IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND

FRATERNAL ORDER OF POLICE LODGE 89 et al., Plaintiffs,	Case No. 08-2455-AW
v.	
PRINCE GEORGE'S COUNTY, MARYLAND Defendant.	

PUBLIC SAFETY PLAINTIFFS' SUPPLEMENTAL BRIEF
AFTER ORAL ARGUMENT AND LIMITED DISCOVERY

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On February 17, 2009, following oral argument on cross-motions for summary judgment, the Court ordered defendant Prince George's County to permit an oral deposition of Jonathan R. Seeman, the Director of the County's Office of Management and Budget, and to provide plaintiffs with various documents requested by the AFSCME plaintiffs. The Court also granted all parties an opportunity to file supplemental briefs after completion of this limited discovery. This Supplemental Brief is filed on behalf of the public safety plaintiffs, who represent more than half of the County employees subject to the Furlough Plan challenged in this action.

As we will demonstrate in detail below, even the limited discovery that has been allowed in this case demonstrates – based on clear, convincing, and effectively uncontroverted evidence – that the County's decision to furlough 5,900 employees for ten work days during Fiscal Year 2009 was neither "required" under Section 16-229 of the County Personnel Law nor "reasonable and necessary" under the Contract Clause of the U.S. Constitution. Indeed, the testimony of Budget Director Seeman essentially concedes both of the following points: First, that during the crucial period in September 2008, when the Furlough Plan was proposed and adopted, the County knew that it had over $300 million in reserve funds, including more than $65 million in undesignated reserves that could be expended by the County for any purpose whatsoever and another $53 million in operating reserves that could be expended by the County to offset budget emergencies. And second, that the County during the summer of 2008 only wanted its unionized employees to relinquish $13 million in cost-of-living adjustments already included in their bargained agreements, and when the unions refused to reopen their binding contracts and make such concessions, the County unilaterally adopted a Furlough Plan to seize $20 million from the employees, notwithstanding the County's acknowledgement that, at most, only $13 million was even arguably required or necessary for the County's budget purposes. Both of these points will be discussed below. In addition, we revisit one issue raised during the oral

argument and address some of the arguments expected to be made by the County in its simultaneously-filed supplemental brief.

I. The County's Reserve Funds in September 2008 Were Plentiful, And Properly Should Have Been Utilized by the County to Avoid Completely or to Mitigate Substantially the Furloughs Being Challenged in this Action

The public safety plaintiffs have argued, in their prior memoranda of law, that the evidence previously submitted in this case demonstrates that the County's furlough of employees was neither "required" nor "reasonable and necessary" because of the availability of hundreds of millions of dollars in County fund reserves. The limited discovery that has now been conducted in this case establishes this point beyond any possible question or reasonable doubt.

A. The starting point for a proper analysis of the County's reserve funds in September 2008, when the Furlough Plan was adopted, is its annually-published Comprehensive Annual Financial Report (CAFR) for the Year Ended June 30, 2008 (hereinafter "2008 CAFR"), Exhibit 1 to Deposition of Jonathan R. Seeman, which Budget Director Seeman acknowledged was finalized and known to the County in September 2008, see Transcript of Deposition of Jonathan R. Seeman at 57-58.[1] The 2008 CAFR sets forth the audited balance

[1] The Transcript of the Deposition of Jonathan R. Seeman will hereinafter be cited as "Seeman Tr." followed by the page number, and Exhibits from the Deposition of Jonathan R. Seeman will hereinafter be cited as "Seeman Exh." followed by the exhibit number. To limit duplicative filings, the public safety plaintiffs will rely on the transcript

sheet of the General Fund of Prince George's County as of June 30, 2008, see Seeman Exh. 1 at 9 (marked as page 93 on exhibit), including the "fund balance" that the County had on that date, both for reserved and unreserved purposes. See Seeman Tr. at 55 ("Certainly, if [a number is] in the CAFR then it's accurate."). Included in the "reserved" fund balances – which totaled more than $148 million – were the monies set aside for "encumbrances" and for "inventories," as well as the 5% contingency reserve that is mandated by the County Charter. Of more importance to this case, the same report describes a total balance of more than $143 million in the "unreserved" fund balances possessed by the County as of June 30, 2008. This balance of "unreserved" funds included more than $27 million designated for "subsequent years' expenditures," more than $8 million designated for potential "equipment purchases" or "real estate purchases," more than $53 million designated for "operating stability" (that is, what has been referenced in this case as the County's Operating Reserves), and of critical importance, more than $65 million in totally "undesignated" and "unreserved" funds (that is, what has been referenced in this case as the County's Undesignated Fund Balance).[2]

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and exhibits from the Deposition of Jonathan R. Seeman that are being filed with the supplemental brief of the AFSCME plaintiffs.

