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Public Sector Furloughs: Player Perspectives, Strategies, and Grounds for Challenge

By Ryan Shannon

I. Introduction

Furloughs are on the rise at a time when tough economic conditions are driving up the demand for state services.[1] Long-used to close budget gaps in economic downturns, furloughs were widespread in the early 1990s, but public employers have used them at greater rates in the latest recession than at any time since World War II.[2] A furlough is a period of non-work. The term can be further qualified to mean a period of non-work, generally no longer than two or three days at a time, from which the employee is guaranteed to return.[3] Furloughs can be voluntary or mandatory; paid or unpaid; and applied uniformly or imposed unevenly on employees based on take-home pay. This flexibility is attractive to employers trying to stop the bleeding in times of rapid downturn.[4] Since the global economic collapse began in 2007, at least 24 states have adopted some type of furloughs to meet their budgetary shortfalls.[5] These include: California, where upwards of 189,000 executive branch employees have been furloughed for three days each month; Maryland, where 70,000 government services employees will be furloughed for 20 days over the next two years; and Hawaii, where public school teachers agreed to 17 annual furlough days.[6] Even with improved economic indicators, states face an estimated $110 billion budget gap in the next two fiscal cycles.[7] Furloughs are likely to be even more widespread as states move through the two years following the recession, which are typically "states' toughest budget years."[8]

This article explores the social and legal consequences of furloughs in the public sector. Part II analyzes the perspectives of the various players, including unions, employees, employers, and members of the public. Part III surveys the law governing authority to declare furloughs at various levels of government. Part IV summarizes the constitutional basis under which unions and employees have challenged furloughs.

II. Player Perspectives

A. Unions and Members

Unions walk a fine line in deciding whether to support or oppose furloughs. For unions, temporary and short-term furloughs are preferable to layoffs because union members keep their jobs and remain members. Furloughs also keep current contracts in place with only temporary salary reductions. When the economy improves, unions that have accepted furlough days will not have to bargain back concessions they might have otherwise made. Opposing furloughs can be risky since employers with time-sensitive budgetary needs may feel it easier to simply issue layoffs, which are not likely to have legal complications.[9]

Some unions have used the furlough as another bargaining chip at the table.[10] For example, in Connecticut, unions agreed to take seven unpaid furlough days over two years in exchange for a promise that the state would not lay off any employees until at least 2012.[11] Public sector unions in Massachusetts and New Jersey exacted a similar promise in exchange for wage freezes and unpaid furlough days.[12]

Unions recognize that furloughs are preferable to layoffs for employers for a number of reasons, the most salient being the political price employers pay in carrying out layoffs and reducing services permanently. Furloughs do have political consequences as well. Unions can barter not only over whether furloughs will be enacted, but also how they will be enacted; a union might concede, for example, to an employer's decision to order a complete office shutdown, where all employees stay home on the same day and the public is unable to make use of government services, and threaten to oppose rolling furloughs (where the public is less visibly affected) to exact a greater price at the bargaining table.[13]

For individual employees, furloughs can have substantial benefits over layoffs. Even where the wages lost during furloughs are not later reimbursed,[14] employees may prefer to have the option of volunteering for long weekends or extending their vacations with a few days of unpaid leave.[15] In periods of economic decline, a steady source of even a reduced income is often preferable to standing in unemployment lines and searching for new employ-

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ment. Individual employees are increasingly living paycheck to paycheck, however, and even a slight reduction or delay in weekly pay can cause hardship.[16] When Hawaii Governor Linda Lingle's proposed three-day per month furloughs for state executive branch employees were struck down as a violation of the state's constitution in 2009, the judge expressed concern that "[t]he nature of a 13 to 15 percent cut in these wages sets in motion changes of jobs, failure of workers to make rents, mortgages, failure . . . to pay tuitions, to pay their loans, creating bad credit ratings, and cascading effects from these events."[17] The Fourth Circuit Court of Appeals expressed a similar concern in invalidating the City of Baltimore's furloughs in 1993, noting an annual salary reduction of $240 dollars "could represent a substantial portion of a monthly mortgage or rental payment, or weeks of food."[18]

B. Employers and the Public

Furloughs have structural and institutional advantages for public employers. By furloughing employees rather than terminating them, public employers are better able to maintain morale and institutional expertise. Furloughs have the benefit of speed and flexibility – features which can be essential when economic calamity takes public officials by surprise.[19] Moreover, as discussed above, furloughs can be more politically expedient than layoffs. Unions are often represented on both sides of the table, and public employers may prefer to use furlough days where the union pushes for them in lieu of layoffs.[20] Additionally, a temporary shutdown can save on infrastructure costs including heating and energy.[21]

But not all costs are avoided. Employees with collective bargaining agreements continue to collect health and retirement benefits while furloughed.[22] Where the contract permits, employers may seek additional savings by structuring furlough days so that employees drop below the minimum level of hours necessary to accrue health benefits,[23] though such a decision is likely to raise the risk of legal challenge by unions. There is also evidence that furloughs, if structured improperly, are ineffective at preserving money in the public coffers.[24] Following Governor Schwarzenegger's furloughing of state employees in February 2009, the Berkeley Center for Labor Research and Education released a study, finding that the savings were far less than claimed considering[25] "lost state income taxes from state employees; reduced revenue collection; . . . and the funds needed to maintain retirement benefits:"[26]

> Based on new data . . . on actual savings from the furloughs since February 2009, we estimate a reduction in wages and benefits of $2.01 billion for 193,000 workers over the course of the year. Accounting for the share of furloughs that impact workers who are not on the General Fund, lost revenue, and increased costs due to the furlough program, the net savings to the General Fund for FY 09-10 is estimated to be just $738 million. The FY 09-10 furloughs will further result in a loss of $503 million over the subsequent years, leaving a net savings of $236 million to the general fund.[27]

