LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Issue 2, 2019

Summer is right around the corner, and the Local Government Commission is in the process of shepherding its own legislative package as well as consulting on other important local government proposals moving through the General Assembly. As usual, we are also keeping a careful eye on the important appellate decisional law and reporting back to the readers of this newsletter. This edition's cases include a landmark United States Supreme Court decision impacting municipal penalties and another decision examining evidentiary burdens in workers' compensation cancer claims, as well as interesting decisions on fair housing and the Ethics Act, among others. We have also included some recently-introduced local government bills to watch.

-Phil Klotz, Executive Director of the Local Government Commission

Legislative Updates:

SB 687, PN 841: Amends Title 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes to specify that municipalities, municipal authorities and intergovernmental entities have the authority to regulate the operation, control, retrieval or launch of unmanned aircraft on municipal buildings, land and water. *See also HB 1528*. Referred to the Senate Local Government Committee.

HB 1559, PN 2042: Amends the Real Estate Tax Sale Law to require any person who intends to bid at a scheduled tax sale to appear and register at the tax claim bureau not less than 14 days before the scheduled sale. The county is authorized to establish a fee for the filing of an application to register. HB 1559 was given first consideration by the House.

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Elections

Reuther v. Delaware County Bureau of Elections, 2019 WL 1339484 (Pa., Mar. 26, 2019). On May 16, 2017, by write-in vote, candidate won a Republican nomination for the office of tax collector. On June 2, 2017, the Bureau notified candidate that she was certified as the nominee. Candidate was instructed to submit a Statement of Financial Interest (SOFI) to the Bureau and to the township by June 30, 2017 in order to have her name appear on the November 2017 general election ballot. On June 30, 2017, she filed her SOFI with the Bureau, but failed to file it with the Township. On September 13, 2017, Objectors filed an emergency petition for relief with the trial court noting that the State Ethics Commission's regulations require write-in candidates to file their SOFIs with the appropriate authorities within thirty days of the certification of the election results. Because Rossi failed to file her SOFI with the Township within that period of time, Objectors asserted that, pursuant to subsection 1104(b)(3) of the Ethics Act, "[f]ailure to file the statement in accordance with the provisions of [the Ethics Act] in addition to any other penalties provided, [shall] be a fatal defect to a petition to appear on the ballot." The Trial court denied Objectors' petition, and a divided panel of Commonwealth Court agreed. The Pennsylvania Supreme Court affirmed, finding that Section 1104 "relates, in its entirety, to petitions to appear on the ballot," and the court would not "resort to equity to force removal from the ballot where the legislature has not prescribed such a consequence."

Eminent Domain

Szabo v. Dep't of Transportation, 202 A.3d 52 (Pa. 2019). Landowners were served with a declaration of taking which, unbeknown to the parties, inaccurately described the "extent and effect" of property proposed for condemnation, specifically, an inaccurate description of ownership interests of three parcels subject to the condemnation. Landowners did not file preliminary objections to the declaration, and only after just compensation proceedings were initiated and a survey was conducted did landowners petition for an evidentiary hearing to determine the extent of the condemnation, which is required to occur within 30 days of the service of the

declaration. The trial court denied Landowners' petition noting that despite the fact that they actually owned more property being condemned than the plans described, "there [was] no dispute as to what property PennDOT desire[d] to take [and Landowners did] not argue that the geographical boundaries of PennDOT's plan [were] ambiguous." Further, the court concluded that Landowners "knew what property was being taken and did not allege the occurrence of some unanticipated consequence unknown to them at the time of the declaration, which would have explained the failure to file preliminary objections." Commonwealth Court reversed, remanding for an evidentiary hearing, holding that the failure to accurately describe the property taken resulted in a *de facto* taking for which just compensation was not provided. The Supreme Court, in an Opinion Announcing the Judgment of the Court (OAJC), affirmed the Commonwealth Court. Two justices concurred in the result, but disagreed with the analysis in the OAJC. Two justices dissented, principally arguing that precedent provides that an owner is presumed to know what they own, and "it is incumbent upon the condemnee to investigate further and, if in disagreement with the plans attached to the declaration of taking, file timely preliminary objections."

