

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND
(SOUTHERN DIVISION)**

Fraternal Order of Police Lodge No. 90, et
al.,

Plaintiffs,

vs.

Prince George's County, Maryland,

Defendant.

Civil Action No. 8:08-cv-02455-AW

**MOTION FOR STAY PENDING
APPEAL**

COMES NOW Defendant Prince George's County, Maryland ("the County"), pursuant to Rule 62 of the Federal Rules of Civil Procedure, and moves this Court for a stay of its judgment pending the County's appeal to the Fourth Circuit.¹ In support of this motion, the County would show as follows:

FACTS AND PROCEDURAL HISTORY

Faced with budget constraints created by a declining housing market and decreased tax revenues during fiscal year 2009, the County implemented a Furlough Plan affecting virtually all County employees. Plaintiffs, several unions and individual union members, instituted this action alleging that the Furlough Plan (1) violated the County's collective bargaining agreements ("CBAs") with the unions, (2) violated § 16-229 of the County Personnel Law, and

¹ The County has consulted with counsel for Plaintiffs, who have not consented to the granting of a stay.

(3) violated the Contract Clause of the United States Constitution, *see* U.S. Const. art. I, § 10, cl.

1. Following limited discovery, the parties cross-moved for summary judgment.

This Court granted the County's motion for summary judgment as to Plaintiffs' claims that the Furlough Plan violated the CBAs and the County Code. As to the Contract Clause claim, this Court granted summary judgment in favor of Plaintiffs. The Court concluded that the Furlough Plan substantially impaired the CBAs and that the impairment was not "reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). Having reached this conclusion, the Court ordered the parties to "consult and discuss the means and manner of refunding any monies owed to Union employees ... within ten (10) days of the entry of this Order." Order of Aug. 18, 2009 (Docket No. 54) (emphasis omitted). The County has appealed this Court's ruling to the Fourth Circuit, and now seeks a stay pending appeal.

ARGUMENT

I. The County Is Entitled To A Stay As A Matter Of Right

Rule 62(d) of the Federal Rules of Civil Procedure entitles an appellant to a stay pending appeal upon posting of an appropriate bond. However, no bond is required if the appellant is the United States or one of its officers or agencies. *See* Fed. R. Civ. P. 62(e); *Rhoads v. FDIC*, 286 F. Supp. 2d 532, 540 (D. Md. 2003) (holding that Rule 62(e) entitles the federal government to a stay pending appeal as a matter of right), *affirmed*, 94 Fed. Appx. 187 (4th Cir. 2004). Read together with Rule 62(d), "Rule 62(e) operates to provide an exception to the bond requirement of ... Rule 62(d)." *Hoban v. WMATA*, 841 F.2d 1157, 1159 (D.C. Cir. 1988) (per curiam)

(interpreting identical provisions of District of Columbia Superior Court rules). Similarly, the Local Rules for the District of Maryland provide that the State of Maryland and its political subdivisions are not required to post an appeal bond. *See* D. Md. R. 110(b). It therefore appears that the policy of the District of Maryland is to place the state and its political subdivisions in the same position as the United States with respect to a stay pending appeal, *i.e.*, to entitle them to a stay pending appeal as a matter of right, without the requirement of posting a bond. Accordingly, the County is entitled to a stay of this Court's judgment pending appeal.

II. The County Should be Granted A Stay Pursuant To Established Standards

Even if this Court does not agree that the County is entitled to a stay pending appeal as a matter of right, the County nevertheless satisfies the showing required for entry of a stay pending appeal.

A. Applicable Standard

Issuance of a stay pending appeal is governed by an assessment of four factors:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987); *see Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). This test "cannot be reduced to a set of rigid rules" but rather must be applied flexibly, with a view to the individual circumstances of each case. *Hilton*, 481 U.S. at 777.

