

ORDINANCES

More Trouble than Layoffs?

by Devala A. Janardan, Associate Counsel

If one were to look for the word "furlough" in a dictionary, she would find that a "furlough" is traditionally defined as a "leave of absence from duty granted especially to a soldier."[1] While taking a "furlough" may have provided some prestige or respite from the rigors of battle for a soldier in the 18th century, the word carries a completely different connotation in the 21st century. The effects of the economic crisis on state and local budgets have forced many of these entities to implement furloughs – typically, an unpaid, temporary leave – for employees. The scope of a furlough can range from small to large, with California being the largest government entity to furlough employees.[2]

Local government attorneys who practice in the area of personnel law are likely to be familiar with certain issues surrounding the enactment of a furlough, such as the interaction with the Fair Labor Standards Act,[3] whether employers are required to continue contributing to an employee's 401(k) account during a furlough, and the accrual and utilization of paid time off.[4] A more recent development for local government attorneys to watch closely is whether furloughs are even permissible under the United States Constitution. A federal district court judge ruled[5] recently that a furlough plan enacted by Prince George's County in Maryland was unconstitutional because the plan violated the Contract Clause[6] of the United States Constitution.

The story for Prince George's County starts much like that of countless other local entities in the United States. From 1999 to 2005, the County experienced exponential growth, due in large part to the active housing market. In 2005, the market began to decline, which eventually resulted in the County facing a budget shortfall for 2009. In September 2008, after the County revised its revenue estimates to reflect a greater shortfall than previously expected, the County Executive called a meeting with the local unions and notified them that it was necessary to implement a furlough plan to reduce expenditures as a preferred and less drastic alternative to layoffs. The furlough plan effectively cut the annual salaries of all covered employees by 3.85%. The unions sued, alleging, among other things, a violation of the Contract Clause.

The Contract Clause states, "No State shall… pass any…Law impairing the Obligation of Contracts."[7] Under Fourth Circuit jurisprudence, a court's analysis under the Contract Clause requires the following inquiry: (1) whether the legislation at issue does, in fact, "impair" a contract;[8] (2) whether the said impairment constitutes a "substantial impairment on a contractual relationship;[9] and (3) if the impairment is substantial, can the government entity nonetheless show that the legislation is "permissible as a legitimate exercise of the sovereign's powers"[10] by being "reasonable and necessary to serve an important public purpose.[11]

The district court held that the furlough plan did indeed impair the plaintiff unions' collective bargaining agreements. The County had voluntarily entered into a contractual relationship with the unions to pay covered employees a guaranteed salary or wage, and set hours, and the furlough plan reduced these. The court also found the impairment to be "substantial," quoting "in the employment context, … no right…[is] more central to the contract's inducement… than the right to compensation at the contractually specified level."[12]

Where the court differed from previous jurisprudence is in finding that the furlough plan was not "reasonable and necessary to service an important public purpose,"[13] the third prong of the Contract Clause analysis. It disagreed with the County's first argument that the furlough plan was reasonable and necessary to protect the financial integrity of the County for its citizens. The court stated that, because the furlough plan "only" addressed approximately one-third of the budget shortfall, the court "had reservations as to whether the County's fiscal crisis was the primary motivation for the furloughs" and even suggested that the County used the furlough plan to "recoup from the Unions" cost of living adjustments paid to employees as a result of failed negotiations with the unions.[14] The court also found the furlough was not reasonable because the County failed to discontinue the plan "immediately upon recognition that the budgetary shortfall would not be so great as anticipated."[15] In September 2008, when the County increased its deficit projection from $48 million to $57 million, it also determined that the amount in its Undesignated Fund Balance ("UFB") – an unrestricted fund that was created from the revenue surpluses from the housing market boom– was not $16 million, but, rather $65 million. The County was faulted for implementing the furlough plan even after, according to the court, it was found there were considerably more resources at the County's disposal. The court found additional reasons why the furlough plan was not necessary. The County, in May 2008, had conducted a series of presentations in front of bond rating agencies, and when the County received an "AAA" rating, it assured investors about its ability to maintain growth during the

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nately expensive, if not impossible to achieve. Other than the plaintiff's own unfortunate experience, there is no evidence that what she tripped over was so obviously hazardous that the [City], had it even been aware of the elevation difference, was required to repair" it.

Both cases are available from the B.C. courts' website at http://www.courts.gov.bc.ca. **ML**

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down economy. The court rebuked the County for changing its tone just weeks later and calling an emergency meeting with the unions to discuss a financial picture that was volatile.