The report concluded that, "for every dollar in reduced spending from furloughs, the state saves . . . 12 cents when losses in subsequent years are taken into account."[28] The report also indicated that the furloughs would result in "disruptions of state services [with] an impact on the broader economy."[29]

An employer's ultimate decision to furlough rests on its ability to convince the public that the furlough is to their benefit. Closed offices result in delays in licensing and can interrupt important government projects or cause major inconveniences for members of the public. In the 1995-1996 federal government shut down,[30] for example, the Center for Disease Control lost several weeks of data regarding the spread of AIDS and the flu virus; seven million potential national parks patrons were forced to forego their visits; and 200,000 U.S passport applications went unprocessed.[31] In the most recent economic downturn, furloughs of state workers charged with processing Social Security payments have been especially widespread.[32] Even though funding for the program comes from the federal government, state workers process claims, and furloughs extend an already long-term application process.[33] Where cuts are especially deep, counties and municipalities find themselves in the undesirable position of slashing emergency response funding or reducing staff at facilities providing public safety,[34] which includes firefighters, police, staff at prisons and healthcare workers.[35]

III. Authority to Furlough

A. Executive/Gubernatorial Authority

The power to furlough, as differentiated from the authority to close or combine executive agencies, is typically (and initially) based on the same implied or express constitutional powers to direct the dispensation of the state's budget that give rise to the ability to enter into collective bargaining agreements. In entering a collective bargaining agreement, a state or city executive is giving up part of its sovereignty and becomes like an ordinary individual; "instead of . . . a reservation of some

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sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."[36] But where there is no guarantee of wages or hours of employment in a collective bargaining agreement, a state or city executive acts within a constitutional mandate when ordering furloughs. In Colorado, for example, once the state's legislative apparatus "appropriates the funds, the Governor takes over to 'administer the appropriation to accomplish its purpose.'"[37]

In a 2009 opinion, the Colorado Attorney General argued that the Colorado Constitution "invests the Governor with discretion to take acts to defray the cost of government" and "allocate staff and resources."[38] Within a separation of powers analysis, the authority to declare mandatory furloughs was implied, and "consistent with the legislature's acknowledgement that the Governor, within his executive authority, can and should restrict the number of employees to the minimum necessary for efficient operation of the State."[39]

The governor's power to direct the dispensation of funding, or to rein it in through furloughs, is essential in light of the executive branch's general incapacity to appropriate funding, even in periods of emergency.[40] In Virginia, for example, the state's Emergency Services and Disaster Law provides that the governor may declare a state of emergency "[w]henever, in the opinion of the Governor, the safety and welfare of the people of the Commonwealth require the exercise of emergency measures due to a threatened or actual disaster."[41] Though the governor's emergency powers are broad, including to some extent an ability to waive state law (and enact furloughs),[42] Virginia's Constitution explicitly states that "[n]o . . . appropriation of public or trust money or property . . . shall be passed except by the affirmative vote of a majority of all members elected to each house. . . ."[43] The separation of powers doctrine limits the governor's emergency powers to the management of appropriated funds, making the implied power of furloughs all the more important when a government shutdown looms for lack of new appropriations.[44]

Several states explicitly allow the governor to furlough employees or shut down services in the event of a state emergency – fiscal or otherwise. By statute, mandatory furloughs are expressly permitted in Colorado following the declaration of a fiscal emergency by that state's General Assembly.[45] This authority differs from the more general constitutional authority used by Governor Ritter to declare furlough days in 2009.[46] During a budget negotiation crisis in 2006, New Jersey Governor John Corzine declared a state of emergency to invoke special powers granted to him under the New Jersey Disaster Control Act.[47] By declaring an emergency, Corzine was able to "shut down non-essential government services to avoid problems," in advance of the impending budgetary deadline.[48] Among the services Corzine designated "non-essential" were New Jersey's Casino Control Commission and Division of Gaming Enforcement.[49] The political pressure from the Casino shutdown influenced the legislature to act quickly in overcoming the negotiation impasse, but caused significant damage to the industry and led many to criticize Corzine's invocation of emergency powers as a political ploy and an abuse of authority.[50]

Even where state executives have the authority to declare furloughs, there is a secondary question as to the scope of their authority in selecting the manner of implementing those furloughs. The Civil Service Amendments to the Colorado Constitution provide only that classified employees "hold their respective positions during efficient service."[51] The Colorado Attorney General has opined that these provisions do not prevent the governor from exempting certain departments or positions from a furlough plan, but instead merely require "equal pay for equal work."[52] Since "[e]mployees who are furloughed receive less pay, but . . . also work less," an exemption from furloughs for certain departments or worker classifications is ostensibly "in keeping with the equal pay for equal work requirement."[53]

At the municipal level, the issue presented is not always the authority to declare an unpaid furlough, but the authority as between city executives to direct which employees will be subject to that declaration. In *Burnette v. Stroger*, for example, the Cook County Public Defender squared off against the President of the Cook County Board when the president selected specific employees in the defender's office to be furloughed.[54] In Illinois, the Public Defender Act "provides the public defender with the right to 'appoint' attorneys to serve as assistant public defenders, who then 'serve at the pleasure of the Public Defender.'"[55] The court differentiated between the county board's power "to fix the number and compensation of the assistant public defenders," and the public defender's right "within that fixed number, to hire and fire individuals to serve as assistant public defenders and staff members."[56] Though the board had an implied right to furlough employees generally, the Public Defender Act placed the authority to implement the furlough squarely in the hands of the public defender.

