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Successfully Navigating Employment Issues Relating to Declining Budgets and Downsizing

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It is well documented that the continuing recession has wreaked havoc on municipalities' budgets. As of the end of August, more than 728,500 public employees and at least 21 States have taken or will soon be forced to take furloughs, according to the National Conference of State Legislatures. *See*, "Have Contract, Can't Furlough", *The National Law Journal*, August 31, 2009. More than 3 million public employees nationwide are covered by Collective Bargaining Agreements, according to U.S. Department of Labor statistics.

Contrary to public perception, layoffs have also accelerated since the beginning of 2008. The Center for Economic Policy in Washington, D.C. estimates job losses of 110,000 public sector jobs during that time, including nearly 4,000 uniformed police officers and firefighters. Five of the most populous states (California, New York, Illinois, Florida and Michigan) account for approximately half of all losses, with California far and away the highest with nearly 28,000 layoffs.

Despite mounting evidence of growing deficits and in the face of requirements for balanced budgets, labor unions and employee groups have mounted multifarious challenges to furloughs and layoffs. These challenges come in several forms and rely on several different sources. These sources include: 1) collective bargaining agreements with employee groups; 2) the Contracts Clause of the United States Constitution; 3) provisions of State constitutions; and 4) State laws including statutes, City and County charters and codes. While a New York court stated in *Richmond Hill Block Ass'n. v Dinkins*, 567 N.Y.S. 2d 584, (Misc. 1991): "The management and operation of municipal government, which requires decisions regarding the quality and quantity of municipal services, should not be preempted by the judiciary but left in the control of duly elected officials." it will become apparent that judicial preemption is often the case.

Like many areas of the law, decisions of various Courts and arbitrators conflict. The results will often be fact driven. Recognizing that the ultimate decisions impacting police departments' budgets will be made outside the department, this article will discuss various arbitration and Court cases on the issues of furloughs and layoffs, and the methods for successfully defending furloughs, reductions and force and/or layoffs.

Breaches of Collective Bargaining Agreements

Furloughs

The State of New Hampshire attempted to enact furloughs for all employees paid more than $15,000 a year, with the number of furlough days increased depending on the level of compensation. The Supreme Court of New Hampshire invalidated the furloughs in the case of *Opinion of the Justices (Furlough),* 609 A. 2d 1204 (N.H. 1992) The case is a illustrative of those which hold that mandatory furloughs violate Collective Bargaining Agreements.

The Court emphasized the preamble and section of the Collection Bargaining Agreement which stated guaranteed a minimum amount of work for covered employees. The Court stated:

> In consideration of the mutual covenants herein said forth, the Parties hereto intending to be bound hereby, agree as follows:… the basic work week for every full-time clerical supervisory and professional employee in the state classified service in each unit, with do allowance for authorized holidays and leaves of absence with pay, **shall be thirty-seven and one-half (37½) hours per week.**

(Emphasis added) The Court held, contrary to the argument of the State Attorney General, that the Collective Bargaining Agreement between the State and its employees guaranteed a minimum amount of work, as well as a guaranteed rate of pay.

The Court also rejected the State's argument that unpaid leave was allowable under the management prerogative article of the Agreement. That provision stated, "The employer retains all rights to manage, direct and control its operations in all particulars, subject to the provisions of law, personnel regulations, and the provisions of this agreement, to the extent they are applicable." The Court interpreted this section to allow exercise of management prerogative only where doing so did not violate the terms of the Collective Bargaining Agreement. It therefore would not allow management prerogative to overcome the specific guarantee of the 37 ½ hour minimum workweek.

The Court also rejected two other arguments advanced by the State. First, the Attorney General argued that the Collective Bargaining Agreements "emergency" provisions allowed the State to take "Whatever actions may be necessary to carry out the mission of the department and situations of emergency, the determination of such situations to be the prerogative of the [State]." The justices stated that even assuming that the States fiscal predicament was an emergency and forcing State workers to take unpaid leave is necessary to carry out the mission of the department, it held that the emergency provision was part of the managerial prerogative section of the agreement, and it already held that management prerogative could not be used to violate any other provision of the Collective Bargaining Agreement, including the one setting forth the minimum work week.

Finally, the Court held the fact that the Collective Bargaining Agreement did not mention forced unpaid leave could not be construed against the employees. The Court did not buy that argument, stating that to have accepted it would mean the State could unilaterally cancel a benefit such as accrued sick leave or it could reduce rates of pay, even though those practices were not specifically forbidden by the contract.