[2] In his deposition, Seeman conceded that the County could have used the $8 million that was unreserved but designated for real estate or equipment purchases as another source of monies to eliminate or mitigate employee furloughs, because these amounts were not subject to any contracts or other binding obligations. See Seeman Tr. at 47-48. Seeman also described how during each of the past several years, the County has

Looking first at the Undesignated Fund Balance of $65 million, Seeman acknowledged in his deposition that, if the County chose to spend the money, the amounts contained in the Undesignated Fund Balance could be expended by the County "for whatever it deems appropriate." Seeman Tr. at 50. Effectively the same standard is applicable to the Operating Reserve, which contained more than $53 million as of June 30, 2008. Although the County has repeatedly asserted in its previous filings in this case that this operating reserve (which contains 2% of the total general fund) is maintained pursuant to a "strategic and fiscal policy" governing the County's budget, in fact the actual policy published by the County simply states that "[t]his reserve . . . of unappropriated funds . . . can be used to offset the impact of budget emergencies or as a funding source for expenditures that the County Executive and County Council determine would benefit the citizens of Prince George's County." Seeman Exh. 2 at 5 (marked as page II-4 on exhibit). See also Seeman Tr. at 39-40 (acknowledging the accuracy of this description of the policy).

By its own admission, therefore, the County as of June 30, 2008 had at least $118 million in operating reserves and undesignated reserve balances

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designated some of its undesignated fund balance for expenditures needed during the subsequent fiscal year. See Seeman Tr. at 41-42; Seeman Exh. 1 at 9 (over $27 million "designated for subsequent years' expenditures" as of June 30, 2008). Because the Operating Reserve and the Undesignated Fund Balance totaled $118 million, more than enough to avoid furloughs, we will not focus on these other available funds.

that could be used for any purpose whatsoever or to offset budget emergencies. Given these undisputed facts, as a matter of law the plaintiffs have demonstrated that the furloughing of County employees for ten days during Fiscal Year 2009 was not "required" or "reasonable and necessary" as mandated by the governing statutory or constitutional standards applicable in this case.[3] We respectfully submit that no other legal conclusion could be reached given the uncontested facts presented.

B. Based on the deposition testimony of Budget Director Seeman, we expect the County to argue that the Undesignated Fund Balance and the Operating Reserves are meant for one-time or non-recurring expenditures, and cannot be expended on compensation provided to County employees. Even

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[3] Although never really disputed by the County, during oral argument the County clearly conceded that the facts of this case present a substantial impairment by the County of its own contractual obligations, and therefore the only question presented to the Court by Counts II and III of the Complaint is whether this substantial contract impairment is properly justified. For ease of reference, the following is the relevant portion of the transcript from the hearing on February 13, 2009:

> THE COURT: Well, let's get that out of the way right now. There was an impairment. Now, all the cases say that. Now, let's understand that.
> MR. KUMAR: Yes.
> THE COURT: So, we're not going to debate that. There's a significant impairment here –
> MR. KUMAR: Correct.
> THE COURT: -- of this contract. So, that's not a dispute with me. So, the issue, again, is what's required, what's necessary and so forth. That's what we're talking about.
> MR. KUMAR: Correct.
>
> Transcript of Oral Hearing at 49.

assuming for the sake of argument that such a limitation somehow applies when spending these reserve funds (a limitation that was invented by the County to defend this case), the County's argument is totally beside the point. The $20 million needed to avoid the employee furloughs that are being challenged in this case – furloughs which are specifically limited to Fiscal Year 2009, with no impact on base salaries or benefits in future years – is precisely the type of one-time or non-recurring expenditure for which the County admits it is appropriate to use reserve funds. Indeed, Budget Director Seeman conceded this point in his deposition:

