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Office of the Attorney General
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The Honorable Joe Aresimowicz
Speaker of the House of Representatives
State House of Representatives
State Capitol
Hartford, CT 06106

The Honorable Matthew Ritter
House Majority Leader
State House of Representatives
State Capitol
Hartford, CT 06106

Dear Speaker Aresimowicz and Majority Leader Ritter:

You have requested an opinion about whether the legal principles and cautions set forth in Attorney General Opinion No. 89-11, 1989 WL 505894 (May 9, 1989) ("Opinion 89-11") concerning the constitutionality of legislative enactments altering the provisions of collective bargaining agreements between the State and its employees remain in force today. Although subsequent cases have further developed the law, we conclude that the principles and cautions expressed in Opinion 89-11 continue to apply.[1]

In Opinion 89-11, this Office addressed the question of whether proposed changes to cost of living adjustment provisions in collective bargaining agreements between the State and its employees would violate state or federal law. Although no state or federal statute prohibited such changes, we concluded

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[1] In answering your question, we have not evaluated or endeavored to assess the constitutionality of any particular budget proposal, but rather to articulate for you the legal standards and constitutional risks that apply generally to legislative enactments that alter provisions of existing collective bargaining agreements. We have not, for instance, undertaken an analysis of whether the State unilaterally may alter wages or benefits governed by expired collective bargaining agreements.

that such legislation might run afoul of the Contract Clause of the federal constitution in some circumstances.[2]

In reaching that conclusion, we noted that "the Contract Clause limits the power of the states to modify their own contracts as well as to regulate those between private parties," and that "a greater degree of judicial scrutiny will be applied to the impairment of the state's own contracts." Opinion 89-11 at 1. We identified several factors that courts consider to determine whether such legislation violates the Contract Clause, including: (1) the severity of the impairment, *id.* at 2-3; (2) whether the State has an important and legitimate public purpose for the impairment, *id.* at 3; and (3) whether the impairment at issue is reasonable and necessary to achieve that public purpose. *Id.* at 4-6.

Applying those principles, we opined that a decrease in the cost of living adjustment provisions in the State's collective bargaining agreements would impair those agreements, and that such an impairment likely would be deemed substantial. *Id.* at 1-3. We further opined that the stated purpose of the legislation to alleviate the State's anticipated budget deficit likely would constitute an important public purpose. *Id.* at 3.

Turning to the third prong of the analysis—whether the impairment is reasonable and necessary—we first noted "that the application of the tests of necessity and reasonableness requires a much greater degree of judicial scrutiny in cases involving legislation which purports to abrogate a state's *own* financial obligation, than in cases involving an impairment by the state of contracts between private parties." *Id.* at 4 (emphasis in original). We stated that the question of "'reasonableness' requires a determination of whether relevant circumstances have changed from the time the contract was made to the present, and whether this change was foreseeable at the time the contract was entered into." *Id.* We further stated that the "necessity" component requires analysis of: (1) whether a less drastic modification of contractual obligations would have been sufficient to accomplish the state's purposes; and (2) whether the state could have achieved its goals through alternative means, such as tax increases or reducing costs in other state programs. *Id.* We noted that courts that have applied these standards in the past have struck down legislation that is intended to remedy a

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[2] We also concluded that such legislation likely would not violate procedural due process, and that the substantive due process analysis would be less rigorous than the Contract Clause analysis. Opinion 89-11 at 6. We adhere to those conclusions now.

state's fiscal crisis by denying contractually guaranteed salary increases. *Id.* at 4-6.

Based on the foregoing, we advised that "the legislature will need substantial justification . . . for any denial of salary increments promised in collective bargaining agreements." *Id.* at 6. More specifically, we advised that, "prior to the adoption of any such legislation, [the General Assembly] should engage in a detailed analysis of the surrounding circumstances and come to the conclusion that all of the following facts exist: (1) that there is a severe financial emergency, (2) that this emergency was not foreseeable when the collective bargaining agreements at issue were entered, and (3) that there are no alternative methods of meeting the fiscal crisis that constitute less of an impairment of contract obligations." *Id.* at 1.

The legal principles under the Contract Clause have not significantly changed since 1989, although several cases have applied those principles in different factual contexts, with varying results.

Consistent with the advice in Opinion 89-11, courts continue to ask three questions when confronted with Contract Clause challenges to legislative impairments of a contract: "(1) is the contractual impairment substantial and, if so, (2) does the law serve a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, (3) are the means chosen to accomplish this purpose reasonable and necessary." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006).

