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Public Sector Layoffs

Contents - Part One (this issue)

- Introduction
- Legal mandates
- Hearings - when required
- Seniority versus performance
- Selective positions, downsizing & work erosion
- References

Contents - Part Two (next month)

- Effect on minorities
- Demotions and promotion freezes
- Duty to bargain
- Bankruptcy
- Non-economic layoffs
- Reduction in work periods
- Recall issues
- Union action
- COBRA health plan premiums

❖ Introduction

Most people call an involuntary work furlough a “layoff.” Employers sometimes refer to the practice as a reduction in force. During economic downturns, it usually is for fiscal reasons (insufficient tax revenues).

Sometimes there is a reduction in the amount of work needed, as when technological improvements displace clerical personnel. There also can be a diminished workload caused by urban population shifts, resulting in vacant neighborhoods, e.g., Detroit and Gary.

Does a municipality or county have a legal duty to maintain a police force or fire service? Most courts have concluded that there is no legal duty to provide protective services.

In Kentucky, the state Supreme Court upheld a quasi-legislative decision by county fiscal authorities to reduce the appropriation of its police force to \$25,000 for the entire year, which effectively abolished those operations. Fiscal Court v. Taylor County Police, #89-SC-525, 805 S.W.2d 113 (Ky. 1991). The justices said:

“As much as we may agree with the decision to have a county police force, and or as much as we may disagree with the rendered appropriation which effectively eliminated the police force as a viable entity, we cannot substitute our judicial fiat for that of the clear legislative purpose and the traditional role of fiscal [authorities] in setting legislative and fiscal policy.”

Similarly, a federal court in Chicago held that the transit authority could abolish its police force, and rejected various claims of due process violations. O’Mahony v. Chicago Transit Auth., #82-C-5543, 1983 U.S. Dist. Lexis 13074 & 14216 (N.D. Ill. 1983); aff’d w/o opin. 779 F.2d 54 (7th Cir.); cert. den. 106 S.Ct. 1516 (1986).

A three-judge appellate court in Michigan upheld a county’s decision to substantially reduce funding for the sheriff’s road patrol. A sheriff, said the court, is not required to regularly patrol unincorporated areas. Brownstone Twp. v. County of Wayne, 242 N.W.2d 538, 68 Mich. App. 244 (1976).

An appellate court in New York upheld a decision by the City of Yonkers to close its jail as an economy measure, with the resultant furlough of personnel. Christiansen v. Casey, 428 N.Y.S.2d 317 (A.D. 1980). See also, Abbott v. City of Poughkeepsie, 414 N.Y.S.2d 458, 98 Misc.2d 601 (1979).

Another New York court refused to intervene in the closing of a fire station, notwithstanding a judicial concern for the inadequate protection of the residents. Richmond Hill Block Assn. v. Dinkins, 567 N.Y.S.2d 584, 149 Misc.2d 654 (1991). The judge wrote:

“The management and operation of municipal government, which requires decisions regarding the quality and quantity of municipal services, should not be preempted by the judiciary but left in the control of duly elected officials.”

In Ohio, an appellate court upheld the right of a city to lay off fire and police personnel for fiscal reasons. Atwood v. Judge, Director, 409 N.E.2d 1022, 63 Ohio App.2d 94 (7th Dist. 1977). In another Ohio case, the state Supreme Court said that modest financial layoffs are lawful and do not paralyze police operations. McNea v. Voinovich, #81-1108, 70 Ohio St.2d 117, 435 N.E.2d 420 (1982).

Similarly, a three-judge panel refused to overturn a trial court decision that allowed a layoff of 290 police officers, from a total force of 1,815 officers. Cleveland Police Patr. Assn. v. Voinovich, 15 OhioApp.3d 72, 472 N.E.2d 759 (1984).

Another Ohio appellate court upheld a trial court determination that an arbitrator improperly went beyond the language of the bargaining agreement and looked to state statutes to interpret the agreement regarding layoffs. Before an arbitrator may look outside of an agreement, he must find that the language used in the agreement is ambiguous, which it was not. FOP Ohio v. Perry Co. Cmsnrs., #02-CA-14, 2003 Ohio 4038, 2003 Ohio App. Lexis 3601 (5th Dist.).

A Pennsylvania appellate court upheld a city’s right to make economic furloughs, Brookman v. Johns, #906-CD-1978, 405 A.2d 1081, 45 Pa. Commw. 629 (1979) although in an earlier case, firefighters were reinstated — holding that Pennsylvania municipalities could not reduce the work force without statutory authority. Bauer v. Peters, #834-CD-1973, 331 A.2d 245, 17 Pa. Commw. 194 (1975).

