then 60 days to conduct a special election. However, counting 472 signatures could be done in a day and there is no practical reason

for the M&CC to use all 120 days. For this reason, Plaintiffs contend that the most efficient and inexpensive way of having the Charter Amendment voted on is to have it placed on the ballot of the November 4, 2008 election. Doing so will also put the Charter Amendment before more voters because it is likely that more Cumberland voters will vote in a presidential election than in a special election for one issue related to the City of Cumberland.

Plaintiffs request that the Court issue a writ of mandamus requiring the Cumberland Board of Election Supervisors, Catherine Davis, the Allegany County Board of Elections and the Maryland State Board of Elections to place the Charter Amendment on the November 4, 2008 ballot. In the alternative, Plaintiffs request that the Court require the City to count all of the signatures, pass a resolution for a special election and conduct a special election within 60 days of the date of the resolution.

CONCLUSION

The Article 23A, § 14 of the Maryland Code plainly requires that the M&CC pass a resolution to place the Charter Amendment before the voters. The M&CC can do this by placing the Amendment on the ballot at the "next general election," November 4, 2008, or by conducting a special election, not later than sixty days after the resolution. Md. Code, Art. 23A, § 14. This Court does not have the authority to make the choice between the next general election or a special election. However, the Court does have the authority to issue a writ of mandamus requiring the M&CC to make the choice. It seems clear that, for

purposes of municipal economy, the best choice is to conduct the vote during the next general election. Therefore, Plaintiffs request that the Court enter an order forthwith requiring the M&CC to make the choice so that the citizens of the City of Cumberland have the possibility of avoiding the cost of a special election.

KAHN, SMITH & COLLINS, P.A.



By:

Francis J. Collins, Esquire
201 North Charles Street, 10th Floor
Baltimore, Maryland 21201
410-244-1010
collins@kahnsmith.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

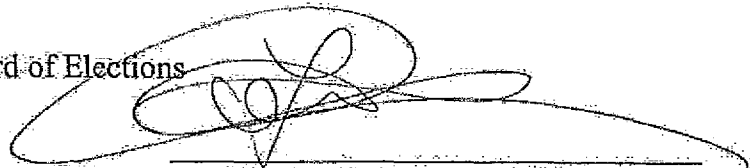
I hereby certify that on Aug 27th a copy of the foregoing was mailed and faxed (where there is a fax number indicated) and emailed (where there is an email address indicated) to:

Sandra Brantley, Asst. Attny. General
Office of the Attorney General
90 State Circle, Room 104
Annapolis, MD 21401
410-946-5600
410-946-5601 (FAX)
sbrantley@oag.state.md.us
Attorney for the State Board of Elections

David Moore, Esq.
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410-576-6955 (FAX)
Attorney for the State Board of Elections.

Michael Cohen, Esq.
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213 Washington Street
Cumberland, MD 21502
301-724-5200
301-724-5205 (FAX)
michaelcohen@atlanticbbn.net
Attorney for the City of Cumberland

Armand Panone, II, Esq.
14 Green Street
Cumberland, MD 21502
301-759-2930
ampjr@pennswoods.net
Attorney for Allegany County Board of Elections

A handwritten signature in black ink, appearing to read "Francis J. Collins", is written over a horizontal line. The signature is stylized and somewhat cursive.

Francis J. Collins, Esq.

In The
Circuit Court
For
Allegany County

Int'l Assoc. of Fire Fighters, Local 1715,
Cumberland Firefighters, *et al.*

Plaintiffs

vs.

Case No.: 01-C-08-30647

The Mayor and City Council of Cumberland
(Maryland), *et al.*

Defendants

-000-

PLAINTIFFS' RESPONSE TO CUMBERLAND'S MOTION TO DISMISS

Plaintiffs, by their undersigned attorneys, respond to Cumberland's motion to dismiss for lack of service of process and state:

1. Plaintiffs made every reasonable effort to timely and effectively serve the City of Cumberland. See the attached affidavit of service of process.
2. According to the postal return receipt, Michael Cohen, the attorney for the City of Cumberland and the City Clerk's office both received the suit papers by certified mail on August 25, 2008.
3. The Court issued the summonses and the order shortening time a few days later and those summonses were sent to the City of Cumberland by email and fax the same day.

4. The City of Cumberland has been on notice of the instant case since August 21, 2008 when the first copy of the complaint and motion to shorten time was sent to the City's attorney.

5. The purpose of service of process is to place a party on notice of a suit. This Court entered an order allowing alternate methods of service of process due to the urgency of the case and the nearness of the election. Such an order is appropriate if it increases that likelihood of actual notice for the defendant. "In weighing the alternative methods of service of process, a court ordering substituted service under Rule 3-121(c) must be careful that the method prescribed in the court order 'is not substantially less likely to bring home notice than other of the feasible and customary substitutes.'" *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 775 A.2d 1218 (2001) quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 658, 94 L.Ed. 865, 874 (1950)]. There is no question that the City has been placed on both legal and actual notice of the case. This case is an equitable action that involves extremely short deadlines. The service of process that has been effectuated in this case complies with the notice requirements of Due Process. The City's motion to dismiss is no more than a legal maneuver to delay the case.

6. The City's intentional delay may cause the residents of the City of Cumberland to incur unnecessary expenses to conduct a special election. Moreover, many residents could be effectively excluded from voting on an important Charter Amendment because they will already have voted at the general election on November 4, 2008. It is unlikely that as

many voters will turn out for a special City election as will turn out for the presidential election.

7. Plaintiffs request that the Court deny the motion to dismiss and conduct an immediate hearing on Plaintiffs' Motion for Summary Judgment and grant the relief requested.

WHEREFORE, Plaintiffs request that the Court conduct an immediate hearing and enter a final judgment in Plaintiffs' favor for the relief requested in the complaint.

KAHN, SMITH & COLLINS, P.A.

By: 

Francis J. Collins, Esquire
201 North Charles Street, 10th Floor
Baltimore, Maryland 21201
410-244-1010
collins@kahnsmith.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 29 2008 a copy of the foregoing was mailed and faxed (where there is a fax number indicated) and emailed (where there is an email address indicated) to:

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dmoore@oag.state.md.
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Attorney for Allegany County Board of Elections

A handwritten signature in black ink, appearing to be "Francis J. Collins", written over a horizontal line. The signature is somewhat stylized and scribbled.

Francis J. Collins, Esq.

IN THE CIRCUIT COURT FOR ALLEGANY COUNTY, MARYLAND

INT'L. ASSOC. OF FIRE FIGHTERS, :
LOCAL 1715, CUMBERLAND :
FIREFIGHTERS, ET AL. :

Plaintiffs :

v. : CASE NO. 01-C-08-030649

MAYOR AND CITY COUNCIL OF :
CUMBERLAND, ET AL. :

Defendants :

: : : : : : : :

MOTION FOR SUMMARY JUDGMENT

The Mayor and City Council of Cumberland (“Cumberland”), Defendant, by Michael Scott Cohen and Michael Scott Cohen, LLC, its attorneys, pursuant to Rule 2-501, moves for summary judgment in its favor and against Plaintiffs and, in support thereof, states as follows:

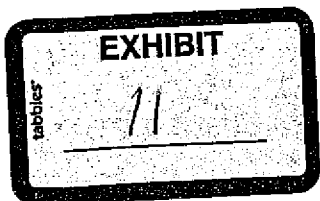
1. Plaintiffs filed a Verified Complaint for Writ of Mandamus, Declaratory Judgment and Injunctive Relief (the “Complaint”) along with other pleadings initiating these proceedings on or about August 22, 2008.

2. The facts which are material to the Court’s determination of this matter are as follows:

A. Plaintiffs Chuck Koelker, Steven Grogg and Jeffrey Dehaven are employees of the Mayor and City Council of Cumberland, working in the City of Cumberland Fire Department. *See* Complaint ¶ 4.

B. The International Association of Firefighters, Local 1715 claims to be the collective bargaining representatives of the fire fighters of the Cumberland Fire Department and other employees therein. *Id.*

C. The Mayor and City Council of Cumberland is a municipal corporation



organized and existing under the laws of the State of Maryland. It is also the legislative body of the municipality more commonly referred to as the City of Cumberland. *See* Complaint ¶ 5.

D. Under the terms of a Memorandum of Understanding entered into by and between Cumberland and the Board of County Commissioners of Allegany County, Maryland on or about November 6, 2001, Cumberland and the Board of County Commissioners of Allegany County, Maryland agreed to conduct joint elections commencing in 2002. Accordingly, elections have been conducted jointly since that date with the Allegany County Board of Elections conducting the elections. *See* Complaint ¶ 12 and Affidavit of Jeffrey E. Repp (“Affidavit”) attached hereto and made a part hereof as Exhibit 1.

E. The Allegany County Board of Elections maintains the list of persons qualified to vote in Cumberland’s general elections. *See* Affidavit.

F. William Shannon Adams submitted a State of Maryland Application for Voter Registration Data (the “Application”), a copy of which is attached hereto and incorporated by reference herein as Exhibit 2, to the Allegany County Board of Elections on or about April 8, 2008.

G. The box for “active voters” as checked on the Application. The box for active and inactive voters was not checked. *See* Exhibit 2.

H. In response to the Application, the Allegany County Board of Elections produced a compact disk, presumably the disk that was identified as Exhibit 6 in the Complaint but was not attached thereto, reported by Plaintiffs to contain the names of 11,906 voters, constituting the names of the persons who are listed as active voters registered to vote in Cumberland’s general elections. *See* Complaint ¶ 13.