As yet an additional ground for its decision, the Court held that the furlough bill violated the Contract Clause of the United States Constitution, Article 1, Section 10 and the New Hampshire Constitution, Part 1, Article 23. Contract clause jurisprudence will be discussed more fully in the next section, with respect to a recent Federal District Court decision from the State of Maryland.

Unions also successfully defeated a furlough program for State employees in Massachusetts in *Massachusetts Community Council v. The Commonwealth of Massachusetts*, 649 N.E.2d 708 (Mass. 1995). The Supreme Court of Massachusetts affirmed a lower Court decision that the furlough program violated various Collective Bargaining Agreements.

That case differed factually somewhat from the New Hampshire case because the State entered into the Collective Bargaining Agreements during the same fiscal year in which the statute providing the furlough program was enacted and the furlough program was implemented. The Court found no evidence that the legislature had failed to appropriate funds to pay the compensation under the Collective Bargaining Agreements. Instead, the furlough program was designed to generate revenue surpluses that would be available at the end of the fiscal year to balance the budget. That opinion suggested that any unilateral reduction of contractually established future employee salary obligations was a substantial impairment of the Collective Bargaining Agreement. That case also held that the furlough program violated the Contract Clause of the United States Constitution.

In Pennsylvania, the Supreme Court of that state will decide a recently argued case where the state originally planned to furlough workers, but were told by a lower court that the governor could either furlough everyone or require everyone to work without pay until a budget was passed. *Council 13 v. Commonwealth of Pennsylvania,* 954 A. 2d 706 (Pa. Cmwlth. 2008) The governor ordered state employees to work without pay. A supplemental appropriation has been approved and employees have been paid, but the union wants the Supreme Court to rule that the payless workdays are unlawful.

In New Jersey, a lower court affirmed the decision of the Public Employment Relations Commission, which granted the State Department of Corrections' application to enjoin binding arbitration of a grievance arising out of the shutdown of all non-essential State functions as a result of a budget impasse between the Governor and the Legislature. *State of New Jersey v. P.B.A. Local 105,* 2008 WL 2050832 (N.J. Super. A.D. 2008). In April a state appeals court reached a mixed result, upholding the government's right to initiate furloughs in an economic crisis, but staying a plan for "staggered layoffs."

The existence of a guaranteed work week in a Collective Bargaining Agreement in both private and public sectors will often be the deciding factor when furloughs are challenged. In *Mahoning County Engineer*, 70 LA 895, the arbitrator concluded that irrespective of budget deficits, the employer could reduce the work week in lieu of layoffs where the Collective Bargaining Agreement contained a provision providing a normal workweek of 40 hours. However, *see* also, *Cooper Airmotive*, 77 LA 901 (converse, where the Collective Bargaining Agreement does not contain a guaranteed workweek provision, arbitrators and Courts are less likely to invalidate furlough plans.) In *City v. Coquille v. Teamsters L-206,* 119 LA 762, an arbitrator held a city did not violate a collective bargaining agreement which stated a "normal" workweek was 40 hours when it reduced the employee's workweek to 30 hours. The term "normal" did not prevent the city from reducing hours because of budgetary shortfalls.

Where a guaranteed workweek does not exist in the contract, the issue will sometimes involve disputes as to whether a provision against "layoffs" or "workforce reductions" prohibit across the board and temporary reductions of work. Compare *Oscar Mayer & Co. Inc*., 75 LA 555 (reduction of hours does not constitute a layoff) with *California Offset Printers*, 96 LA 117 (any reduction of work constitutes a "layoff")

Layoffs

Courts and arbitrators are less reluctant to enjoin layoffs or to require bargaining over layoffs. The justification for this result is that the level of staffing is a management prerogative, and is not otherwise limited by the terms of a collective bargaining agreement. As previously noted, a New York court stated the issue as follows: "The management and operation of municipal government, which requires decisions regarding the quality and quantity of municipal services, should not be pre-empted by the judiciary, but left in the control of duly elected officials." *Richmond Hill Block Ass'n v. Dinkins,* 567 N.Y.S. 2d 584 (Misc. 1975). That decision refused to enjoin closure of a fire station.

A federal court in Chicago held the transit authority could abolish its police force and rejected claims including due process. *O'Mahony v. Chicago Transit Auth.*, 779 F. 2d 54 (7th Cir. 1986). In Ohio, cases have upheld the right to layoff fire and police personnel for fiscal reasons. See, *Atwood v. Judge, Director,* 409 N.E. 2d 1022 (Ohio App. 1977); *Cleveland Police Partr. Assn. v. Voinovich,* 472 N.E. 2d 759 (Ohio App. 1984).