B. The County Will Be Irreparably Harmed If A Stay Is Denied

The County will suffer irreparable harm if a stay pending appeal is denied. This Court has ordered the County to pay damages to Plaintiffs in the amount of “any moneys owed to Union employees” as a consequence of the implementation of the Furlough Plan. Upon information and belief, Plaintiffs contend this amount to be approximately \$17 million. Any damages paid by the County will be quickly disbursed to the approximately 4,400 union employees who were furloughed during fiscal year 2009. If the County prevails on appeal, it will be enormously difficult, if not altogether impossible, to recover these funds from the individual County employees to whom it was paid. Such an inability to undo the effects of the Court’s judgment constitutes irreparable harm. *See, e.g., Hughes Network Sys., Inc. v. InterDigital Commc’n Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) (holding that irreparable harm exists where damages are unrecoverable due to the defendant’s insolvency); *Rowland v. United States District Court*, 849 F.2d 380, 382 & n.* (9th Cir. 1988) (finding irreparable harm when plaintiffs would be unable to repay costs wrongfully paid); *NSK Corp. v. United States*, 2007 WL 4296636, at *3 (Ct. Int’l Trade Dec. 10, 2007) (finding irreparable harm when no mechanism existed by which party could recoup wrongfully paid antidumping duties).

C. Plaintiffs Will Not Be Harmed By A Stay

In contrast, granting of a stay pending appeal will only delay—if the decision is affirmed—the payment of damages to Plaintiffs. It is well-settled that there is no irreparable harm when damages are available as a remedy. *See Hughes Network Sys.*, 17 F.3d at 694.

Therefore, there is no harm to Plaintiffs that militates against the granting of a stay pending appeal.

D. The County Is Likely To Succeed on the Merits

The requirement of showing a likelihood of success does not mandate that the County convince this Court that its decision was wrong. *See St. Agnes Hosp. v. Riddick*, 751 F. Supp. 75, 76 (D. Md. 1990). Rather, when the other factors favor a stay (as they do here), it is sufficient if the district court has “ruled on an admittedly difficult legal question.” *Goldstein v. Miller*, 488 F. Supp. 156, 172-73 (D. Md. 1980) (internal quotation marks omitted), *affirmed*, 649 F.2d 863 (4th Cir. 1981) (unpublished). For the reasons set forth below, the County submits that this Court’s resolution of the legal question of whether the County’s Furlough Plan passes constitutional muster present a sufficiently difficult legal question that a stay is warranted.

A violation of the Contract Clause exists when a substantial impairment of a contract by the state “is nonetheless permissible as a legitimate exercise of the state’s sovereign powers,” *i.e.*, the impairment is reasonably necessary to serve an important public purpose. *Baltimore Teachers Union v. Mayor of Baltimore*, 6 F.3d 1012, 1015 (4th Cir. 1993). For purposes of this Motion *only*, the County will assume that this Court correctly concluded that the CBAs were substantially impaired by the Furlough Plan. However, the County respectfully submits that this Court’s conclusion that the Furlough Plan was not reasonably necessary to serve an important public interest was flawed in several respects.

First, this Court articulated a standard far more stringent than the one actually adopted by the Fourth Circuit in *Baltimore Teachers*. For example, this Court asserted that “[t]he Fourth Circuit afforded a cautious amount of deference” to the decision to impair a contract. Order at 29. Further, this Court required that the impairment be “narrowly tailored” to the problem faced by the state. *Id.* In reality, the Fourth Circuit granted far more deference to state policy decisions resulting in the impairment of public contracts. While the court noted that the deference afforded to the state with respect to the impairment of public contracts is not as broad as the near-total deference afforded with respect to the impairment of private contracts, *see Baltimore City*, 6 F.3d at 1019, nevertheless the role of the court is not to second-guess or nit-pick the policy choices made by the state. Rather, the court’s role is limited to ensuring “that states neither consider impairing the obligations of their own contracts on a par with other policy alternatives or impose a drastic impairment when an evident and more moderate course would serve its purpose equally well, nor act unreasonably in light of the surrounding circumstances.” *Id.* at 1020 (internal quotation marks & alterations omitted). The rule articulated by this Court is inconsistent with the law of the Fourth Circuit.

Second, in identifying several possible alternatives to the Furlough Plan, this Court engaged in precisely the kind of second-guessing that is prohibited by the Fourth Circuit in *Baltimore Teachers*:

It is not enough to reason, as did the district court, that “[t]he city *could have* shifted the burden from another governmental program,” or that it “*could have* raised taxes.” Were these the proper criteria, no impairment of a governmental contract could ever survive constitutional scrutiny, for these courses

are always open, no matter how unwise they may be.