I. There are 12,907 persons registered to vote in Cumberland's general elections. *See* compact disk attached hereto and incorporated by reference herein as Exhibit 3, containing 12,907 names of persons who are active and inactive voters and an additional 23 who are listed as "pending." Exhibit 3 was produced by the Allegany County Board of Elections to Cumberland shortly after July 25, 2008. In addition to the 12,907 names contained in Exhibit 3, there are three individuals who are registered to vote solely in Cumberland's elections. *See* Affidavit.

J. The formatting of the disk attached hereto as Exhibit 3 led Cumberland to believe that there are 12,911 persons registered to vote in Cumberland's general elections. *See* Affidavit.

K. The compact disk attached hereto as Exhibit 3 includes active voters and inactive voters as well as three voters who were registered to vote only in Cumberland's general elections.

L. On or about July 25, 2008, Plaintiffs filed the Petition identified in the Complaint with Cumberland. The signatures of 3,550 persons were attached thereto. *See* Complaint ¶¶ 15 & 17.

M. On or about August 15, 2008, Cumberland announced that only 2,172 of the signatures submitted on July 25, 2008 were valid. *See* Complaint ¶ 17.

N. Twenty percent of 12,911 and 12,910 is 2,582.

O. On or about August 18, 2008, Plaintiffs submitted another petition to Cumberland, containing the same text as the petition submitted on or about July 25, 2008, with the signatures of 472 persons attached thereto. *See* Complaint ¶ 17.

P. Plaintiffs contend that Defendant must count and verify the signatures presented on August 18, 2008 and combine those results with the submission made on July 25, 2008 and that both submissions constitute one petition for the purposes of Md. Code Ann. § 14(a). *See* Complaint and Affidavit.

Q. Cumberland's position is that the two submissions constitute separate petitions for amendments to the Charter of the City of Cumberland and that it is not required to consider the second submission because, even if all 472 signatures are valid, that number of signatures is significantly less than 20% of the voters qualified to vote in its general elections. *See* Complaint ¶¶ 19 & 20.

3. The foregoing facts are undisputed.

4. Cumberland is entitled to judgment as a matter of law.

5. The Memorandum in Support of Response to Motion for Summary Judgment and in Support of the Mayor and City Council of Cumberland's Motion for Summary Judgment is submitted in support of this Motion and is incorporated by reference herein.

WHEREFORE, the Mayor and City Council of Cumberland respectfully request that this Honorable Court grant it the following relief:

- A. That it enter summary judgment in its favor and against Plaintiffs;
- B. That it dismiss the Complaint and deny the relief requested therein; and
- C. That it grant such other and further relief as the nature of its cause may require.

MICHAEL SCOTT COHEN, LLC

By: 

MICHAEL SCOTT COHEN
213 Washington Street
Cumberland, MD 21502
(301) 724-5200

Attorneys for Defendant, Mayor and City
Council of Cumberland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 8th day of September, 2008, a copy of the foregoing was mailed, postage prepaid, to Francis J. Collins, Esq., Kahn, Smith & Collins, P.A., 201 N. Charles St. - 10th Floor, Baltimore, MD 21201, Armand M. Pannone, Esq., 14 Greene Street, Cumberland, MD 21502, Sandra Brantley, Asst. Attny. General, Office of the Attorney General, 90 State Circle, Room 104, Annapolis, MD 21401, and David Moore, Assistant Attorney General, Office of the Attorney General, Civil Division, 200 St. Paul Place, Baltimore, MD 21202.



MICHAEL SCOTT COHEN

EXHIBIT 1

IN THE CIRCUIT COURT FOR ALLEGANY COUNTY, MARYLAND

**INT'L. ASSOC. OF FIRE FIGHTERS, :
LOCAL 1715, CUMBERLAND :
FIREFIGHTERS, ET AL. :**

Plaintiffs :

v. : CASE NO. 01-C-08-030649

**MAYOR AND CITY COUNCIL OF :
CUMBERLAND, ET AL. :**

Defendants :

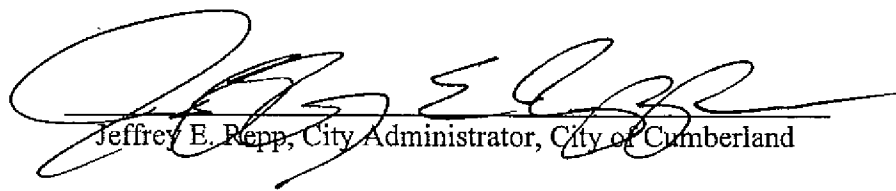
: : : : : : : : :

AFFIDAVIT OF JEFFREY E. REPP

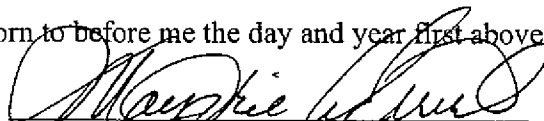
**STATE OF MARYLAND,
COUNTY OF ALLEGANY, to wit:**

I HEREBY CERTIFY that on this 8 day of Sept., 2008, before me, a Notary Public of the State and County aforesaid, personally appeared Jeffrey E. Repp, known to me or satisfactorily identified to be the person whose name is subscribed to this Affidavit, and made oath in due form of law as follows:

1. I am over the age of eighteen and am competent to testify.
2. I am the City Administrator of the City of Cumberland.
3. I have reviewed the matters and facts set forth in the Motion for Summary Judgment to which this Affidavit is attached.
4. The matters and facts set forth in paragraph 2 subparagraphs D, E, I, J and P are true and correct to the best of my knowledge, information and belief.
5. The employees of the City of Cumberland are divided into four bargaining units. The non-management employees of the Cumberland Fire Department, Cumberland Police Department and Department of Public Works are represented by unions. The other employees, the fourth bargaining unit, are not represented by a union. The City of Cumberland does not have binding arbitration regarding wages, hours and working conditions for any of its employees.


Jeffrey E. Repp, City Administrator, City of Cumberland

Subscribed and sworn to before me the day and year first above written.


NOTARY PUBLIC

My Commission Expires: 6/10/2012

EXHIBIT 2

State of Maryland Application for Voter Registration Data

1. Applicant's Name: William Shannon Adams 2. Date: 4/8/08
3. Applicant's Residence Address: 11909 Bayberry Ave
4. City: Cumberland 5. State: MD 6. Zip Code: 21502
7. Telephone numbers - Home: 301 729 2030 8. Business: 301 876 1941
9. Registered voter in Allegheny County (County/City) District: 6 Precinct: 6
10. If you are buying data on behalf of a corporation or other business entity, provide the name and address of entity.
 Name of Entity: City of Cumberland Firefighters Local 1715
 Address: P.O. Box 1147
 City: Cumberland State: MD Zip Code: 21502
11. Specify the intended use of data (detailed explanation required): Addresses of registered voters to do petition for City election

12. Will supplemental lists be required? Yes No (refer to General Information for details)
13. Delivery: Will pick up Mail - If mailing address is different from above, provide mailing address.
 Address: _____
 City: _____ State: _____ Zip Code: _____

AREA: (Check one) →	<input type="checkbox"/> Statewide (All counties & Baltimore City) <input type="checkbox"/> Single County - Specify: _____ <input type="checkbox"/> Multiple Counties - Specify: _____ <input checked="" type="checkbox"/> District - Specify Legis., Cong., etc.: <u>City of Cumberland</u>
TYPE OF LIST: (Check all that apply) →	<input checked="" type="checkbox"/> County Voter Walking List <input checked="" type="checkbox"/> Registered Voter List (Basic list with no voting histories) <input type="checkbox"/> Voting History List by Election Type and Date (Select type(s) & year(s) below) Election type: <input type="checkbox"/> Gubernatorial Primary <input type="checkbox"/> Gubernatorial General <input type="checkbox"/> Presidential Primary <input type="checkbox"/> Presidential General Election years: 1990, 1992, 1994, 1996, 1998, 2000, 2002 & 2004 are available <input type="checkbox"/> All years <input type="checkbox"/> Specific year(s) - Specify: _____
VOTER INFORMATION: (Check all that apply) →	<input checked="" type="checkbox"/> All Voters <input type="checkbox"/> Male <input type="checkbox"/> Female <input type="checkbox"/> By Age Range* <input type="checkbox"/> By Registration Date* * Specify age or date range: _____ <input checked="" type="checkbox"/> All Party Affiliations <input type="checkbox"/> Specific Party - Specify: _____ <input checked="" type="checkbox"/> Active Voters <input type="checkbox"/> Active & Inactive Voters

Please read statement before signing. Under penalty of perjury, I hereby declare, as required by Election Law Article, § 3-506, Annotated Code of Maryland, that I do not intend to and I will not use the list of registered voters for which I am applying for purposes of commercial solicitation or for any other purpose not related to the electoral process, and that I will not knowingly allow the list to be used by any other person or entity for purposes of commercial solicitation or for any other purpose not related to the electoral process. I am aware that any person who knowingly allows such a list under his or her control to be used for commercial solicitation or for any other purpose not related to the electoral process is guilty of a misdemeanor and is subject to punishment under Election Law Article, Title 16, Annotated Code of Maryland.

William Shannon Adams (print name), have read and understand the above statement and agree to pay the balance due upon receipt of the initial and/or supplemental voter registration list.