A trial court in Cincinnati recently denied a motion by the police union for a preliminary injunction. The motion requested the court to prohibit the City of Cincinnati from laying off 138 police officers and 19 middle management employees. Citing the *Cleveland Police* case, it held the decision to layoff employees based on a budget shortfall is reviewable only for an abuse of discretion. *Queen City Lodge No. 69 v. City of Cincinnati,* (No. A0907695, 9/4/09) The court held the union failed to demonstrate a substantial likelihood of success on the merits of the case.

In Pennsylvania, the Supreme Court concluded that the Financially Distressed Municipalities Act, a state 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). It held that the article of the state constitution authorizing the General Assembly to permit binding arbitration of disputes within police and fire departments was not mandatory, and therefore did not preempt the Act.

It should be noted that while courts and arbitrators will generally hold that layoffs are a management right, bargaining could be required if the furloughs or layoffs have a serious impact on safety or workload. This is known as "effects bargaining."

A California court held that a municipality's decision to lay off firefighters was not a mandatory subject of bargaining, although the effects of the decision, such as workload and safety concerns, were negotiable. *IAFF L-188 v. PERB (Richmond),* 2009 Cal. App. LEXIS 373 (2009). See also, *Philadelphia Fire Fighters Union, L-22 v. City of Philadelphia*, 901 A. 2d 560 (Pa. Cmnwlth. 2006) (same).

Federal Constitutional Challenges

A recent case from a Maryland Federal Court invalidating furloughs for, among other unions, the Fraternal Order of Police, has attracted a nationwide attention and has been cited as the model for future challenges in other states. As will be discussed, the benefits to unions and employee groups of using the Federal Constitution are that it can be cited in any state, and as will be discussed, affords a municipalities less flexibility in their decision making processes. That case invalidated a county furlough plan even though the Court held the plan complied with the County's own laws.

In *Fraternal Order of Police v. Prince George's County, Maryland*, ___ F. Supp .2d ____, 2009 WL 2516788 (D. Md. 8/18/09), various county unions, including the Fraternal Order of Police, challenged the implementation of an employee furlough plan proposed by the Defendant's County Executive and approved by the County Council. The County furloughed approximately 5,900 employees. The complaint challenged the legality of the furlough plan in light of the collective bargaining agreements between the Plaintiffs and the County and it alleged federal constitutional violations as well as the County Personnel Law.

The District Court held while that the furlough plan did not violate the County Personnel Law, it did violate the Contract Clause of the United States Constitution. The collective bargaining agreement, which once had a provision prohibiting furloughs, no longer had that provision. Furthermore, the County Personnel Law permitted furloughs "Where the County Executive determines that an ascertained shortfall in revenue, based upon available projections, during any fiscal year requires the compensation level of a department, agency or office to be reduced…" The Law set forth steps to be followed in the enactment of a furlough plan. The court concluded that the language of the statute made the decision to enact a furlough plan a subjective one.

However, in invalidating the plan on federal constitutional grounds, the Court stated that while the County Executive enjoyed a great deal of discretion under the County's Personnel

Law, the same could not be said under the more rigorous strictures of Article 1, Section 10 of the United States Constitution. The Contract Clause states, "No State shall…pass any…law impairing the obligation of contracts." While conceding that States retain a certain amount of power to safeguard the welfare of citizens, when exercising this power by enacting legislation that constitutes a substantial impairment of their own contracts, they must demonstrate that the legislation is "reasonable and necessary to serve an important public purpose". *United States Trust Company in New York v. New Jersey*, 431 U.S. 1, 25 (1977). As will become readily apparent from review of this decision, this inquiry permits unelected federal judges to second guess freely the fiscal decisions of local governments.

A court analyzing the Contract Clause must engage in a three-part inquiry. The three questions it must decide are:

1) Does the legislation at issue in fact "impair" a contract?
2) Given the finding of impairment does the impairment constitute a "substantial impairment of a contractual relationship?"
3) Assuming the impairment is substantial is the impairment "nonetheless permissible as a legitimate exercise of the [Governments'] sovereign powers?

