[J-22A-2014 & J-22B-2014]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

UNITED POLICE SOCIETY OF MT. LEBANON; RETIRED POLICE OFFICERS; MARK KUBIT, MARY EICHINGER, JOHN MICHALEC, DAVID WHITE, LES PALOMBINE, MARY SUE JOYCE, WILLIAM LAURENCE, KEVIN MACKEN, TOM GIANNI, ROBERT GEHRMANN, PAT O'DONNELL, AND BLAISE LAROTONDA	:	No. 23 WAP 2013
v.	:	Appeal from the Order of the Commonwealth Court entered July 16, 2012 at No. 1602 CD 2011, reversing the Order of the Court of Common Pleas of Allegheny County entered July 28, 2011 at No. SA-07-793.
MT. LEBANON COMMISSION; STEPHEN M. FELLER; MT. LEBANON PENSION PLAN ADMINISTRATOR; MUNICIPALITY OF MT. LEBANON	:	49 A.3d 4 (Pa. Cmwlth. 2012)
	:	ARGUED: April 8, 2014
APPEAL OF: UNITED POLICE SOCIETY OF MT. LEBANON	:	
UNITED POLICE SOCIETY OF MT. LEBANON; RETIRED POLICE OFFICERS; MARK KUBIT, MARY EICHINGER, JOHN MICHALEC, DAVID WHITE, LES PALOMBINE, MARY SUE JOYCE, WILLIAM LAURENCE, KEVIN MACKEN, TOM GIANNI, ROBERT GEHRMANN, PAT O'DONNELL, AND BLAISE LAROTONDA	:	No. 24 WAP 2013
v.	:	Appeal from the Order of the Commonwealth Court entered July 16, 2012 at No. 1602 CD 2011, reversing the Order of the Court of Common Pleas of Allegheny County entered July 28, 2011 at No. SA-07-793.

MT. LEBANON COMMISSION; STEPHEN M. FELLER; MT. LEBANON PENSION PLAN ADMINISTRATOR; MUNICIPALITY OF MT. LEBANON	:	
	:	49 A.3d 4 (Pa. Cmwlth. 2012)
APPEAL OF: LES PALOMBINE AND ROBERT GEHRMANN	:	ARGUED: April 8, 2014

DISSENTING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: NOVEMBER 24, 2014**

Because I believe the Per Curiam Opinion turns the Municipal Pension Plan Funding Standard and Recovery Act ("Act 205")[1] on its head, I respectfully dissent.

From the outset, I note that our standard of review is indispensable in ascertaining the facts of this case, as to which we construe and apply Act 205, since there seems to be some tension between the findings of the Mt. Lebanon Commission below and the factual recitations and characterizations of the Court of Common Pleas below, and the Per Curiam Opinion by this Court. In the context of judicial review of the actions of a local agency such as the Mt. Lebanon Commission, the mandatory administrative law and procedure is clear. Section 754 in Title 2 of the Pennsylvania Consolidated Statutes provides:

> **(b) Complete record.--**In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the

[1] 53 P.S. §§ 895.101–895.803.

> provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals).

2 Pa.C.S. § 754. This Court has confirmed that where, as here, the Court of Common Pleas in reviewing local agency action takes no additional evidence, such that a full and complete record is made before the local agency, our standard of review is limited, under section 754(b), to determining whether the local agency violated a constitutional right or committed an error of law, or whether **the local agency's** factual findings are unsupported by substantial evidence. V.L. Rendina, Inc. v. City of Harrisburg, 938 A.2d 988 (Pa. 2007). Thus, the finder of fact in these circumstances is the local agency alone, and there is no place for additional fact finding by the courts at any level. Whether the record might support additional or contrary factual findings is of no moment.

