

Legal Issues – FY 2011 Budget

January 20, 2010
CWA State Worker Steward Conference

FY 2011 Legal Issues

- Can we enforce the MOA's economic consequences for a violation of the no layoff pledge?
- Can we enforce the MOA's limitations on furloughs?
- What is the state of the law with respect to the negotiability of furloughs?
- Can Christie propose a budget that does not include funding for the raises due in FY 2011?
- Can Christie invoke "emergency powers" to void contractual obligations or statutory rights such as layoff rights?
- Can the Legislature pass a budget that mandates there will be no layoffs in FY 2011?
- Can the Legislature pass a law reducing pension benefits, and if so, for whom?

MOA's Furlough Provisions

- Section B2 states that “through June 30, 2011, CWA unit employees will not suffer any involuntary unpaid leaves of absence or furloughs, except as expressly permitted in paragraphs B1 above and B3 through B6 below”
- Section B1 provides for 10 furlough days and B3-B6 provide that 1 of the 10 days shall be used in FY 2009 and that another 2 of the 10 days will be the day after Thanksgiving 2009 and Lincoln's Birthday 2010 and the remaining 7 days are self-directed.

MOA Furlough Days cont'd

- Section B13 provides that if “any CWA unit member is furloughed or required to use an unpaid leave day in violation of B2 above, **such member shall suffer no loss of compensation as a result of not being permitted to work on such day.**”
- B13 further states that “if CWA submits to arbitration a grievance alleging a violation of B2 and the arbitrator sustains the grievance, the arbitrator shall be limited to **awarding an employee his or her lost compensation for being furloughed in violation of B2.**”

Recap of the Law on Furloughs

- April 17, 2009 Appellate Division decision on the emergency furlough rule
 - Civil Service properly bypassed normal rulemaking based upon the existence of “imminent peril”
 - Staggered layoffs may be inconsistent with statutory layoff rights
 - Court also stated that **“a decision to lay off all employees in a layoff unit, even on a temporary basis, must be considered a managerial prerogative, and lawfully embodied in the emergent regulation.”**

Negotiability Test

- To determine if a subject is a mandatory subject of bargaining PERC and Courts use the following test:
 - Does the subject intimately and directly affect terms and conditions of employment?
 - Does any statute or regulation preempt negotiations?
 - Would negotiations significantly interfere with the determination of governmental policy?

PERC's Interim Relief Decision

- May 16, 2009 PERC interim relief decision on State and local government furloughs
- First ruled on furloughs where Civil Service law applies – State and Local
- Although PERC, not the courts, have primary jurisdiction over scope of negotiations disputes, PERC's designee held that “irrespective of whether the court issued a ruling or dicta, this agency does not have the authority to rule that the Appellate Division went beyond its jurisdictional bounds.”

Interim Relief Decision cont'd

- In **Maplewood**, a non-civil service jurisdiction, the Township announced the unilateral imposition of 12 furlough days during June, July and August
- Finding that the Appellate Division decision is not controlling, the PERC designee applies the Local 195 negotiability test.
- **“The Commission has consistently found action termed ‘temporary layoff’ or ‘furlough’ as changes to the length of the an employee’s hours of work, level of compensation, and unpaid leave time, all matters considered to be mandatorily negotiable.”**

Legal Status of Furloughs

- Furlough Rule Repealed November 18
- Only decisions on furloughs by PERC are interim relief decisions
- Only Appellate Division decision based on repealed rule and the court improperly exercised jurisdiction over a scope of negotiations dispute
- Unanswered is the right to enforce annual salary and hours of work provisions in collective negotiations agreements

No Layoff Pledge

- C5 provides that if any CWA unit member is laid off prior to January 1, 2011 the deferral of the 3.5% increase shall immediately end, the furlough provisions of the MOA will end and anyone laid off who does not have a right to go into the displaced worker pool under Side Letters 35 or 13 can go into the pool for two months.

Arbitration of Furlough and Layoff Provisions of MOA

- Section L2 provides that if CWA seeks to arbitrate a dispute arising under sections A through D - the furlough provisions and no layoff pledge are sections B and C respectively – “the State waives any right it may have to claim that the dispute is not legally arbitrable or negotiable under scope of negotiations law.”

The Legal Obligation to Fund Contractual Raises

- Necessary to understand two interrelated decisions.
 - The **May 21, 1991 PERC** decision on Florio's decision to submit a budget proposal that did not fund the 5.5% raise due July 1, 1991.
 - The **December 29, 1992 NJ Supreme Court** decision on the constitutionality of legislation requiring unclassified non-bargaining unit employees earning over \$50,000 a year to be laid off first and then classified non-bargaining unit employees earning over \$50,000 a year to be laid off next and barring any layoffs of employees at psychiatric hospitals and developmental centers providing direct services.