Impairment of Contract

The Court in the *Prince George's* case spent little time concluding that the furlough plan constituted an impairment of the unions' collective bargaining agreements. It stated that the County voluntarily entered into contractual relationships with the unions, and the agreements were ratified by the County Council. These contracts guaranteed salaries, wages and hours, and by furloughing the employees, the County reduced the salaries/wages and hours. The Court found that in the absence of the right of the County to make unilateral adjustments, the furlough plan impaired the agreements.

Substantial Impairment of Contract

The Court also found the impairment was substantial, and again did so in short order. It acknowledged that the Supreme Court of the United States has provided little guidance in determining whether an impairment is "substantial," but it has concluded "where the right abridged was one that induced the parties to contract in the first place" a Court can assume the impairment to be substantial. *City of El Paso v. Simmons*, 379 U.S. 497, 514 (1965). Every employee subject to the furlough plan lost 80 hours of pay, constituting 3.85% reduction of their salaries. The district court cited a Fourth Circuit case involving the Baltimore Teachers Union which held that an annual salary reduction of less than 1% constituted substantial impairment of the union's contracts. *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F. 3d 1012 (4th Cir. 1993) Given that decision, the court in *Prince George's County* had no difficulty concluding that the County's actions substantially impaired its collective bargaining agreements with the unions. It then turned to the third and most important element of whether the impairment was reasonable and necessary.

Reasonable and Necessary

The Court said that complete deference to legislative assessments of the reasonableness and necessity for modifying public contracts is not appropriate. It stated a Court's task is to "ensure…that State's neither 'consider impairing the obligations of their own contract on a par with other policy alternatives or imposing more drastic impairment when in evident more moderate course would serve its purposes equally well, nor act unreasonably in light of the surrounding circumstances'." The Court compared the events leading up to the County's furlough plan to those leading up to the furlough plan the Baltimore adopted in the *Baltimore Teachers Union* case. While in that case the Fourth Circuit upheld the City's furlough plan, the Court in the *Prince George's County* case found that factual differences required it invalidate the County's furlough plan.

Reasonableness. Without discussing the facts in great detail, on the issue of reasonableness, the Court rejected the County's argument that its deficit totaled $57 million and it therefore reasonably chose to address $20 million of the shortfall through the furlough plan. The Court said the County's reasoning for determining why more than 1/3 of the shortfall should be absorbed by the unions was unclear, and the question remained whether the amount it was taking from union employees was "no greater than necessary to meet the anticipated shortfall." The decision contrasted the City of Baltimore's actions in discontinuing its furlough plan immediately on its recognition that the budgetary shortfall would not be as great as anticipated to the County's action, which continued the furlough at its initial levels despite evidence that its financial position was better than previously anticipated and because it increased the amount it attempted to recoup from the unions to the $20 million figure from $13 million.

Necessity. Addressing the necessity issue, once again the Court relied on the particular circumstances surrounding institution of the furlough plan. It said it balanced the public purpose to be fulfilled against: 1) the magnitude and timing of the events that prompted the furlough plan; 2) the County's efforts to exhaust numerous alternatives before resorting to the furlough plans; and 3) the breadth of the plan.

On the question of magnitude and timing, the Court stated again that the facts created a less than clear picture of the financial crisis that the County faced. While not questioning the general severity of the current economic crisis, the Court questioned the County's accounting practices and accuracy of its calculations, and it placed significance on its belief that the County was well aware of an economic slowdown long before it enacted the furlough plan.

Even more significantly, it emphasized that the County had more than $230 million in reserves at its disposal to offset the shortfall but chose not to draw down from them to protect its AAA bond rating. (County representatives met with bond rating companies and promised to do whatever it could, including furloughs, to attain and preserve the highest bond rating before it enacted the plan.) On the issue of the County's efforts to exhaust other alternatives, the Court noted that the Fourth Circuit found in favor of the City of Baltimore in the *Teachers Union* case because the City decided to furlough its employees "only when it concluded that it had no better

alternatives." Baltimore had experienced sudden funding cuts from the State, had previously laid off a portion of its employees and was suffering problems in "other areas of government."

The District Court rejected the County's argument that it faced dire circumstances and had no other reasonable alternatives. Instead it stated that the record suggested that the County's action resembled trappings of doing that which was "politically expedient". Again, it pointed to the existence of $230 million in reserves. Based on the County's descriptions of its reserve funds, the Court found that $97 million was at the County's disposal at the very time it considered implementing the furlough plan. It found the County's reasons for not using any of its reserves vague and designed to "suit its own obscure needs."