> Q. . . . [D]o you understand the finances of the furlough plan that's been imposed by the County on the employees and that is the subject of this lawsuit?
>
> A. I believe I do.
>
> Q. And what is the savings from that furlough plan?
>
> A. The savings will be about 17 and a half million dollars.
>
> Q. And that's a one-time savings, is it not?
>
> A. It is.
>
> Q. So do you consider the furlough plan to be a one-time budget item or a one-time budget savings or a continuing matter?
>
> A. I would consider that, you know, our – it is a one time for as long as you do it but we're now doing it more than once. So it's, it's, you know, you do a furlough if you need to balance your budget rather than lay people off.
>
> Q. But the furlough for fiscal year 2009 was a one-time savings?

A. Yes, that's correct.

* * *

Q. Well, the furlough is a one-time expenditure, we've already established that.

A. That's correct.

Q. So you chose to use furloughs as a one-time savings rather than available fund balance?

A. That's correct.

Seeman Tr. at 44-45, 66.

C. The County also is likely to argue that the nation's financial crisis has worsened since September 2008, and thus the need for the furloughs imposed on County employees is now more defensible. To buttress this argument, the County is expected to submit excerpts from its latest proposed budget for Fiscal Year 2010, which projects for the end of the current fiscal year (June 30, 2009) an Operating Reserve of $52.7 million and an Undesignated Fund Balance of only $7.5 million.

Of course, these projections are largely irrelevant to the issue presented to the Court, which challenges the furlough decision made by the County in September 2008, based on the facts and circumstances known at that time (which certainly was before the full extent of the current banking and credit crises was known). Moreover, if the current economic situation were deemed

relevant to the Court's analysis, all motions for summary judgment would have to be denied and additional discovery would be necessary, as the County also should be compelled to account for other recent economic developments, including by way of example the economic stimulus measures adopted by the Federal Government in February 2009, the additional monies that the State of Maryland has agreed to share with Prince George's County when implementing that stimulus legislation, and the recent increase in mortgage re-financings and the corresponding boost to the County's transfer and recordation tax receipts. What was made clear in the deposition testimony of Budget Director Seeman is that none of these or other positive economic developments has been taken into account in the County's recently proposed budget, see Seeman Tr. at 82-89, and thus once again the County has disseminated a document that reflects worse-case scenarios which are aimed not at accurate depictions of the County's reserve funds, but rather at potential uses in litigation and future bargaining. It also bears noting, moreover, that even this latest projected budget for Fiscal Year 2010 acknowledges the existence of at least $60 million ($7.5 million in the Undesignated Fund Balance and $52.7 in the Operating Reserve) in readily available funds that could be used by the County as an alternative to its furlough decision.

D. Another disturbing piece of evidence that was uncovered during the discovery in this case concerns the constant changes in the County's estimate

of its own Undesignated Fund Balance. Budget Director Seeman acknowledged that, as a policy matter, it makes sense to present "worse case scenario[s]" when discussing budget matters, and to be "conservative" when discussing the County's finances, especially when projections are involved. Seeman Tr. at 78, 55. But the County's repeated re-calculation of its Undesignated Fund Balance during the crucial period before the Employee Furlough Plan was adopted in 2008 suggests an overzealous attempt to justify the furloughs.

In March 2008, when the County Executive's proposed budget for Fiscal Year 2009 was first disseminated, the County projected an Undesignated Fund Balance of $35.8 million as of June 30, 2008. Seeman Tr. at 94. This same estimate was used by Budget Director Seeman when he made presentations to the New York-based bond rating houses in May 2008. Id.; Seeman Exh. 7 at 2 (marked as page 57 on exhibit). On June 1, 2008, however, in the offering statement issued to potential purchasers of the County's bonds, the estimate for the Undesignated Fund Balance as of June 30, 2008 was suddenly $70 million. See Seeman Exh. 8 at 2 (marked as page 40 on exhibit). Then, less than four weeks later, Seeman prepared a powerpoint presentation that was shared with the unions at a June 26, 2008 meeting, at which time the County Executive personally urged the employee representatives to give up their negotiated cost-of-living adjustments or merit step increases for Fiscal Year 2009. In this powerpoint, the Undesignated Fund Balance as of June 30, 2008

was estimated to be only $16.7 million. See Seeman Tr. at 57; Seeman Exh. 3 at 3 (marked as page 6 on exhibit). Finally, by September 2008, when the Employee Furlough Plan was both proposed and adopted, the County knew that the audited Undesignated Fund Balance as of June 30, 2008 was actually $65 million, but neither the Budget Director, the County Executive, nor any member of the County Council either informed the unions of this fact or considered that fact relevant to eliminating or mitigating the furlough plan. The arbitrary nature of this decision making process is illustrated by Seeman's own deposition testimony:

