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Office of the Attorney General  
State of Connecticut

Opinion No. 89-11

May 9, 1989

The Honorable John B. Larson  
President Pro TemporeThe Honorable Richard J. Balducci  
Speaker of the House of Representatives

Dear President Larson and Speaker Balducci:

Pursuant to letter dated April 25, 1989, you have requested an opinion as to whether the legislative enactment of a decrease or delay in the cost of living adjustments to the salaries of state employees, [FN1] "notwithstanding existing contracts or pending contract negotiations," would violate any provision of state or federal law.

We conclude that no state or federal statute prohibits such an enactment. However, the federal constitution, especially Article I, Section 10, [FN2] imposes severe restrictions on such a law. For this reason, we advise you to approach the abrogation of provisions of **collective bargaining** agreements with extreme caution. As our following discussion will reveal, in order to ensure compliance with constitutional restrictions, we advise that, prior to the adoption of any such legislation, you 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.

Cost of living adjustments are set forth in a number of **collective bargaining** agreements between the state and its employees. These contracts are entered into pursuant to the statutory scheme in Chapter 8 of the General Statutes. As part of that scheme, they are subject to legislative review and approval. Conn. Gen. Stat. § 5-278(b). **Collective bargaining** agreements are thus the State's own contracts.

Pursuant to the contract clause of the United States Constitution "No state shall ... pass any ... law impairing the obligation of contracts ...". "It has long been established that the Contract Clause limits the power of the states to modify their own contracts as well as to regulate those between private parties. Fletcher v. Peck, 6 Cranch 87, 137-139, 3 L.Ed. 162 (1810); Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 2d 629 (1819)." United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 17 (1977) [hereinafter U.S. Trust]. However, a greater degree of judicial scrutiny will be applied to the impairment of the state's own contracts. Id. at 26.

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Obviously a decrease, or delay which in effect operates as a decrease, in the cost of living adjustments would affect the value of the state's contracts with its employees. Such a diminution in value to the employee constitutes an impairment of his/her contract with the state. The court in Subway-Surface Supervision Association v. New York City Transit Authority, 44 N.Y.2d 101,375 N.E.2d 384, 388 (1978) [hereinafter Subway-Surface], found it indisputable that a law that mandated a wage freeze despite salary increases provided in a collective bargaining agreement constituted an impairment of contract rights.

\*2 Although the prohibition of the contract clause appears to proscribe “any” impairment, “the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.” [Home Building and Loan Assn. v. Blaisdell], 290 U.S. at 428, 54 S.Ct., at 236 [1934]. Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution.” U.S. Trust, 431 U.S. at 21 (1977).

In order to determine whether or not any impairment of the state's contracts with its employees will pass constitutional muster, courts have required the evaluation of several factors.

First, the severity of the impairment must be considered. Absent detail as to the proposed scope of any decrease, or length of any delay, in the cost of living adjustment we cannot definitively analyze this factor, or as you will see from the following, any of the factors which must be considered. However we will provide you what guidance we can glean from judicial decisions in this area.

In determining the severity of the impact it must be considered whether the proposed state action operates to deprive individuals of benefits on which they reasonably relied. E.g., Maryland State Teachers Association, Inc. v. Hughes, 594 F.Supp. 1353, 1362 (D.Md. 1984) [hereinafter Maryland State]; Grant v. Nellius, 377 A.2d 354, 357-58 (Del. 1977); Wage Appeal v. Board of Personnel Appeals, 676 P.2d 194, 199-200 (Mont. 1984) [hereinafter Wage Appeal]; Local #8 International Association of Fire Fighters v. City of Great Falls, 174 Mont. 53, 568 P.2d 541, 544-45 (1977) [hereinafter Local #8]. In other words, if the employees have performed in a certain manner in reliance on the promise of salary increases contained in their collective bargaining agreements, the abrogation of these promises is likely to be considered more than a minimal impairment of contractual obligations. Local #8, *supra* p.3; Sonoma County. Organization of Public Employees v. County of Sonoma, 152 Cal. Rptr. 903, 591 p. 2d 1, 5 (1979) [hereinafter Sonoma County].

