IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Falls Township	:	
	:	
v.	:	
	:	
Police Association of Falls Township,	:	No. 1972 C.D. 2010
Appellant	:	Argued: May 9, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: October 19, 2011

The Police Association of Falls Township (Association) appeals from an order of the Court of Common Pleas of Bucks County (common pleas court) that granted Falls Township's (Township) Petition to Vacate an Act 111[1] Grievance Arbitration Award (Award) which directed the Township to continue to provide cost of living adjustments (COLA) to the pension benefits of retired Police Officer, Joseph Hennigan (Hennigan).

Collective Bargaining Agreement and Township's Police Pension Ordinance Provisions Relating to COLAs

The Association and Township were parties to an Act 111 Collective Bargaining Agreement (CBA) which incorporated the Township's Police Pension Ordinance.[2]

[1] Act of June 24, 1968, P.L.237, No. 111, *as amended*, 43 P.S. §§217.1-217.10.

[2] The CBA is not part of the reproduced or certified records, and there is nothing in the record from which this Court may discern the date of the CBA.

The Township's Police Pension Ordinance was adopted by the Falls Township Board of Supervisors (Board of Supervisors) on December 22, 1969.[3]

Section 72-4E of the Township's Police Pension Ordinance provided retired bargaining unit members with a COLA:

> Any member who retires after January 1, 1992, shall be eligible for a cost of living adjustment (COLA) pursuant to Act 600. This COLA is based on the Consumer Price Index (CPI) for all urban consumers for the Philadelphia, Wilmington, Atlantic City (PA-DE-NJ-MD), with an annual cap of 8%, up to 130% of the original amount of the member's pension, or the maximum amount allowable under Act 600, whichever is higher.[4] The Consumer Price Index for the PA-DE-NJ-MD is published every other month. (Emphasis added).

§72-4E of Falls Township's Police Pension Ordinance.

Police Pension Fund Act ("Act 600") – Cap on COLAs

The Police Pension Fund Act, also known as "Act 600,"[5] is Pennsylvania's municipal police pension statute which authorizes boroughs, towns and townships to establish police pension funds. Act 600 governs all aspects of managing those funds and awarding benefits.

[3] According to the Township Code, the Police Pension Ordinance was amended in its entirety in 2001 but no changes material to this case were made.

[4] While neither party raises the issue, it appears that the phrase "whichever is higher" in the Ordinance erroneously authorizes the Township to provide retirement benefits in excess of those permitted by Act 600.

[5] Act of May 29, 1956, P.L. (1955) 1804, *as amended*, 53 P.S. §§767-778.

Section 5(g)(1) of Act 600, 53 P.S. §771(g)(1), limits the maximum COLA to be granted to retired police officers and prohibits any cost of living increase that would impair the actuarial soundness of the pension fund:

> (g)(1) The ordinance or resolution establishing the police pension fund may provide for a cost of living increase for members of the police force receiving retirement benefits. The cost of living increase shall not exceed the percentage increase in the Consumer Price Index from the year in which the police member last worked, shall not cause the total police pension benefits to exceed seventy-five per centum of the salary for computing retirement benefits and shall not cause the total cost of living increase to exceed thirty per centum.[6] No cost of living increase shall be granted which would impair the actuarial soundness of the pension fund. (Emphasis added).

Township Terminated Hennigan's COLA Because "Act 600" Maximum was Reached

Hennigan retired on January 1, 1998, with a service-connected disability and began receipt of a pension benefit set at 50% of his final salary. On an annual basis thereafter, this amount was increased by a COLA.

In 2008, the Township informed Hennigan that it would no longer increase his monthly pension benefit by a COLA because any additional increases would cause the total cost of living increases to exceed "thirty per centum" of his

[6] The Act does not specify 30% of what. The parties disagreed as to whether Act 600 prohibits COLAs that exceed 30% of Hennigan's final average salary (the position advanced by the Association) or an increase that exceeds 30% of his initial pension benefit (the position advanced by the Township).

initial pension benefit," i.e., the maximum permitted under Section 72-4E of the Police Pension Ordinance (which incorporated Section 5(g)(1) of Act 600).

The Association disagreed with the Township's interpretation of the basis on which the cost of living increases should be calculated. The Association believed that such increases should be calculated based on the retiree's final average salary, not the initial pension benefit amount. The matter was submitted to Grievance Arbitration pursuant to Act 111 to enforce the terms of the CBA.