Recently, the Ninth Circuit rejected a union claim that employee layoffs violated the National Labor Management Relations Act. A county is not an employer covered by the Act; the statute’s definition of “employer” excludes states and political subdivisions. Int. Union of Oper. Engineers v. Co. of Plumas, #07-16001, 2009 U.S. App. Lexis 5822 (9th Cir.).

Courts have split on whether a civil service board or authority must approve a force reduction. In Illinois, an appellate panel said that a police chief, acting on a mayor’s instruction, could lay off an officer for fiscal reasons, without approval of the civil service authority. Hahn v. City of Harvard, #2-91-1056, 605 N.E.2d 95, 239 Ill.App.3d 819 (2d Dist. 1992).

In California, an appellate court set aside an agency's decision to reduce to half-time a classified position in the employ of that agency's civil service commission. The court concluded that only the commission itself had that power. Personnel Cmsn. v. Bd. of Educ., 223 Cal.App.3d 1463, 273 Cal.Rptr. 288 (1990); 266 Cal.Rptr. 46 vacated.

❖ Legal mandates

In California, a city attorney won a suit against the city council for cutting the budget below that which is necessary to perform the legal mandates of the agency.

The common council had eliminated the positions of the two investigators that were employed by the city attorney, who also prosecuted state misdemeanors and infractions. The City Attorney made a factual showing that the cuts prevented him from performing his mandated duties under the city charter. A Superior Court ordered the reinstatement of funds and a three-judge appeals panel affirmed.

A legislative body cannot use the budget process "to eliminate a mandatory function prescribed by city charter." Scott v. Common Council, City of San Bernardino, 52 Cal.Rptr.2d 161, 44 Cal.App.4th 684, 1996 Cal. App. Lexis 339.

Another California appellate panel held that the Orange County Board of Supervisors could not use the budget process to transfer 22 investigators from the District Attorney's Office to the Sheriff's Dept. The transfer prevented the D.A. from performing the legal mandates of his office. Hicks v. Bd. of Supervisors, 69 Cal.App.3d 228 (1977).

❖ Hearings - when required

A tenured public employee may not be terminated or demoted without a pre-termination notice of the charges, an opportunity to review the evidence and respond to the charges. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). However, a furlough for economic reasons usually is non-disciplinary.

A California appeals court held that a pre-deprivation hearing was not required for a demotion or termination for economic reasons. Duncan v. Dept. of Personnel Administration, #B129036, 77 Cal.App.4th 1166, 2000 Cal. App. Lexis 60, 92 Cal.Rptr.2d 257, 15 IER Cases (BNA) 1753.

A federal court in Pennsylvania held that a police officer who was furloughed for economic

reasons was not entitled to a *Loudermill* type hearing because his removal was non-disciplinary. [Lohman v. Duryea Borough](#), #3:05-CV-1423, 2007 U.S. Dist. Lexis 87720 (M.D. Pa.).

An exception is when a public employer acts in bad faith. A federal court held that if a local government dissolved its police force in bad faith, the affected officers would be entitled to a termination hearing. [Baker v. Bor. of Port Royal](#), #1:CV-06-0932, 2006 U.S. Dist. Lexis 77198; 2007 U.S. Dist. Lexis 39037 (M.D. Pa.).

Other states have rejected the need for hearing for financial layoffs:

- [Amaan v. City of Eureka](#), 615 S.W.2d 414 (Mo. 1981).
- [Almy v. Bor. of Wilkinsburg](#), 416 A.2d 638 (Pa. Cmwlth. 1980).
- [Smith v. City of Houston](#), 552 S.W.2d 945 (Tex.Civ.App. 1977).

❖ Seniority versus performance

Another exception to the rule that no hearing is required is when the *first person fired* was not the *last person hired*, that is, considerations other than seniority are used to select those who are terminated. The time of hiring principle is not always followed.

The First Circuit held that public employees who are furloughed for economic reasons are entitled to a *Loudermill* hearing, if they are selected for reasons of job performance rather than seniority. [Whalen v. Mass. Trial Court](#), #04-1976, 397 F.3d 19, 2005 U.S. App. Lexis 1829 (1st Cir. 2005).

Not all courts are in agreement on that point. A Louisiana appellate court upheld demotions and layoffs of 181 New Orleans firefighters. Pretermination and pre-demotion hearings were not required, and the city could integrate service ratings with seniority. [New Orleans Assn. of Firefighters, L-632 v. Civil Serv. Cmsn.](#), 495 So.2d 958 (La. App. 1986).

A few years later, another Louisiana appellate panel upheld the use of supervisor ratings to determine order of layoffs necessitated by financial considerations. The fact that some of the supervisors were not themselves proficient at the skills they had rated was not determinative. [In re Civil Serv. Cmsn. Layoff Investigation \(Collongues\)](#), 546 So.2d 523 (La. App. 1989).