Another potential constraint on executive authority to declare furloughs is the essential nature of the service. In Colorado, for example, there may be an implied authority by statute allowing the governor to suspend or discontinue certain services once it becomes apparent that insufficient revenues are available to provide for those services.[57] An executive at the municipal level may be constrained by charter provisions describing particular governmental func-

tions as "mandatory," as is sometimes the case with certain duties of the city prosecutor's office.[58] Unions have had little success, however, in arguing that public safety services are mandatory where not expressly deemed so. In *Fiscal Court of Taylor County v. Taylor County Metro Police*, furloughed police officers challenged Taylor County's ability to effectively terminate its police services by appropriating inadequate funds.[59] The Kentucky Supreme Court determined that the county's decision was not subject to judicial review, describing the decision to fund and maintain a police force as "political."[60] Similar decisions have permitted municipalities to cease the operation of the local jail,[61] close a fire station even where the closing potentially endangered residents,[62] and abolish the Chicago's Transit Authority police force.[63]

B. Legislative and Judicial Furloughs

The separation of powers doctrine prevents state or city executives from directly furloughing the employees of other branches, though the legislature can still effectively force furloughs by reducing appropriations, with some exceptions. For the sake of parity with executive branch employees, legislative leaders have sometimes volunteered to take furloughs themselves and extended furloughs to all legislative branch employees.[64] Many state constitutions explicitly prevent their legislative branches from altering the pay of state judges, but judicial furloughs can be a practical reality when funding reductions reach other judicial branch employees. In New Jersey, Article VI of the state constitution prohibits any reduction in judicial salaries during the term of appointment.[65] In an attempt at achieving parity for all judicial branch employees after declaring mandatory furloughs for 8,500 administrative and clerical staff in 2005, Chief Justice Stuart Rabner had success in asking for voluntary furloughs by state judges.[66] Most state judges agreed to take voluntary unpaid furloughs in an effort to share the fiscal pain and lost wages of their employees.[67]

At the federal level, some courts have been forced to implement furlough days and shorten hours in recent years.[68] When inadequate appropriations from Congress result in layoffs or furloughs, this "can erode the independence of the judiciary," and "[w]hile the Constitution attempts to provide some measure of protection for the judiciary by making clear that judges' salaries may not be reduced, there is no provision whatsoever for the funding of the infrastructure needed for efficient courts: the physical facilities, clerks, and staff."[69] In the battle over budget and the provision of services, furloughs in the courts not only threaten the separation of powers, but provide an example of a significant effect on the efficiency of the judiciary.[70]

IV. Limitations on the Authority to Furlough

A. Collective Bargaining Agreements & Impairment of Contract Analysis

Unions find themselves in a precarious position when opposing an employer's decision to furlough, since employers with time-sensitive budget issues may opt to implement permanent layoffs instead. In 2003, AFSCME argued that a proposed statewide one-day furlough of State of Illinois employees violated the terms of their collective bargaining agreement, and sought an injunction and an order for arbitration.[71] After the court granted the injunction, the employer "amended its furlough plan to provide for permanent layoffs in seven State agencies and began to implement the amended plan."[72] The injunction was ultimately upheld as valid, but AFSCME was left to arbitrate the issue of the employer's layoffs instead of furloughs.[73]

Though the issue has not been explicitly decided in any jurisdiction, at least one court has indicated that the impact of furloughs is subject to mandatory bargaining and a public employer commits an unfair labor practice when it refuses to bargain prior to implementation. In *Commonwealth v. Board, Pennsylvania Labor Relations Bd.*, the Commonwealth Court of Pennsylvania reviewed an order of the Pennsylvania Labor Relations Board finding the employer had committed an unfair labor practice by refusing to bargain over the transfer of its employees out of the bargaining unit.[74] The employer's plan included long-term furloughs with recall rights for employees once the economy improved; the court indicated that because the decision to furlough affected the "hours, wages, and terms and conditions of employment" of the workers, the impact of the decision fell outside of the managerial prerogative exception and the implementation of the furlough was a mandatory bargaining issue.[75] Applying Pennsylvania's "balancing test of the various competing interests of the public employer and the public employees in order to determine whether a particular issue is subject to bargaining," the court approved the Board's determination that even where the employer decided to furlough employees for a legitimate reason such as the lack of funding, the employer's "furlough of . . . employees . . . [was] clearly [a] matter[] of fundamental concern to the employees' interest in wages, hours, and other terms and conditions of employment."[76]

Where a collective bargaining agreement expressly guarantees a minimum level of wages or hours, a furlough would normally constitute a breach of the agreement. Where an agreement exists and the furlough is done pursuant to state law, unions can challenge the "unilateral "amend[ment] [of] collective bargaining agreements without further

negotiations,"[77] as a violation of the Contract Clause in the U.S. Constitution.[78] A furlough enacted pursuant to state law is not a breach of contract, but the law itself may be an invalid impairment of the contract.[79]

The Contract Clause, "on its face . . . appears to be absolute," but "courts have held that the Contract Clause does not take precedence over the police power of the state to protect the general welfare of its citizens, a power which 'is paramount to any rights under contracts between individuals.'"[80] In *U.S. Trust Co. of New York v. New Jersey*, the Supreme Court indicated that the Contract Clause applies to both public contracts as well as private ones:

> It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties. . . . Yet, the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects.[81]

The Supreme Court instead set out to "reconcile the requirements of the Contract Clause with the essential attributes of sovereign power necessarily reserved by the states to safeguard the welfare of their citizens."[82] The Supreme Court's analysis in *U.S. Trust* requires a three-part inquiry to determine the constitutionality of impairments for both private and public contracts.[83] The court first assesses whether "the legislation at issue, in fact, impairs a contract."[84] If the court finds an impairment, it must second "determine whether said impairment constitutes a "substantial impairment of a contractual relationship."[85] Finally, the court must determine whether the impairment is "reasonable and necessary to serve an important public purpose."[86]

The application of the Contract Clause to public contracts differs in an important way, however, in that courts are not willing to grant the same level of deference to state legislatures when the contracts are of their own making. In determining what is "reasonable and necessary," the U.S. Supreme Court noted:

> [C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."[87]

The First Circuit has indicated that, though complete deference to a state's impairment of public contracts is inappropriate, "where economic or social legislation is at issue, some deference to the legislature's judgment is surely called for."[88]

1. The Development of the Contract Clause in Furlough Litigation

In 1992, the New York legislature passed a state finance law "which effect[ed] a five-day lag payroll upon both represented and unrepresented nonjudicial employees of the Unified Court System for the fiscal year."[89] Under the law, additional "savings [were] to be realized by paying employees for nine days, rather than 10, in each biweekly salary check over five payroll periods. The wages deferred [were] to be paid in lump sums when the employees' service [was] terminated, either by retirement or death."[90] The employees' union sued, arguing the statute violated the Contract Clause.