William Shannon Adams
Applicant's Signature

4/8/08
Date

EXHIBIT 3

IN THE CIRCUIT COURT FOR ALLEGANY COUNTY, MARYLAND

INT'L. ASSOC. OF FIRE FIGHTERS, :
LOCAL 1715, CUMBERLAND :
FIREFIGHTERS, ET AL. :

 Plaintiffs :

v. : CASE NO. 01-C-08-030649

MAYOR AND CITY COUNCIL OF :
CUMBERLAND, ET AL. :

 Defendants :

: : : : : : : : :

**MEMORANDUM IN SUPPORT OF RESPONSE TO MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF THE MAYOR AND CITY COUNCIL OF
CUMBERLAND'S MOTION FOR SUMMARY JUDGMENT**

The Mayor and City Council of Cumberland (“Cumberland”), Defendant, by Michael Scott Cohen and Michael Scott Cohen, LLC, its attorneys, submits the following Memorandum in support of its response to the Motion for Summary Judgment filed in these proceedings by Plaintiffs and the Mayor and City Council of Cumberland’s Motion for Summary Judgment, stating as follows:

INTRODUCTION

This case was initiated on or about August 22, 2008 pursuant to Plaintiffs’ filing of a Verified Complaint for Writ of Mandamus, Declaratory Judgment and Injunctive Relief (the “Complaint”) along with other related pleadings. The subject matter of the dispute is Plaintiff’s petition (the “Petition”) for an amendment to the Charter of the City of Cumberland (the “Charter”) that would impose binding arbitration for non-management employees of the Cumberland Fire Department.

Plaintiffs submitted the Petition to the City on about July 25, 2008. As submitted 3,550

persons signed the Petition. The preliminary count of the signatures conducted by Cumberland revealed that there were an insufficient number of signatures attached thereto, 2,192 of the signatures were determined to be valid, 1,366 were determined to be invalid and the determination of the validity of an additional 12 signatures was pending. *See* Complaint, Ex. 1.

There are 12,910 registered voters in the City of Cumberland. Therefore, in order to proceed with a referendum, Plaintiffs were required to submit 2,582 valid signatures along with the Petition. *See* Md. Code Ann., Art 23A §14. They failed to do so.

On or about August 18, 2008, Plaintiffs submitted another petition (the “Second Petition”), the text of which was identical to the Petition, which was signed by 472 individuals. Plaintiffs requested that Cumberland count the signatures attached to the Second Petition. Cumberland refused to do so as the Second Petition constitutes a separate and distinct petition for an amendment to the Charter and it was not supported by the signatures of 20% of the voters qualified to vote in the municipal elections of the City of Cumberland. This litigation ensued.

The relief Plaintiffs are seeking is set forth in the Declaratory Judgment, Writ of Mandamus and Injunction (the “Proposed Writ”) they filed in conjunction with their initial pleadings.¹ Plaintiffs are not entitled to that relief by way of summary judgment or otherwise.

ARGUMENT

I. Applicable law dictates that the Petition and the Second Petition are two separate petitions seeking referenda on amendments to the Charter.

Md. Code Ann., Art 23A §§ 11-18 occupies the entire field of law regarding amending municipal charters. There is no room for the expansion of the express wording contained therein,

¹ It should be noted that the Plaintiffs incorrectly identified the Clerk of the City of Cumberland. The City Clerk is Marjorie A. Eirich.

nor is there any basis to judicially create exceptions to or expand upon those provisions.

The process of amending a municipality's charter may be initiated by a resolution initiated by the legislative body or by a petition signed by 20% of the persons who are qualified to vote in the municipality's general elections. *See* Md. Code Ann., Art. 23A § 14(a). Article XI-E, § 4 of the Maryland Constitution provides for the initiation of charter amendments by legislative resolution or by petition. It also provides that "[the] General Assembly shall amplify the provisions of this section by general law in any manner not inconsistent with this Article."

Such amplification with respect to the initiation of charter amendments by petition of the qualified voters is set forth in Md. Code Ann., Art. 23A § 14 which provides as follows:

(a) Petition; resolution of legislative body setting time for referendum.-

Twenty per centum or more of the persons who are qualified to vote in municipal general elections in the particular municipal corporation may initiate a proposed amendment or amendments to the municipal charter, by a petition presented to the legislative body of the municipal corporation, by whatever name known. The petition shall contain the complete and exact wording of the proposed amendment or amendments, and the proposed amendment or amendments shall be prepared in conformity with the several requirements contained in subsections (b) and (c) of § 13 of this subtitle. Each person signing it shall indicate thereon both his name and residence address. Upon receiving the petition, the legislative body is directed to verify that any person who signed it is qualified to vote in municipal general elections, and shall consider the petition as of no effect if it is signed by fewer than twenty per centum of the persons who are qualified to vote in municipal general elections. If the petition complies with the requirements of this section, the legislative body shall by resolution, passed as in its normal legislative procedure, and not later than sixty days after the petition shall have been presented to it, specify the day and the hours for the election at which the question shall be submitted to the voters of the municipal corporation. This may be at either the next regular municipal general election or at a special election, in the discretion of the legislative body. In the event a special election is designated, it shall be within a period of not less than forty days nor more than sixty days after the final passage of the resolution. In the resolution, the exact wording shall be specified which is to be placed on the ballots or voting machines when the question is submitted to the voters of the municipal corporation.

(b) *Adoption of amendment by resolution.*- Provided, however, that if the legislative body shall approve of the amendment or amendments provided for in the petition presented to it under subsection (a) above, it shall have the right by resolution to adopt the amendment or amendments thereby proposed and to proceed thereafter in the same manner as if the amendment or amendments had been initiated by such legislative body and in compliance with the provisions of § 13 of this article.

The provisions set forth in Md. Code Ann., Art. 23A §§ 11-18 were “enacted to implement Article XI-E [of the Maryland Constitution], and particularly to implement Section 4 thereof, [and] they occupy the whole field of amendments to charters of municipalities.” *Hitchins v. Mayor and City Council of Cumberland*, 208 Md. 134, 143 (1955). Thus, the entire body of statutory law relative to amending the charters of municipalities is set forth therein. If contrary or supplemental provisions relative to amending municipal charters are included within local charters, they are of no force and effect. *See Hitchins, supra* (conflicting provisions in charter of City of Cumberland held of no force and effect subsequent to passage of Art. 23A §§ 11-18); *Mayor of City of Hagerstown v. Lyon*, 236 Md. 222 (1964) (Mayor of City of Hagerstown did not have power to veto proposed charter amendment despite charter provisions including mayoral veto). Md. Code Ann., Art. 23A § 14 does not allow for persons petitioning for a referendum to supplement their petition subsequent to the date of its original submission.

Plaintiffs claim that the Court of Appeals specifically rejected the contention that all of the signatures had to be filed on the same day in *State v. McLean*, 249 Md. 436 (1968). However, they neglect to mention that the *McLean* case addresses referenda regarding enactments of the General Assembly and it has no application with respect to the process of amending municipalities’ charters.

The *McLean* case concerned a petition for referendum with respect to legislation enacted

by the General Assembly known as the Open Housing Bill. The applicable law relative to referenda on state legislation was found in Article XVI of the Constitution of the State of Maryland and Md. Code Ann., Art. 33 §169C. *See McLean*, at 437-38.²

Following the passage of the Open Housing Bill, two groups of opponents, the names of which were shortened to “Maryland” and “Taxpayers” in the opinion, gathered 20,000 signatures, Maryland gathering 2,000 and Taxpayers gathering 18,000. The signatures were delivered to the Secretary of State on May 31, 1967. Then applicable law provided that 27,593 signatures were required “it being sufficient if more than half were filed before the first of June and the remainder before June 30.” *Id.* at 438.

It is significant to note that the *McLean* Court cited Article XVI § 3, which expressly provided that the time for filing a petition for referendum would be extended by 30 days if more than one-half of the required number of signatures were filed on or before June 1. Similar provisions relative to multiple submissions remain in that section of the Maryland Constitution today and they are set forth in footnote 2 of this Memorandum. It is even more significant to note

²Article XVI, § 3(b) of the Maryland Constitution provides:

If more than one-third, but less than the full number of signatures required to complete any referendum petition against **any law passed by the General Assembly**, be filed with the Secretary of State before the first day of June, the time for the law to take effect and for filing the remainder of signatures to complete the petition shall be extended to the thirtieth day of the same month, with like effect.

If an Act is passed less than 45 days prior to June 1, it may not become effective sooner than 31 days after its passage. To bring this Act to referendum, the first one-third of the required number of signatures to a petition shall be submitted within 30 days after its passage. If the first one-third of the required number of signatures is submitted to the Secretary of State within 30 days after its passage, the time for the Act to take effect and for filing the remainder of the signatures to complete the petition shall be extended for an additional 30 days.

(emphasis added)

for the purposes of the instant dispute that there are no such provisions in Article 23A.

The *McLean* Court noted that section 169C of Article 33 of the Maryland Annotated Code contained the requirement that the filing of the petition submitted by Maryland and Taxpayers be accompanied by a financial statement setting forth the contributions and expenditures for the petition. *McLean*, 249 Md. at 438. The Attorney General rejected the petition because Maryland's financial statement was invalid and because, as all of the signatures were submitted at one time in boxes, it was impossible to distinguish which of the signatures were procured by Maryland and which were procured by Taxpayers. *Id.* at 439. Therefore, in accordance with the Attorney General's argument, the invalid financial statement resulted in the invalidation of all 20,000 signatures. Notwithstanding that argument, at the hearing on the petition for mandamus, it was established that the 2,000 signatures collected by Maryland could be identified and separated from the joint filing. *Id.* at 441-42.

The relevant portion of the Court's ruling is as follows:

[Circuit Court for Harford County] Judge Dyer denied a defendant's motion for a directed verdict at the end of the plaintiffs' case, finding that the plaintiffs had shown that the "number of signatures" attributable to Maryland and Taxpayers, respectively, "although not made known to the Secretary of State at the time submitted, has been made here in Court," but at the conclusion of the case rested his decision on the ground that:

"the Maryland Petition Committee, Inc. made a good faith and bona fide effort to comply with Section 169C which, while not strict or literal compliance on May 31, 1967, was a sufficient degree of compliance to merit an opportunity to amend to the strict requirement of the Section. The amendment of June 30, 1967, met this latter standard. The petition for a Writ of Mandamus, therefore, is granted."