Contract Language Relating to Funding

- Two applicable contract provisions
- Article 6A – “Subject to the State Legislature enacting appropriations of funds for these specific purposes, the State agrees to provide the following benefits First full pay period in July 2010, each employee covered by this agreement shall be entitled to a 3.5% across-the-board increase applied to the employee’s current base salary.”
- Article 41A, The Effect of Law – “If any provisions of this agreement require legislative action . . . or require the appropriation of funds for their implementation . . . the parties shall jointly seek the enactment of such legislative action”

Historical Background

- Early January 1991 Florio brought in Gerry Dorf who met with the unions and announced ultimatum – Either rollback salaries to June 30, 1990 levels, contribute 25% toward cost of healthcare and agree that the State can forego its 2% pension payment **or** there will be 10,000 layoffs.
- End of January 1991 Florio proposed a budget with \$500 million in personnel savings:
 - 3500 layoffs of bargaining unit members
 - No funding for the 5.5% raise due July 1
 - Shifting of healthcare costs

Union Response

- All State unions refused to reopen contracts or grant any concessions.
- January 25 – day budget presented – mass rally of unions in Trenton
- February/March mass grievances circulated for signatures
- March 7 CWA Statewide Political Action Committee votes to **run independent candidates** in swing districts if Legislature does not fund the raises
- April 1991 PEC issues report entitled “**Do the Right Thing – A Program to Solve New Jersey’s Fiscal Crisis.**”
 - The report, prepared by CWA research staff, identified over \$1 billion in savings from various sources including bloated management.

Union Response cont'd

- April 11 – Petitions filed for 15 independent candidates in 9 swing districts
- April 15 – All unions participate in wear black to work
- April 16 – Lunchtime picketing at worksites throughout the state by all unions
- May/June – Meetings with Legislators demanding that raises are funded and opposing layoffs
- May 22 – The **Coalition for Human Priorities**, consisting of the NJ Council of Churches, NOW, the Rainbow Coalition, Black Issues Convention, National Association of Social Workers, tenants groups, legal services organizations and labor unions sponsor conference – “Shaping Government to Meet Human Needs” at the War Memorial
- June – Mass Rally in Trenton

1991 PERC Decision

- May 21, 1991 PERC Decision
 - State Unions (CWA, AFSCME, AFT, IFPTE, PBA) filed grievances alleging that Florio's proposed budget violated the contracts, including the salary, health benefits and "Legislative Action" articles. State sought restraint of arbitration.
 - PERC ruled that **"if the parties can negotiate over wages and benefits, it logically follows that they can agree on a procedure to seek the necessary funding."**

Contract Funded

- In return for pulling the independent candidates Joe Doria agrees to fund the raises.
- Fewer than 1000 layoffs
- November 1991 elections
 - Democratic Massacre as a result of massive grassroots backlash against Florio income and sales tax increase
 - Republicans gain veto proof majorities in both houses of the Legislature

1992 Supreme Court Decision - Background

- Florio again proposes massive layoffs to balance the budget
- Legislature enacts appropriations language requiring unclassified non-bargaining unit employees earning over \$50,000 a year to be laid off first and then classified non-bargaining unit employees earning over \$50,000 a year to be laid off next and barring any layoffs of employees at psychiatric hospitals and developmental centers providing direct services.
- Florio vetoes language
- Legislature overrides veto
- High ranking officials in Florio Administration acknowledge layoffs not fiscally necessary

CWA v. Florio

- While the Legislature retains broad powers to control the size and priorities of State government, and can exercise that authority by reducing the amount of money appropriated to the salary and wages accounts of the departments, “decisions on how to use the funds appropriated by the Legislature to staff executive agencies are for the Governor to make, and the Legislature may not dictate whom he may, or may not, lay off.”

Impact of 1991 PERC and 1992 Supreme Court decisions in 2010

- Governor Christie will be required to fund raises
- The Legislature has no power to prevent Christie from laying off workers. Even if the Legislature does not appropriate funds for negotiated raises, Christie can still layoff workers.

Can the Governor Use Emergency Powers to abrogate contracts and statutes?

■ **Civilian Defense Act and Disaster Control Act**

■ **Purpose**

- To provide for the health, safety and welfare of the people of the State of New Jersey and
- to aid in the prevention of damage to and the destruction of property during any emergency as herein defined
 - by prescribing a course of conduct for the civilian population of this State during such emergency and
 - by centralizing control of all civilian activities having to do with such emergency under the Governor and for that purpose
- to give to the Governor control over such resources of the State Government and cope with any condition that shall arise out of such emergency and
- to invest the Governor with all other power convenient or necessary to effectuate such purpose.

Civilian Defense Act and Disaster Control Act

■ **Definition of Emergency**

- Any unusual incident resulting from natural or unnatural causes which endangers the health, safety or resources of the residents of one or more municipalities of the State, and which is or may become too large in scope or unusual in type to be handled in its entirety by regular municipal operating services.