The New York Court of Appeals had little trouble finding a substantial impairment of the collective bargaining agreement, noting that "withholding 10 percent of an employee's expected wages each week over a period of 10 weeks . . . is not an insubstantial impairment to one confronted with monthly debt payments and daily expenses for food and other necessities of life."[91] In reaching the last step of the analysis – whether the legislation was "reasonable and necessary to accomplish the State's purposes" – the court indicated that while it would typically defer to the state's choice of "revenue-raising or revenue-saving devices," the impairment was not on the "menu of alternatives."[92] Because other alternatives were available, the legislation was deemed unconstitutional, and the court upheld the enjoinment of the legislation's enforcement.[93]

In the New York litigation, the substantial impairment was a long-term delay in pay rather than an actual diminishment in compensation. It follows that mandatory unpaid furloughs, in which there is an actual reduction in compensation, should constitute substantial impairments in Contract Clause analysis. The Fourth Circuit found a substantial impairment when the City of Baltimore declared mandatory furloughs during a budget crisis.[94] The court noted that "at the very least, where the contract right or obligation impaired was one that induced the parties to enter into the contract and upon the continued existence of which they have especially relied, the impairment must be considered 'substantial.'" Though the court did not adopt a particular minimum reduction sufficient to establish that an impairment was "substantial,"[95] it did "reject the . . . contention that an annual salary reduction of .95 percent is insubstantial."[96] Just as the New York Court of Appeals had cited the effect of the proposed pay lag on public employees' ability to pay monthly bills and provide for food and other necessities, the Fourth Circuit focused on the day-to-day effect of the lost wages resulting from mandatory furloughs, noting that an annual salary reduction of .95 percent "could represent a substantial portion of a monthly mortgage or rental payment, or weeks of food," and indicating a reluctance to hold that "any decrease . . . beyond a de minimis one could be

considered insubstantial."[97]

The Fourth Circuit next determined that the furlough plan was reasonable and necessary "in light of the magnitude and timing of . . . cuts in state funding, . . . the undisputed legitimacy of the City's need to balance its budget, the City's concerted efforts to exhaust numerous alternative[s], . . . the . . . nature of the furlough plan, and the City's immediate abandonment of the reductions at the first opportunity."[98] This final determination has been heavily criticized, with some arguing that the court gave too much deference to the City in light of the principle that the impairment of public contracts should receive less deference.[99]

Several years later, in *Massachusetts Community College Council v. Commonwealth*, the Supreme Court of Massachusetts applied Contract Clause analysis to the declaration of legislatively-directed furloughs.[100] The Massachusetts Legislature's enacted legislation providing for furloughs "as a matter of paramount public policy, during this period of fiscal exigency."[101] The legislature indicated in its findings that it considered furloughs "the least painful means" of reducing spending "while permitting the continuation, without any interruption, of the provisions of vital services."[102] The furlough gave employees several options of how to take their furlough days, and required additional furlough days for employees earning more than $25,000.[103]

Applying the analysis from *U.S. Trust*, the court determined that the furlough program "substantially impaired the Commonwealth's obligation to pay compensation to the various affected employees covered by the collective bargaining agreements."[104] The court cited *Baltimore Teachers Union* with approval for the proposition that even small reductions in compensation can amount to substantial impairments of collective bargaining agreements.[105]

The Massachusetts Supreme Court determined that the furloughs were not reasonable under the third part of the *U.S. Trust* analysis. Though the financial situation in Massachusetts in 1990 was precarious and the legislature had legitimate concerns regarding its ability to balance the budget, it had already allocated sufficient funds to pay the compensation called for in its collective bargaining agreements with state employee unions.[106] Indeed, it sought to declare furloughs in order to "generate revenue surpluses that would be available at the end of the fiscal year."[107] Moreover, the court determined that "[t]he fiscal problems . . . were reasonably foreseeable when the collective bargaining agreements were signed."[108] Though the ultimate difficulties proved worse than expected, "[a]ny difference . . . was a difference in degree and not a difference in kind," leading the court to declare the "substantial impairment of State employees' rights under collective bargaining agreements cannot be justified as reasonable."[109]

After *Massachusetts Community*, the fiscal crisis of the early 1990s calmed. Contract Clause jurisprudence with respect to furloughs would remain largely dormant until the most recent downturn,[110] when the issue was again raised in *Fraternal Order of Police v. Prince George's County, Maryland*.[111] In the wake of the housing bubble, Prince George's County sought to close a revenue gap by furloughing 5,900 employees.[112] The County was hit more severely than others, and had the highest foreclosure rate in Maryland at one point.[113] Several unions representing the employees sued, arguing that the County could not abrogate the collective bargaining agreements in light of the Contract Clause.[114]

Applying the three-part inquiry, the Federal District Court for the District of Maryland determined that there had in fact been an impairment when the county furloughed its employees,[115] and that the resulting 3.85 percent salary reduction was a significant impairment.[116] Turning to the issue of whether the impairment was "reasonable and necessary,"[117] the court found that the county's actions were unreasonable because they sought to recoup more than one third of their total deficit of $57 million from the employees, and did not narrowly tailor the plan to take the minimum amount necessary, as the City of Baltimore had done in *Baltimore Teacher's Union*.[118] Nor were the furloughs a necessity: the county had forewarning of the downturn and had significant reserve funds that it could have drawn from to avoid impairing collective bargaining agreements (the county had chosen not to do so to preserve its bond rating).[119]

