Bradley-Brian

From: Shillinger-Bob
Sent: Friday, May 01, 2020 2:27 PM
To: Bradley-Brian
Subject: FW: Item B1 - Resolution rescinding the authorization for emergency response work pay

For the public records requests.

From: Shillinger-Bob
Sent: Thursday, April 30, 2020 9:42 AM
To: Shillinger-Bob <Shillinger-Bob@MonroeCounty-FL.Gov>
Cc: Gastesi-Roman <Gastesi-Roman@MonroeCounty-FL.Gov>; Kevin Madok (kmadok@Monroe-Clerk.Com) <kmadok@Monroe-Clerk.Com>
Subject: Item B1 - Resolution rescinding the authorization for emergency response work pay

Mayor & Commissioners (via bcc):

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Several of you have asked whether the County can lawfully rescind the authorization for emergency response work pay which would have the effect of retroactively taking away the extra pay that was earned by employees under the then effective policy of the Board in Resolution 146-2013. The short answer is that we would have a very difficult time defending against claims made by affected employees absent seeking protections in bankruptcy court. While time constraints prevent me from drafting a formal, indepth opinion, the below summarizes my findings.

While there is not a lot of case law out there for non-unionized employees, the case law that exists holds that a retroactive change in a pay policy that adversely affects payment to employees for work already performed invokes constitutional principles under the Due Process clauses of the constitution. The closest case we found involved an attempt by Congress to retroactively reduced pay federal employees were to be paid in 1979. In sum, the Court held that the "right to a salary for work performed at the rate admittedly effective during the period when the work was performed is a right or property interest, a legitimate entitlement which qualifies for protection against governmental interference under the Due Process Clause of the Fifth Amendment." *Foley v. Carter,* 526 F.Supp. 977 (U.S.D.C. 1981). In an unreported federal case out of Texas that resulted from retroactive pay reductions to a handful of employees, the Court held that the plaintiffs established a due process claim based upon on the retroactive reduction in pay. *Campos v. Donna Ind. School Dist.,* 2016 WL 8117635 (S.D.Tex. 2016). While neither of these cases are directly on point, both decision reinforce the principle that government cannot retroactively reduce pay after it has been earned. One commenter has remarked that: "Once a raise goes into effect, the employer must pay it until it is withdrawn. It may be withdrawn only prospectively, never retroactively; a retroactive pay cut will always violate the law." 20 No. 8, Employer's guide Fair Labor Standards Act Newsletter, volume 11.

The case would be harder to defend from claims raised by employees subject to collective bargaining agreements. Collective bargaining disputes are subject to arbitration which experience has shown generally favor the employees absent compelling fiscal circumstances. While there is a statutory process in Florida for government entities to revisit union contract commitments during times of "fiscal urgency", in order to invoke those procedures, the County would need to show that the funds necessary to make the subject payment are available from no other reasonable source. Absent such a showing, we would have no basis to invoke that statute. Moreover, attempts by local governments to invoke this statutory process have led to lengthy, expensive litigation over whether the statute's requirements have been met. *See, e.g., Headley v. City of Miami,* 215 So.3d 1 (Fla. 2017).

To be clear, local governments do have an ability to reorganize its obligations under chapter 9 of the bankruptcy code. Until we are at that point of seeking those protections, I am of the opinion that we would spend considerable time and resources defending a decision to retroactively change the county's emergency pay plan and would likely lose in the end. The likely result would be more expensive.

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