Employee Relations

Kern v. Green Tree Borough, 2019 WL 386396 (Pa. Cmwlth. Jan. 31, 2019) (UNREPORTED; *See* 210 Pa. Code § 69.414). Police officer assigned to contact local businesses, collect information regarding security cameras, and establish liaison relationships was disciplined by borough council pursuant to a recommendation from the police chief. The recommendation was made in response to an alleged insubordinate communication within the department about the officer's responsibilities. Initially, the chief discussed the possibility of disciplinary action with the officer, promising a follow-up meeting that was cancelled due to a scheduling conflict and never rescheduled because the officer admitted the underlying conduct and the chief believed further proceedings superfluous. Trial court overturned disciplinary action because informal meeting with the chief was insufficient to satisfy due process requirements for notice and opportunity to respond. Commonwealth Court reversed, finding that without disputed facts, the officer's general awareness that disciplinary action was contemplated was sufficient process.

Bristol Borough v. Workers' Comp. Appeal Bd., 2019 WL 1302441 (Pa. Cmwlth., Mar. 22, 2019). Employer Borough appealed an order of the Workers' Compensation Appeal Board (Board) affirming judge's order awarding total disability benefits to volunteer firefighter claimant for a closed period. Employer argued that language in the act requiring that "any claim by a member of a volunteer fire company be based on evidence of direct exposure to a carcinogen…as documented by reports filed pursuant to the Pennsylvania Fire Information Reporting System (PennFIRS)" required that claimant use the PennFIRS system only to report exposure to a Group 1 carcinogen. Claimant introduced testimony of State Fire Commissioner regarding legislative intent behind provision, including an assertion that the PennFIRS requirement for volunteer firefighters was only intended to show attendance at fires rather than a compendium of carcinogens released at fire events. Employer also challenged the competence of claimant's medical evidence, the burden of causation on a claimant, and the legitimacy of a subrogation lien. Commonwealth Court affirmed the Board on all points. The court held the testimony of the Commissioner to be competent and persuasive and found that the PennFIRS reporting requirements were for purposes of determining a firefighting record, not a list of carcinogens at particular fires. Furthermore, Claimant satisfied his burden of causation under the Pennsylvania Supreme Court's decision in *City of Philadelphia Fire Department v. Workers' Compensation Appeal Board (Sladek)*, 144 A.3d 1011 (Pa. Cmwlth. 2016), rev'd, 195 A.3d 197 (Pa. 2018), which was decided after briefs were filed in this case. The court also determined that the medical testimony presented by Claimant was appropriately relied upon by the Board and sufficient to establish causation in accordance with *Sladek*, and subrogation lien was appropriate in light of record.

Ethics Act

Sivick v. State Ethics Comm'n, 2019 WL 81867 (Pa.Cmwlth., Jan. 3, 2019, reconsideration denied February 1, 2019) (UNREPORTED; See 210 Pa. Code § 69.414). Appellant, a former township supervisor, board chairman and full-time roadmaster, petitioned the court for a review of the State Ethics Commission's final adjudication and order. The commission had determined that Appellant had violated sections of the Ethics Act

and ordered him to make restitution. On appeal, the court affirmed the commission's final adjudication and order. The commission found that Appellant used the authority of his public office when he: spoke to the other supervisors in order to gain support for removal of the nepotism policy from the employee handbook in order to hire Appellant's son; told a supervisor not to note the changes to the nepotism policy in the handbook; failed to state why he abstained on the vote to remove the nepotism policy; lobbied other supervisors to hire his son; and included his son in township road worker training before his son had even submitted an application for employment. The commission also found that Appellant's son was hired without any formal notation in the township's meeting minutes. The court noted that regardless of whether Appellant's interaction with the other supervisors about repealing the nepotism policy and hiring his son were considered requests, recommendations or veiled heavy-handed mandates, they were made in his capacity as a supervisor and roadmaster. The use of authority of office is more than the mechanics of voting and includes all of the tasks needed to perform the functions of a given position. Under the totality of the circumstances, Appellant violated section 1103(a) of the Ethics Act when he took the specified actions. Had Appellant not engaged in the improper conduct, the board of supervisors would not have rescinded the nepotism policy or hired his son. Because Appellant's son's salary was a direct consequence of Appellant's use of authority of his office, it was financial gain in violation of the Ethics Act.