As respecting factual inquiry, the relevant question for the courts is simple and modest: whether the local agency's factual findings have any substantial evidentiary support in the record. If so, then the local agency's factual findings control, and it is not within the province of the judiciary to make a contrary factual assessment. Accord In re Thompson, 896 A.2d 659, 668 (Pa. Cmwlth. 2006) ("A reviewing court may look only to the evidence relied upon by the fact finder . . . to see if it is sufficiently substantial to support the findings. . . . The reviewing court is not to substitute its judgment on the merits for that of the municipal body. . . . [T]he court is bound by the municipal body's findings which are the result of resolutions of credibility and conflicting testimony.") (citing 2 Pa.C.S. § 754(b)). Here, the Mt. Lebanon Commission is unquestionably the

sole fact-finder. Its findings are binding, except to the extent that they are determined to be unsupported by the record.

That stated, the following are several of the Commission's findings which are relevant to the analysis at this juncture:

> 2. The [Mt. Lebanon, Pennsylvania Police Officers' Pension Plan ("Plan")] provides a Normal Retirement Benefit, payable . . . when a participant reaches age 50 and has completed 25 years of service.
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> . . . .
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> 4. . . . A normal retiree can . . . receive a maximum of 15% in [cost of living adjustment ("COLA")] benefits.
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> 5. The Plan allows for early retirement after seven years of service.
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> . . . .
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> 8. . . . [T]he only cost study that was carried out in this case assumed that the COLA was limited to 15%. . . .
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> . . . .
>
> 10 The first time the [United Police Society of Mt. Lebanon ("UPS" or "Union")] requested a cost-of-living adjustment [for retirees] was in 1999 during contract negotiations that resulted in a collective bargaining agreement being entered into in 2000. . . .
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> 11. Marcia Taylor is the Assistant Manager of the Municipality, and is charged with administration of the Plan. Ms. Taylor was present and participated in the 1999 Negotiations.
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> 12. **The COLA provision of the Plan was agreed to in the 1999 Negotiations**.
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> 13. The parties to the 1999 Negotiations did not specifically discuss how the COLA provision would apply to

> the Early Retirement Benefit. Consequently, the 2000 Plan contains no language describing how, if at all, the COLA provision should be applied to retirees who elect the Early Retirement Benefit option.
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> . . . .
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> 22. After **the parties reached [a] tentative agreement** concerning the issues discussed during the 1999 Negotiations **but prior to ratification of the tentative agreement by the Commission, Ms. Taylor . . . requested that [Mockenhaupt Benefits Group, an actuarial consulting firm] calculate the cost of the new retirement plan provisions**. Ms. Taylor's request did not include a specific request that Mockenhaupt consider the cost, if any, of the COLA provision's impact as it relates to the Plan's Early Retirement Option.
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> 23. **Mockenhaupt performed a cost study, but only in terms of the effect on the Normal Retirement Benefit. Early retirement was not included**.
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> 24. Thus, the interpretation of the COLA currently proposed by the UPS was not included in this study.
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> 25. . . . [W]ith respect to [a] 2004 Amendment . . . a cost study was done by Mockenhaupt that reflected the COLA as it was being administered; i.e., with a 15% cap for early retirees.
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> 26. **Ms. Taylor's actions in requesting the cost studies and in administering the Plan were based on a good faith belief that this is how the COLA should be implemented.**

Findings and Conclusion of Commission at 1-6 (emphases added). Notably, the Per Curiam Opinion does not establish that any of these factual findings are unsupported by substantial evidence.[2] Therefore, the Court's analysis should begin with an

[2] The Per Curiam Opinion does recite a trial court conclusion that there was not substantial evidence to support the Commission's finding that Ms. Taylor interpreted the Plan in good faith, since -- in the opinion of the trial judge -- her calculation was not an (…continued)

acknowledgment that these findings of fact are binding in this Court, notwithstanding any improper judicial fact-finding or characterization to the contrary that has arisen since the matter made its way into the courts.

