AELE Monthly Law Journal

Cite as: 2009 (7) AELE Mo. L. J. 201
ISSN 1935-0007
Employment Law Section – July 2009

Public Sector Layoffs - Part Two

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Part One of this article discussed general legal principles relating to reductions in the work force prompted for fiscal reasons. This part focuses on special issues.

❖ Effect on minorities

Discrimination can be individualized, as in the case of layoffs that rely on "performance" assessments, or layoffs that affect a disproportionate number of minorities or women.

Although most courts have found that pre-termination hearings are unnecessary in the case of financial layoffs, they have underscored the importance of adequate post-termination reviews for furloughed employees who claim individualized discrimination.

The Seventh Circuit found that Cook County's post-termination procedures lacked minimal standards of due process, involving a national origin discrimination claim brought by a furloughed Asian-Indian county employee. The panel remanded the case for the assessment of damages and wrote:

> "It is true that even public employees with a property interest in their jobs can be terminated without full-blown due process hearings if they are properly terminated during a RIF that is not implemented through individualized decisions about whom to fire. . . .
>
> "But the purpose of a due process hearing for an employee with the equivalent of civil service protection is precisely to find out whether the termination under the auspices of a RIF was permissible or not. Under Cook County's view of the case, reflected in the district court's instructions, no one would ever know if he or she was entitled to a due process hearing until somehow it was already clear whether the termination was a legitimate part of the RIF or if the RIF was being used to mask an individualized, merit-based action."

Lalvani v. Cook County, #03-1922, 396 F.3d 911, 2005 U.S. App. Lexis 1716 (7th Cir. 2005).

Several courts have held that fiscal layoffs must exclude minority firefighters and police officers where past discrimination is evident. See the Boston police and firefighters' case, Boston Firefighters Union v. NAACP, 468 U.S. 1206 (1984) and Firefighters' Local 1784 v. Stotts, 467 U.S. 561 (1984); see also the Toledo firefighters' case, Brown v. Neeb, 523 F.Supp. 1, aff'd 644 F.2d 551 (6th Cir. 1981). In those cases, the layoffs impacted on court-ordered remedial hiring mechanisms.

❖ Demotions and promotion freezes

Financial constraints can justify layoffs, but not demotions, said an appellate panel in Michigan; the city could not reduce a lieutenant to firefighter. Greenslait v. City of Taylor, 358 N.W.2d 30 (Mich. App. 1984); see also, Cleveland Police Patr. Assn. v. Voinovich, 15 OhioApp.3d 72, 472 N.E.2d 759 (1984).

An arbitrator ordered the Detroit fire department to fill supervisory posts by promotion; he found that economic conditions did not justify a promotional freeze. Detroit Firefighters

Assn., IAFF L-344 and City of Detroit, AAA Cases 54-39-0651-75 and 54-39-0849-75 (Casselman, Nov. 18, 1975).

- A city council was immune from a lawsuit filed by a lieutenant who was demoted for "budgetary reasons" and who alleged the real reason for this demotion was his criticism of departmental racism. Herbst v. Daukas, 701 F.Supp. 964 (D. Conn. 1988).

❖ Duty to bargain

Courts and state labor boards will generally hold that layoffs are a management right, but bargaining could be required if the furloughs have a serious impact on safety or workload.

A California appellate court held that a municipality's decision to lay off firefighters was not a mandatory subject of bargaining, although the effects of a layoff decision, such as workload and safety concerns, were negotiable. IAFF L-188 v. PERB (Richmond), #A114959, 2009 Cal. App. Lexis 373 (1st Dist.).

The Illinois Labor Relations Board's General Counsel agreed with management that a city can reduce the number of fire captains after a retirement, but found that it must bargain with the firefighters' union over the impact of the decision. Effingham Fire Fighters Assn., L-3084 and City of Effingham, #S-CA-03-144, 21 PERI 11, 2005 PERI (LRP) Lexis 8 (2005).

In Pennsylvania, a court initially blocked the elimination of eight fire companies in Philadelphia. An appellate court reversed. Philadelphia Fire Fighters Union, L-22, v. City of Philadelphia, #2271-CD-2005, 901 A.2d 560; 2006 Pa. Commw. Lexis 322; appeal denied, 906 A.2d 545 (Penna. 2006). The panel wrote:

> "… the city's decision to close certain fire companies was a matter of inherent managerial prerogative and not a mandatory subject of bargaining. However, as implementation of the plan will certainly impact union members' working conditions, the arbitrator correctly determined that the city is required under Act 111 to bargain over such effects."