Fair Housing

Cornerstone Residence, Inc. v. City of Clairton, 2018 WL 6839723 (3rd Cir. Dec. 31, 2018) (UNREPORTED). On appeal from the District Court's dismissal of underlying claims, the Third Circuit held that the city's ordinance, which does not permit a treatment center to be located in residential areas, was not facially discriminatory against recovering addicts and was not in violation of the Fair Housing Amendments Act (FHAA). The ordinance's definition of "treatment center" included "[a] use (other than a prison or a hospital) providing housing for three or more unrelated persons who need specialized housing, treatment and/or counseling because of. . . [c]urrent addiction to a controlled substance that was used in an illegal manner or alcohol. . . ." The FHAA provides that current addicts are not a protected group, but the Third Circuit has held that recovering addicts are. In the instant matter, the plain meaning of the ordinance's definition of "treatment center" does not include recovering addicts as the language most naturally reads to be limited to current addicts. However, the nonprofit corporation argued that the phrase "was used" transforms the term "current addiction" into "current and past addiction." The court explained that one can be currently addicted to a drug that was used in the past. Moreover, the ordinance, read as a whole, reflects a familiarity with and an intent to conform to the FHAA. Consequently, a treatment center would include only the unprotected class.

Federal Grants

City of Philadelphia v. Attorney General of the United States. 916 F.3d 276 (3rd Cir. 2019). Appellee City receives annual "Justice Assistance Grant" each year from the Department of Justice. Appellant Attorney General inserted three grant conditions related to immigration enforcement not based upon the statutory criteria for the grant program. City obtained order from District Court enjoining grant conditions among other things. Third Circuit upheld District Court's injunction on the basis that Executive Branch was not delegated authority by Congress to impose conditions on grant City was otherwise entitled to receive according to the statute's formula.

Home Rule

In re Agenda Initiative to Place on the Agenda of a Regular Meeting of County Council, 2019 WL 1338938 (Pa. Cmwlth., Mar. 26, 2019). Constituents challenged a provision of home rule county's administrative code restricting "agenda initiatives" and voter referenda to preclude matters involving "registration of electors and conduct of elections" after being denied an opportunity to present an ordinance establishing a Voting Process Review Commission to conduct periodic review of the county's voting machine systems. The trial court denied constituents' petition to reverse the decision of the county and force it to place the ordinance on the agenda. Commonwealth Court affirmed. After noting that there is not a Pennsylvania constitutional right to change laws by initiative and referendum, the court determined that the ordinance would regulate the "registration of electors and

the conduct of elections," which is expressly withheld from home rule municipalities except as authorized by statute. Furthermore, the ordinance would impermissibly supplant the constitutional role of the General Assembly in providing for elections and was not capable of being severed.

Apartment Ass'n of Metropolitan Pittsburgh v. City of Pittsburgh, 2019 WL 1118752 (Pa. Cmwlth., Mar. 12, 2019). Home rule city enacted ordinance to prevent residential property owners, real estate brokers, and others from denying a person access to housing based on source of income. Association filed a declaratory judgment action against city alleging that ordinance violated the Home Rule and Optional Plans Law (HROPL) and the Pennsylvania Constitution. Trial court granted the motion of the Association and held the ordinance invalid asserting that the ordinance "[made] participation in the Section 8 [P]rogram mandatory." Commonwealth Court affirmed, holding that the HROPL prevents regulation of business to the extent that such regulation imposes affirmative duties on businesses. The ordinance "necessarily mandates that all residential landlords in the City comply with the federal Section 8 Program requirements, when previously their participation in the Section 8 Program was voluntary. That is clearly an affirmative obligation…."

Land Use

Wimer Realty, LLC v. Township of Wilmington, 2019 WL 1370790 (Pa. Cmwlth., Mar. 27, 2019). Landowners seeking to use property as a wedding barn proposed a curative amendment to township ordinance. Although Township had previous considered, but did not adopt, a wedding barn amendment six months prior to the curative amendment proposal, it did not finally advertise or adopt a related amendment until after the challenge was filed. The final adopted amendment did not contemplate the scope of use sought by the landowners. The zoning hearing board refused landowners' curative amendment and the trial court reversed, granting Landowners site-specific relief. Township appealed to Commonwealth Court arguing (1) landowners' land use appeal was moot based upon ordinance ultimately passed; (2) the appeal should have been dismissed under the pending ordinance doctrine and/or because the ordinance was not exclusionary; (3) the Board's decision was supported by substantial evidence; and (4) trial court abused its discretion in refusing to permit Township to supplement the record. The Commonwealth Court affirmed trial court. The appeal was not moot because the ultimate ordinance was substantially different than the relief requested by Landowners. The pending ordinance doctrine did not apply because no ordinance had been advertised at the time that the curative amendment was proposed. The ordinance at the time of the curative amendment proposal was exclusionary notwithstanding that another wedding barn was operating under a special exception, and the Township failed to show the proposed use was detrimental to the public health, safety and welfare. Finally, the court held that the trial court did not abuse its discretion in granting site-specific relief and refusing to open the record for the presentation of additional evidence.