With regard to the first prong of the analysis, not all modifications of contractual benefits will impair a contract, and whether a particular modification constitutes an impairment will depend on the specific language of the contract at issue and of the legislation that modifies it. *See generally Poole v. City of Waterbury*, 266 Conn. 68, 99-107 (2003) (upholding modification of vested benefits because contract language permitted government to modify benefits, and because the benefits provided under the modified plan were "reasonably commensurate" with the benefits that retirees previously had enjoyed). That being said, courts generally have held that legislative reductions in wages, working conditions and other contractually bargained for benefits constitute a substantial impairment of the contract. *See, e.g., Buffalo Teachers*, 464 F.3d at 368. Thus, legislative changes materially diminishing collectively bargained

guarantees on working conditions and benefits would likely be deemed to substantially impair contracts.

With regard to the second prong, "[a] legitimate public purpose is one aimed at remedying an important general social or economic problem rather than providing a benefit to special interests." *Id.* (quotation marks omitted). Although that purpose "may not be simply the financial benefit of the sovereign" or "the mere advantage of particular individuals," courts frequently have held that "the legislative interest in addressing a fiscal emergency is a legitimate public interest." *Id.* at 368-69. Based on your letter, we assume that the budget proposals at issue are intended to advance such a public purpose.

With regard to the third prong, for an impairment of a government contract to be reasonable and necessary "it must be shown that the state did not (1) 'consider impairing the . . . contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,' nor (3) act unreasonably 'in light of the surrounding circumstances.'" *Id.* at 371 (quotation marks omitted).[3] Although this standard is relatively easy to state, it is more difficult to apply.

For example, in *Ass'n of Surrogates & Supreme Court Reporters Within City of N.Y. v. State of N.Y.*, 940 F.2d 766, 769 (2d Cir. 1991), New York faced a budget deficit at the same time that it wanted to expand its court system. It therefore imposed a "lag-payroll scheme" that would have "finance[d] an expansion of its court system by deferring the wages of certain court employees contrary to their collective bargaining agreements." *Id.* at 768. New York argued that such impairments were reasonable and necessary because they were only temporary and prospective measures, and because the alternatives—not hiring new judges or cutting court programs—would have exacerbated the crisis in the

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[3] Courts appear to be split on which party bears the burden to establish that these factors are (or are not) satisfied. *See United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuno*, 633 F.3d 37, 42 and 43 n.9 (1st Cir. 2011). Although the Second Circuit in *Buffalo Teachers* arguably placed the burden on the plaintiffs, *accord United Auto*, 633 F.3d at 44, some district courts in this Circuit have since done the exact opposite. *See, e.g., Donohue v. Paterson*, 715 F. Supp. 2d 306, 322 (N.D.N.Y. 2010) (holding that "the Court must determine whether Defendants can demonstrate that . . . the [impairments] are in fact reasonable and truly necessary"). Whether a contractual impairment will survive judicial scrutiny may depend in part on which party ultimately bears this burden.

court system. *Id.* at 773. The Second Circuit flatly rejected those arguments, and held that the impairments were not "essential" because New York could have shifted money from other government programs, or alternatively, could have simply raised taxes. *Id.* While the court acknowledged that such alternatives would not be politically popular, that was not an excuse for impairing the contracts in that case. *Id.*

The Second Circuit invalidated a similar "lag payroll" scheme in *Condell v. Bress*, 983 F.2d 415 (2d Cir. 1993). In that case, New York sought to reduce a more than $1 billion budget deficit by imposing a lag payroll scheme for executive branch employees. *Id.* at 417. New York admitted that it had alternative options—including raising taxes or laying off more employees—but asserted that it had considered and rejected those alternatives as "unwise fiscal policy" that "would cause further damage to the state's competitive position vis-a-vis other states or have unacceptable adverse impacts on state programs and employees." *Id.* (quotation marks omitted). In holding that the impairments were unconstitutional, the court acknowledged that impairments of state employee contracts might be permissible in "extreme crises," but held that such crises must be "much worse" than the $1 billion deficit that New York faced. *Id.* at 420. Because that $1 billion budget crisis was not sufficiently severe, and because "other (albeit unpopular) alternatives existed," the court held that the impairments were not reasonable or necessary.

In contrast to *Surrogates* and *Condell*, the Second Circuit upheld legislative impairments of government contracts in *Buffalo Teachers*.[4] In that case, the City of Buffalo confronted a severe and spiraling budget deficit, and a state oversight board therefore imposed wage freezes on City employees that conflicted with the terms of their collective bargaining agreement. *Buffalo Teachers*, 464 F.3d at 365-67. Although the Second Circuit noted that the wage freeze substantially impaired the employees' contract, it held that the freeze was reasonable and necessary to address the State's legitimate public purpose of ensuring the City's fiscal stability.