Also in Pennsylvania, an appellate panel concluded that a statute authorizing layoffs of public employees by financially distressed cities superseded any collective bargaining agreements. Wilkinsburg POA v. Cmwlth. of Penn., 636 A.2d 134 (Pa. 1993).

Similarly, New York courts have ruled that a city could institute economic furloughs in violation of collectively bargained contracts. In the Matter of Burke v. Bowen, 373

N.Y.S.2d 387 (A.D. 1975); Schwab v. Bowen, 363 N.Y.S.2d 434 (A.D. 1975); Lippman v. Delaney, 370 N.Y.S.2d 128 (A.D. 1975).

Privatization or consolidation is another matter. In the state of Washington a city de-activated the entire fire dept. and replaced it with an enlarged county fire protection district. The state's Public Employment Relations Commission blocked the furloughs.

An appellate court reversed, noting that "the city was out of the fire suppression business and no longer had the authority or responsibility to maintain its fire department."

The PERC was reversed, insofar as it required the city to:

1. Make whole former fire suppression personnel that were laid off as a result of an annexation, and

2. To bargain with the union concerning the effects of annexation.

Intern. Assn. of Fire Fighters, L-1445 v. Kelso, #12685-1-II, 57 Wn. App 721, 790 P.2d 185. 1990 Wash. App. Lexis 164

Not all adverse economic actions are layoffs. Cities also have revoked take-home car policies to save money.

- In New Jersey, an arbitrator found that management violated the bargaining agreement by unilaterally implementing a pool car system and eliminating take-home vehicles, which was a long-standing practice. The Borough also was required to compensate officers who were affected by the elimination of the take home vehicle policy during the relevant time period. Bor. of West Mifflin and POA, 126 LA (BNA) 139 (Miles, 2008).

- In Ohio, an arbitrator held that the establishment of a take-home vehicle program that was established by a unilateral employer policy was subject to amendment or rescission by the same process. This was especially true in the absence of the past practice clause. City of Marion and FOP Ohio, 126 LA (BNA) 212, FMCS Case #08-03111 (Fullmer, 2009).

- In California, the Public Employment Relations Board held that a city unilaterally modified a recognized past practice concerning the use of take-home vehicles. It had a duty to bargain such changes. AFGE L-117 and City of Torrance, Case #LA-CE-232-M, Decision #2004-M (Cal. PERB, 2009).

❖ Bankruptcy

Businesses reorganize in bankruptcy all the time. It offers employers the opportunity to defer or restructure contractual payments, to void and renegotiate labor agreements, and to pull out of expensive pension and retired health care plans.

Federal bankruptcy laws allow local governments to seek those benefits. Section 903 of the law, together with 11 U.S. Code §109(c)(2), allows states to act as gatekeepers when a municipality seeks relief under the Bankruptcy Code. When a state law authorizes its municipalities to file a Chapter 9 Petition, it relinquishes state control over its municipal insolvencies.

In Vallejo, a California Bay Area city, the Firefighters' union, the Police Officers' Assn. and two civilian unions challenged the city's Petition. The bankruptcy judge ruled that a city has the authority to void its existing union contracts in an effort to reorganize, noting that 11 U.S. Code §365(a) "preempts state law by virtue of the Supremacy Clause, the Bankruptcy Clause, and the Contracts Clause."

Moreover, public workers lack the protections of union workers for private companies under Chapter 11. Although the Congress enacted 11 U.S. Code §1113, it applies in Chapter 11 cases and imposes on those employers certain procedural and substantive requirements that must be met prior to rejection of collective bargaining agreements.

While the Congress considered adding a provision to Chapter 9 to require a municipal employer to exhaust state labor law procedures prior to rejecting a collective bargaining agreement, the Bill was not passed; H.R. 3949, 102d Cong., 1st Sess. (1991). In re City of Vallejo, #08-26813-A-9, 2009 Bankr. Lexis 705, Pacer Doc. 473 (Memorandum Decision); Findings of Fact & Conclusions of Law (Bankr. E.D. Cal. 2009).

❖ Non-economic layoffs

A furlough or termination for lack of work might be necessitated by a changed population, the consolidation of agencies (or units in agency) or the displacement of a worker because of technology.

The Pennsylvania Supreme Court and the U.S. Supreme Court declined to hear the appeal of a state employee who was furloughed, supposedly for funding reasons, when the true reason was lack of work. But the appellate court said that the law does not require that a public employee be informed of the exact reason for his furlough, if it is for a lack of funds or work.

The three-judge panel reasoned that specifics are unnecessary in the case of furloughs, whereas in the case of a dismissal for cause, there could be an infinite number of reasons for the dismissal, necessitating that the employee be notified of the reasons for the dismissal.