We do not think it necessary to rule on this ground of decision. The Secretary did not controvert the facts as to sufficient compliance with Art. XVI of the

Constitution and with § 169C of Art. 33, proven by the plaintiffs, namely that 18,000 valid signatures covered by a valid financial statement had been filed by June 1, and 17,000 more filed by June 30. He merely showed that he was told by Taxpayers and Maryland that they did not want to separate their signatures and that although later advised that Maryland's could be identified was never told how, and therefore followed the ruling of the Attorney General.

We think it was abundantly and clearly proven that approximately 18,000 valid signatures related to and covered by a valid financial statement were filed on May 31. Only approximately 13,800 were needed by June 1 (there is no dispute that enough additional signatures, duly covered by valid financial statements, were filed by June 30). The persons whose signatures were legally and constitutionally presented and filed with the Secretary are entitled to have Ch. 385 referred under Art. XVI, and the Circuit Court for Harford County did not err in ordering that it be referred.

Id. at 442-43.

Although Plaintiffs would encourage this Court to interpret the *McLean* case as a statement of the law relative to all referenda, it cannot be given such a reading. *McLean* constitutes a resolution of a dispute regarding whether two groups of signatures submitted collectively at the same time can be separated from one another so as to distinguish which group of signatures had a valid financial statement submitted with it and which one did not. Nothing more was decided and nothing more can be inferred from the decision. It is a decision relative to the interpretation and application of state law regarding referenda on enactments of the General Assembly. That decision has no applicability to this case.

Interestingly enough, however, the Maryland Constitution provisions cited in *McLean* lend give great weight to Cumberland's argument that the General Assembly knows how to provide for multiple submissions of signatures for petitions seeking referenda. It did so in Article XVI § 3 of the Maryland Constitution and in Md. Code Ann., Art. 25B § 10(h)(3). There are no similar provisions in Article 23A or in the Maryland Constitution. By the omission of

such a provision, it is clear that the General Assembly did not intend to allow petitioners seeking amendments to municipal charters to submit signatures on separate occasions and to consider those submissions to be one petition.

"[I]t is a cardinal rule that in construing a legislative enactment courts should confine themselves to a construction of a statute as written, and not attempt, under the guise of statutory construction, to supply omissions or remedy possible defects in the statute, or to insert exceptions not made by the legislature. Cases to this effect are legion." *National Union of Hospital and Health Care Employees v. Johns Hopkins Hospital*, 293 Md. 343, 360 (1982).

It is a settled principal of statutory construction that the Legislature's enumeration of one item, purpose, etc. ordinarily implies the exclusion of all others. *State Insurance v. Nationwide*, 241 Md. 108, 117, 215 A.2d 749 (1966); *Trust Co. v. Ward Baking Corp.*, 177 Md. 212, 220, 9 A.2d 228 (1939); *Railroad Co. v. Lichtenberg*, 176 Md. 383, 390, 4 A.2d 734, *appeal dismissed*, 308 U.S. 525, 60 S. Ct. 297, 84 L. Ed. 444 (1939); *Vanderford v. Farmers' Bank*, 105 Md. 164, 168, 66 A. 47 (1907) ("the express mention of one thing implies the exclusion of another"); 2A Sutherland, *Statutory Construction*, §§ 47.23, 47.24 (4th ed. 1973). The principle is often expressed as the latin maxim "*expressio unius est exclusio alterius*," *Gay Investment v. Comi*, 230 Md. 433, 438, 187 A.2d 463 (1963). A related principle is that where a statute authorizes or permits a person or agency to take a certain type of action in a particular manner, such manner becomes a mandatory limitation, and the action must be taken in conformity with it. *Trust Co. v. Ward Baking Corp.*, *supra*, 177 Md. at 220 ("A statute that directs a thing to be done in a particular manner ordinarily implies that it shall not be done otherwise."); 2A Sutherland, *supra*, §§ 57.14-57.18.

Office & Professional Employees Int'l. Union v. Mass Transit Admin., 295 Md. 88, 95 (1982).

The relevant provisions of Article 23A prescribe a specific method for submitting a petition for a charter amendment. By virtue of the prescription of this methodology, action must be taken in conformity with it. Plaintiffs' attempt to supplement the signatures submitted with the Petition by means of the Second Petition is inconsistent with the methodology provided in

Md. Code Ann., Art. 23A §14 and is, therefore, impermissible.

The Court must exercise restraint in this case and decline to create exceptions to the express provisions of Md. Code Ann., Art 23A §14(a). If it accepts Plaintiffs' argument that supplementation is permitted, it will also have to create a new exception to the statutory rule and determine the applicable time frames for a municipality to verify the signatures after a supplemental submission as well as the applicable time frames for the holding of a special election in the event a petition, as supplemented, contains the signatures of at least 20% of the persons qualified to vote in municipalities' general elections. The Court would also have to determine how many times a petitioner is permitted to supplement a petition. Do the submissions stop at two occasions as is the case with respect to referenda regarding acts of the General Assembly, does it stop within a finite period of time provided a specified number of signatures are submitted with the original submission as is the case with respect to county charter amendment petitions in Md. Code Ann., Art. 25B § 10(h)(3), or is there some other scheme that should be adopted so as to allow supplements to petitions for referenda on amendments to municipalities' charters?

These are not decisions for this Court to make. Rather, if the General Assembly is inclined to do so, it may legislatively enact changes to Article 23A. Until that occurs, this Court must construe it strictly and it should decline to grant the relief Plaintiffs are seeking.

- II. If, under the guise of equitable considerations, the Court is inclined to require Cumberland to consider the Petition and the Second Petition to be one petition for the purpose of initiating a referendum, under those same principles, if the combined petitions contain the signatures of 20% of the qualified voters, it should permit Cumberland to defer the referendum until the 2010 general election.**

For the reasons stated hereinbefore, it is Cumberland's position that this Court should not consider the Petition and the Second Petition to be one petition for the purposes of initiating a charter amendment under Md. Code Ann., Art 23A § 14(a). However, in the event the Court determines that it would be inequitable not to do so, invoking the Court's powers in equity, and if it is determined that Plaintiffs' combined submissions contain the signatures of at least 20% of the persons qualified to vote in the City of Cumberland's municipal general elections, the same equitable principles would apply to require that the Court order that Cumberland has discretion to defer the referendum until the November, 2010 general election.

In that Cumberland and Allegany County conduct joint elections which are administered by the Allegany County Board of Elections and the deadline for submitting matters to be included on the State's ballot is set by state law, Cumberland is effectively subject to that same deadline. In this instance, the deadline for submitting matters to be included on the electronic ballots was August 18, 2008. The Petition was not submitted until July 25, 2008 and the Second Petition was submitted on August 18, 2008.

The applicable provisions of Article 23A of the Annotated Code of Maryland do not address those circumstances where petitions for charter amendments are submitted within time frames that make it impossible for municipalities who conduct their elections jointly with counties to hold referendum elections at their next general elections.

The pertinent provisions of Md. Code Ann., Art. 23A § 14(a) are as follows:

If the petition complies with the [signature verification and percentage] requirements of this section, the legislative body shall by resolution, passed as in its normal legislative procedure, and not later than sixty days after the petition shall have been presented to it, specify the day and the hours for the election at which the question shall be submitted to the voters of the municipal corporation.

This may be at either the next regular municipal general election or at a special election, in the discretion of the legislative body. (emphasis added)

In that decisions regarding whether referenda are submitted to voters at special elections or general elections are discretionary, municipalities' legislative bodies have the right to exercise that discretion in the manner they see fit. When a statute grants public officials the discretion to act in a certain fashion, the decision made will not be subject to review. *See Phillip Morris, Inc. v. Glendening*, 349 Md. 660 (1998).

In the instant case, Plaintiffs seek to take away that discretion from Cumberland.

Cumberland made considerable efforts to verify the signatures that were submitted on July 25, 2008 in order to meet the State's August 18, 2008. Cumberland announced the results of its counting on or about August 15, 2008, immediately after it was preliminarily completed. In that an insufficient number of valid signatures were submitted, Plaintiffs scrambled to collect additional signatures, submitting the Second Petition on August 18, 2008, the date of the State's deadline.

Plaintiffs admit that they started collecting signatures for the Petition in the spring of 2008. *See* Complaint ¶ 18. While Plaintiffs collected 3,550 signatures over the course of the spring and summer of 2008 prior to July 25, they were able collect an additional 472 signatures over the course of the three day period from August 15-18.

In deferring the dates of their submissions to a time so close to the general election, Plaintiffs have effectively divested Cumberland from its right to hold the referendum at a general election. The State Board of Elections deadline was known to all concerned and was readily ascertainable through a reading of the applicable laws and regulations as those deadlines are set

as a matter of law. *See* Motion to Dismiss of State Board of Elections. That is why Cumberland completed the verification of the signatures on the Petition on August 15, 2008 rather than waiting until September 23, 2008, sixty days from the date of its submission, the deadline date for its completion of the verification process under Md. Code Ann., Art. 23A § 14(a).

For the reasons stated hereinbefore, Cumberland took the position that the Petition and the Second Petition were separate petitions seeking an amendment to the Charter and that, since the number of signatures submitted with the Second Petition did not amount to 20% of the voters qualified to vote in Cumberland's general elections, there was not point in making the effort to verify those signatures. Notwithstanding the foregoing, with the Second Petition being submitted on August 18, Cumberland did not have sufficient time in advance of the State Board of Elections' deadline to verify the signatures and pass a resolution scheduling the referendum for the next municipal general election.

