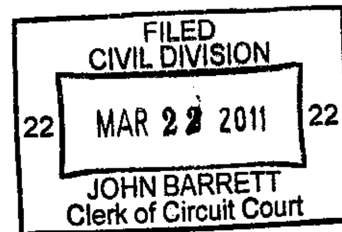
STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

MILWAUKEE POLICE SUPERVISORS' ORGANIZATION

Plaintiff



v. Case No. 09-CV-010154

Code No.30701 Declaratory Judgment

CITY OF MILWAUKEE

Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this case, the plaintiff Milwaukee Police Supervisors' Organization, that being MPSO labor union, which represents 290 supervisory sworn employees of the Milwaukee Police Department, entered into a collective bargaining agreement with the defendant, the City of Milwaukee, for a period of time from 2004 until 2006. On January 30 of 2006, MPSO President Thomas Klusman and the city labor negotiator, Troy Hamblin, executed a Memorandum of Understanding, extending the 2004 - 2006 CBA until its successor was adopted.

In June of 2009, Milwaukee Mayor Tom Barrett proposed mandatory unpaid furlough days for city employees as a means of generating savings for the Tax Stabilization Fund, or TSF.

On June 16 of 2009, the Milwaukee Common Council enacted Ordinance 350-116, contained in the Common Council File 090102, which provides in relevant part:

Under 350-116:

1. APPROVAL BY COMMON COUNCIL RESOLUTION. The Common Council may by resolution impose mandatory furlough time for city officials and employees.
2. POSITIONS AFFECTED
a. Mandatory furloughs shall apply to all city employee positions, regardless of the funding source, pursuant to sub. 3.
b. The city attorney, city comptroller, city treasurer, and municipal court judges shall be subject to mandatory furloughs.
3. FURLOUGH GUIDELINES. The department of employee relations shall issue furlough policy guidelines for city departments as necessary to administer the implementation of mandatory furlough programs.

On the same day, the Common Council also adopted a "Substitute resolution approving a 2009 Budget Management Plan," containing Common Council File No. 090043. The substitute resolution approves a 2009 Budget Management Plan with adjusted expenditures including, at Section 2: "Suspending a total of approximately $1,527,00 from the salary and wages account of various city departments as a result of the implementation of a furlough program enacted under ordinance File No. 090102."

Exhibit B to the substitute resolution separated employees into several classifications: furlough-eligible, furlough eligible/must report, and furlough-ineligible. The exhibit left the classification of MPD employees and Milwuakee Fire Department employees to the discretion of the Milwaukee Police Chief and the Milwaukee Fire Chief, respectively. The Milwaukee Fire Chief classified all Milwaukee Fire Department employees as furlough-ineligible.

On June 18 of 2009, MPD issued a memorandum regarding the implementation of the mandatory furlough days. The MPD classified some MPSO members as furlough-eligible.

MPSO filed this lawsuit, alleging that the city's mandatory furlough ordinance is an unconstitutional impairment of the contract under both the United States and Wisconsin Constitutions. This case came before Judge Elsa Lamelas, who declined to issue an ex parte temporary restraining order and later declined to issue a temporary injunction. The city later came before this court on motion seeking summary judgment. Failing to make an argument of merit regarding potential alternatives to the ordinance or its reasonableness under the Sannaus/Chappy test, this court denied said motion and found the following:

Having found that the City's furlough ordinance was indeed a law by applying the court's holding in Pembaur v. City of Cincinnati, 475 U.S. 469, this court then turned its attention to determine whether the furloughs were an unconstitutional impairment of the CBA contract by applying the three-part analysis established in Chappy v. Labor and Industrial Review Commission, 136 Wis.2d 172. First, it was determined that the furlough ordinance did indeed operate as a substantial impairment to the CBA contract in both the allowance for an unrestricted right for the City to determine the hours of work, and in the mandatory two day furloughs.

Both parties were then allowed in a court trial to present evidence, and to reframe their arguments in more detail, and with specific reference to the purpose and reasonableness prongs of the test. The court makes the following findings of fact and conclusions of law:

As presented to the court in testimony from Cynthia Ratliff, Senior Human Resources Analyst with the Milwaukee Police Department, the court finds that:

(1) Ms Ratliff, who has worked for MPD for over 15 years, could not recall MPSO members previously taking mandated unpaid leaves of absence. Her testimony is supported by the fact that there were no codes for unpaid leaves on MPSO members' time cards.

(2) It was common and ordinary practice for employees to be paid biweekly for 80 hours of work, or work shifts of eight consecutive hours of work, which in the aggregate resulted in an average 40 hour work week;

(3) The only time an MPSO member could get paid less than 80 hours in a biweekly period was if he or she had some kind of approved leave of absence, including but not limited to military, FMLA, or illness.