Act 111 – Grievance Arbitration

The Association asserted that the basis on which the cost of living increases should be calculated was a retiree's final average salary, not the initial pension benefit. Under the Association's view, Hennigan should have continued receiving a COLA increase until his total COLA increases reached 30% of his $4,520.65 monthly Final Average Salary (FAS), or $1,356.20. The Association applied the "prior antecedent" rule of statutory construction and argued that immediately preceding the "thirty per centum" was the phrase "salary for computing retirement benefits" or FAS. The Association argued that Hennigan was entitled to receive COLAs until those adjustments equaled "thirty per centum" of Hennigan's final average salary.

The Township argued that the "thirty per centum" referred to the original pension benefit.

The Arbitrator agreed with the Association and issued an Award on February 25, 2009, that found the Township in violation of the CBA. The

Arbitrator directed the Township to reinstitute the COLA bargained for until the adjustment equaled 30% of Hennigan's final average salary for pension purposes.

Township's Petition to Vacate the Award

On March 21, 2009, the Township petitioned to vacate the Award and argued before the common pleas court that the Award was in excess of the Arbitrator's powers as it ordered the Township to commit an "illegal act" insofar as it required the Township to make payments in excess of those permitted under Act 600.

The Township also argued that the Arbitrator exceeded his authority by awarding a benefit without considering its effect on the actuarial soundness of the pension fund in violation of Section 5(g)(1) of Act 600 which specifically states that "[n]o cost of living increase shall be granted which would impair the actuarial soundness of the pension fund." (Emphasis added). According to the Township, the Arbitrator's Award, if allowed to stand, would create a substantial additional expense which would impair the actuarial soundness of the pension fund.

The common pleas court initially noted that the Association's interpretation of Act 600, adopted by the Arbitrator, was contrary to the manner in which COLAs are normally calculated:

> [A] compliant Act 600 COLA is calculated by taking a percentage of the pension benefit itself, not a percentage calculated against the full final average salary. Since a COLA is taken as a percentage of the initial pension benefit, any calculation regarding the limitation of COLA

> would presumably be calculated using the original pension benefit amount.

Common Pleas Court Opinion, September 1, 2010, at 5.

The common pleas court, however, neither reached the issue of the proper interpretation of the cost of living increase under Act 600, nor whether the Award required the Township to perform an "illegal act.[7]" The common pleas court also did not address whether the Arbitrator exceed his authority by awarding a benefit without considering the actuarial soundness of the pension fund under Act 600.

Instead, the common pleas court focused on "the threshold issue" of whether there was a violation the Municipal Pension Plan Funding Standard and Recovery Act ("Act 205")[8] which governs how municipality pension plans are to be assessed for actuarial soundness.

[7] An Arbitrator exceeds his authority when he either mandates an "illegal act" or grants an award which addresses issues outside the realm of the collective bargaining agreement. City of Scranton v. Local Union No. 669 of Int'l. Assocs. of Fire Fighters, AFL-CIO, 551 A.2d 643 (Pa. Cmwlth. 1988). An "illegal act" is typically one that is not within the statutory authority of the employer or an act which is prohibited by law. Id. Thus, an arbitrator is restricted in that he may only direct a public employer to do that which it could otherwise do voluntarily.

[8] Act of December 18, 1984, P.L. 1005, *as amended,* 53 P.S. §§ 895.101-895.803.

The common pleas court noted that there was an Actuarial Cost Study in the record, but found that it did not comply with Act 205 because it was completed on October 8, 2008, and was based on a January 1, 2007, Biennial Valuation, and not done "at the time the benefit was included in the CBA." Common Pleas Court Opinion, at 9. (emphasis added). The common pleas court concluded that the Arbitrator "exceeded his authority" when he required the Township to implement an unlawful CBA provision that was negotiated without the necessary Act 205 Cost Study to guarantee fund's soundness, and it vacated the Award "on [these] other grounds." Common Pleas Court Opinion, at 1 (emphasis added).[9]

Association's Appeal to this Court

On appeal,[10] the Association contends that the common pleas court erred when it required the Township to produce an Act 205 Cost Study done at the time the COLA was negotiated and made part of the CBA. The Association contends that the common pleas court misconstrued Act 205. The applicable provisions are set forth in Section 305 of Act 205 which provides that prior to any modification of a benefit which would affect funding or actuarial soundness of a pension plan, the municipality (or arbitrators) must consider a Cost Study which

[9] The "Township of Falls Police Pension Plan Actuarial Cost Study as of January 1, 2007" was prepared by the Township's Actuarial Consultants, Beyer-Barber Company on October 8, 2008. It appears for the first time in the certified record as Exhibit "E" to the Township's Petition to Vacate the Arbitration Award. The parties do not dispute that it was presented to the Arbitrator, although the Arbitrator makes no mention of it.

