INTERNATIONAL MUNICIPAL LAWYER'S ASSOCIATION

74TH ANNUAL CONFERENCE

MIAMI, FL

WORK SESSION: PERSONNEL

SHIFTING SANDS IN A DOWNSIZED ECONOMY:

OPTIONS FOR A PUBLIC EMPLOYER -RIFS, FURLOUGHS AND REDUCTIONS IN SALARIES

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CITY OF ATLANTA

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Shifting Sands in a Downsized Economy: Options for a Public Employer- RIFS, Furloughs and Reduction in Salaries

By

Jerry L. De Loach

To date, more than 728,000 public employees in at least 21 states have taken or will soon be forced to take furloughs[i]. [1]

INTRODUCTION

In local government centers throughout the country, the following scene is being played out almost daily: There is a call from the CFO to the Mayor, Chief Operating Officer, Chief Administrative Officer, City Manager, County Manager or some other high ranking official to discuss the budget situation because of dwindling revenue. The call is to place the official on notice that there is a widening gap in the revenues projected and the revenues collected. It is a direct result of a worsening economic situation and it has come home to rest on the shoulders of the local government entity. An entity which by law cannot run a deficit. Its budget must be balanced.

A public sector employer is limited to the choices it can exercise when the financial resources are not sufficient to cover expenses. First and foremost, the governmental entity should move to cut discretionary expenses such as supplies, commodities and the like. In addition, it should place a hiring freeze on non essential hiring. In our local government, when a hiring freeze is implemented, we require an Authorization to Fill (ATF) Form to be completed before a position is even advertised. A committee consisting of the Commissioner of Human Resources, the Chief Financial Officer and the Chief Operating Officer must approve all hiring while the freeze is in place. Finally, because personnel expenses are more likely than not the greatest line item in the budget, at some point, the question that must be answered is the impact of the budget on active personnel.

[1] National Conference of State Legislatures

Of course, the options are very limited as to what you can do without impacting the delivery of services. There may be others, but I want to specifically talk about three options available to a public employer when budget considerations impact staffing and personnel. The three options are Furloughs, Reduction in Force (RIFS) and Reduction in Salaries (RIS). You will want to implement a plan that is the least disruptive for your staff as well as minimizing the impact on delivery of services. It is possible depending on the severity of the budget gap for an entity to implement one or several plans and it might be in stages.

Regardless of which option you exercise, it is wise to make sure that you have planned appropriately for implementation. This will require that you form a committee of stakeholders to make sure that all necessary steps have been taken for a smooth transition. Your stake holders will vary depending on which plan you are implementing. It should include representatives from HR, Law, DIT, Payroll, and Pension. It is very important to have a communication plan to minimize rumors and to provide accurate information.

IMPLEMENTATION OF A FURLOUGH PLAN

A furlough plan is the least disruptive because it keeps in place regular staff, yet it provides some relief to a cash strapped governmental entity. Employees are not paid for a designated number of days in the fiscal year. The authority to implement a furlough plan is normally vested in the appointing authority or the legislative body. Employees may beg to differ on the least disruptive description because at the end of the day they are taking less money home. However, on the brighter side, all employees are sharing in the pain of the financially strapped entity.

In the City of Atlanta, we implemented a furlough plan in December 2008. However, the planning commenced in early October 2008, three months into FY 09. A task force was created which included HR, DIT, Payroll, Law, Pension and others. The goal of the task force was to ensure a smooth transition for employees. It is important that you include the various stakeholders because you will need to answer questions such as the impact of the furlough on pension plans, accrual of leave, and the distinction between exempt and non exempt employees. The annual salary of employees is reduced based on the number of days the furlough will last and this will impact the pension and accrual rates. Unless the issue is addressed upfront, a side effect will be felt years later when the employees retire.[2]

[2] City of Atlanta Administrative Order 2009-2

Specific Challenges for Furlough Plan

Exempt v Non Exempt Employees

One consideration is the distinction between exempt and non exempt employees. Non exempt employees are only paid for hours worked as a basic principle. Therefore, to reduce the number of hours they work has little implications under the FLSA. However, when your furlough plan requires exempt employees to participate, you might have additional challenges. It might be necessary for you to look to another option for your exempt employees depending on the severity of the particular budget situation.

Salaried executive employees normally are exempt from the overtime provisions of the Fair Labor Standards Act. However, because of the furlough plan implemented in the City there were two situations which could arise and obligate the city to pay compensation for overtime.[3]

1. Furloughed employee works 40 hours in a week: The City was operating a 36 hours work week. If an exempt employee worked between 37-40 hours, then the City must provide comp time to the employee for each hour worked above 36 in a week up to 40. If an exempt employee leaves the City and there are accrued comp hours earned during the furlough, the City will be required to pay cash for the comp hours.