In the event the Court determines that the Petition and the Second Petition constitute the same petition for the purpose of Md. Code Ann., Art 23A § 14(a) and that the number of valid signatures submitted therewith meets the 20% threshold, it must also consider the right of Cumberland to hold the referendum at a general election. If the Court makes both of those initial determinations, it will be interpreting state law to include provisions that are not expressly set forth therein. In essence, it will be creating a procedure that allows for multiple submissions of a petition for an amendment to a municipality's charter to be considered to be one submission. If the Court is going to judicially legislate, which it should refrain from doing, it should go one step further to protect Cumberland's right to exercise discretion over whether to hold the referendum at a special election or a general election. In that it appears to be out of the question for

Cumberland to submit the matter for the November 4, 2008 general election, the only option available other than holding a special election on the matter is to defer the matter until the November, 2010 general election. If the Court is going to grant equitable relief, it should grant such relief in a manner such that equity is extended to all parties concerned.

III. If the Court is not inclined to grant summary judgment in favor of Cumberland for the reasons stated previously herein, it must determine that there are 12,910 persons qualified to vote in Cumberland's general elections and that 20% of those persons so qualified must sign the Petition in order for the question presented therein to be submitted to the voters by referendum.

Plaintiffs' contention that they may rely on the list of voters submitted to them in response to the request submitted to the Allegany County Board of Elections William Shannon Adams on or about April 8, 2008 as constituting the list of voters qualified to vote in Cumberland's general elections is baseless. They cite no authority in support of this request and, accordingly, the Court should disregard it.

There are 12,910 persons qualified to vote in Cumberland's general elections. That list of persons includes active voters, inactive voters and three persons who are registered solely to vote in Cumberland's general elections.

In that Cumberland utilizes universal registration, using the voter registry supplied by the Allegany County Board of Elections as qualification for voting in municipal elections, Subtitle 5 of Title 3 of the Elections Article applies with respect to the maintenance of Cumberland's voter registry.

Md. Elections Code Ann. § 3-503 provides as follows:

§ 3-503. Inactive list.

(a) *In general.*- If a voter fails to respond to a confirmation notice under §

3-502(c) of this subtitle, the voter's name shall be placed into inactive status on the statewide voter registration list.

(b) *Restoration to active status.*- A voter shall be restored to active status on the statewide voter registration list after completing and signing any of the following election documents:

- (1) a voter registration application;
- (2) a petition governed by Title 6;
- (3) a certificate of candidacy;
- (4) an absentee ballot application; or

(5) a written affirmation of residence completed on election day to entitle the voter to vote either at the election district or precinct for the voter's current residence or the voter's previous residence, as determined by the State Board.

(c) *Removal.*- An inactive voter who fails to vote in an election in the period ending with the second general election shall be removed from the statewide voter registration list.

(d) *Counting for official administrative purposes.*- Registrants placed into inactive status may not be counted for official administrative purposes including establishing precincts and reporting official statistics.

Subsection (c) specifically contemplates that voters who have been placed on the inactive list are qualified to vote in elections. An inactive voter is not removed from the list and disqualified from voting until that person fails to vote in two general elections. Therefore, active and inactive voters are properly included in the list of persons qualified to vote in Cumberland's general elections.

Plaintiffs specifically requested that the Allegany County Board of Elections produce an incomplete list of the voters qualified to vote in Cumberland's general elections, i.e., a list that was limited to active voters. One can only assume that, had they properly couched their request

for the voter list, they would have been provided with the complete list which is attached to Cumberland's Motion for Summary Judgment as Exhibit 3. In that they failed to do so, the Court should not take any action to remedy their mistake in the calculation of the number of signatures required to move the Petition forward to referendum.

Md. Code Ann., Art. 23A § specifically requires that a petition for charter amendment be signed by 20% of those persons qualified to vote in the municipality's general election. Circumventing this legal requirement and permitting the matter to go forward to referendum with a lesser number of signatures is not permitted in law or in equity.

IV. The amendment to the Charter proposed in the Petition is illegal and impermissible and, as such, mandamus is not an available remedy.

Plaintiffs submitted a Memorandum of Law to this Court under a cover letter from their counsel dated September 4, 2008 in order to address "an issue raised by the City of Cumberland," to-wit: whether the charter amendment they propose in their petition is proper charter material or whether it is legislative in nature and, therefore, not permitted to be included in the Charter. The issue was in fact raised by Cumberland prior to the initiation of these proceedings and it remains as a defense to the relief sought by Plaintiffs.

A. Portions of Plaintiffs' Memorandum of Law should be stricken or, alternatively, disregarded by the Court.

The arguments set forth in Plaintiffs Memorandum of Law are a mixture of legal argument and factual averments. The Court should disregard all factual averments contained therein that are not supported by affidavit or documentation.

Rule 2-311(d) provides as follows: "A motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers

on which it is based.” Section B of Plaintiffs’ Memorandum of Law consists entirely of purportedly factual statements which are unsupported by affidavit or any papers submitted with the Memorandum of Law. Therefore, in accordance with that Rule and Rule 2-322(d), the Court should disregard Section B in its entirety.

B. Mandamus may not be invoked for the purpose of requiring the enactment of an illegal measure.

“[W]here the performance of a duty prescribed by law depends on whether the statute or regulation is constitutional or invalid, there is no reason why the question may not be determined on a petition for a writ of mandamus. . .” *Murray v. Curlett*, 228 Md. 239, 243-44, *rev'd on other grounds*, 374 U.S. 203 (1963). It is Cumberland’s position that the charter amendment proposed in the Petition is not proper charter material and is illegal. That issue is ripe for determination in this case and it is properly raised as a defense in these proceedings.

C. Despite Plaintiffs’ assertion otherwise, the *Bunting* case does not stand for the proposition that charter amendments imposing binding arbitration are properly included in charters.

In their Memorandum of Law, Plaintiffs rely heavily upon *Mayor and City Council v. Bunting*, 168 Md. App. 134 (2006) in support of their proposition that the charter amendment proposed in the Petition is proper charter material. They also argue that other jurisdictions have incorporated charter provisions requiring charter provisions that mandate binding arbitration and therefore, the amendment to the Charter they propose is proper. For the reasons stated hereinafter, their reliance on *Bunting* is misplaced and their arguments are flawed. The amendment to the Charter they propose is illegal and it is not proper charter material.

In interpreting the *Bunting* decision, Plaintiffs argue, “Since the charter [in *Bunting*]

could be interpreted as allowing the City Council to legislate the details of the binding arbitration process, the Court found no infirmity in the charter provisions permitting it." See Plaintiffs' Memorandum of Law, p. 7. The *Bunting* Court did not find any infirmity in the charter provisions as a whole because it did not consider nor did it make a ruling on that issue. Their statement regarding the Bunting Court's finding is misleading.

The sole issue before the Court in *Bunting* was whether Ocean City violated the terms of a charter amendment providing for binding arbitration for police officers by refusing to permit officers holding the ranks of lieutenants and higher from participating in collective bargaining. The Court did not make any rulings with respect to whether the charter amendment as a whole was proper charter material or whether it was legislative in nature. It remarked,

Unlike in *Cheeks* and *Griffith*, we are not asked to review the constitutionality of all or a substantial part of the charter amendment at issue, but only to interpret the specific provision of the Ocean City charter amendment permitting "employees" of the police department to collectively bargain. 11 Consequently, the question of whether the Ocean City charter amendment imposes a comprehensive "collective bargaining" scheme is not before us. But the lesson of *Cheeks* and *Griffith* is still applicable. Here we are asked to review a provision that has nothing to do with "the broad organizational framework establishing the form and structure" of Ocean City, *Cheeks*, 287 Md. at 607, and that is sufficiently "specific" and "technical" in nature that it is clearly an issue for the Council and not the voters to resolve. In other words, it is "legislative" in character.

Id. at 147-48. The Court of Special Appeals' remarks in footnote 11 clearly show that Plaintiffs incorrectly summarize the *Bunting* opinion.

We observe that the [Ocean City] charter amendment also sets forth rather detailed procedures for binding arbitration in the event of an impasse in collective bargaining. We are not asked to and do not address whether those procedures exceed the bounds of proper charter material, as the matter has no bearing on the issue before us: Whether the amendment requires that captains and lieutenants be permitted to collectively bargain.

Id., n. 11. The *Bunting* decision provides no support for Plaintiffs' position.

In essence, Plaintiffs further argue that since other counties and municipalities (i.e., Baltimore County, Anne Arundel County, Howard County, Montgomery County, Prince George's County, Baltimore City, and Ocean City) have charter provisions requiring binding arbitration for firefighters, similar provisions are proper charter material. Plaintiffs are unable to cite any cases where such charter provisions withstood legal challenge in Maryland's courts. Rather, they would have this Court approve of the amendment to the Charter proposed in the Petition simply because other Maryland counties, Baltimore City and Ocean City have passed charter amendments requiring binding arbitration for firefighters. The Court should disregard this argument and should decline to approve the validity of the amendment to the Charter proposed in the Petition simply because other jurisdictions' charters contain similar provisions.