Id. at 1019-20 (citations omitted). Thus, this Court erred in identifying particular cuts the County “should have” made in order to avoid furloughs. This analysis essentially—and improperly—substituted the judgment of the district court for the judgment of the County.

In addition to being inconsistent with the law of the Fourth Circuit, the analysis employed by this Court ignores the substantial measures the County took to balance the budget before resorting to the Furlough Plan. In May 2008, the County passed CR 22, which increased the County income tax from 3.1 percent to 3.2 percent for fiscal year 2009. The County also passed CB 10, which increased the County’s recordation tax rate by 30 cents for every \$500 subject to the tax. The County withdrew \$27.1 million from the Undesignated Fund Balance. And, the County employed a substantial number of cost-saving measures, including but not limited to a hiring freeze, reduction to agencies’ operating budgets, reduction and/or deferral of capital projects, reduction in debt service, and savings in health benefits costs. The County then attempted to avoid furloughs by re-opening certain terms of the CBAs, an effort that proved unsuccessful. Only then, and in an effort to avoid the far more drastic solution of layoffs, did the County resort to the Furlough Plan. Furthermore, the Furlough Plan was reasonably limited and accounted for only one third of the budget shortfall faced by the County.

This history reveals that the County simply did not consider impairment of the CBAs on a par with other policy choices. To the contrary, the County took numerous steps to avoid furloughs. The fact that the County could have made a limited number of different choices is not the appropriate inquiry in deciding whether impairment of the CBAs was reasonably

necessary to serve an important public purpose. *See Baltimore Teachers Union*, 6 F.3d at 1019 (holding that the ruling of the district court that “[a]lternatives always exist” was erroneous because it “afforded essentially no deference whatsoever” to the city’s policy choices).

For the reasons set forth above, there is a substantial likelihood that the Fourth Circuit will reverse the decision of this Court. The County is therefore entitled to a stay pending appeal.

E. The Public Interest Favors a Stay

Finally, a stay pending appeal is in the best interests of the public. The County continues to face substantial financial difficulties due to the continued economic crisis in this country, in the State of Maryland, and within Prince George’s County itself. As a result of continuing budget shortfalls, the County has been forced to implement another furlough plan for fiscal year 2010. Even during the best economic times, it would ill-serve the citizens of Prince George’s County to require the County to pay a large judgment which it would be unable to recoup if it prevailed on appeal. During the current crisis, such a requirement is even more unwise. The interest of the public is best served by preserving the status quo pending the outcome of the County’s appeal to the Fourth Circuit. *See Dairy King, Inc. v. Kraft, Inc.*, 665 F. Supp. 1181, 1189 (D. Md. 1987) (holding that public interest favors a stay when failure to preserve the status quo when failure to enter a stay might harm non-parties to the litigation), *affirmed*, 851 F.2d 356 (4th Cir. 1988) (unpublished).

CONCLUSION

For the reasons set forth above, the County respectfully submits that it is entitled to a stay pending appeal as a matter of right. Alternatively, the County has made the necessary showing for a stay pending appeal under well-established legal standards. Furthermore, the County has promptly noted its appeal, which is neither frivolous nor intended solely to stall the proceedings. *See In re Startec Global Commc'ns Corp.*, 303 B.R. 605, 609 (D. Md. 2004) (noting that a stay pending appeal was appropriate when the opposing party would not be substantially harmed and the appeal was neither frivolous nor a mere delaying tactic). The County therefore asks this Court to enter an order staying its judgment until such time as the Fourth Circuit has completed its review of this case.

Respectfully submitted,

STEPHANIE P. ANDERSON
COUNTY ATTORNEY

/s/ Rajesh A. Kumar

Rajesh A. Kumar (Fed. ID No. 14137)
Special Counsel
Office of Law – Room 5121
14741 Governor Oden Bowie Drive
Upper Marlboro, Maryland 20772
PHONE: 301.952.5249
FACSIMILE: 301.952.3071
RAKumar@co.pg.md.us

William W. Wilkins
Kirsten E. Small
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
PHONE: 864.370.2211
FACSIMILE: 864.282.1177
BWilkins@nexsenpruet.com

Attorneys for Defendant
Prince George's County

August 21, 2009
Greenville, South Carolina