[10] This Court's review of an arbitrator's award in an Act 111 case is limited to four aspects of the arbitrator's award: (1) the arbitrator's jurisdiction; (2) the regularity of the arbitration proceeding; (3) whether the arbitrator exceeded his authority and (4) whether the arbitrator deprived one of the parties of constitutional rights. City of Philadelphia v. Fraternal Order of Police, Lodge No. 5, 564 Pa. 290, 768 A.2d 291 (2001).

addresses the possible financial impact of the modification (or award) on the pension fund. The Association contends that, here, the Arbitrator had the benefit of a Cost Study before he issued the Award.

"**Act 205**"

Act 205 provides for two types of actuarial reports. The first is an Actuarial Valuation Report pursuant to Section 201 of Act 205, 53 P.S. §895.201. The actuarial reporting required in Chapter 2 of Act 205, relates to disclosure of the pension assets and liabilities. Pursuant to this Section each municipality which has established or maintained a pension plan for its employees is required to file with the Public Employee Retirement Study Commission (Commission) an actuarial valuation report and update it biennially, i.e., every other January 1. Section 201 of Act 205, 53 P.S. §895.201. The "Biennial Valuation" report describes the financial position of the pension fund and determines its actuarial soundness. Section 202 of Act 205, 53 P.S. §895.202.

The second type of actuarial report is found in Chapter 3 of Act 205 which sets forth minimum funding standards and governs the minimum annual cash contributions to the pension fund. A "cost study" or "cost estimate" which is required under Section 305(a) of Act 205, tells the municipality how much funding each particular benefit in the plan requires in order to maintain actuarial soundness. Section 305(a) of Act 205, 53 P.S. §895.305(a), requires that prior to the adoption of any benefit plan modification by a municipality, a "cost estimate" of the effect of the proposed benefit plan modification must be completed by chief administrative officer of the municipality:

> (a) **Presentation of cost estimate**. – Prior to the adoption of any benefit plan modification by the governing body of the municipality, the chief administrative officer of each pension plan shall provide to the governing body of the municipality a cost estimate of the effect of the proposed benefit modification. (emphasis added).

53 P.S. §895.305(a).

This Court has consistently held that before an arbitrator modifies a police pension plan there must be a finding under Section 305(a) of Act 205 that the modification will not affect the actuarial soundness of the pension plan. This Court has interpreted this section to apply equally to interest arbitration, as well as grievance arbitration awards which change the way a municipality has been administering and interpreting the pension plan.

In Upper Merion Township v. Upper Merion Township Police Officers, 915 A.2d 174 (Pa. Cmwlth. 2006), this Court concluded that a grievance arbitration award was properly vacated due to the lack of an Act 205 cost study. There, a grievance arbitrator directed Upper Merion Township to retroactively increase survivor benefits under a grievance arbitration award. He did so without first obtaining an Act 205 cost study on the retroactive effect of the benefit enhancement. This Court ruled that the pension plan could not be changed in the absence of an Act 205 cost study.

Similarly, in Shippensburg Police Association v. Borough of Shippensburg, 968 A.2d 246 (Pa. Cmwlth 2009), this Court held a grievance arbitrator who awarded a modification of a police pension plan in the absence of an

Act 205 cost study necessitated vacation. There, the parties agreed for the last 25 years the police pension plan had not included unused vacation pay in the calculation of pension benefits. The grievance arbitrator's award, however, changed this and "unsettle[d] the Borough's once predictable pension liability." Shippensburg, 968 A.2d at 251. Because there was no Act 205 cost study to quantify the change, this Court determined the arbitrator exceeded his authority in awarding the pension modification.

In the present controversy, the grievance Arbitrator modified the existing benefit because it changed the way in which the Township had historically calculated COLAs to the pension benefits of retired police officers. Instead of basing the COLAs on the retiree's monthly benefit, the Award required the Township to base it on the retiree's final average salary.

Because the Arbitrator's Award increased[11] the amounts the Township was required to pay its retirees the Arbitrator was required pursuant to Section 305 of Act 205, to consider a "cost study" which demonstrated the expected actuarial impact of his Award attributable to the benefit plan modification. Section 305(e) of Act 205 requires that the contents of the "cost study" shall be complete and accurate and shall disclose "the impact of the proposed benefit plan, the modification on the future financial requirements of the pension plan and the future minimum obligation of the municipality with respect to the pension plan." 53 P.S. §895.305(e). (emphasis added).