Several courts have defined statutes altering state benefits which are to be provided for services performed in the future as purely prospective state action, which does not constitute a substantial impairment of the contract clause. Maryland State, *supra* p.3; Grant v. Nellius, *supra* p.3; Subway-Surface, *supra* p.3; Wage Appeal, *supra* p.3. However, in only one of these cases were the promises of future benefits embodied in collective bargaining agreements. Subway-Surface, *supra* p.3.

In Subway-Surface, the New York Court of Appeals noted that “full consideration [for the promised salary increases] had not passed from the [[affected] employees, and, as regards the services for which compensation at the increased rates provided by the agreement would be paid, the contract of employment was still executory.” 375 N.E. 2d at 390. The court “attached significance” to this fact.

\*3 However we feel that a more persuasive analysis of the question of the severity of the impairment of collective bargaining agreements is contained in Sonoma County, *supra*. There the California Supreme Court ruled that a state statute which declared null and void promises in municipal employees' collective bargaining agreements providing for cost-of-living increases violated the contract clause. The court criticized the determination

of the New York court in Subway-Surface regarding the severity of the impairment. The court noted that a multi-year contract was involved in both Subway-Surface and Sonoma County. [FN3] The court stated:

We seriously question the New York court's rationale. A contract must be viewed as a whole; it cannot be fractured into isolated components. The anticipated wage increase during the second year thereof may have affected the employees' wage demands for the first years of the contract, and undoubtedly many employees rendered their services in the first year in anticipation of their contractual right to the second year increase.

It is doubtful, therefore, that the New York court was correct in its conclusion that the employees had not rendered consideration for the second year of the contract when the freeze was imposed.

591 p.2d at 10. The court also noted that employees might have surrendered other employment benefits in exchange for the promised wage increase, when the contract was negotiated. Id. Therefore the court held the impairment of the **collective bargaining** agreements to be substantial and ruled that the state had not met its burden of justifying that impairment.

It should be kept in mind that as the level of impairment of contractual rights rises, for example, the greater the delay or reduction of the cost-of-living increases, the stricter will be the scrutiny applied by courts to the state action involved.

The second part of the constitutional analysis requires that in order to overcome a contract clause attack, the legislation must be based on an important and legitimate public purpose. Energy Reserves Group, Inc. Kansas Power and Light Co., 459 U.S. 400, 412 (1983); U.S. Trust, 431 U.S. at 26. You have described in your opinion request the purpose of the proposed legislation as the achievement of "the necessary level of budget cuts." We interpret this to refer to the need to legislate with regard to the state's anticipated budget deficit.

Courts that have examined contract clause issues have indicated that the state's desire to reduce spending, and in particular its need to avoid a financial crisis, are important public purposes that meet this part of the contract clause requirements. Maryland State, 594 F.Supp. at 1364-65; Pineman v. Oechslein, 494 F.Supp. 525, 549 (D. Conn. 1980), rev'd on other grounds, 637 F.2d 601 (2d Cir. 1981); Sonoma County, 591 P.2d at 10; Subway-Surface, 375 N.E. 2d at 389.

\*4 The last part of the three-prong contract clause analysis is a determination of whether the proposed legislation is "reasonable and necessary" to serve the important governmental purposes identified above.

As a preliminary matter, it is important to note that in U.S. Trust the Supreme Court stated 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.

[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

U.S. Trust, 431 U.S. at 26.

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. U.S. Trust, 431 U.S. at 31-32; Pineman, 494 F.Supp. at 552-53. If a court determines that cir-

cumstances have not significantly altered or if any such alteration is found to have been reasonably foreseeable, an impairment clause violation is more likely to be found.

In U.S. Trust the court found the contract clause had been violated where the circumstances surrounding the repeal of certain statutory covenants to bond holders were not new, that is, that the likelihood that efforts to improve and encourage mass transit would produce substantial deficits were considered when the original covenants were adopted. Similarly, here the court would look at the State's financial condition at the time the contract provisions were entered into and predictions of its future financial condition which were made at the time in evaluating the subsequent impairment of those contracts.