(4) Not a single instance was shown in which a police supervisor on a 5-2-4-2 schedule was allowed to denote less than 80 hours in a biweekly period;

(5) According to a report created by Ms. Ratliff in February of 2010, $44,309.73 in MPSO pay was retained by the City as a result of the mandatory furloughs during 2009.

As presented to the court in testimony from Mark Nicolini, head of the City's Budget Office, the court finds that:

(1) There has been a surplus in the City's budget for the past 17 years;

(2) There has been no employer contribution to City pension plans for the past 15 years prior to the furlough ordinance's enactment;

(3) The Tax Stabilization Fund enables stability within the budgets;

(4) TSF funding is essential to proper budget operation;

(5) Funding of pensions dropped precipitously from 132% in 2008 to 82.7% in 2009;

(6) In 2009, negative investment returns caused by the greater economy had a dramatic impact on available funds. As a result between $49 million and $100 million were needed for regeneration of the TSF;

(7) The primary objective of the furloughs was the regeneration of funds in the TSF;

(8) Employer contribution to the pension fund was unforeseeably required for 2010 while no contribution was expected because of previous years' returns on investment;

(9) Concern for TSF funding levels led to concerns by the various bond rating agencies possible need to place bonds into negative watch classification;

(10) In order to solve the TSF funding issue and bond rating concerns, the furloughs were enacted. The furloughs were initially larger but were reduced as much as possible because there were no raises for the police department employees for fiscal year 2010;

(11) The furloughs were enacted by the Common Council in an effort to avoid layoffs and to avoid raising fees for services; and

(12) $44,635.78 were effectively saved by the furlough ordinance and rolled into the TSF.

As presented to the court in testimony from Waldemir Morics, the City Comptroller, the court finds that:

(1) There has been a surplus in the City's budget for the past 18 years;

(2) There was a budget surplus of $23 million in 2009;

(3) The TSF's valuation has gyrated from $26.4 million in 1999 to its peak of $58.9 million in 2007, and plummeted to $25.5 million in 2009;

(4) The City has not used furloughs for any budgetary purpose previously;

(5) The TSF devaluation negatively impacted the City's bond rating, as the bond ratings had been consistent from 2000-2009, but then were placed on negative watch as a result of lower reserve levels;

(6) Bonds for City projects come at a lower cost if the City has a good bond rating. If the bond rating becomes negatively impacted by the TSF shortfall, City projects would stall from lack of purchaser interest, causing the City to pay a higher interest rate on the bonds. Thus, a drop in the bond rating could effectively cost the City millions of dollars;

(7) The spring 2009 pension contribution rose to $90 million based on reduction of value in assets within the pension fund;

(8) The Pension Board approved a reduction of contribution from $90 million to $49 million dollars in August; and

(9) Both Mr. Morics and the bond rating agencies had concerns of the TSF continuing to lose value, mirroring similar concerns about the national economy.

As presented to the court in testimony from Tom Klusman, Labor Relations Manager for MPSO, the court finds that:

(1) The CBA remained in effect through fiscal year 2009;

(2) The furloughs substantially impaired the CBA between MPSO and the City because under Article 3 of the CBA, the City cannot change the agreement;

(3) The mandatory furlough ordinance effectively cut pay of the members of the MPSO through a substantial impairment of the CBA contract;

(4) Similarly, the furlough ordinance directly contradicts provisions of the CBA that provide for the hours of work MPSO members were to be paid for, and simultaneously preventing MSPO members from making up those hours at a later time;

(5) The two days of mandatory furlough cost each MPSO member roughly $582.32 per year.

I. UNRESTRICTED RIGHT TO DETERMINE HOURS OF WORK

Plaintiff MPSO alleges that the City cannot schedule MPSO members for less than the typical 40 hour workweeks, in the aggregate, over an 80 hour biweekly pay period. The 7th Circuit has held that collective bargaining agreements (CBAs) must be analyzed using any and all relevant extrinsic evidence, in addition to the actual contract language. Sprague v. Central States, 269 F.3d 811, 815 (7th Cir. 2001). This necessitates analysis that includes within the scope of the governing document(s), documents that clearly lay out both party's agreement prior to execution of the CBA, as well as past practices and norms. Id.

In the instant case, looking first to the four corners of the CBA, Article 11(1) of the CBA, the hours of work are set at 8 consecutive hours, which in aggregate results in an average of 40 hours per week. This specific language, viewed together with (1) CBA

language indicating "regular scheduled hours of work" (e.g., Art. 9, CBA); (2) past practices of providing all MPSO members 80 hours of bi-weekly work or required approval for leaves of absence; and (3) the fact that no evidence demonstrating that any MPSO member on a 5-2-4-2 schedule ever received less than 80 hours of pay in any bi-weekly time period, all indicate that the City cannot demonstrate unrestricted right to determine the hours of work.