2. Furloughed employee works over 40 hours in a week: The City was operating a 36 hours work week. If an exempt employee worked more than 40 hours, then the City must pay cash compensation for the first four hours after 36 at straight time and provide comp time for time worked beyond 40 hours. The comp time for hours in excess of 40 shall be at the rate of time and half of the normal rate. Paying the employees in cash for hours 37-40 allows us to give them comp time for the hours above 40. If an exempt employee leaves the City and there are accrued comp hours earned during the furlough, the City will be required to pay this in cash.[4]

To Contract on Not to Contract

Is there a contract or not? Furlough plans are being challenged in a number of jurisdictions as they are announced. It does not matter whether it is the local or state entity authorizing the furlough. For instance, in Prince George's County, MD, a federal district court declared that the plan violated the Contract Clause of the United States

[3] See 29 CFR 541.710(b)
[4] See 29 CFR 778.315

Constitution by unilaterally cutting wages guaranteed through collective bargaining.[5] The same thing happened when a state judge in Hawaii ruled the same when it stated that a furlough plan there violated the state constitution when the furloughs were ordered without first negotiating with public employee unions.

It is crucial that you review your state and federal law regarding collective bargaining agreements before you announce a furlough plan. Union officials are mobilizing based on the limited success in Maryland and Hawaii. The appeal process is underway in both cases and will continued to be followed.

Facts in Prince George's County[6]

Prince George's County, MD was like all other jurisdictions in the country in late 2007 and early 2008 when it started to feel the economic crunch. The budget process for FY 09 was started in early 2008 and it projected a significant budget deficit that needed to be addressed. A Proposed Operating Budget (POB) was submitted which represented the continued funding of the administration's priorities. A few weeks after the POB was submitted, the County entered into a Collective Bargaining Agreement (CBA) with the ASFCME unions. Also, Prince George's County like other jurisdictions maintained "reserve funds". The FY 09 budget was enacted without substantial changes and the CBA's with the Public Safety Unions were fully and finally approved. The OMB did not revise the projected revenue while the POB was before the County Council, but after the budget was passed, the OMB re-projected the revenues.

Immediately thereafter, the County called the Plaintiffs and their representatives to a meeting and announced that the County was expecting a revenue shortfall and asked each labor organization to give up their merit step increases or cost of living adjustments. There were several exchanges between County executives and union officials over the course of the next several weeks. The Unions did not budge and finally, the county agreed to provide the Public Safety Unions with all of their negotiated wage increases.

In September 2008, the County Council approved the Employee Furlough Plan (EFP). The plan essentially cut the salary of all covered employees by 3.85%. At the time the EFP was enacted, the County had approximately $230 million in its three reserved funds. The Unions filed lawsuit a few days later.

[5] Fraternal Order of Police, et al v Prince George's County, MD, Civil Action No. AW-08-2455
[6] Id

In its opinion, the court recognized that the County enjoyed more discretion under the County Personnel Code than it did under the Contract Clause of the Constitution. A court's analysis under the Contract Clause requires a three part inquiry. First, whether the legislation at issue, in fact, impairs a contract; second, if there is an impairment, the court must then determine whether said impairment constitutes a "substantial impairment of a contractual relationship."; third, assuming that the impairment is substantial, the court must then determine whether the impairment is nonetheless permissible as a legitimate exercise of the County's sovereign powers" [7]The Court concluded that the EFP constituted an impairment of the Union CBAs.

In summary, the court stated that the County voluntarily entered into a contractual relationship with the unions and each was ratified by Council. The employees were guaranteed certain wages and salaries and could not be unilaterally adjusted by the County. As for substantial impairment, the Court concluded that it was because the employees subject to the EFP faced an annual reduction of 3.85% which was more than the .95% that a court previously held was substantial. Finally, on the issue of whether the impairment was reasonable and necessary the court state that on these facts that the EFP was not reasonable in light of the County's actual budget picture.

It is important to note that the court stated " ... furloughs have occurred nationally in both the public and private sector, and in light of the economic forecast, furloughs are likely to continue. This court's holding is not a pronouncement regarding furloughs in general, but rather applies to the narrow issue of the legality of EFP as proposed by Prince George's County executive and approved by the County Council on September 16, 2008"[8]

THE BASICS OF A RIF POLICY[9]

Another option available is to implement a Reduction in Force Policy (RIFs), which is essentially a lay off. Other means should be addressed before executing a RIF. This would include hiring freezes, furloughs, reduced workweeks, reassignments, etc. Under the Atlanta City Code, a RIF can be instituted for one of several reasons, including but not limited to shortage of funds. It is important to remember that a RIF should not be used to dismiss or demote regular employees who have performance issues. Also, your RIF should not be used to

[7] Prince George's County, Order, P. 25
[8] Id., P. 42
[9] Atlanta City Code Section 114-379

alter the racial or sexual composition of a department or classification. You should work very closely with you HR Department to ensure that you RIF is in conformance with the laws of your jurisdiction. If your RIF policy is codified or statutory, please make sure you are in compliance, since any deviation will serve as the basis for a challenge. Under the Atlanta City Code, an employee who is riffed can file an appeal to the Civil Service Board for failure to follow procedure in the administration of the RIF, but shall have no right to appeal the reason for the reduction. [10]

The RIF policy is only applied to classified employees. Unclassified employees who serve at the will and pleasure of the appointing authority are not subject to the RIF policy. For FY 08, we riffed 307 employees and only 42 filed an appeal before the Civil Service Board. Of the 42 requested hearings, only 34 were actually conducted with 34 appeals being denied. In other words, the RIF was conducted according to procedure. For FY 09, we riffed 327 employees, of that number, 46 filed an appeal before the CSB with 38 hearings held. There were 3 appeals granted. In those cases where the appeal was granted, it was based on miscalculation of points. When we conduct a RIF at the City, retention points are calculated based on years of service and the most recent performance rating given to the employee. From this calculation, a list is compiled based on total points awarded and in compliance with the RIF plan submitted and approved by the Commissioner of Human Resources.