In order to follow the Constitutional mandate the proposed legislation must not only be reasonable but "necessary" to serve the important state interest that has been identified. In Pineman v. Oechslin, *supra* p.6 the United States District Court for the District of Connecticut described this requirement as follows:

The inquiry into the "necessity" component of the United States Trust Co. standard "can be considered on two levels": first, whether "a less drastic modification" of contractual obligations would have been sufficient to accomplish the state's purposes, and second, whether, without modifying its obligations at all, the state "could have adopted alternative means of achieving [its] goals ...." United States Trust Co. v. New Jersey, *supra*, 431 U.S. at 29-30, 97 S.Ct. at 1521-1522. It is no answer that "choosing among these alternatives is a matter for legislative discretion," since "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purpose equally well." United States Trust Co. v. New Jersey, *supra*, 431 U.S. at 30-31, 97 S.Ct. at 1522.

\*5 Pineman, 594 F.Supp. at 549.

In Pineman and U.S. Trust the courts engaged in a detailed analysis of alternative methods of achieving the "important" purpose behind the challenged legislation. In U.S. Trust the Supreme Court went so far as to suggest tax increases as an alternative to the contract impairment at issue. 431 U.S. at 30 n. 29. This indicates that the state will have to go far to show that there are no alternative methods of saving or raising money that would not impact on collective bargaining agreements.

The Subway-Surface case, *supra*, p.3, is particularly instructive regarding this issue. There the New York Court of Appeals upheld legislation which suspended pay increases established in New York City employees' **collective bargaining** agreements, based on New York City's severe financial emergency. The plaintiff fully accepted the reality of New York's financial crisis and did not challenge the legislative findings in this regard. Neither did the plaintiff present any evidence to support a claim that alternate measures could be adopted to meet the emergency. The court therefore relied on the findings made by the legislature in enacting the challenged statute, in ruling that the legislation was necessary to meet New York's financial crisis. The findings that the court found dispositive are as follows:

"The city is unable to obtain the funds needed by the city to continue to provide essential services to its inhabitants or to meet its obligations to the holders of outstanding securities. Unless such funds are obtained the city will soon (i) fail to pay salaries and wages to employees and amounts owed vendors and suppliers to the city (ii) fail to pay amounts due to persons receiving assistance from the city and (iii) default on the interest and principal payments due the holders of outstanding obligations of the city.

If such failures and defaults were to occur, the effect on the city and its inhabitants would be devastating: (1) unpaid employees might refuse to work; (2) unpaid vendors and suppliers might refuse to sell their goods and render services to the city; (3) unpaid recipients of public assistance would be unable to provide

themselves with the basic necessities of life; and (4) unpaid holders of city obligations would seek judicial enforcement of their legal rights as to city revenues. These events would effectively force the city to stop operating as a viable governmental entity and create a clear and present danger to the health, safety and welfare of its inhabitants.” (L.1975, ch. 868, §1.)

Subway-Surface, 375 N.E. 2d at 389 n.3.

In cases where the claimed bleakness of the government's financial picture has been challenged, the courts have refused to find legislation denying promised salary increases necessary to serve an important government purpose. In Sonoma County, *supra* p. 4, the California Supreme Court declared unconstitutional legislation denying salary increases scheduled to go into effect under municipal employees' **collective bargaining** agreements. The municipalities attempted to rely on the impending financial crisis projected to occur from the enactment of Proposition 13, which placed severe limitations on the taxing power of local and state governments. The declaration of purpose accompanying the legislation declared that it “was intended by the Legislature to alleviate the fiscal crisis created by the passage of Proposition 13, and to provide for maintaining essential services, and that the measure would allow local governments to continue services at a higher level than would otherwise be the case, would promote full employment, and prevent layoffs.” Sonoma County, 591 P.2d at 7-8.