The City's assertion that the CBA language bars application of the "past practice" doctrine, simply on the basis that "implied" contract terms cannot be found in past practices is incomprehensible because it flies in the face of logic and runs perfectly opposite of the holding in Sprague. Further, it is plainly apparent, when weighing all of the evidence produced, that both parties contemplated a 40 hour work week. To think otherwise would render the inclusion of Article 11 in the CBA completely meaningless.

Accordingly, this Court finds that the mandatory furlough ordinance as enacted did not empower the City with an unrestricted right to determine hours of work for MPSO members.

II. CONTRACT IMPAIRMENT

Plaintiff seeks to have the mandatory furlough ordinance struck down by this Court as an unconstitutional impairment of the CBA contract. In evaluating a claim of unconstitutional impairment of contract, courts must conduct a three part analysis. First the court must determine whether the challenged statute has "operated as a substantial impairment of the contractual relationship." Chappy v. Labor and Industrial Review

Commision, 136 Wis. 2d 187-88. Second, if the legislation constitutes a substantial impairment, the court must analyze whether the legislation serves "a significant and legitimate public purpose." Id. Finally, "if a legitimate public purpose has been found, the inquiry then hinges upon whether the challenged legislation is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." Id. at 188.

A. Substantial Impairment

Plaintiff MPSO reasons that the CBA has been substantially impaired because there was no bargained for provision that would allow the City to implement unpaid furloughs. The determination of a substantial impairment of contract should first seek to define the term substantial. Having defined substantial, the analysis then rests upon that terms application to the present facts, and finally to other courts' decisions in similar circumstances.

According to Black's Law Dictionary (5thed), "substantial" is defined as: "Something worthwhile as distinguished from something without value or merely nominal." Thus, it must be determined whether the two furlough days' roughly $44,000.00 in MPSO pay (or $580.00 per member) is an amount of monetary compensation that is worthwhile and is more than merely nominal. This Court finds that a reasonable person would be more than nominally distraught at the idea of losing as significant a sum as $580.00, regardless of the method of the loss.

Turning to prior case precedent, it becomes even more evident that the implementation of the two days of unpaid furlough leave constitutes a substantial

impairment of the CBA. Other courts have determined that even statutory "pay lag" schemes enacted to merely postpone state employee pay constituted substantial impairment for Contract Clause purposes. University of Hawaii Professional Assembly v. Cayetano, 183 F.3d 1096 (9th Cir. 1999); U.S. Const. Art. I, § 10. Moreover, the Supreme Court has determined greater scrutiny in analyzing the substantiality of contract impairment must be applied in cases where a government entity was a contracting party. U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 29 (1977). In this case, examined under a strict scrutiny standard, it is clear that reducing a municipal employee's annual pay roughly $580.00 through a mandatory two day furlough constitutes a substantial impairment because the employees had a reasonable expectation of those wages, which were more than merely nominal.

B. Significant and Legitimate Public Purpose

Having established that the City's mandatory furlough ordinance constituted a substantial impairment of the CBA, this Court must then determine whether that impairment achieves a significant and legitimate public purpose. Disregarding Defendant's vapid application of the arbitrator decisions cited in its brief, the determination of a significant and legitimate public purpose will instead be based upon the appropriate facts of this case viewed through the lens of case law and binding legal precedent.

The facts as presented show without question that the Tax Stabilization Fund (TSF) is an integral part of the City's pension system, tax structure and budget. If the City's bond ratings were negatively impacted by the rating agencies due to an

insufficiency of funding in the TSF, City projects would stall from lack of purchaser interest, causing the City to pay a higher interest rate on those bonds. The resulting cost of bond coverage would ultimately force the City to consider significantly raising taxes and fees to compensate for the shortfall.

Concerns about the City's TSF funding levels led various bond rating agencies to consider placing the City's bonds into a negative watch classification. In order to prevent this from occurring, the City enacted the furlough ordinance, which did not target MPSO indiscriminately, but rather was applied in various but similar ways to most areas of City employment. Furthermore, the City of Milwaukee is by no means alone in being faced with this fiscal crisis, given the recent turmoil in the national economy. Other cities and towns across the nation have also enacted a wide variety of legislative and budgetary patches to locally blunt the impact of the greater economy.

Plainly, the mandatory furlough ordinance served a significant and legitimate public purpose for the City Milwaukee. By passing this temporary Act, Milwaukee helped to keep the TSF fund from dragging the City's bond rating into a negative watch category, thereby preventing further erosion of the City's economic situation.