> *We recognize that the City's enactment of the Ordinance was well-intended. However, implementation … will require all residential landlords to significantly alter their business practices in order to accommodate Section 8 Program participants. Contrary to the City's contention, the Ordinance does, in fact, place affirmative "duties, responsibilities or requirements" on private businesses and employers…. Therefore, we agree … that the City violated Section 2962(f) of the Home Rule Law in enacting the Ordinance.*
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> - *Apartment Ass'n of Metro. Pittsburgh, Inc. v. City of Pittsburgh*

Law Enforcement

Timbs vs. Indiana, 139 S.Ct. 682 (2019). State of Indiana ordered defendant petitioner to forfeit a vehicle valued at $42,000 following a guilty plea for the sale of heroin to an undercover police officer. State Supreme Court reversed trial court finding that forfeiture constituted an unconstitutionally excessive fine on the basis that the excessive fines clause of the Eighth Amendment had never been expressly applied to state fines. Supreme Court reversed, holding that the Eighth Amendment prohibition on excessive fines be incorporated by the Due Process Clause of the 14th Amendment and thus applicable to the states.

Municipal Claims

Fouse v. Saratoga Partners, 204 A.3d 1028 (Pa. Cmwlth., 2019). Appellants appealed trial court order denying their petition to redeem property sold at an upset tax sale and holding that the Pennsylvania Real Estate Tax Sale Law's (RETSL) lack of a post-tax-sale right of redemption does not violate either the Equal Protection Clause of the United States Constitution or Article III of the Pennsylvania Constitution. After sale of their property, Appellants alleged a right to redeem under the Municipal Claim and Tax Lien Law (MCTLL), asserting that RETSL's failure to provide such relief violated principles of due process and equal protection, and violated the Pennsylvania Constitution. Commonwealth Court affirmed. After dismissing the due process claim on procedural grounds, the court held that a rational basis analysis applied to the distinction between procedures available in first and second class counties (MCTLL-post sale redemption provided) and those which existed in Second Class A through Eighth Class counties (RETSL- no post sale redemption). Because the former classes of counties represented larger pools of potential buyers, additional procedural protections for owners are warranted. Because such a rationale was conceivable, and the classification does not rest on "grounds wholly irrelevant to the state's purpose [of providing efficient means of enforcing tax liens]," the law survives an equal protection claim.

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."

- *Timbs v. Indiana*

Municipal Distress

Fraternal Order of Police Fort Pitt Lodge No. 1 v. City of Pittsburgh, 203 A.3d 965 (Pa., 2019). Union appealed arbitration award to Commonwealth Court under Section 252(e) of Act 47 of 1987, which provides that a collective bargaining unit may appeal an arbitration settlement "which deviates from the [municipal recovery plan.]" The union alleged that jurisdiction was appropriate given that plan work force components enunciated a goal of "competitive compensation" and that the award did not satisfy this goal. Furthermore, the union alleged that the plan's annual salary increase caps were arbitrary. Commonwealth Court granted City's motion to quash the appeal, noting that its lack of jurisdiction was rooted in a determination that the "competitive compensation" provision was a generalized statement not a mandate. Furthermore, the union's attack on the figures within the plan was not an attack on the award. The Pennsylvania Supreme Court affirmed. It agreed that if the salary increase caps, which were followed by the award, were not "competitive compensation," then the union was disputing the plan, not the award. Furthermore, Section 252(e)(4), which provides that the "coordinator's decision setting a limit on expenditures for an individual collective bargaining unit . . . shall not be disturbed on appeal unless the limit is determined to be arbitrary, capricious or established in bad faith[,]" did not provide independent grounds for appeal.

Pensions

McFillin v. Workers' Comp. Appeal Bd. et al., 2019 WL 418338 (Pa Cmwlth., February 4, 2019) (UNREPORTED; *See* 210 Pa. Code § 69.414). Appellee Workers' Compensation Appeal Board upheld administrative judge's ruling reversing arbitrators finding converting appellant retired police officer's time and service pension into a disability based pension. Seeking reinstatement of disability benefits, appellant challenged Board's refusal to rehear disability claim and asserted that abitrator's findings should have precluded the administrative judge's decision based on the doctrine of collateral estoppel. Commonwealth Court rejected both arguments and affirmed Board's decision on the basis that: (1) the evidence offered to justify Board's rehearing was irrelevant and the underlying claim was time barred, and (2) collateral estoppel did not apply where the subsequent hearing examined a different legal question than the arbitrator's finding.