\*6 The court carefully examined the claims of fiscal emergency and rejected them, declaring that only six percent of the municipalities' revenue would actually be lost under Proposition 13. *Id.* at 8. It therefore refused to find that an emergency existed which made the elimination of the salary increases at issue necessary.

These cases indicate that the legislature will need substantial justification, such as that set forth above in Subway-Surface, for any denial of salary increments promised in **collective bargaining** agreements.

Another constitutional provision that is relevant to your inquiry is the due process clause of both the state and federal constitutions. The delay or reduction of salary increases scheduled under **collective bargaining** agreements may constitute a deprivation of a property interest which requires both procedural and substantive due process. See, e.g., Pineman v. Oechslin, 195 Conn. 405, 416-17 (1985).

With regard to procedural due process, the Connecticut Supreme Court has recently declared that the legislative process provides sufficient procedure under the due process clause “for the alteration of substantive rights through enactment of rules of general applicability.” Connecticut Education Ass'n. v. Tirozzi, 210 Conn. 286, 289-99 (1989).

Analysis of the substantive due process issue is somewhat more complex. The applicable test is whether the legislature has acted in an arbitrary and irrational way. Connecticut Education Ass'n., 210 Conn. at 299. If the legislation is justifiable “on any conceivable rational basis” then it should be upheld. Pineman v. Failon, 662 F.Supp. 1311, 1317 (D. Conn. 1987), *aff'd*, Pineman v. Failon, 842 F.2d 598 (2d Cir. 1988).

The determination of whether a violation of substantive due process has occurred requires resolution of many of the same factual issues as are discussed above in relation to the contract clause. However, the level of scrutiny applied to legislative judgments under the due process clause is much lower. Pineman, 842 F.2d at 601; Pineman, 662 F.Supp. at 1317. Therefore to show due process was provided will require substantially less than to meet the burden under the contract clause discussed *supra*.

You also inquire as to whether any state or federal law would be violated by the passage of the proposed legislation. We are aware of no federal statutes that are implicated by the proposed legislation.

With regard to state statutes, the legislature is not prevented by the existence of previous legislation from passing new, inconsistent provisions, as long as constitutional rights are not violated. The new legislation would repeal, either by implication or specifically, all inconsistent state statutes." [FN4] Where the provisions of legislative acts on the same subject are in conflict, the later or more specific provisions are said to prevail. E.g., *Becchia v. City of Waterbury*, 185 Conn. 445, 448, 441 A.2d 131, 138 (1981); *Greenwich v. Connecticut Transportation Authority*, 166 Conn. 337, 341, 348 A.2d 596, 598 (1974). It would be helpful if the legislature made its intentions in this regard clear, i.e., by a specific statement that the provisions of the proposed legislation shall prevail over the provisions of any other inconsistent legislation. The courts give effect to the legislative intent expressed in its statutes. E.g., *State v. Ellis*, 197 Conn. 436, 445, 497 A.2d 974 (1985); *In re Juvenile Appeal*, 195 Conn. 344, 358, 488 A.2d 790 (1985).

\*7 In summary, we have outlined the legal considerations applicable to your inquiry. Determination of whether contract clause or substantive due process rights will be violated by the proposed legislation rests on resolution of the factual issues discussed above.

Very truly yours,  
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Acting Attorney General

By: Jane S. Scholl  
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[FN1] Our opinion addresses only those employees covered by a **collective bargaining** agreement. Since the attorneys in the Attorney General's Office are not subject to a **collective bargaining** agreement we can render an opinion as to those employees without implicating Conn. Gen. Stat. §1-84 et seq.

[FN2] Article I, Section 10 of the Constitution of the United States provides that: "No state shall ... pass any ... law impairing the Obligation of Contracts."

[FN3] We also assume that multi-year contracts are involved in the instant case.

[FN4] It should be noted that the proposed legislation would have an impact on state statutes in addition to those statutes that contain inconsistent provisions. Statutes establishing employment benefits to be based, in part, on an employee's salary, such as those setting retirement and insurance benefits, could be affected by the proposed legislative action.

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