C. **Reasonable Basis and Appropriate Character**

Having established that the City's mandatory furlough ordinance served a significant and legitimate public purpose, this Court must then determine whether adoption of the ordinance was based upon reasonable conditions and is of a character appropriate to its purpose.

"The extent of any impairment [of contract] is a factor in determining its reasonableness, as is the importance of the public purpose to be served. An impairment is not a reasonable one if the problem sought to be resolved by an impairment of a contract existed at the time the contractual obligation was incurred." Massachusetts Community College Council v. Commonwealth, 649 N.E.2d 708, 713 (Mass. 1995) (*citing* United States Trust Co. v. New Jersey, 431 U.S. 1, 27 (1977). *A fortiori*, an impairment may be reasonable if the problem sought to be resolved was not in existence at the time of execution. There is no question in this case that the CBA was executed prior to the precipitous drop in the TSF. Likewise, there is also no question that the City was caught unaware by the timing and extent of the financial recession currently plaguing the nation.

Plaintiff argues that the furlough ordinance should be found unreasonable based on a sufficient similarity between the facts of Massachusetts and the present case. Unfortunately, Plaintiff's application of the facts in Massachusetts to the facts in the matter before us is ultimately specious. While the court in Massachusetts did find that the furlough program in question violated the Contract Clause, the reason for this finding was derived from the fact that the Commonwealth was *fully aware* of the fiscal problems facing it *at the time* it agreed to the terms of the CBA. In this case it is axiomatic that the City was unaware of the breadth of the fiscal crunch facing it when it signed the CBA with Plaintiff, as the entire nation was similarly caught unaware by the recent economic upheaval.

Plaintiff then cites to University of Hawaii Professional Assembly v. Cayetano, 183 F.3d 1096 (9th Cir. 1999), to further argue against the reasonableness of the City's furlough ordinance. In Cateyano, the court found that a substantial contractual impairment was not reasonable or necessary because obtaining forced loans to the state from its employees through the "pay lag" scheme did not amount to a benefit to the state significant enough to warrant contract impairment. Id. Simply put, the "paper savings" achieved by accounting hocus pocus, amounting to mere dollars per employee, was not reasonable, give the size of Hawaii's budgetary crisis and the myriad alternatives to generate significant state revenue. Id.

By contrast, here, the furloughs appear reasonably drafted to effectuate their purpose, given the evidence presented showing that the City will save a significant amount of funds through the two day furloughs provided for in the ordinance. If perhaps the savings realized were mere "paper savings" or "pay lag" holdovers, then the court may find otherwise. Clearly though, that is not the case here.

Surrogates I and II, two cases involving pay lag holdovers, are also cited by Plaintiff in support of its argument, and both are similarly inapplicable to the instant case because the amount of savings and the availability of other means of funding precluded a finding of reasonability by the courts. Assoc. of Surrogates & Supreme Court Reporters v. N.Y., 940 F.2d 766, 770-73 (2nd Cir. 1991); 79 N.Y.2d 39. Even so, as in Cayetano, the budgetary schemes invoked by the government in Surrogates I and II are sufficiently dissimilar to the instant case to at minimum be of little value, or alternatively to work against Plaintiff's claim for relief.

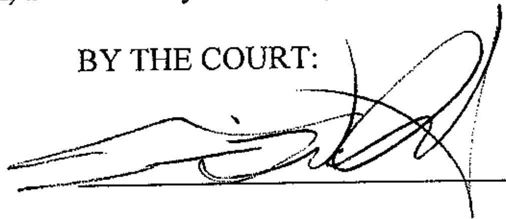
Finally, Plaintiff argues that the amount of money saved by the City through the ordinance as compared to the overall TSF renders the ordinance unreasonable. While this Court concedes that the total amount of savings gained by the furlough ordinance amounts to a fraction of the overall TSF, this Court also recognizes that the Plaintiff is not the only group of governmental workers who have been negatively impacted by the financial crisis or the City's attempts to mitigate it. When viewed as a whole, the amount of savings gained from all the furloughs and cuts held across the board to all City agencies is substantial, and thus reasonable and appropriate of a character to effectuate the ordinances purpose.

The Court concludes that though the ordinance as written did substantially impair the CBA, it did so to effectuate a significant and legitimate public purpose in a manner which was reasonable and appropriate given the gravity of the surrounding circumstances.

The defendant is to submit an order to the court based upon these findings and conclusions.

Dated at Milwaukee, Wisconsin, this 22nd day of March, 2011.

BY THE COURT:



Honorable Timothy Witkowiak