In reaching that conclusion, the court emphasized that "[t]he legislature and Board did not treat the wage freeze on par with other policy alternatives," and

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[4] Although *Buffalo Teachers* involved municipal contracts instead of state contracts, the court analyzed the Contract Clause issue in that case under the same "less deference scrutiny" standard that applies to state contracts. *Buffalo Teachers*, 464 F.3d at 369-73.

instead allowed the wage freeze only as "a last resort" and only after a finding had been made that it "was essential to maintenance of the City's budget." *Id.* at 371. The court emphasized that the government previously had attempted other alternatives, including a hiring freeze, school closings, and more than 1000 layoffs. *Id.* The court concluded that imposing more of those alternatives would have been a more drastic solution to the problem than the wage freeze. *Id.* In addition, the court emphasized that the nature and scope of the impairment—a temporary and prospective wage freeze that did not impact past salaries for labor already rendered, and which the board had to periodically reassess—demonstrated that the impairment was reasonable and tailored to the State's goal of ensuring the City's fiscal stability. *Id.* at 371-72.

Notably, the court rejected the argument that the wage freeze "was unnecessary because other alternatives existed." *Id.* at 372. The court stated that "it is always the case that to meet a fiscal emergency taxes conceivably may be raised." *Id.* But the court held that the Contract Clause does not require "that a legislature's *only* response to a fiscal emergency is to raise taxes," especially when the government already has increased taxes and when further increases might exacerbate the problem. *Id.* (emphasis in original). The court therefore declined to "second-guess" the legislature's choice about how to deal with the fiscal crisis it confronted. *Id.*

Buffalo Teachers appears to be in tension with *Surrogates* and *Condell*. *Buffalo Teachers* distinguished those cases by emphasizing that in *Condell* and *Surrogates* there was a question about whether there was a sufficiently dire fiscal emergency to justify the impairment of contracts, or whether the impairments were instead simply matters of "political expediency" that could and should have been addressed in different ways. *Id.* at 373. In *Buffalo Teachers*, by contrast, there was no dispute that the nature and extent of the fiscal crisis rose to the level of an emergency. The court thus held that the case was more akin to *In re Subway-Surface Supervisors Association v. New York City Transit Authority*, 44 N.Y.2d 101 (1978), which upheld analogous contractual impairments. *See* Opinion 89-11, at 5.

Finally, in *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Gov't of Virgin Islands*, 842 F.3d 201, 04-05 (3d Cir. 2016), the Virgin Islands attempted to address a budget deficit by imposing an 8% reduction in government employee wages, in violation of their collective bargaining agreements. The Third Circuit held that the reductions

substantially impaired the contracts, that the government had a legitimate purpose for imposing the impairment, and assumed without deciding that the reductions were necessary to achieve the government's legitimate goals. *Id.* at 210-13. However, the court concluded that the reductions were not reasonable for two reasons.

First, the court concluded that the impairment was not reasonable because the fiscal crisis existed and was foreseeable when the government negotiated and entered into the collective bargaining agreements. *Id.* at 213-14. The fact that the crisis worsened after the collective bargaining agreements were approved did not change the court's conclusion, since "the Government knew it was facing severe budget deficits and that the financial condition of the Virgin Islands was precarious. That the budget deficit projections grew and the financial condition became increasingly dire is not a change in the *kind* of problem that VIESA sought to solve. It is a change in *degree*." *Id.* at 214.

Second, the court was "troubled by the assurances made to Union representatives during the negotiations," and in particular, the government's representations that it could and would pay for the wages it agreed to in exchange for concessions that the unions accepted as part of the agreement. *Id.* at 214-15. Because "the Government chose the politically expedient route of reducing wages after it had received its benefit of the bargain" instead of "honoring [its] promise or never making it in the first place," the court concluded that the "*post hoc* changes in contractual obligations" were not reasonable. *Id.* at 215.

As the cases discussed above reflect, whether a legislative impairment of collective bargaining agreements between the State and its employees will survive scrutiny under the Contract Clause is a difficult question that will depend on a number of factors. Chief among them are a variety of fact-specific inquiries about the circumstances surrounding the impairments, including but not limited to: (1) the severity of the fiscal crisis; (2) the nature, scope, severity and duration of the impairments; (3) the extent to which the State has attempted to implement other alternatives in the past; (4) the extent to which the State has considered, studied and made findings about the feasibility of adopting other alternatives in the future; (5) whether adopting other alternatives would be a less drastic remedy than the impairments at issue; (6) the extent to which the problem that the impairment is intended to address existed, or was foreseeable, when the State negotiated and entered into the contract; and (7) the State's conduct and representations when negotiating the contract.

Ultimately, to the extent that the budget proposals that you identify in your letter impair existing contracts between the State and its employees, those impairments would raise substantial constitutional questions under the Contract Clause. It is difficult to predict with any certainty how a court would likely rule if presented with a constitutional challenge, given the need for a careful and detailed factual analysis of any specific proposal and the circumstances of its enactment. Accordingly, we reaffirm the caution expressed in Opinion 89-11 that the alteration of existing contracts between the State and its employees has the potential for running afoul of the constitutional standards under the Contract Clause.

We trust that this is responsive to your question.

Very truly yours,

GEORGE JEPSEN
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