D. The amendment to the Charter proposed in the Petition is not proper charter material and is illegal.

In order to ascertain whether the amendment to the Charter proposed in the Petition is proper, the Court must consider whether it is proper charter material or whether it is legislative in nature. It has been acknowledged that a "charter is equivalent to a constitution" and that "the 'basic function' of a charter is to 'distribute power among the various agencies of government, and between the government and the people who have delegated that power to their government.'" *Save Our Streets v. Mitchell*, 357 Md. 237, 248 (2000) (quoting *Board v. Smallwood*, 327 Md. 220, 237 (1990)). "A charter is thus a permanent document intended to provide a broad organizational framework establishing the form and structure of government in pursuance of which the political subdivision is to be governed and local laws enacted. It is the

organic, the fundamental law.” *Id.* at 248-49 (quoting *Cheeks v. Cedlair Corp.*, 287 Md. 595, 607 (1980)). “[T]he charter of the city is the organic law of the corporation, being to it what the constitution is to the state, and the charter bears the same general relation to the ordinances of the city that the constitution of the state bears to the statutes.” *Maryland Cl. Emp. Ass’n v. Anderson*, 281 Md. 496, 512-13 (1977) (quoting 5 *McQuillan Mun. Corp.* § 15.19 (3rd ed. 1969)).

The power to adopt or amend a charter is the power to organize a local government which power is reserved to the voters of the county or municipality. *Save Our Streets*, 357 Md. at 249. In contrast, the power to initiate local legislation vests in the governing body of the county or municipality alone and may not be exercised by the voters. *Id.* “[S]uch legislative power cannot be exercised by means of an amendment to [a] charter.” *Id.* It follows that a charter amendment

is necessarily limited in substance to amending the form or structure of government initially established by adoption of the charter. A charter amendment, therefore, differs in its fundamental character from a simple legislative enactment. Its content cannot transcend its limited office and be made to serve or function as a vehicle through which to adopt local legislation.

Id. at 249-50 (quoting *Cheeks*, 287 Md. at 607).

In *Griffith v. Wakefield*, 298 Md. 381 (1984), the Court of Appeals determined that a charter amendment requiring binding arbitration for Baltimore County firefighters was not proper charter material and determined that it was invalid. The charter amendment was proposed by a petition presented by Baltimore County voters and it included provisions entitling either the firefighters or the County to demand binding arbitration before a three person arbitration board in the event of an impasse, with the board decision regarding the disputed matters being final and binding on both parties, setting forth the procedure for the appointment of the arbitration board, the board’s powers and the procedure it must follow, the factors it must take into consideration

when making its award, and that the funds necessary to implement the Board's award be incorporated into the County's budget. *Id.* at 383.

In reaching its decision that the proposed charter amendment was not proper charter material, the *Griffith* Court remarked,

When viewed as a whole, **it is clear that the Baltimore County amendment is not intended to, nor does it, alter the "form or structure" of the Baltimore County government.** Instead, the core of the amendment is the imposition of a comprehensive system of binding arbitration concerning a single group of county employees. As in *Cheeks*, the charter amendment proposed in Baltimore County is "essentially legislative in character;" it is a complete and specifically detailed legislative scheme. Again as in *Cheeks*, the present case presents a situation whereby the electorate, through the charter amendment process, is attempting to circumvent the local legislative body and enact local law.

Id. at 388. (emphasis added). While the amendment to the Charter proposed in the Petition does not go into the same elaborate detail as the amendment in *Griffith*, a charter amendment imposing binding arbitration does not alter the form or structure of the City of Cumberland government and, therefore, is not proper Charter material.

The *Griffith* Court also remarked,

"We assume, but have no need to decide, that, in light of the above cited cases on the point, had a State public general law or *the County Charter* authorized the binding arbitration provisions enacted by the County Council, the provisions would be valid. But there is no such *authority* in either a public general law or *the County Charter*. As is evident from the cases above cited, the prevailing rule in other jurisdictions is in complete accord with the view expressed in *Mugford [v. City of Baltimore]*, 185 Md. 266, 44 A.2d 745 (1945)] to the effect that absent *such authorization* it is invalid for a municipality or charter county to attempt to bind itself in the exercise of legislative discretion over compensation of its public employees. We follow that rule. Because the Harford County ordinance attempted to bind the County in the exercise of its legislative discretion over public employee compensation *without being authorized to do so* by a public general law or by *the County Charter*, the provisions of the ordinance to that end are invalid." (Emphasis added.)

Turning to the instant case, the defendant firefighters association asserts that because *Anderson* held that "authorization of the charter is required, then the matter must be one which is concerned with the 'form or structure of government' . . . [and] is properly deemed 'charter material.'" (Brief, p. 9.) The flaw in this argument is the failure to distinguish between "authorization" on the one hand and a detailed local enactment on the other hand. It is common for constitutions or charters to authorize, or preclude, specified types of enactments by legislative bodies. This is quite different from a charter itself containing all of the detailed provisions concerning the subject.

If the proposed Baltimore County charter amendment had merely authorized the Baltimore County Council to enact a system of binding arbitration with regard to the compensation of Baltimore County employees, and if, pursuant to that authorization, the Baltimore County Council had exercised its discretion to enact an ordinance containing provisions similar to those in the proposed charter amendment now before us, the present case would be distinguishable from *Cheeks*.

Id. at 389-90 (quoting *Anderson*, 281 Md. at 512-13 (1977)). In *Save Our Streets*, the Court of Appeals that the Griffith Court drew a distinction between "proposed charter amendments that 'authorize, or preclude, specified types of enactments by legislative bodies' and thus are ordinarily valid, and those that constitute specified legislative schemes, and thus are ordinarily invalid." 357 Md. at 251 (quoting *Smallwood*, 327 Md. at 329).

The amendment to the Charter proposed in the Petition goes beyond the mere authorization of binding arbitration. It mandates binding arbitration. Had Plaintiffs sought to amend the Charter with a provision that merely *authorized* Cumberland to enact legislation requiring binding authorization in the event of an impasse in its negotiations with the firefighters, it would be allowable under *Griffith*. However, the Petition goes too far in this regard.

Plaintiffs seemingly argue that the length and detail of charter amendments regarding binding arbitration are determinative as to whether they constitute charter material or legislative enactments. This approach has been rejected in *Save Our Streets*.

Although both *Cheeks* and *Griffith* involved legislative schemes that were lengthy and detailed, thereby furnishing some indication of ordinary legislation under the guise of charter amendments, nevertheless the length and detail of a proposed charter amendment are not dispositive as to whether the proposed amendment constitutes legislation or proper charter material. An important consideration is the degree to which the county council retains discretion and control regarding an area under its authority. . .

Save Our Streets, 357 Md. at 253. “[A]n authorization or preclusion of a type of legislative enactment allow’s for the council’s exercise of discretion and, thus, is ordinarily proper charter material.” *Id.* at 254. In the case at bar, the proposed amendment to the Charter leaves no discretion with Cumberland as to whether or not to pass legislation mandating binding arbitration because that mandate is contained in the proposal itself.

The *Anderson* case supports Cumberland’s position. In that case, the Maryland Classified Employees Association, Inc. petitioned for a writ of mandamus in order to enforce an arbitration award granting them an increase in pay when Harford County refused to grant them that increase after the parties’ impasse in negotiations was submitted to an arbitrator in accordance with the provisions of the Harford County Code. Opining that the “time is ripe and this case appropriate to determine whether a binding arbitration provision with respect to the compensation of public employees is valid,” the Court of Appeals allowed Harford County to challenge the validity of the very ordinances it enacted. *Id.* at 506.

The Court upheld the circuit court’s decision denying the writ of mandamus because binding arbitration was neither authorized in the public general law nor the Harford County Charter. It remarked

Where municipal governments have been authorized by higher law, i.e., state constitutional provisions or public general laws or municipal charter provisions, to enter into collective bargaining agreements which bind them in the exercise of

their legislative discretion, the courts have generally upheld such collective bargaining agreements, rejecting contentions that they amount to invalid abdications or delegations of legislative authority.¹¹ On the other hand, in the situation where neither a public general law nor municipal charter provision authorized the municipality to bind itself in the exercise of legislative discretion over public employee compensation, the courts have generally taken the position that attempts to do so in collective bargaining agreements or municipal ordinances are invalid.

Id. at 508-09. In the absence of the authority to delegate decisions regarding wages and terms of employment under the terms of a public general law or a charter, the delegation of such power would be a “serious violation of the law.” *Id.* at 511 (*quoting Mugford v. City of Baltimore*, 185 Md. 266, 270-71 (1946)). “Absent such authorization it is invalid for a municipality or charter county to attempt to bind itself in the exercise of legislative discretion over compensation of its public employees.” *Id.* at 512-13. There is no public general law which authorizes municipalities to delegate decisions regarding compensation of public employees to third parties. Further, at present there are no Charter provisions that permit the delegation of that authority. The proposal set forth in the Petition must fail because it goes beyond merely authorizing the delegation of such decisions.

Additionally and consistent with the *Griffith* decision, the form of the proposal is invalid because it goes beyond a mere authorization for binding arbitration and prescribes several terms which are legislative in nature. The proposal requires the appointment of “a neutral arbitrator,” thereby prohibiting Cumberland from implementing binding arbitration with an arbitration panel. The decision as to whether to elect for binding arbitration before a single arbitrator or a panel is legislative in nature and has nothing to do with the form or structure of government.

The proposal set forth in the Petition contains a mandate that "Any ordinance that is enacted shall prohibit strikes or work stoppages by the represented employees." The subject matter of this directive has no relation to the form or structure of government. Its proscription is solely legislative in nature, constituting an exercise of police power.

Thus, for the foregoing reasons, summary judgment should be granted in favor of Cumberland and against Plaintiffs and Plaintiffs' Motion for Summary Judgment should be denied.