McAndrew v. Penn. Civil Serv. Cmsn., #3118 C.D. 1998, 736 A.2d 26, 1999 Pa. Commw. Lexis 695 (Pa. Commw. 1999); appeal dismissed, 563 Pa. 168, 758 A.2d 1167 (2000); certiorari denied, 532 U.S. 1066 (2001).

❖ Reduction in work periods

It is common to reduce the workweek in the private sector. No one is furloughed (or fewer workers are laid off), and the union collects full dues from members even though they earn less each pay period. When the revenue stream returns, no one has to be rehired or retrained.

Not all unions are silent on this issue. In Oregon, an arbitrator held that a city did not violate a bargaining agreement which stated that a "normal" workweek was 40 hours, when it reduced the grievant's hours to 30. Use of the term "normal" did not prevent the city from reducing hours because of budgetary shortfalls. City of Coquille and Teamsters L-206, 119 LA (BNA) 762 (Hoh, 2004).

However, an arbitrator in Kansas wrote a long, thoughtful opinion on past practices and reduction of work time as a cost-saving measure. A sheriff sought to reduce premium overtime by cutting the workweek for officers that went beyond their eight-hour shifts during the applicable pay period, thus denying them overtime possibilities. The arbitrator noted:

> "Even if an officer worked more than eight hours on the first day of the week, he would continue to be scheduled for normal eight-hour shifts for the remainder of the week. Thus, the extra hours worked on the first day would be overtime, and the Department would compensate the officer by providing time and a half pay or time and a half compensatory time off."

Sworn testimony revealed that this practice was consistent, unequivocal, uniform, and maintained over an extended period of time, including the full twelve years that a witness had been employed by the Department.

He ordered the sheriff to "cease and desist from engaging in such conduct" and to compensate all officers affected by the policy "so as to make them whole." Shawnee Co. Sheriff's Dept. and FOP L-3, FMCS Case #91/11143, 97 LA (BNA) 919 (Berger, 1991).

❖ Recall issues

An arbitrator found that a city violated the bargaining agreement when it hired a new part-time police officer rather than recall an officer who had been laid off three years earlier, even though the CBA provided that an employee's right to recall ends 12 months after he has been laid off. City of Frankfort and P.O.A. of Michigan, 124 LA (BNA) 381 (Mackraz, 2007).

An appellate court in New York ruled that reinstated fire and police personnel, who were laid off during fiscal crisis, do not earn seniority credit during the layoff periods. McKechnie v. Ortiz, 518 N.Y.S.2d 134, 132 A.D.2d 472 (1987).

The Wisconsin Supreme Court has held that cities were not required to give preferential rehiring status to former police officers or firefighters that were hired with federal funds, and later laid off when the funds expired. Ragner v. Zielke, 273 N.W.2d 304 (Wis. 1979).

State statutes covering civil service and public employment may apply to rehire rights.

❖ Union action

Unions also get sued, especially when a class of worker defined by race or gender is pitted against another. In Michigan, a federal appeals panel concluded that a union had no duty to "forcefully" contest layoffs. There was no breach of its "duty of fair representation." NAACP v. Detroit Police Officers. Assn., 821 F.2d 328, 1987 U.S. App. Lexis 7469, 43 FEP Cases (BNA) 1786 (6th Cir. 1987).

In Pennsylvania, an appellate court held that a city could not abolish a chief's job for alleged economic reasons, when in fact it was in retaliation for labor union activities. Borough of Canonsburg v. Flood, 387 A.2d 951 (Pa. Cmwlth. 1978).

❖ COBRA health plan premiums

The American Recovery and Reinvestment Act of 2009, which became law on Feb. 19, 2009, provides a subsidy of 65% of the COBRA [1] premium charged to an individual for a maximum period of nine months. The former employee pays 35%, and the employer pays for and credits the remaining 65% against payroll taxes.

- The subsidy applies to both individual and family coverage.

- It is not applicable to any portion of a premium that is subsidized by an employer as part of a bargaining or severance agreement.
- If a former employee becomes eligible for other group health benefits or Medicare, he or she becomes ineligible for the subsidy.
- Persons who are denied the subsidy by their former employer may appeal that decision. For public sector plans subject to federal or state COBRA laws, individuals can appeal to the Department of Health and Human Services.

***Caution*:** The above summary is not intended to be guidance. Management and affected employees should consult a qualified benefits counselor for eligibility requirements.

Endnote:

1. COBRA, the Consolidated Omnibus Budget Reconciliation Act of 1986, gives workers, ex-workers and their families the right to continue group health for limited periods of time, at their own expense. See, An Employer's Guide to Group Health Continuation Coverage Under COBRA, U.S. Dept. of Labor, Employee Benefits Security Admin. (2005).

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