On appeal, however, the Fourth Circuit Court of Appeals reversed, holding that there had been no impairment of the contract, since the county personnel laws permitted officials to require furloughs unless "specifically provided otherwise in . . . collective bargaining agreements."[120] While the union had previously bargained for prohibitions on furloughs, no such prohibition appeared in the operative agreement.[121] The Fourth Circuit reasoned that the furlough provisions in the county personnel laws were sufficiently narrow, and did not prevent the parties from entering into an otherwise "meaningful and binding contract."[122]

B. Furlough Challenges Based on Due Process

The Contract Clause cannot protect collective bargaining agreements from Congressional impairment in the District of Columbia, since the Clause only applies to the states.[123] In affirming "the expansiveness of Congress's power to legislate for the District," and refusing to recognize "any constitutional limitation on that power derived from constitutional limitations on actions by states,"[124] the District of Columbia Court of Appeals determined that furlough days enacted through appro-

priations legislation were not subject to Contract Clause review.[125]

In *District of Columbia v. AFSCME*, the union alternatively argued that Congress was limited in its ability to impair collective bargaining agreements under the Due Process Clause in the Fifth Amendment.[126] The trial court agreed that the Due Process Clause does limit Congress in this respect. On appeal, and under the rational basis standard, the D. C. Court of Appeals determined that the city's furlough plan, approved in Congressional appropriations, was based on reasonable judgments about the availability and allocation of resources, and that there had been no violation of the unions' due process rights.[127]

C. Analyzing Contract Clause Jurisprudence and Union Strategy

Challenging furloughs as unconstitutional violations of the Contract Clause should prove a popular avenue if the jurisprudence continues to develop favorably against impairment. A full survey of all public contracts impairment case law published in 2007 concluded that "[e]ven in cases of extreme fiscal crisis, including bankruptcy, the courts have been reluctant to modify or repeal the provisions of collective bargaining agreements."[128] A secondary benefit of the jurisprudence thus far is that the Contract Clause can be cited just as easily in New York as it can be in California, and against cities just as easily as against states or the federal government. Moreover, and as the decisions in *Baltimore Teachers Union and Massachusetts Community College Council* indicate, it is relatively easy to demonstrate a substantial impairment of a collective bargaining agreement even where the wages lost from mandatory furloughs are later reimbursed.[129] Indeed, except for *Baltimore Teachers Union*,[130] which was highly criticized, unions whose collective bargaining agreements guaranteed a minimum level of hours or wages had yet to lose an impairment claim in furlough litigation until the reversal in *Fraternal Order of Police*.[131] Now, in the Fourth Circuit at least, unions will have to be mindful of local personnel laws requiring specific provisions in the collective bargaining agreement prohibiting furlough plans.

The strategy to challenge furloughs is not without its perils, however, in that while reducing the compensation level provided in a collective bargaining agreement may run afoul of the Contract Clause, it is also usually a more amenable solution for state employees than the elimination of staff positions altogether. If states and municipalities see a trend toward furloughs being struck down as unconstitutional, they will be less likely to declare furlough days and more likely to proceed directly to reducing staff through layoffs, as was the case when AFSCME sought to challenge unilateral furloughs in 2003,[132] as discussed in Part IV. In this analysis, unions should take care not to overuse Contract Clause suits. Unions should to strike a balance, whereby their employers will use furloughs to avoid layoffs when the financial situation is truly dire, but will avoid using furloughs when there are more ready alternatives that will not impact members of the bargaining unit. Impairment litigation can be seen as a tactical option to be used only sparingly in directing the behavior of the employer.

V. Conclusion

Furloughs will likely continue to be a popular tool for state officials seeking to reduce expenditures in light of shrinking revenues while maintaining employee expertise and morale. Unions prefer furloughs to layoffs because they keep members on their rolls and offer an additional bargaining chip to negotiate long-term job security. But mandatory unpaid furloughs can anger unions when imposed unilaterally, and have the potential to generate challenges based on a variety of legal theories.

Perhaps the most widespread and successful approach for unions thus far has been to challenge furloughs under the Contract Clause of the U.S. Constitution. As the economic downturn proceeds into its third and fourth years, the litigation over furloughs will continue. Unions will win sometimes, requiring compensation for days never worked – and services that the state will never receive; and states will win sometimes, affecting the local economies which are dependent on the incomes of state workers. In the meantime, state workers and the members of the public who rely on government services will continue to be caught in the crosshairs of uncertainty as the courts work out the limits on state authority to send workers home without pay. ♦

Notes

1. Katharine Q. Seelye, *More States Resort to Furloughs, Even as Need for Services Grows*, N.Y. Times, April 24, 2009, at A1.
2. *See id.* (quoting professor of labor relations Robert Bruno, "This may well be the most widespread use, or consideration of use [of the furlough], at least since the emergence of the post-World War II economic boom.").
3. *See generally* 14 Emp. Coord. Personnel Manual § 21:34, Implementing Furloughs (2010).
4. See Christine Vestal, *After Furloughs, States Mull Permanent Cuts*, Stateline.org, Dec. 2, 2009, http://www.stateline.org/live/details/story?contentId=44 0784.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See*, *e.g.*, Richard Borreca, *Court Rejects Lingle's Furloughs*, Honolulu Star Bull., July 3, 2009, *available at* http://archives.starbulletin.com/content/20090703_Court_rejects_Lingles_furloughs ("Lingle has said previously that if [her furloughs] were blocked in court, she would start laying off state workers.").
10. Seelye, *supra* note 1.
11. John Moran, *State Employee Union Concessions in Other States*, OLR Res. Report 2009-R-0427, *available at* http://www.cga.ct.gov/2009/rpt/2009-R-0427.htm.
12. *Id.*
13. *See*, *e.g.*, Jeff Sabin, *Mayor Suttle Wants Pay Freezes, Not Furloughs*, WOWT, Aug. 20, 2009, *available at* http://www.wowt.com/news/headlines/53844707.html (discussing negotiations for a rolling furlough for emergency workers in Omaha).
14. *See* Mike Causey, *Federal Furlough's Bark*