The Court asserted that unlike the County Personnel Law, the Contract Clause of the United States Constitution did not afford the County such wide discretionary latitude to pick and choose whether to impair its own financial obligations to remedy its financial woes. The Court also noted that the County chose not to eliminate line item purchases for real estate and equipment totaling $8 million, and failed to provide an adequate explanation for not doing so.

Finally, on the issue of the breath of the furlough plan, the Court repeated the contrasts with the *Baltimore Teachers Union* case, noting that the County's plan required 5,900 employees to take 80 hours of unpaid hours, effectively reducing their annual salaries by 3.85%. It stated that the plan had not been rescinded, and that future furloughs may be contemplated.

The lesson to be learned from this case is that a federal judge ultimately decided that the United States Constitution required alternatives other than furloughs for solving the County's fiscal problems. The Court did not opine as to what it would do in the future in the face of future layoffs. The result instead may be massive layoffs, which, unlike furloughs, would affect some union employees and not others, and could be less susceptible to challenge.

State Constitutional Challenges

Just as the *Prince George's* case attracted significant attention, a decision from the Circuit Court in the State of Hawaii invalidating a furlough plan on State Constitutional grounds has attracted public attention. In *Hawaii State Teachers Association v. Lingle, et. al.*, Civil Action No. 09-1-1372-06 KKS (Cir. Ct. Hawaii 7/29/09) the trial court in Hawaii invalidated a statewide furlough of three days a month for all State employees for two years. The Court entered a permanent injunction against its implementation. It based its decision on State constitutional grounds. For that reason, its precedential value is limited.

The State Constitution provided that the right to organize for purposes of Collective Bargaining was constitutionally established and that public employees were also afforded a constitutional right to accrue retirement benefits that could not be diminished or impaired. Hawaii is one of five states in the nation affording constitutional protection for collective bargaining. The four other States, with dates of enactment are: New York (1939), Florida (1944), Missouri (1945), and New Jersey (1947).

The Court cited several decisions of the Supreme Court of Hawaii favoring unionized employees. *Chun v. Employees' Retirement System of the State of Hawaii*, 607 P.2d 415 (1980) held that the State Constitution was intended to protect members of employees retirement systems from a reduction in accrued benefits. The Supreme Court later held in *United of Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi*, 62 P.3d 189 (2002) that denying public employees the right to negotiate over core subjects, including wage and cost items, caused a violation of the State Constitution. In this case the State unilaterally implemented the statewide furlough and refused to bargain with the unions over the criteria and procedures for implementing the furloughs.

The Court enjoined its enactment, finding that the unilateral imposition of the furloughs concerned course subjects of Collective Bargaining, such as wages. The approximately 14%-16% reduction in monthly salaries violated the State Constitution citing the Supreme Court's decision in *Malahoff v. Saito*, 140 P.3d 401 (2006) holding that while a near delay in payment of wages did not constitute a subject of Collective Bargaining, reduced payments would constitute a change of wages and could not be unilaterally imposed. It also likened the unilateral change doctrine under the State Constitution to the law under the National Labor Relations Act that an employer cannot implement unilateral changes regarding matters that are mandatory subjects of bargaining and which are in fact under discussion. *NLRB v. Katz*, 369 U.S. 736 (1962).

The Court rejected the State's argument that the dispute should have been submitted to the Local Labor Board, which has jurisdiction over unfair labor practices. The Court's reasoning was that the prohibited furlough practices were constitutional violations, for which the Labor Board had no jurisdiction. It also rejected the State's reliance on the managerial rights provisions in a state statute to justify unilateral imposition on the furlough program. The Court said acceptance of this position would allow law makers absolute discretion to define the scope of collective bargaining, therefore defeating the intent of the Constitutional provision enacted to "improve the standard of living of public employees".

The Hawaii decision was strongly grounded on state constitutional provisions, and is therefore likely, if at all, to be limited to the five States having constitutional provisions guaranteeing the right to collective bargaining. After this decision, the governor ordered more than 1,100 layoffs of state workers to begin in November, and negotiations are ongoing.

Other State Statutory Challenges

California: Five Challenges, Various Theories, One Successful

In California, unions have mounted five separate challenges to furlough plans. Thus far, only one has been successful. The furloughs were issued by an Executive Order of Governor Arnold Schwarzenegger.

The first lawsuit asserted that the Executive Order violated the State Constitution and various California statutes. A trial court judge dismissed the case earlier this year, and the case is now before the California Court of Appeals in Sacramento. A second lawsuit asserted that the

Order violated the State Administrative Procedures Act, which sets forth a process for changing State Rules and Regulations. The State attempted to dismiss the case, but the trial judge denied the Defendant's Motion to Dismiss. As of mid-September no hearing date had been scheduled.