Right-to-Know Law

Borough of Pottstown v. Suber-Aponte, 202 A.3d 173 (Pa. Cmwlth. 2019). An individual submitted a request under the Right-to-Know Law (RTKL) for police video footage of herself on a specific day and from the time she was brought into

the police department and all activity of the department on that day. The Borough denied the request citing exemptions from disclosure (personal security, public safety, safety or physical security of a building, criminal investigation and noncriminal investigation) and because the request lacked specificity. The Office of Open Records granted the requester's appeal and ordered the borough to produce the footage. The trial court, on appeal by the borough, held that the request was insufficiently specific and that the video footage was exempt from disclosure. Commonwealth Court, on appeal, determined that the request was sufficiently specific as it clearly identified the subject matter of the request (police department activity and requester), the scope of records sought (video surveillance footage), and a specific timeframe (October 4, 2015, a single day). In regard to the personal security, public safety and building security exemptions under the RTKL, the court determined that the police chief's testimony specifically detailed the dangers if certain portions of the video were made public, but remanded to the trial court to examine the footage to determine which parts of the footage are exempt as showing areas that posed security risks. However, the department produced no evidence that the public area footage pertains to either a criminal or noncriminal investigation because the recordings of public areas show only what a bystander would see. Since non-public restricted areas are recorded 24/7, not everything that is recorded involves criminal activity. Thus, these recordings must be examined by the trial court on remand to determine whether the criminal and noncriminal investigation exemptions apply.

Taxation

Mid-Atlantic Systems of WPA, Inc. v. Tax Office of Monroeville, 204 A.3d 579 (Pa. Cmwlth. 2019) Mid-Atlantic Systems challenged trial court order affirming municipal tax officer determination of business privilege tax (BPT) obligations for tax years 2012-2016. The business claimed that municipality was preempted from levying the tax by Section 12 of the Home Improvement Consumer Protection Act 1 (HICPA), which provides that "[r]egistration under [HICPA] shall preclude any requirement of payment of a fee or registration or licensing of any home improvement contractor by any political subdivision," and paying the tax would require registration and licensing by the municipality. The business also claimed that Subsections 301.1(f)(1) and (f)(11) of the Local Tax Enabling Act (LTEA) precluded imposition of the BPT because it excepts certain activities "from any tax ... on a privilege, ... subject, [or] occupation ... which is now or does hereafter become subject to a State tax or license fee…." Commonwealth Court affirmed. In a case of first impression, the court held that the scope of the preemption under HICPA was not intended to preclude the taxation of business broadly and local registration for such purposes. Furthermore, the fee under HICPA was not a true licensing fee, but rather a registration fee and the BPT did not duplicate a state tax. Consequently, the BPT was not prohibited.

Telecommunications

T Mobile Northeast, LLC v. City of Wilmington, De., 913 F.3d 311 (3rd Cir., 2019). Service provider's application to erect a cellular antenna in the city was denied. The Telecommunications Act of 1996 (TCA) provides that a state, local government or instrumentality thereof must act on any request for authorization to place, construct or modify wireless service facilities within a reasonable period of time after the request is filed by issuing a written decision. Zoning board orally denied the service provider's application at the hearing and failed to issue a written decision until after the service provider filed its initial complaint in the district court and the city filed its answer. Third Circuit found (1) that a written decision is required for a denial to be final, and therefore, the cause of action was not ripe when the initial complaint was filed; and (2) supplemental complaint was filed more than 30 days after the zoning board issued its written decision, and thus untimely under the TCA. Because Congress did not evidence an intent to make the 30-day time period jurisdictional, district court should not have granted the city's motion for summary judgment. The case was remanded to the district court for further proceedings.

Legislative Updates:

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HB 1246, PN 1450: Amends the Municipalities Financial Recovery Act (Act 47) by specifying additional ethical compliance requirements for the appointees, recovery coordinators and receiver, who work directly with financially distressed municipalities on behalf of the Department of Community and Economic Development. *See also* SB 554. HB 1246 was given first consideration by the House.