This case is now on appeal, with opening briefs submitted by the time this *Municipal Lawyer* issue goes to print. One issue that wasn't discussed at all in the opinion was whether or not a furlough plan constitutes a "law" under the Contracts Clause. In this case, it is arguable that there was no legislative act that impaired the contract, as the furlough plan was implemented by the County Executive. IMLA will be filing an *amicus* brief as well in support of the County, as it feels that the court substituted its opinion for that of duly elected local government officials, particularly in the situation where the court chastised the County for not utilizing its UFB, a fund which most local governments save for one-time disaster situations, not for ongoing expenses like employee salaries.

Notes

1. *Webster's New Collegiate Dictionary* 462 (1979).
2. Cal. Exec. Order No. S-13-09 (July 1, 2009), available at http://gov.ca.gov/executive-order/12634.
3. For a good FAQ document on the interaction between FLSA and furloughs, go to http://www.imla.org/images/stories/pdf/Events/AudioConferences/personnel/FLSA/furloughfaq.pdf.
4. IMLA conducted a teleconference in August 2009 on *Furloughs and Reduction in Force Policies*. Send an email to djanardan@imla.org, reference this article, and I'll send you the presentation slides from the event.
5. Fraternal Order of Police v. Prince George's County, No. AW-08-2455 (D. Md. Aug. 18, 2009).
6. U.S. Const. art. I, § 10, cl. 1.
7. *Id.*
8. U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 25-26 (1977).
9. Baltimore Teachers Union v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1015 (4th Cir. 1993) (emphasis in original).
10. *Id.*
11 U. S. Trust Co. of New York, 431 U.S. at 25.
12. *Fraternal Order of Police*, No. AW-08-2455, quoting *Baltimore Teachers Union*, 6 F.3d at 1018.
13. *U.S. Trust Co. of New York*, 431 U.S. at 25.
14. *Fraternal Order of Police*, No. AW-08-2455 at *30.
15. Baltimore Teachers Union v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1020 (4th Cir. 1993). **ML**

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imposed were "so onerous as to prevent employees from effectively using the time for personal pursuits." This was a highly fact-specific inquiry, and summary judgement was inappropriate in light of issues of material facts in dispute on whether the restrictions imposed on the plaintiff while monitoring the pager on evenings and weekends had prevented her from effectively using her time for personal matters. The evidence suggested that, even assuming the plaintiff's on-call duties forced her to remain at home, it did not necessarily follow that she was restricted from engaging primarily in personal pursuits during her on-call time. "Merely having to remain at home would not, in and of itself, prevent Plaintiff from engaging in a variety of personal pursuits." Further, other employees had testified that the pager duty was voluntary and that this duty did not confine them to their homes. However, the court agreed that the plaintiff was entitled to overtime compensation at one and a half times her normal hourly rate for the time she actually spent dealing with each after-hours page. *Abdelkhaleq v. Precision Door of Akron*, No. 5:07 CV 3585, 2009 WL 2762356 (N.D. Ohio, Aug. 28, 2009).

Schools

IDEA

T.Y., a child with autism, was placed in a special education class within New York City's public school system. The Individuals with Disabilities Education Improvement Act (IDEA) entitled all children with a disability to access to a free and appropriate public education. At the heart of IDEA is the Individualized Education Program (IEP). This is a plan, resulting from meetings between parents, educators, and representatives of the school district, which not only establishes annual and short-term goals for student performance, but also provides for specially-designed instructions and services for the disabled child. If parents are dissatisfied with an IEP, their complaint will be heard by an impartial hearing officer (IHO), whose decision can subsequently be appealed to a state hearing officer (SHO), whose decision, in turn, can be further appealed to a state or federal court.

T.Y.'s IEP stated that he would receive three 30-minute sessions of individual speech therapy a week, two 30-minute sessions of individualized occupation therapy, and a similar amount of physical therapy. What the IEP did not mention was the specific school where the therapy would take place, except to state that it would be a school that specialized in providing education for children with disabilities. When T.Y.'s parents received notice of the actual school, they did a site visit and found the school to be unsuitable for T.Y. They also rejected another school put forward by the school district. T.Y. was subsequently enrolled in a specialized private school and his parents ultimately brought a lawsuit against the City. The lawsuit contended, among other things, that the IEP materially violated T.Y.'s right to a free and appropriate education because it did not provide adequate speech services, and was procedurally deficient because it did not include a specific school placement.

The U.S. Court of Appeals for the Second Circuit affirmed the lower