Respectfully submitted,

MICHAEL SCOTT COHEN, LLC

By: 

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Attorneys for Defendant, Mayor and City
Council of Cumberland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 8th day of September, 2008, a copy of the foregoing was mailed, postage prepaid, to Francis J. Collins, Esq., Kahn, Smith & Collins, P.A., 201 N. Charles St. - 10th Floor, Baltimore, MD 21201, Armand M. Pannone, Esq., 14 Greene Street, Cumberland, MD 21502, Sandra Brantley, Asst. Attny. General, Office of the Attorney General, 90 State Circle, Room 104, Annapolis, MD 21401, and David Moore, Assistant Attorney General, Office of the Attorney General, Civil Division, 200 St. Paul Place, Baltimore, MD 21202.



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September 3, 2008

The Honorable W. Timothy Finan
Circuit Court for Allegany County
30 Washington Street
Cumberland, Maryland 21502

Re: *International Association of Firefighters, Local 1715, et al. v. The Mayor & City Council of Cumberland, et al.*
Case 01C09030649

Dear Judge Finan:

Enclosed please find Defendant Maryland State Board of Elections' Motion to Dismiss the complaint in the above captioned matter.

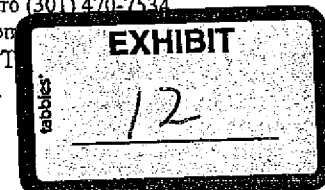
Very truly yours,

A handwritten signature in black ink, appearing to read "D. Moore".

David R. Moore
Assistant Attorney General

Enclosure

cc: Frances J. Collins, Esq.
Michael Cohen, Esq.
Armand Panone, II, Esq.



International Association of Firefighters,
Local 1715, Cumberland
Firefighters, et al.,
Plaintiffs

v.

The Mayor & City Council
of Cumberland, et al.,
Defendants.

* In the Circuit Court for
* Allegany County
* Case Number: 01C08030649

* * * * *

MOTION TO DISMISS

On July 25, 2008, the International Association of Fire Fighters Local 1715, Cumberland Firefighters (plaintiff), filed a petition with the City of Cumberland (“the City” or “Cumberland”) to place a proposed Charter amendment on the City’s ballot for referendum. (Ex. 1, Complaint, ¶¶ 15, 17.) Plaintiff brings the instant complaint in order to compel inclusion of that proposed City-charter amendment on the State ballot administered by the defendant State Board of Elections (“SBE”). Pursuant to Md. Rule 2-322, the SBE hereby moves to dismiss the complaint as to the SBE and the Allegany County Board of Elections (which performs its duties in conjunction with the SBE), because the belated addition of the referendum would disrupt the statutorily-timed process SBE must complete to prepare for the November 4, 2008 general election, and because plaintiff has an adequate alternative remedy — a special election held by Cumberland at a time and place separate from the State-administered election — if this Court finds plaintiff is entitled to relief. *See* Md. Code Ann. Art. 23A, § 14 (providing for either *municipal*, not State, general election or special election to resolve charter amendment referenda).

Summary of Facts

Plaintiff alleges that on Friday, August 15, 2008, the Mayor & City Council of Cumberland determined that plaintiff's July 25, 2008 petition lacked an adequate number of valid signatures and denied it. (Ex. 1, Complaint ¶ 17.) On Monday, August 18, 2008, rather than challenge Cumberland's action, plaintiff filed additional signatures in support of its petition and asked Cumberland to verify them and add them to those already validated to achieve the requisite number for placement on the ballot. (Ex. 1, Complaint ¶ 17.) Plaintiff seeks to have Cumberland hold a vote on their referendum, and seek to compel the State Board of Elections ("SBE") to administer the vote for Cumberland. While the State permits Cumberland municipal elections issues to be voted on through the State elections system, on Monday, August 18, 2008, the Maryland State Board of Elections's ("SBE") deadline closed for accepting county and municipal ballot items for inclusion on the November 4, 2008 State ballot.

Plaintiff was aware of the August 18th deadline at least as early as July 2008. (Ex. 1, Complaint, attached exhibit 5.) In addition, at least as early as July 2008, plaintiff was already asserting to the City the same complaint that is now filed and pending before this Court. (Ex. 1, Complaint ¶ 3.) Although plaintiff's requested injunctive relief is necessarily based on a claim that it would suffer "immediate, substantial and irreparable harm," Rule 15-504(a), in the absence of court intervention, and although plaintiff was aware of the subject matter of its grievance and the August 18th deadline for inclusion on the State ballot, plaintiff

nonetheless waited until Friday, August 22, 2008, to file a complaint in the Circuit Court for Allegany County. Plaintiff's proper remedy at this time, if any, is to seek to have Cumberland administer a special election on a day other than November 4, 2008.

Argument

Plaintiff's complaint seeks and order, in part, to compel SBE to place the referendum question on the November 4, 2008 State-administered ballot, despite the burden that such an order would impose upon the orderly administration of the November 4, 2008 election. Plaintiff seeks to shift the burden to SBE, even though plaintiff delayed seeking such relief until after the SBE deadline had already passed.

Plaintiff seeks injunctive relief despite acknowledging the existence of a less burdensome, but adequate, alternative — Cumberland's administration of a separate special election at another date and time — that does not interfere with the November 4 election. *See* Ex. 1, Complaint ¶ 26. A special election administered by Cumberland on a date other than November 4th would avoid the necessity of including the referendum on the State ballot, and would, accordingly, avoid the disruption of the schedule already in progress. It would also relieve the pressure to expedite this litigation, because the election could be held, even in plaintiff's view, up until December 19, 2008. (Ex. 1, Complaint ¶ 26.)

The SBE's election timetable is well underway and would be disrupted by compelling the addition of the plaintiff's referendum to the State-administered ballot.

The SBE's procedures for accepting a referendum question to be placed on the ballot

are consistent with an overarching goal of ensuring a swift, orderly and accurate preparation of ballots in accordance with the short timelines imposed by statute. While the SBE does permit Cumberland to submit city election matters for placement on the State ballot, any such local matter must comply with the State law to be included in the SBE process and timetable.¹

Under the SBE timetable, once a locality, such as Allegany County, has provided its portion of the ballot information to the State (and in this case, the City's portion as well) by August 18th, the State still has an array of tasks that must be accomplished before the entire ballot may be certified. Certification is statutorily set to occur by September 10, 2008, and, this year, may occur as early as September 5, 2008.

SBE's tasks, and the checks of their successful completion, must move expeditiously in order to meet the statutory deadlines. The Court of Appeals has emphasized the importance of elections deadlines "in view of the necessity for making timely preparations for elections." *Andrews v. Secretary of State*, 235 Md. 106, 108 (1964).

After all of the local ballot information was provided to the State on August 18th, the SBE began the ballot preparation process. This process is governed by strict deadlines and EL § 1-301 provides that, in computing periods of time under the Article, Saturdays,

¹Municipal elections, including those to resolve charter amendments, are not normally within the definition of an "election" under Md. Code Ann. Election Law § 1-101(v)(3). Accordingly, municipal elections are generally *not* administered by SBE. Nonetheless, the SBE's powers and duties are to administer "elections" under the State elections code, and if a municipal election *is* to be administered by SBE it must comport with the State timetable.

Sundays, and legal holidays are included, making time all the more pressing. *See* EL § 1-301(a)(1). Election Law § 9-202(a) requires the SBE to “certify the content and arrangement” of the ballots *at least* 55 days before the general election, i.e. by September 10, 2008. *See* EL § 9-207(a)(1). Within 48 hours of the certification, the SBE is required to deliver to each local board of elections a copy of the certified ballot content and arrangement for that county. *See* EL § 9-207(c). The requirements of prompt ballot certification and delivery by the SBE allows the local boards to comply with their statutory responsibilities in a timely fashion. *See* EL § 9-207(d)(1).

Under the statutory timeframes set forth above, the printing of ballots may begin three days after the posting of the ballots by the local boards. *See* EL § 9-207(e). At that point, extraordinary action is required to halt the process, and the attendant consequences impose severe burdens on the rights of voters. Reprinting of the ballot may be approved by the SBE “if there is sufficient time,” EL § 9-208 (b)(1); if there is not sufficient time, SBE may approve the use of stickers to be affixed to the printed ballots, or, if that is not feasible (as with the current electronic voting system), some other form of notification of the changes must be provided to the voters, *see* EL § 9-208(b)(2), (3).

Reprinting ballots to correct an “error” obviously imposes a large administrative burden on the SBE and the local board of elections. The consequences are of still greater concern when the matter of absentee ballots is considered. Election Law § 9-213 requires the content of an absentee ballot to be identical to the ballot used in the absentee voter’s

polling place. Thousands of Maryland troops are stationed overseas, many deployed in combat areas. The Federal Voting Assistance Program of the United States Department of Defense has advised that a reasonable benchmark for overseas and military ballot mailings is 45 days. Implementing the Uniformed and Overseas Citizens Absentee Voting Act and avoiding the disenfranchisement of Marylanders stationed overseas thus requires close adherence to the timeframes prescribed by statute.

Even before the ballot may be certified (which at the latest is September 10th) and before the election may be held, the SBE has to perform a panoply of tasks if it is to meet these statutory deadlines. For example, the audio recordings of the ballot used to assist visually impaired voters using the touch-screen voting system, including the Cumberland portion, must be produced, and screen shots from the touch-screen system prepared, for reproduction in specimen ballots. *See* EL § 9-214. In addition, the computer specialist under contract to program the ballots for the electronic voting system must complete her work. (Ex. 2, Duncan Affidavit.) Both of these tasks depend on professionals who are retained by SBE specifically to perform them and have already been scheduled. (Ex. 2, Duncan Affidavit.)