Worse than Bite, Wash Times, June 24, 2008, at A06.
15. *See*, Frank Ahrens, *Long Weekends Serve as Alternative to Layoffs*, MSNBC, April 24, 2009, *available at* http://www.msnbc.msn.com/id/299165 69/.
16. *See* Causey, *supra* note 14.
17. *Judge's Ruling Halts Lingle's Plan to Furlough State Workers*, Honolulu Advertiser, July 2, 2009, a*vailable at* http://the.honoluluadvertiser.com/article/2009/Jul/02/br/hawaii90702064.html.
18. *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012, 1018 n. 8 (4th Cir. 1993).
19. Seelye, *supra* note 1.
20. *See generally* Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. Tol. L. Rev. 265 (1987).
21. *See*, *e.g.* Preston Sparks, *Furlough Days Trim School Energy Costs*, The Augusta Chronicle, March 18, 2010, *available at* http://chronicle.augusta.com/news/education/2010-03-18/furlough-days-trim-school-energy-costs.
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25. Ken Jacobs, *The High Cost of Furloughs, UC Berkeley Labor Law Center*, October 2009, *available at* http://laborcenter.berkeley.edu/californiabudget/furloughs09.pdf.
26. *Id*. at 4.
27. *Id*. at 1.
28. *Id*.
29. *Id*.
30. The political nature of federal furloughs is discussed in Section III.C, below.
31. Kevin R. Kosar, *Shutdown of the Federal Government: Causes, Effects, and Process*, Cong. Research Serv. 98-844, 4-5 (2004), *available at* http://www.rules.house.gov/archives/98-844.pdf.
32. Seelye, *supra* note 1.
33. See *id*.
34. See, *e.g*., Sabin, *supra* note 13.
35. Seelye, *supra* note 1.
36. Keith J. Zimerman, *When the Grim Reaper Calls: Primer on Contract Clause Protections*, 43 MD. B.J. 26, 27 (2010).
37. *Id*.
38. *See, e.g*., Op. Att'y Gen. 09-05 (Colo. 2009) (citing Anderson v. Lamm, 579 P.2d 620, 623 (Colo. 1978)).
39. *Id*.
40. Note, however, that in a 1992 decision, the Florida Supreme Court indicated that the governor's incapacity to appropriate funding weighed against deferring to a governor's entry into a collective bargaining agreement. *State v. Fla. Police Benevolent Ass'n*, 613 So.2d 415, 418-19 (Fla. 1992).
41. Va. Code Ann. § 44-146.17(7).
42. *See* Op. Att'y Gen. 06-044 (Va. 2006).
43. Va. Const. art IV, § 11.
44. See Op. Att'y Gen. 06-044 (Va. 2006).
45. Colo. Rev. Stat. § 24-50-109.5.
46. See Op. Att'y Gen. 09-05 (Colo. 2009).
47. Kelly Cooper, *The New Jersey Casino Shutdown: The Litigation and Costs to the Industry and Atlantic City's Poor,* 9 Rutgers Race & L. Rev. 209, 229 (2007); N.J. Stat. App. § A:9-33.
48. Cooper, *supra* note 47, at 230.
49. *Id*. at 229-30.
50. See *id*. at 210.
51. Colo Const. art XII, § 13(8).
52. *See* Op. Att'y Gen. 09-05 (Colo. 2009).
53. Op. Att'y Gen. 09-05 (Colo. 2009).
54. *Burnette v. Stroger*, 389 Ill. App. 3d 321, 905 N.E.2d 939 (2009).
55. *Id*. at 333, 905 N.E.2s at 950 (quoting 55 Ill. Comp. Stat. 5/3-4008.1).
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57. Colo Rev. Stat. § 24-2-102(4).
58. See *Scott v. Common Council, City of San Bernardino*, 44 Cal.App.4th 684 (1996). *See also Hicks v. Bd. of Supervisors*, 69 Cal. App.3d 228 (1977).
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62. *Richmond Hill Block Ass'n v. Dinkins*, 567 N.Y.S.2d 584 (N.Y. Sup. Ct. Queens Cnty.1991).
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79. *See* Shelby D. Green, *Development Agreements: Bargained - for Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 Cap. U.L. Rev. 383, 403 (2004).
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81. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977).
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89. *Ass'n of Surrogates & Supreme Court Reporters Within the City of New York v. State*, 588 N.E.2d 51, 52 (N.Y. 1992).
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101. *Id*. at 710.
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104. *Id*. at 712.
105. *Id*.
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109. *Id*.
110. *Fraternal Order of Police v. Prince George's County, Maryland*, 645 F.Supp.2d 492, 509 (D. Md. 2009) ("The last financial crises experienced by the United States happened in the early 1990s. . . . Thus, much of the most recent case law interpreting the Contract Clause with respect to the impairment of public contracts was generated during this period."), *rev'd*, 608 F.3d 183 (4th Cir. 2010).
111. *Id*.
112. *Id*. at 494-95.
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123. *District of Columbia v. AFSCME*, 619 A.2d 77, 81 (D.C. 1993).
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Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the collective bargaining statutes.

IELRA Developments

Charter Schools

In *Chicago Mathematics & Science Academy Charter School, Inc. and Chicago Alliance of Charter Teachers & Staff, IFT, AFT* Case No. 13-RM-1768 (NLRB RD 2010), the Region 13 Office of the National Labor Relations Board held that Chicago Math and Science Academy Charter School (CMSA) is "political subdivision of the State of Illinois," and therefore outside of the jurisdiction under the National Labor Relations Act.

The Regional Director dismissed a petition filed by CMSA seeking an election after the Chicago Alliance of Charter Teachers and Staff filed a majority interest representation petition with the IELRB.