We have had tremendous success with our RIF policy by reducing the number of appeals filed both at the Civil Service Board and on Petition for Cert to the Superior Court. Primarily, this is due to early involvement and consultation with legal at the moment that it is determined to implement a RIF.

REDUCTION IN SALARY

Finally, the third option which a public employer might implement is a reduction in salary. Earlier we discussed the furlough plan and the distinction between exempt and non exempt employees and the challenges associated with such a distinction. If the overall objective of the furlough is to reduce the financial strain on the budget, then you encounter additional problems when you have exempt employees on a furlough and they lose their exempt status in the week of the furlough. It might be necessary to look at other options such as a reduction in salary. The issue is complicated by the fact that a salary reduction for exempt employees could be construed as the legal equivalent of a furlough due to the highly structured nature of governmental pay plans. The essence of this approach is to get completely away from the idea of a "furlough" of exempt employees by simply instituting a reduction in pay of a specified percentage while

[10] City of Atlanta Ordinance, Section 114-379(n)

continuing to pay these employees on a guaranteed salary basis regardless of the number of hours worked in a work week. [11]

> Unlike many government agencies, the City of Atlanta has a pay and classification plan that is not stringently structured based upon predetermined pay grades and steps through which an employee automatically progresses. Instead, the City's pay plan is defined by ordinance as follows:
>
> The mayor and council shall establish by ordinance a pay plan for all classes of positions. This plan shall consist of a series of pay grades with minimum, midpoint and maximum salaries and may be amended by ordinance, subject to the limitations in the charter relating to the period during which salary or wage increases may be granted.[12]
>
> Thus, any individual employee's salary is "guaranteed" only to the extent that, within a classification, the employee is entitled to a salary within the range of the classification. This concept is further explained by the following directive:
>
> Pay and incentives shall be based on performance, and no employee shall be guaranteed compensation just for adding another year to organizational service.[13]
>
> As you can see from the foregoing, the issue that caused you some concern regarding this proposal does not exist with regard to the City's pay plan. At most, the pay plan provides broad parameters for the executive branch of government to implement individual salary decisions that best suit the needs of a given department. Beyond that, however, the executive branch of government retains the flexibility to adjust salaries as needed, with the noted exception stated in the ordinance of not being able to give raises after the time specified in the City Charter. The only other limitation on the executive branch in this arena is that "[f]unding for positions must be within the existing budget allocations of the department employing the individual."[14]
>
> Consistent with these provisions setting forth the City's pay plan is the City's procedure for reductions-in-force, which also is included in the Code of Ordinances:

[11] Godfrey Memo to the DOL dated January 27, 2009
[12] City of Atlanta Ordinance § 114-123(a)
[13] City of Atlanta Ordinance § 114-121(f)
[14] City of Atlanta Ordinance § 114-125(a)

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> Prior to initiating a RIF, the mayor should consider using other means, such as hiring freezes, reduction through attrition, furloughs without pay, reduced workweeks, reassignments *or other methods* to lessen the negative impact of such an action.[15]
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> At this point in time, the City of Atlanta, like other governmental bodies in Georgia and elsewhere, has been forced to monitor and to re-anticipate revenues on a continual basis. The City's fiscal year runs from July 1 through June 30 and the budget adopted for fiscal year 2008-2009 anticipated revenues in the form of property taxes, sales taxes and fees that simply were not realized due to the national economic crisis. . . .
>
> What the City proposes to do to address the current fiscal crisis is to comply with the ordinance provisions that funding for positions be within the existing budget allocations of City departments and that the Mayor resort to means other than layoffs where practicable, by reducing the salaries of all covered exempt employees for an indefinite period of time to comport with the shortfall in revenue that has caused the City to have to reduce its budget across-the-board. Salaried exempt employees will continue to receive a guaranteed salary that is not tied to the number of hours worked in any given work week and the amount of the salary will be above the threshold mandated by the Regulations. This will allow the City to address its fiscal downturn without forcing the City to separate any additional exempt employees and without losing its overtime exemption for covered executive, professional and administrative employees. [16]

The City move forward with a reduction in salary for exempt employees and re-issued the administrative order which implemented the furlough plan. The reissued Admin Order implemented a 10 % salary reduction for exempt employees.

CONCLUSION

At one point, most employees thought that government employment was safe and secure; however, the current economic picture has dramatically changed the way the government employment is viewed.

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[15] City of Atlanta Ordinance §114-379(b) and (d)
[16] Godfrey Memo to DOL dated January 27, 2009