The audio recording, with the exception of the nominees for Vice President of the United States, was completed on Friday, August 29, 2008. (Ex. 2, Duncan Affidavit.) The programmer's calendar is set for her to fly into Maryland on September 4th and she is anticipated to be done by September 5th. (Ex. 2, Duncan Affidavit.) Both of these tasks must

be accomplished with a multiplicity of detailed checks for errors and the checks must be done for each and every ballot variant throughout the State. (Ex. 2, Duncan Affidavit.) Time spent altering the ballot programming and recording for the Cumberland portion of Allegany County is time taken from accomplishing the same tasks throughout the State and risks the entire elections schedule.

At the time of plaintiff's August 22nd filing of the instant complaint in Circuit Court, many of these milestone dates were swiftly approaching or had already passed. Most importantly, as the Complaint states plaintiff knew, the local board of elections had already provided its ballot information to the State. Accordingly, the SBE had begun to move forward with ballot preparation. At this point, any delay either for Cumberland to verify the new signatures or to add the referendum to the Cumberland portion of the State ballot without waiting for verification, would hinder the ballot preparation and election administration process at both the State and county level.

The election preparation has continued, of course, to progress since plaintiff filed its complaint. To ensure the proper functioning of the voting equipment, each electronic voting unit must, by regulation, undergo "preelection logic and accuracy" testing. *See* COMAR 33.10.02.14 - .15. This testing must be completed at least 10 days before an election, *see* COMAR 33.10.02.14, and counties must complete this testing and the requisite public demonstration of the tests, *see* COMAR 33.10.02.16. Following the test and demonstration, the votes recorded during the test are cleared from the system, and the unit is sealed.

For the ballot to be changed to add a referendum question would require the entire process to be repeated. The programming and installation of the data cards would be delayed and the programmer could not complete her work on September 5th. The audio recordings would have to be redone. Conducting the logic and accuracy tests on each voting unit could be delayed (or would have to be repeated if already done), and the public demonstration of the results (before which 10 days' notice must be given, COMAR 33.10.02.16) would be similarly impacted. In short, the elections process has passed this litigation by, and an order compelling the State Board to add plaintiff's referendum to the ballot is an order which would unnecessarily encumber the State Board and the local board of elections.

Regardless of the reasons for plaintiff's delay in seeking to compel placement of the referendum question on the ballot, the demand must at this point be rejected. The Court of Appeals has recognized the special considerations that apply in the elections context when a claimant comes before a court seeking injunctive relief. *See Ross v. State Bd. of Elections*, 387 Md. 649, 671-72 (2005). As the discussion of the elections timeline above demonstrates, the timing of a lawsuit challenging an aspect of the election process is crucial. Thus, for instance, the Supreme Court has made clear on several occasions that injunctive relief may be inappropriate in an elections case even where a constitutional violation affecting the fundamental rights of voters has been shown, if the election is too close for the State to realistically be able to implement the necessary changes before the election. In *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), the Court said:

[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. *In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.*

(Emphasis added.) The Court elaborated on the equitable considerations that bear on the timeliness of an election challenge:

With respect to the timing of relief a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Id.; see also *Wells v. Rockefeller*, 394 U.S. 542, 547 (1969); *Kilgarin v. Hill*, 386 U.S. 120, 121 (1967).

Following this rationale, courts have denied or dismissed claims for injunctive relief on equitable principles based on the nearness of the elections and the harm to the State, candidates and citizens from the disruption of the electoral process. See, e.g., *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991); *Knox v. Milwaukee County Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984).

Moreover, the SBE should not be compelled to place plaintiff's referendum question on the ballot, because it is entitled to the protection of the limitations period imposed by EL § 12-202(b)(1). That provision requires that an action such as the present one must be brought within "10 days after the act or omission or the date the act or omission became

known to the petitioner.” Plaintiff asserts in its complaint that it had made Cumberland, through the City’s counsel, aware of plaintiff’s grievance in July 2008. (Ex. 1, Complaint ¶ 3.)

Even if plaintiff timely filed its complaint, the pace at which it has been pursued is relevant to the resolution of this claim. To grant the relief requested would lead to unnecessary disruption of the election.

By contrast, the harm suffered by plaintiff is abstract and speculative. Plaintiff has the alternative of pursuing a special election and has asserted this option. Even if plaintiff’s claim that it has accomplished what is necessary to petition its cause to referendum — an issue not up to SBE to determine — Cumberland can administer a special election at a time and a place appropriate under the law and can do so without interfering with the State-wide election.

Conclusion

This Court should dismiss the complaint as to the State Board of Elections and the Allegany County Board of Elections.

Respectfully submitted,
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Dated: September 3, 2008

CERTIFICATE OF SERVICE


I hereby certify that on this 3rd day of September, 2008, a copy of Defendant Maryland State Board of Election's Motion to Dismiss was mailed, postage prepaid and sent by electronic mail to:

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EXHIBIT 1

EXHIBIT 2

INT'L ASSOC. OF FIRE FIGHTERS
LOCAL 1715, CUMBERLAND
FIREFIGHTERS, et al.

Plaintiffs

v.

THE MAYOR AND CITY COUNCIL
OF CUMBERLAND (Maryland), et al.

Defendants

* IN THE
* CIRCUIT COURT
* FOR
* ALLEGANY COUNTY
* CASE NO. 01-C-08-30649

* * * * *

AFFIDAVIT OF DONNA DUNCAN

I, the undersigned, state as follows:

1. I am over 18 years of age, a citizen of Maryland, and have personal knowledge of the facts contained herein.

2. I am the Director of the Election Management Division of the Maryland State Board of Elections ("SBE").

3. By law, the SBE must certify the ballot for the November 4, 2008 general election, at latest, by September 10, 2008. The process of ballot design follows a carefully planned schedule, which cannot be disturbed without causing significant confusion and jeopardizing the integrity of the election.

4. Before the November 4, 2008 election may be held, the SBE has to perform many tasks if it is to meet its statutory deadlines. This includes development of approximately 50 core ballot databases, and creating and formatting 4 versions of each — one for the touchscreen voting unit, one for the absentee and provisional ballots, one for specimen ballots, and one for an electronic version of each ballot. The result is 200 ballot formats for the upcoming presidential election. Each of the 50 databases must have an audio recording of every item on the ballot. Upon completion, the ballot material is provided to the local boards of elections to begin installation of the programming on each and every voting machine and the performance of logic and accuracy testing.

5. The SBE retains a computer specialist by contract to develop the ballot databases and create the various versions of the ballots. The local boards of elections

schedule personnel to assist with the loading of the ballots onto each voting unit and the logic and accuracy testing of each electronic voting machine.

6. The computer specialist came to Maryland on August 19th to perform the initial development of the core ballot databases and has been scheduled for several months to arrive back in Maryland to finalize her work on September 4, 2008, and September 5, 2008. The programmer performs this function for many states and is only available for the scheduled period of time. Outside the existing contract, the 2008 rate of pay for this person is \$200.00 per hour.

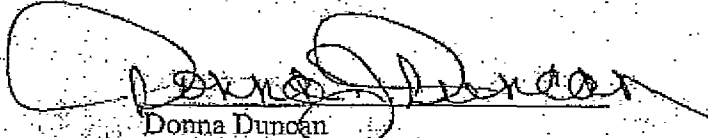
7. In order for the election to occur, audio recordings of the ballot must be produced to assist visually impaired voters using the touch-screen voting system, including the Cumberland portion, and screen shots from the touch-screen system prepared, for reproduction in specimen ballots.

8. The audio recording, with the exception of the nominees for Vice President of the United States, was completed on Friday, August 29, 2008.

9. Both the audio recording of the ballot and the programming of the voting machines must be accomplished consistent with the State election law timetable, along with a multiplicity of detailed checks for errors, all of which must be done for each and every item on the ballot from throughout the State.

I HEREBY DECLARE OR AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE CONTENTS OF THE FOREGOING AFFIDAVIT ARE TRUE AND CORRECT BASED UPON MY PERSONAL KNOWLEDGE.

Dated: 9/3/08


Donna Duncan

Maryland State Board of Elections

**In The
Circuit Court
For
Allegany County**

Int'l Assoc. of Fire Fighters, Local 1715,
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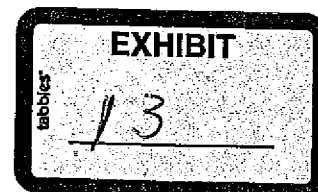
Petitioners

vs.

Case No.: C08-30649

THE MAYOR AND CITY COUNCIL OF
CUMBERLAND (MARYLAND)
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Cumberland, Maryland 21501

Allegany County Board of Elections
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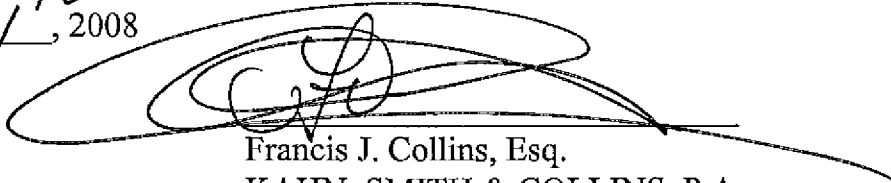
Maryland State Board of Elections
c/o Linda H. Lamone, Administrator of Elections
P. O. Box 6486
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Annapolis, MD 21401 - 0486

Respondents

-o0o-
NOTICE OF APPEAL

Plaintiffs, IAFF 1715, Chuck Koelker, Steve Grogg and Jeffrey G. DeHaven hereby appeal to the Court of Special Appeals from the decision of the Circuit Court of Allegany County dated September 10, 2008. Simultaneously with this Notice of Appeal Plaintiffs are seeking review by the Court of Appeals and are filing a petition for a writ of certiorari.

DATED: September 11th, 2008



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CERTIFICATE OF SERVICE

I hereby certify that on Sept 11, 2008 a copy of the foregoing was mailed and faxed and e-mailed to:

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