Section 2(2) of the NLRA excludes "any state or political subdivision thereof." The Regional Director applied the test set forth in *NLRB v. National Gas Utility District of Hawkins County, Tennessee*. 402 U.S. 600 (1971), which limits the political subdivision exemption to entities that are either (i) created by the state, so as to constitute departments or administrative arms of the government, or (ii) administered by individuals who are responsible to public officials or the general electorate. The Regional Director found that CMSA is "clearly a political subdivision of the State of Illinois under both prongs . . . each one by itself equally compelling."

The Regional Director found that CMSA was a creation of Illinois statute, satisfying the first prong of the *Hawkins* test. The enabling legislation for charter schools is the Charter Schools Law, 1995. 105 ILCS 5/27A-1 *et. seq*., which establishes the state's intent, authorizes local school boards to certify a charter, and provides for public funding, governmental oversight and accountability requirements.

The Regional Director emphasized that the Illinois General Assembly's declared purpose for enacting the Charter Schools Law was "to create a legitimate avenue for parents, teachers, and community member to take responsible risks and create new, innovative, and more flexible ways of educating children *within the public school system*." (emphasis in Board opinion).

The Regional Director also found that the recent declaratory amendments to the Charter Schools Law providing that a charter school shall comply with the IELRA and that the governing body of the a charter school is an "educational employer" subject to the IELRA, respectively, further exemplified legislative intent that charter schools are within the public school system.

The Regional Director found that the CMSA was accountable to Chicago Public Schools (CPS) for compliance with the charter, provisions of law and its finances. CMSA's Board of Directors, although not appointed or subject to removal by public officials, are nonetheless accountable to CPS to such an extent that its governing body is responsible to the public officials or to the general electorate. CMSA's Board of Directors must submit independent annual financial audits, a detailed budget, and quarterly statements. CMSA receives 80 percent of its operating budget from CPS. CMSA's compliance with reporting requirements to CPS determines the amount of funding allocated to CMSA and whether its charter is renewed, put on probation or revoked by CPS. These reporting requirements include daily accountability reports, academic progress oversight, and required teacher credentials.

Duty to Bargain

In *Thornton Fractional High School District No. 215 v. IELRB* No. 1-09-1597, 2010 WL 3834467 (Ill. App. 1st Dist. Sept. 30, 2010), the Illinois Appellate Court for the, First District reversed the IELRB's determination that the District had violated of the IELRA. The IELRB had affirmed the administrative law judge's holdings that that the District violated section 14(a)(5) of the Act when it changed the hiring policy in the guidance office at Thornton Fractional South High School without notice or negotiation with the Union and sections 14(a)(3) and 14(a)(1) when it refused to give Carmen Mureiko a 12-month position as the most senior secretary.

Mureiko testified before the ALJ that she started working at Thornton South on June 17, 1997, and began working in the registrar position in 1999. In February of 2005, District Superintendent Robert Wilhite announced that at the start of the 2005-06 school year, in an attempt to reduce a major budget deficit, "all 12-month building secretaries will be reduced to 10.5 months except the principal secretary and the senior guidance secretary." Mureiko testified that Thornton South principal John Hallberg told the secretaries at Thornton South that the most senior employee in the guidance department, Kim Nichols, would remain a 12-month employee.

In February 2006, certain clerical employees of the District met with the Union, decided on representation by the

Union and selected officers. Mureiko was selected as vice president and grievance officer.

In February 2007, Mureiko addressed a bargaining session about the need to increase the hours worked by the clerical staff . Mureiko testified that District Board President Debbie Waitekus told her to be "careful what she wished for," and superintendent Wilhite told her "to be careful" about her comments.

In May 2007, a secretarial position became vacant at Thornton South. The vacancy posting did not specify whether the position was a 12-month or 10.5-month position, but it was given to Kim Taylor, who was less senior than Mureiko by more than two years, on a 12-month basis. Mureiko continued to be employed on a 10.5 month basis.

When questioned about this decision at a bargaining meeting, the District did not offer an explanation other than it was not obliged to assign Mureiko to the position. Dr. Wilhite testified that he told his building principals and his assistant principal that he wanted the "best preson to be able to take care of that Guidance Office in the summer regardless of seniority." Waitekus testified there was never a practice or understanding between the Union and District that employees who had their hours cut from 12 months to 10.5 months would have their positions restored based on seniority. Waitekus also denied that Mureiko's participation in union activities was discussed by the District before a decision was made on her application and said " she didn't know that Ms. Mureikos even had anything to do with organizing the union until this hearing. She also denied telling Mureiko to be "careful what she wished for."

Emilie Junge, field service director for the Union, testified that she asked the District's attorney "what the deal was" with Mureiko not being selected for a 12-month assignment and that the attorney responded "[Mureiko will] never get it." Junge also admitted that during negotiations the Union withdrew a proposal to "restore staff 12 months to 10.5 months.

The IELRB found that the evidence established a "status quo" of assigning 12-month schedules in the guidance department based on seniority. The IELRB found that the District violated Section 14(a)(5) when it denied Mureiko a 12-month schedule despite her seniority, also noting the District's refusal to discuss the issue and the District's attorney's statement that Mureiko would "never get it."

The Appellate Court applied a "clearly erroneous" standard for reversal. With respect to the 14(a)(5) violation, the court noted that "a term or condition of employment must be an established practice in order to constitute a status quo," and that whether a status quo exists must be determined on a 'case-by-case' basis" and include an evaluation of past history, past bargaining practice, existing contract terms and the reasonable expectations of employees.

The court held that in this case there were no existing contract terms or written pronouncements by the District indicating an official policy of assigning the guidance department's 12-month schedules based solely on senority. The court noted that the parties had also stipulated before the ALJ that the "Educational Support Staff Work Rules and Regulations" from 2002 to 2006 did not state that seniority controls which employees schedules were reduced from 10.5 months or which employees had a first right to a future 12-month position.