■ **Emergency Powers of the Governor**

- Authorized to utilize and employ all available resources of the State Government and of each and every political subdivision of this State, whether of men, properties or instrumentalities, and
- to commandeer and utilize any personal services and any privately owned property necessary to avoid or protect against any emergency subject to the future payment of the reasonable value of such services and privately owned property.

Worthington v. Fauver

- 1982 Supreme Court decision
- To alleviate overcrowding in State prisons, executive order gave Comm'er of Corrections authority to direct county correctional facilities to house state prisoners.
- The Court held that the purpose of the Act to protect the public by centralizing control over local government resources in situations whose remedies were beyond the authority and power of local government.
- The statute does not grant the executive the power to label any situation an “emergency.” **There must be a substantial likelihood of an occurrence within the immediate future.**
- Executive action must be **“closely tailored to the scope of the current emergency situation.”**
- EO trumped statutes requiring convicted prisoners to be incarcerated in State prisons.

Uses of Emergency Powers to Abrogate Contracts

- Abrogate provisions in collective bargaining agreements providing for raises
 - Here no commandeering of local government resources to address emergency
 - Not closely tailored – savings from abrogation of contracts perhaps 2% of deficit of \$4-8 billion deficit. Difficult to justify use of such extraordinary powers to evade contractual obligations, particularly after previous Governor obtained agreement on wage deferral etc. in return for promise to adhere to contractual commitments.

Use of Emergency Powers to Abrogate Layoff Rights

- Abrogate statutory layoff rights
 - Again, tough sell to courts
 - No commandeering of local government resources, which is the purpose of the Disaster Control Act.
 - In past there have been 1000s of layoffs carried out consistent with statutory and regulatory layoff rights.
 - Hard-pressed to explain why this situation so radically different. May be less convenient to respect layoff rights, but does not prevent layoffs.

1991 Parallels and Lessons

- Governor threatens massive layoffs unless there are concessions
- Certain legislators may threaten not to fund raises
- In 1991 the key was the creation of maximum leverage through unity of action (locals, unions, allies), membership mobilization, political pressure, legal action, and never blinking.
- In 2010 may not replicate what we did in 1991, but take to heart valuable lessons from that struggle.

Can the Legislature Reduce Our Pension Benefits?

- Under a 1997 amendment to the pension statute, any member of PERS with five or more years of service has a “**non-forfeitable right** to benefits based on the laws governing the retirement system on the date the member completes five years of service.” N.J.S.A. 43:3C-9.5.
- A non-forfeitable right to receive benefits means that “**the benefits program, for any employee for whom the right has attached, cannot be reduced.**”
- 2006 OLS and AG opinions conclude that a reduction in pension benefits for employees with non-forfeitable rights would likely **violate the US and NJ constitutional proscriptions against the impairment of contractual obligations.**

Could Not Be More at Stake

- Integrity of government service and the social contract
- Integrity of our collective bargaining agreements
- Integrity of collective bargaining itself
- Jobs of Members
- Retirement security for us, our children and our children's children
- Our Union

Quiz

- T or F: Since the 10 furlough days agreed to in the 2009 MOA must be used before the end of this fiscal year, Governor Christie can unilaterally impose additional furlough days in the next fiscal year beginning on July 1, 2010.
- T or F: There is a Civil Service Rule in effect that expressly authorizes the State to impose furloughs on its workforce.
- Multiple Choice: The decision to layoff is a non-negotiable managerial prerogative because:
 - a. There is a statute that specifically declares layoffs to be non-negotiable.
 - b. Negotiations would undermine the very foundation of representative democracy.
 - c. An executive order signed by Governor Whitman bars negotiations over layoffs.

Quiz cont'd

- T or F: Because the decision to layoff is non-negotiable, Corzine's no-layoff pledge in the 2009 MOA is not worth the paper it is written on.
- T or F: If even a single State worker is laid off, all furloughs immediately end and the 3.5% deferred raise immediately becomes due.
- T or F: Governor Christie is not legally required to submit a proposed budget to the Legislature that funds the annual across-the-board raises, because CWA's collective negotiations agreements with the State make the raises subject to appropriations by the Legislature.

Quiz cont'd

- T or F: No governor has ever failed to include funding for across-the-board raises in his/her proposed budget.
- T or F: The Legislature can prohibit layoffs of state employees, provided it appropriates enough money in the departmental salary accounts to fund all existing positions.
- T or F: The Legislature can legally reduce pension benefits for anyone who is not vested by virtue of having ten years of service in PERS.

Quiz cont'd

- T or F: The statute that Governor Christie would have to rely on to declare a “state of emergency” limits the definition of an emergency to a “natural disaster” that endangers the health and safety of State residents.
- T or F: Governor Christie can suspend layoff rights by Executive Order because those rights are only protected by Civil Service regulations and not by the Civil Service statute.