> Q. But on June 26, 2008, you presented a $16 million undesignated fund balance to the unions?
>
> A. Correct.
>
> Q. Asking them to give up approximately $13 million in compensation, correct?
>
> A. That's correct.
>
> Q. In September you imposed a $20 million cut through furloughs, correct?
>
> A. Correct.
>
> Q. And around the same time the county became aware that the actual undesignated fund balance was $65 million as of June 30th; is that right?
>
> A. Yes.
>
> Q. Did anyone in the county consider saying to the employee we no longer need the furlough in order to balance our budget this year because our undesignated fund balance is much

larger than expected?

A. No . . . .

Seeman Tr. at 106-107.

In short, the undisputed existence of more than $100 million in the County's undesignated fund balances and operating reserves as of September 2008 clearly demonstrates that the County's decision to furlough employees by substantially impairing its own collective bargaining contracts was neither required nor reasonable and necessary. Accordingly, summary judgment should be granted for all plaintiffs.

II. The County Decision to Impose Exactly Eighty Hours of Unpaid Furlough on Every County Employee Was Not Supported By Evidence That Such A Substantial Furlough Was Either Required or Reasonable and Necessary

Even if the Court were to conclude, contrary to what we have shown above and in our prior memoranda, that notwithstanding the availability of large reserve funds the County could furlough its employees in a manner consistent with the governing statutory and constitutional requirements, the undisputed evidence further demonstrates that the County's specific decision to furlough all employees for ten days or eighty hours cannot satisfy the County's legal obligations. In particular, the County acknowledged through the deposition testimony of Budget Director Seeman that it only needed its employees to relinquish $13 million in cost-of-living adjustments contained in

their collectively bargained agreements. It only was after the unions refused during July 2008 to reopen their negotiated contracts and make such concessions that the County adopted a Furlough Plan to seize $20 million from its employees. Thus, Seeman specifically conceded that the entire $20 million in savings from the Furlough Plan was not necessary to the County's financial well-being during Fiscal Year 2009.

This concession appears in the following questions and answers, which are best understood by quoting them in detail:

> Q. I want to go back to the 80 hours just so I understand the selection of 80 hours, was it because it's a nice round number and two weeks is better than one week or worse than one week and better than three weeks?
>
> A. No, it was intended to make up a certain amount of the shortfall. What we were trying to do was close the gap in the budget. And so that amount of money was intended to -- remember we had -- CB-51 [adopted in July 2008] had established $48 million in closing the gap and now [in September 2008] we had a gap of $57 million so the amount was intended to get as close as possible to achieving the $57 million.
>
> Q. So of the $48 million in CB-51 [adopted in July 2008], approximately $13 million was supposed to come or the county wanted to come from employee compensation; is that right?
>
> A. That's correct, and that amount was calculated based on elimination of our proposals to the unions which were to eliminate the COLA or the merits, that's where the $13 million came from.
>
> Q. And the subsequent shortfall or additional shortfall of $9 million [i.e., the difference between $48 million and $57 million] that was generated or occurred between June and September, you recommended that $7 million of that approximately be taken from the employee compensation?

A. That's correct.

* * *

Q. If the employees had agreed, if the unions had agreed to eliminate their COLAS during July for the fiscal year, where would you have gone for the $9 million?

A. We would not have gone, we would not have done anything. Because they didn't agree to the COLAS, we had to achieve the savings from somewhere. Had they agreed to it that would have been the end of it. . . .

And so, you know, our plan was to achieve that savings, that was the only legislative solution that we were seeking but, you know, two months later we didn't have the $12 million because obviously the employees had not agreed to that so at that point we needed to save at least the $12 million.