The court also held that the evidence of past bargaining was insufficient to show the District failed to bargain in good faith. The court noted that despite Mureiko's testimony that she received no answers about why she was not selected for the position, there was nothing in the record showing a proposal was made by the the union to bargain over the issue of Mureiko receiving the 12-month position. The court further noted that Junge testified consciously chose to withdraw the general proposal that would have given Mureiko a 12-month position.

Finally, the Court held that the employees in the guidance office could not have reasonably expected seniority to be the determining factor in the selection of 12-month employees because there was no such past practice and, even assuming they were made, representations to that effect by the assistant principal and the assistant superintendent did not carry the weight of policy pronouncements.

Layoffs

In *Chicago Teachers Union v. Board of Education,* 2010 U.S. Dist. LEXIS 105715 (N.D. Ill. Oct. 4, 2010) the U.S. District Court for the Northern District of Illinois ordered the Board of Education to rescind discharges of tenured teachers, and to promulgate a set of recall rules, following good faith negotiations with the Chicago Teachers Union, within 30 days. The court also permanently enjoined the layoffs or "honorable discharges" until such time as the recall rules are promulgated.

Facing significant budget deficits before the 2010-2011 school year, the Board was forced to lay off nearly 1,300 teachers. The Board implemented its layoffs through a series of resolutions authorizing the "honorable termination" of tenured teachers, and authorizing schools to first lay off teachers who were under remediation and whose last performance ratings were negative. However, the majority of tenured teachers laid off were rated "excellent," "superior," or "satisfactory."

Throughout the summer, the Board implemented layoffs of 1,289 teachers. All laid-off teachers received notice of their termination, but were not provided an opportunity to demonstrate their qualifications

for retention in some capacity.

The Union argued that tenured teachers, laid off for economic reasons, had a due process right to some type of retention procedure before they were permanently discharged. The Court stated that to prevail on a claim for the deprivation of property without due process, a plaintiff must establish that she holds a property interest protected by the Fourteenth Amendment. However, such property interests are not formed by the Constitution, but are created by existing rules, such as state law.

The Union located the property interest in 105 ILCS 5/34-18(31), which requires the Board to consider teachers' qualifications, certifications, experience, performance ratings or evaluations, and . . . job performance" when implementing layoffs. The Union relied on *Mims v. Bd. of Educ.*, 523 F.2d 711 (7th Cir. 1975), which held that that plaintiffs had a property interest in their continued active employment, and that the board failed to establish a procedure for employees to obtain review of layoff decisions to ensure they were not for impermissible reasons or to demonstrate that they should have been retained in some capacity.

The court agreed that, in light of *Mims* and 105 ILCS 5/34-18(31), the Board violated the tenured teachers' due process rights to some sort of retention procedure, because the Board failed to promulgate rules to govern layoffs which were contemplated by Section 5/34-18(31). Although the court admitted that the statute's statement that the Board "shall have the power" to promulgate rules is "ambiguous," it noted when the Board passed its resolution to consider performance ratings and evaluations when making layoff decisions, the Board explained that this rule was "require[d]" by Section 5/34-18(31). The court concluded that Section 5/34-18(31) provides tenured teachers some residual property rights in the event of an economic layoff. However, the court stated that normally state law rules and regulations create the property interest whereas here there were "no rules, only the statutory authorization/requirement for rules under 5/34-18(31)[, and] [w]ithout rules or regulations, the court can do no more than read 5/34-18(31) as vaguely providing a property interest in some sort of retention procedure." The court added, "Because the court lacks institutional competence to draft the missing rules and regulations," the Board must compile a set of rules in consultation with the Union which abides by Section 5/34-18(31).

IPLRA Developments

In *Illinois Council of Police v. ILRB*, Local Panel, No. 1-09-1859 and 1-09-1860, 2010 WL 3834596 (Ill.App. 1st Dist. Sept. 30, 2010) the First District Appellate Court affirmed the Local Panel's certification of a new, stand-alone bargaining unit of aviation security sergeants. This decision partially overturned *Illinois Council of Police & Sheriffs*, Local 7, 18 PERI § -01-010 (ILRB Local Panel 2002), where the Board found that the aviation security sergeants were not peace officers under the IPLRA and a stand-alone bargaining unit for the sergeants was not appropriate.

The City aruged that the only appropriate bargaining unit for the sergeants would be a preexisting Unit II which included other aviation security employees because the stand-alone unit would create fragmentation.

In affirming the ILRA's decision, the court examined the Board's departure from its long standing-preference for large, broad functionally based bargaining units and recent precedent in certifying small, stand-alone units. The court stated that an agency may adjust its standards and policies in light of experience, as long as the adjustments are not arbitrary and capricious. The court analyzed three recent Board certifications of smaller units, and determined that this departure was "anything but arbitrary and capricious." *See International Brotherhood of Teamsters*, 23 PERI ¶ 172, (ILRB Local Panel, (2007) (Board certified unit of 23 supervising police communications operators); *State v. ILRB*, 388 Ill. App. 3d 319, 902 N.E.2d 1122 (2009) (affirming decision of the Board in Illinois Nurses Ass'n, 23 PERI 173 (ILRB State Panel, 2007) (certifying a unit of six Bureau of Administrative Litigation staff attorneys), City of Chicago v. ILRB, 396 Ill. App. 3d 61, 918 N.E. 2d 1103 (2009) (affirming Board decision certifying unit of 34 public health nurses).

The Board has held that the fragmentation factor by itself was insufficient to deny a petition seeking unit certification for a small subset of employees who had never been represented. In *International Brotherhood of Teamsters* the Board explained, that "although the preference for large functionally-based unit was, and continues to be, an important consideration, . . . excessive concern with avoiding fragmentation and promoting economy and efficiency in public bargaining and contract administration consumed not only the employee's right to organize, but also the criteria set forth in section 9(b)." The court found this reason more than adequate to show that the shift in certifying smaller units was well considered and reasonable. Thus, given the shift in Board policy to certify smaller units, it was not clearly erroneous for the Board to certify this bargaining unit though it had denied certification of the same unit in 2002. ♦

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