In Indiana, an agency could demote selected supervisors for fiscal reasons, on the basis of a

competitive exam and performance ratings, instead of seniority. Young v. Williamson, 497 N.E.2d 612 (Ind. App. 1986).

In Texas, an arbitrator ruled that a bargaining agreement requiring layoffs of deputy sheriffs by seniority was unenforceable, because state law provided that deputies serve at the pleasure of the sheriff, and the department manual permits layoffs by the use of performance appraisals. Webb Co. and C.L.E.A.T., 103 LA (BNA) 446 (McKee, 1994).

❖ **Selective positions, downsizing & work erosion**

In Ohio, an arbitrator reinstated all full time dispatchers, where the entire unit was furloughed for fiscal reasons, but only two police officers and two firefighters were laid off. Because the officers assigned to replace the dispatchers earned more, there was no financial justification for singling out the dispatchers for furlough.

The arbitrator noted:

“A lack of funds was the very reason for the reduction in force ... [and] any reasonable interpretation of ‘lack of funds’ must include a fiscal crisis of the type in the within proceedings. ... The City’s contention that [the contract] permits patrol officers to sit [at a] desk as long as no one officer does so for over four hours, is also without merit. ...

“Job security is an inherent element of the labor contract, a part of its very being. ... The transfer of work customarily performed by employees in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract’s basic purposes. ...

“Moreover, while layoffs were necessitated by the City’s fiscal crisis, the decimation of the Dispatcher Bargaining Unit, under the pretext of saving money, is questionable. Patrol Officers, by and large, are paid more than Dispatchers.”

City of Fostoria, Ohio and Ohio PBA Dispatchers Unit, 117 LA (BNA) 1093, AAA Case #53-L-390-001712 (Lalka, 2002).

An arbitrator ruled that a county violated the bargaining agreement, by assigning

bargaining-unit work to a non-unit employee in order to lay off two unit employees, and redistributing those job duties to non-unit employees. Lawrence County and C-8, AFSCME L-3319, FMCS #00/14501 & 00/14499, 115 LA (BNA) 789 (Imundo, 2001).

An Ohio arbitrator ordered a sheriff to rehire three deputies who were laid-off for financial reasons. The county commissioners failed to justify a budget cut, and sheriff was using special deputies to perform the work of laid off bargaining unit members. Jackson Co. Sheriff and FOP, FMCS Case #01/16348, 116 LA (BNA) 1753 (Kindig, 2002).

A federal court in Ohio held that a city could abolish a desk officer position and replace it with a civilian clerk. Ryman v. Reichert, 604 F.Supp. 467 (S.D. Ohio 1985). Quoting Ohio case law, the judge wrote:

“It is well-established that the power to create a position in the civil service includes the power to abolish it. This is particularly true where the purpose of such abolishment is economy or the increased efficiency of the public service. Thus, an appointing authority has the power to abolish civil service positions pursuant to a plan of reorganization.”

The City of Reno, Nev. removed a fire company from station 7 and replaced it with a engine company from a neighboring fire protection district. None of the replacement firefighters were members of the city’s IAFF local and the arrangement was unilaterally imposed during the term of the existing contract. Members of the fire district company were also required to respond to calls within the city limits. The city attempted to justify the change by citing a preexisting emergency aid agreement with the fire district.

An arbitrator rejected the ploy, finding that the city violated the bargaining agreement. He ordered the city, prospectively and retroactively, to pay to the replacement firefighters the same pay and benefits given to Reno firefighters, and to require those firefighters to join IAFF Local 731. City of Reno and IAFF Local 731, 101 LA (BNA) 126 (1993).

- A Connecticut court held that only seniority within the affected department is relevant for reductions in force, unless layoffs are citywide. Town of East Hartford v. CSEA-MEU L-760 SEIU, CV#040830663S, 2004 Conn. Super. Lexis 1274 (Unpub. 2004).

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Closing a Government Facility, by Robert D. Behn, 38 (4) *Public Administration Review* 332-338 (1978).

The Consequences of Fiscal Stress: Cutback Management and Municipal Employment, by Gregory B. Lewis, 20 (2) *State & Local Government Review* 64-71 (1988).

Hiring Recovery grants: DoJ's Community [Oriented Policing Services](#) announced the availability of \$1 billion in new grants under the [Hiring Recovery Program](#), with funding from the [American Recovery and Reinvestment Act of 2009](#), for new, full-time sworn officer positions – including filling existing unfunded vacancies – or for rehiring officers who have been laid off.

[Shrinking Budgets? One Option: Use Retired Police Officers](#), 23 (3) *Subject to Debate (PERF)* 4, 6 (Mar. 2009).

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Wayne W. Schmidt
Employment Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: wws@aele.org
Tel. 1-800-763-2802

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