The first successful challenge was to the Order as it applied to employees of the State Compensation Insurance Fund. A San Francisco judge agreed that the Order violated provisions of the California Insurance Code and ordered the furloughs immediately cease for 6,200 employees employed by the Fund and represented by the local union. The Court's Order also ordered back pay for those employees, totaling $23.5 million. The Court relied on a provision of the California Insurance Code that exempted the employees from "any hiring freezes and staff cutbacks otherwise required by law". The judge concluded that because a furlough "reduces the availability of staff and constitutes a "staff cutback," it was illegal to extract furloughs from insurance fund workers. An appeal has been filed.

A fourth lawsuit challenged the furloughs of more than 20,000 employees whose salaries were not paid out of the General Fund. That included Transportation Department employees, Motor Vehicle Department employees, and other departments. The basis for the complaint is that because the Executive Order imposing furloughs was designed to save General Fund money, the measure could not be legally applied to workers whose salaries were paid from other sources of revenue. A hearing was scheduled for September 29th.

The fifth and final lawsuit asserts that the imposition of the third furlough day violated the Emergency Services Act. The Union's attorneys have argued that the State's fiscal crisis was not an emergency and that the Governor's actions were, in fact, political expediency related to a labor dispute for which the Emergency Services Act could not be used. It further contended that since the State legislature had passed a revised budget, any fiscal emergency justifying the furloughs no longer existed. It filed a case in San Francisco in August, no answer has been filed.

Individual Issues Arising From Furloughs and Layoffs

Due Process and Discrimination Issues

While public employees having property interests in their employment may not be terminated without pre-termination and post-termination hearings, *Cleveland Bd. Of Educ. v. Loudermill,* 470 U.S. 532 (1985), furloughs for non-economic reasons are usually considered non-disciplinary, and therefore due process rights may not be invoked.

A California appeals court held that a pre-deprivation hearing was not required for a demotion or termination for economic reasons. *Duncan v. Dept. of Personnel,* 77 Cal. App.4th 1166 (2000). A federal court in Pennsylvania held that a police officer furloughed for economic reasons was not entitled to *Loudermill* rights because his removal was non-disciplinary. *Lohman v. Duryea Borough,* 2007 U.S. Dist. LEXIS 87720 (M.D. Pa. 2007) See also, *Amaan v. City of Eureka,* 615 S.W. 2d 414 (Mo. 1981); *Smith v. City of Houston,* 552 S.W. 2d 945 (Tex, Civ. App. 1977).

However, as in other issues on this topic, there are exceptions and contrary decisions. A court has held that if it could be demonstrated that a local government dissolved its police force in bad faith, affected officers would be entitled to a post-termination hearing. *Baker v. Bor. of Port Royal,* 2006 U.S. Dist. LEXIS 39037 (M.D. Pa. 2006). The Court of Appeals for the First Circuit held that public employees furloughed for economic reasons are entitled to a *Loudermill* hearing if they are selected for reasons of job performance rather than by seniority. *Whalen v. Mass. Trial Court,* 397 F. 3d 19 (1st Cir. 2005)

The Seventh Circuit has held that a County's post-termination procedures lacked minimal standards of due process when a furloughed worker brought discrimination claims under 42 U.S.C. §§1981 and 1983. While it held that it was not feasible for the County to hold pre-termination hearings for all furloughed employees, it held those challenging the basis for the adverse employment action had the right to a post-termination hearing.

Conclusion

It should be apparent from this discussion that unions and employee groups are utilizing numerous weapons to fight furloughs and layoffs. The results vary depending on the provisions in collective bargaining agreements, the existence of various protections created by State constitutions, the existence of state or local statutes on the subject of furlough and layoffs, and the willingness of Federal Judges to second guess the decisions of public officials by use of the Contracts Clause of the United States Constitution.

Cities and counties contemplating furloughs and layoffs need to know the provisions of any and all collective bargaining agreements, state and local statutes and codes, and particular constitutional provisions that may impact fiscal decisions. It has been reported that negotiating with unions will often bring about agreements that will avoid litigation. Finally, even where the law grants a degree of discretion to governmental authorities for instituting these plans, the governmental decision makers will need to be prepared to justify the need and extent of the plans, especially when faced with a federal constitutional challenge.

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