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# SCHRPP quarterly

THE SOCIETY OF COUNTY HUMAN RESOURCE PROFESSIONALS OF PENNSYLVANIA NEWSLETTER

*Fact or Fiction in the Wake of Fraternal Order of Police, Flood City Lodge No. 86 v. City of Johnstown, 39 A.3d 1010 (Pa. Cmwlth. 2012)*

## Did The Commonwealth Court Sweep Away The Ability To Bargain Over Changes To Post-Retirement Health Benefits?

*By Michael McAuliffe Miller and Kevin M. Skjoldal, Eckert Seamans Cherin & Mellott, LLC*

As Clint Eastwood once trenchantly observed, “a man has got to know his limitations.” While Clint may have growled that line as part of a movie, his point also applies to the arbitration and collective bargaining process. Collective bargaining often involves misstatements, exaggerations or misreadings of the law in furtherance of one’s bargaining position.

This article discusses the Commonwealth Court’s recently issued opinion which addresses whether or not a municipal employer may legally seek to diminish post-retirement healthcare benefits for both current and former police officers. Fraternal Order of Police, Flood City Lodge No. 86 v. City of Johnstown, 39 A.3d 1010 (Pa. Comwlth. 2012) (“Flood City”). This opinion may have a significant impact during collective bargaining by SCHRPP member counties, as unions may use Flood City as a vehicle to argue that

the reduction of post-retirement benefits for active employees is impermissible. Knowing what is fact and what is fiction about Flood City may help prevent the unions from misusing this decision as a method to eliminate bargaining over these benefits.

### BACKGROUND

The case involved the City of Johnstown (“City”) (which is both a home rule charter municipality under the Home Rule Charter Law and a distressed municipality under the Municipal Financial Recovery Act (“Act 47”)), and the union for the City’s police officers, the Fraternal Order of Police, Flood City Lodge No. 86 (“FOP”).

The City and the FOP were parties to a collective bargaining agreement (“CBA”) concerning the employment terms of the City’s police officers, which was effective from January 1, 2007 to December 31, 2009. Under the terms of an interest arbitration award relating to the CBA, active officers hired before October 11, 2007, were entitled to full post-retirement



health insurance benefits for an officer and his spouse and dependents until the member became Medicare eligible and active officers hired after October 11, 2007, were entitled to full post-retirement health insurance for only the officer, until he became Medicare eligible.

The City, however, as a distressed municipality under Act 47, adopted a recovery plan to address the City’s financial problems on December 12, 2007. The recovery plan altered the availability of the post-retirement benefits, providing that employees hired on or before October 11, 2007, would retain their post-retirement health benefits for the employees only and not for their spouse or dependents.

In 2009, the parties engaged in collective bargaining over the terms for a successor CBA. Unable to reach an agreement over the post-retirement health benefits, the FOP requested an Act 111 interest

arbitration. After hearing testimony and considering exhibits, the arbitrators issued an award consistent with the City's recovery plan. With regard to post-retirement health insurance, the award provided that employees hired on or before October 11, 2007, would retain retiree healthcare for the employee only, and it required those employees to pay an increase in healthcare premiums after they retire.

### COURT OF COMMON PLEAS

The FOP filed a petition with the Court of Common Pleas to partially vacate the award. After hearing argument, the court issued an order vacating the post-retirement insurance provision, determining that provision constituted an unlawful elimination of post-retirement medical benefits in violation of the Home Rule Charter Law. The City appealed to the Commonwealth Court.

### COMMONWEALTH COURT

The precise issue on appeal before the Commonwealth Court was limited to whether § 2962(c)(3) of the Home Rule Charter Law protects future expectations of post-retirement benefits by precluding elimination of those benefits for current employees. An evenly split Commonwealth Court, sitting *en banc*, affirmed the Court of Common Pleas' Order vacating the provision related to post-retirement healthcare benefits.

