THE PUBLIC SECTOR

News flash: Public agencies are declaring emergencies — is anyone listening?

by Jonathan Holtzman

"Financial emergencies" are busting out like chicken pox all over California state and local governments. In each of the last two fiscal years, the governor has declared a state of financial emergency, and recently, the superintendent of public schools declared a financial emergency in schools. Last May, the city of Stockton declared a financial emergency. I'm currently involved in arbitration in which Stockton firefighters are challenging the city's declaration of emergency. It probably comes as no surprise that the emergency is very real.

Commonplace emergencies

What all of these emergencies have in common are local and state governments in terrible financial distress. The causes are well-known and largely common to governmental agencies statewide. As a result of Propositions 13, 218, and now 26, the ability to raise fees or taxes or even to tax existing property in California is very limited. The bad news is that even if revenues begin to climb again, the cost of employee benefits is accelerating at such an alarming pace that there is no reasonable scenario in which cash resources can satisfy increased expenditures.

Various state statutes include "emergency" provisions. For example, when the governor declares an emergency, he can require the legislature to remain in session. Under the Meyers-Milias-Brown Act, public agencies that declare emergencies can take actions within the scope of bargaining without negotiating. Various city and county charters allow chief executives or boards to take actions not otherwise allowed.

Under very limited circumstances, true emergencies may permit temporary impairment of contracts. Although both the U.S. and California Constitutions prohibit government from enacting legislation that impairs contracts, courts have long recognized that this prohibition is subservient to government's inherent police powers. So public agencies with "locked-in" labor contracts may declare emergencies and seek to temporarily abrogate their contractual commitments — perhaps as a means to stave off bankruptcy or severe cuts to vital services. Plainly, this is not a long-run strategy, but when unions refuse to reopen contracts and the emergency is real, it's a possibility that cannot be overlooked.

What constitutes a true financial emergency?

There is no clear-cut test for determining when financial circumstances justify declaration of an emergency. Courts considering whether a true emergency exists have varied considerably in their assessments. Generally, courts have upheld emergency *actions* when:

(1) there is a real and unexpected emergency;

(2) relief from contractual obligations is necessary to serve an important public purpose;

(3) the modification is narrowly tailored to the emergency at hand; and

(4) the modification imposed is temporary and limited to the exigency that prompted the legislative response.

At a minimum, a financial emergency must involve a sharp and unexpected decline in revenue coupled with the inability of a public agency to provide essential services.

There are times when declaring an emergency is the only acceptable course. In Stockton, for example, the city council canceled raises provided in memorandums of understanding with police and fire unions and took a number of other steps to preserve vital services to the public. Had the council not taken action, it would have been forced to lay off an additional 40 police officers, over and above nearly 100 police jobs already cut over the prior two years. For Stockton, a city with a high crime rate, the loss of more than a quarter of its police force was already pretty darn catastrophic. Falling below that level was just plain unacceptable. The Stockton emergency is now being litigated in a variety of forums.

I don't advocate breaking labor or other commitments to employees as a "strategy." But when there is a crisis, a declaration of emergency may be the only way short of bankruptcy for a public agency to get its house in order while preserving essential services.

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