Q. The 12 million, you're referring to the $13 million?

A. I'm sorry, the $13 million.

Q. So I think you've answered this, so if the $13 million had been saved through a agreement, voluntary agreement to eliminate the cost of living adjustments for the fiscal year, the county would have just managed around the additional --

A. Yes.

Q. $9 million shortfall?

A. Exactly. We would have, we would have -- there wouldn't have been a furlough. I mean, we would have achieved the savings that we thought we could achieve and we would have, just as you put it, sort of managed from there.

Seeman Tr. at 72-75. See id. at 54 ("Had the employees agreed to give up their COLAS, we would not be sitting here today. I hope everybody understands

that. There would not have been a furlough had the employees given up their COLAS.")

Through this concession – a specific acknowledgement that the County would not have furloughed its employees during Fiscal Year 2009 if the unions had agreed to wage concessions of $13 million voluntarily – the County has admitted that the entire scope of the Employee Furlough Plan (eighty hours per employee or $20 million in total) cannot possibly be found to be "required" under Section 16-229 of the Personnel Law or "reasonable and necessary" under the Contract Clause. Accordingly, the Court at a minimum must find that $7 million of the $20 million in savings from the Furlough Plan (that is, 28 of the 80 hours of unpaid furlough time forced upon each employee) was neither required nor necessary under the governing standards.[4]

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[4] The deposition testimony of Budget Director Seeman uncovered other relevant facts that could be useful to the Court's analysis, but the limited nature of the discovery granted to the plaintiffs has not provided sufficient time to uncover all relevant information. For example, it became clear during the Seeman Deposition that in September 2008 neither the County Executive nor the County Council considered easily available alternatives to the Employee Furlough Plan, including not only, as described in the text, the use of reserve funds or more limited furloughs that would have caused less severe impairments, but also reductions in other County expenditures not subject to binding contractual commitments (e.g., cutting funding for Prince George's Community College, further reducing grants to nonprofit institutions), or the identification and use of other sources of revenue that were accessible to the County (e.g., at least $60 million in reserve funds held by the Maryland-National Park and Planning Commission). See, e.g., Seeman Tr. at 24-29.

Indeed, Seeman disclosed that in his capacity as Budget Director, the primary person in the County Government who advises and makes budget and financial recommendations to the County Executive, the County Administrative Officer, and the

III. A Final Note On Other Contract Clause Cases

During oral argument, the Court inquired whether there are any reported cases where governments have been ordered or required to draw down reserves in order to avoid impairing their own contracts, and counsel for the public safety plaintiffs answered in the negative "because there is no case in which the county or municipality dares to furlough [employees] or breach collective bargaining agreements when there are reserve funds." Tr. of Oral Hearing at 22.

We again have searched the available cases, and have located only one decision that is arguably analogous. In 1979, the Supreme Court of California in Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979), declared a state statute unconstitutional because it tried to void all county collective bargaining agreements that provided cost of living adjustments to employees during the budget crisis that the State of California and its counties were facing after adoption of the infamous "Proposition 13." In finding this contract impairment to be a violation of the Contract Clause, the Court relied in part on the fact that the counties received special appropriations from the State of California to offset "five-sevenths of the revenues lost by the local entities." More

County Council, he considered only an Employee Furlough Plan in September 2008, and specifically did not make any other recommendations to, or discuss any other alternatives with, either the County Executive or the County Council. See, e.g., Seeman Tr. at 70, 72 ("Q. So there was no consideration given in September to other alternatives other than the furlough plan? A. . . . [N]o, there was no other consideration.").

specifically, the State Legislature "almost immediately returned $5 billion accumulated in the state's surplus to local agencies to alleviate the potential - but not realized - effects of Proposition 13." 23 Cal. 3d at 311, 591 P.2d at 8, 152 Cal. Rptr. at 910-11.

The decision in Sonoma County therefore concludes that where a county or local government justifies a contractual impairment on the grounds of fiscal emergency despite having allocable funds on hand, the courts will find the impairment to be unreasonable and unnecessary. It should not matter whether those allocable funds are received from a higher government authority (as in Sonoma County) or are present in the government's own bank accounts (as in Prince George's County).

Conclusion

For the foregoing reasons, and for the reasons stated in the plaintiffs' previous submissions and arguments, the County's motion to dismiss and/or motion for summary judgment should be denied, and the plaintiffs' motions for summary judgment on Counts I, II, and III should be granted.

Respectfully submitted,

__________/s/_________________________
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