[11] The parties do not dispute that the Association's interpretation would result in the Township paying Hennigan $452.06 more per month.

The Association points out, without elaboration, that the Arbitrator "was presented with an Act 205 cost study prepared by the plan actuary." Association's Brief at 11. The Cost Study in the record, however, does not comply with Section 305(e).

First, it is unclear whether the Arbitrator considered the Cost Study prior to issuing his Award because it is not mentioned in his Decision. Second, the only Cost Study in the record was prepared on behalf of the Township in order to demonstrate that the Association's interpretation, if accepted by the Arbitrator, "would create a substantial additional expense which would impair the actuarial soundness of the pension fund." See Falls Township's Brief in Support of Petition to Vacate Arbitration Award, March 12, 2010, at 15, and Exhibit E "Actuarial Cost Study" attached thereto. Thus, even if the Arbitrator did consider it, it ostensibly demonstrated that the Arbitrator's award would impair the actuarial soundness of the pension fund. Third, the Cost Study was prepared on October 8, 2008, to study "[t]he effect on plan costs" created by the following two scenarios:

> Scenario 1
>
> Provide an automatic COLA for all eligible retiree benefits limited to 30% COLA attained by the addition of the individual COLA percentages granted on the annual basis; (emphasis added)
>
> Scenario 2
>
> Provide an automatic COLA for all eligible retiree benefits. This COLA shall cease when the benefit accumulated is equal to 75% of the average monthly compensation on which the original retirement benefit calculation was based. (emphasis added).

Falls Township's Brief in Support of Petition to Vacate Arbitration Award, March 12, 2010, at 15, and Exhibit E "Actuarial Cost Study."

Because neither party addressed the substance or conclusions of the Cost Study, this Court in its best effort was constrained to decipher it on its own. It appears that Scenario 1 studied the effect of limiting COLAs to 30 per cent of "the total annual COLA increases" a position which neither party advanced, so that portion of the Cost Study was essentially useless to the Arbitrator. Scenario 2 studied the effect on the plan when the COLA was limited to "75 percent of FAS" one of the limitations of Section 5(g)(1) of Act 600. So, it is unclear what the "Cost Study" showed in terms of the Association's interpretation on the future financial requirements of the Plan or the Plan's actuarial soundness. Because the only Cost Study in the record did not address the Association's interpretation upon which the Award was based nor how the Arbitrator's proposed modification of the plan would impact the fund, or the modification of the future financial requirements of the pension plan, or the future minimum obligation of the municipality with respect to the Award, it did not comply with Section 305 of Act 205. The Award must be vacated. Erie v. International Association of Firefighters, 836 A.2d 1047 (Pa. Cmwlth. 2003).

The Association contends that the common pleas court must be reversed because it, *sua sponte*, deemed the controlling question to be whether the Township considered an Act 205 "cost study" when it first negotiated the COLA provision. The Association argues that the issue before the common pleas court was whether the Arbitrator exceeded his authority by awarding the COLA without considering whether that particular COLA increase would impair the actuarial soundness of the pension fund.

Again, the record is silent as to when the Township initially agreed to provide a COLA to its officers. In any event, this Court agrees with the Association that whether the pension plan was actuarial sound at the time of "the entry of the CBA[12]" was not before the common pleas court. Rather, the common pleas court was required to consider whether and to what extent altering the way in which COLAs had been calculated, from 30% of monthly benefit to 30% of final average salary, impacted the actuarial soundness of the pension fund.

The common pleas court's error in this regard notwithstanding, the result it ultimately reached was correct because the "Cost Study" in the record did not comply with Section 305 of Act 205. It is well settled that an appellate court may affirm the judgment of the trial court where it is correct "on any legal ground or theory disclosed by the record, regardless of the reason or theory adopted by the trial court." Moss Rose Manufacturing Company v. Foster, 314 A.2d 25, 26 (Pa. Super. 1973).

Accordingly, this Court affirms but on different ground than those relied on by the common pleas court.

BERNARD L. McGINLEY, Judge

[12] Common Pleas Court Opinion, at 5 (emphasis added).

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v.	:	
	:	
Police Association of Falls Township, Appellant	:	No. 1972 C.D. 2010

O R D E R

AND NOW, this 19th day of October, 2011, the Order of the Court of Common Pleas of Bucks County in the above-captioned case is hereby affirmed.

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BERNARD L. McGINLEY, Judge