### Opinion of the Court

The Court determined that the post-retirement provision violated § 2962 of the

Home Rule Charter Law. The Court reasoned that the Supreme Court's decision in Appeal of Upper Providence Township, 526 A.2d 315 (Pa. 1987) conclusively established that post-retirement healthcare benefits of both former and current employees are protected by § 2962 and cannot be lawfully reduced. Flood City, 39 A.3d at 1015 (citing Upper Providence, 526 A.2d 315). The Court stated that the Supreme Court's decision not to distinguish between present and former employees set forth in Upper Providence is logical because "the prospective elimination of the post-retirement healthcare benefits most immediately affected former employees, but it would also affect current employees when they retired in the future." The Court found itself bound by Upper Providence, and held that as to both former and current employees, the diminishment of post-retirement healthcare benefits was unlawful under the Home Rule Charter Law.

### Dissenting Opinion

An equal number of Judges, however, strongly disagreed. In writing for the dissent, Judge Pellegrini determined that the Upper Providence decision did not address whether § 2962 precludes the reduction of benefits for current employees. Indeed, Judge Pellegrini noted that the Commonwealth Court had already determined that Upper Providence does not preclude reducing post-retirement healthcare benefits for active officers in its decision in City of Pittsburgh v. Fraternal Order of Police, 911 A.2d 651 (Pa. Comwlth 2006) ("FOP II"), and that while FOP II was affirmed on other grounds, the Supreme Court did not disavow the reasoning with regard to Upper Providence.

Judge Pellegrini also engaged in an independent analysis of § 2962(c)(3), concluding that "[n]othing in [that Section] precludes the elimination of future benefits or deferred benefits for a present gain as long as it is not done unilaterally by the home rule employer." Flood City, 39 A.3d at 1018 (Pellegrini, J., dissent). In reaching this conclusion, Judge Pellegrini then noted that while the language of § 2962 precluded reduction of all "benefits" of retired employees, it only precluded reduction of benefits awarded as part of the "pension or retirement system" for current employees. He reasoned that because the term "system" is a direct reference to retirement systems administered at the state, e.g., Public School Employee Retirement, State Employee Retirement System, etc., only the benefits

related to those systems were protected from reduction. Judge Pellegrini also noted his belief that § 2962(c)(3) simply provides that a Home Rule Charter municipality cannot unilaterally reduce pension benefits for current employees and that it does not preclude reduction of those benefits through collective bargaining.

### FACT OR FICTION

All of this legal jargon could have a very real effect on a municipal employer's ability to negotiate over changes to post-retirement healthcare benefits for its active employees. While the boundaries of this case have not yet been tested in the courts, an understanding of the facts and fiction of this decision may help to prevent it from having any real impact on SCHRPP member counties.

**FICTION:** This decision eliminates a county's ability to negotiate over changes to post-retirement healthcare benefits with its active employees.

**FACT:** The limited issue before the Court involved the Home Rule Charter Law, and the Court's analysis dealt solely with the Home Rule Charter Law. To the extent a municipality is not a Home Rule Charter municipality, it should not be bound by this decision.

**FACT:** The Court recognized that outside the Home Rule Charter context, it has already held that the change of post-retirement healthcare benefits does not violate constitutional protections. *See*, Millcreek Township Police Assoc. v. Millcreek Township, 960 A.2d 904 (Pa. Cmwlth. 2008).

**FACT:** This decision has no precedential value. There was a tie vote among the judges, and the Court affirmed simply as an operation of law. Accordingly, this decision will not bind future court decisions.

### CONCLUSION

We conclude that Flood City is a case limited by its particular facts that should not be applicable to the efforts of counties to control their post-employment health care expenditures. However, Flood City may represent another wave in the attempt by organized labor to exempt post-employment healthcare from bargaining and it bears close attention. ❖

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Section 2962(c)(3) provides that a municipality is not "authorized to diminish the rights or privileges of any former municipal employee entitled to benefits or any present municipal employee in his pension or retirement system." 53 Pa.C.S. § 2962(c)(3). That provision is particular to the Home Rule Charter and Optional Plans Law and is not repeated elsewhere in the County Code.