Applying Act 205 to the actual facts that constrain our role in review, it is readily apparent that the Plan at issue is unlawful as construed by the Union. Section 301 of the Act provides, in relevant part:

> Notwithstanding any . . . municipal ordinance . . . pension plan agreement or pension plan contract to the contrary, the applicable provisions of this chapter shall apply to any municipality which has established and maintains, directly or indirectly, a pension plan for the benefit of its employees . . . and to the respective pension plan.

(continued…)
interpretation of the Plan, but an assumption on her part by which she ignored the clear language of "the Plan," and since -- again in the opinion of the trial judge -- her testimony on this point was neither relevant nor appropriate since the language of the Plan is unambiguous. This conclusion by the trial court erroneously disregards and mischaracterizes the findings of the Commission. In the first place, the Commission did not find that the information Ms. Taylor submitted to the actuary was based on a good faith "interpretation" of "the Plan." What the Commission actually found was that her actions in requesting the initial cost study and in administering the Plan were based on her good faith belief, not an interpretation of "the Plan." And while the trial court held out the finalized and adopted Plan as the end-all with respect to Ms. Taylor's actions in securing the initial cost study, such that none of her testimony is relevant concerning whether her actions were taken in good faith, the Per Curiam Opinion's summary of the trial court's conclusion neglects to acknowledge that at the time of her actions in requesting the initial cost study, there was no finalized and adopted Plan, but merely a proposed plan based on negotiations in which Ms. Taylor participated, for submission to the Commission for an approval decision informed by the requisite cost study she was requesting. In other words, when Ms. Taylor submitted information to the actuary to secure the requisite cost study, there was no controlling Plan or Plan language, because the Plan had yet to be adopted, and was necessarily, therefore, subject to change. See 53 P.S. § 895.305(a) and (e). The windfall approved by the Court today derives from this initial judicial error, deriving from a misapprehension of the limits of judicial review here.

53 P.S. § 895.301. Further, Section 305 of the Act, which is entitled "Actuarial cost estimate required for benefit plan modification," dictates in clear mandatory terms:

> (a) . . . **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 plan modification.
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> . . . .
>
> (e) . . . **Any cost estimate of the effect of the proposed benefit plan modification shall be complete and accurate** and shall be presented in a way reasonably **calculated to disclose** to the average person comprising the membership of the governing body of the municipality, **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 (emphasis added). Thus, concerning benefit plan modification -- which is what is actually at issue here -- as noted in Borough of Ellwood City v. Ellwood City Police Department Wage & Policy Unit, 825 A.2d 617, 623 n.11 (2003), Act 205 "mandates that such change be preceded by a cost estimate [accurately] describing the impact upon the plan." There, the Court further noted that 53 P.S. § 895.306(a) declares the legislative finding that failure to adhere to Act 205's requirements "threatens serious injury to the affected municipal pension plan, to the entire system of public employee pension plans in the Commonwealth and to the Commonwealth itself." In light of this unambiguous legislative declaration, Act 205 prohibits "the making of a contrary agreement" and requires that in the event of a conflict between Act 205's requirements and a collective bargaining agreement, the statute must be given effect, even at the expense of the contrary agreement. Borough of Ellwood City, 825 A.2d at 622. Thus, notwithstanding this Court's continuing recognition of the sanctity of the

collective bargaining process, this Court is also obliged to give due respect to the legislative decision to subordinate this policy to the standards and requirements set forth in Act 205, including the prerequisite of a complete and accurate cost study. See id. at 623. Furthermore, Borough of Ellwood City made it clear that even "where a political subdivision secures material advantage by way of promises that the Legislature has rendered incapable of enforcement, judicial and quasi-judicial tribunals lack authority to require fulfillment of such promises in the first instance." Id. at 624.

What this Court, therefore, cannot do, and what the lower tribunals could not do, is set aside Act 205's cost study prerequisite in order to salvage a benefit plan modification which is unsupported by a complete and accurate cost study. And while the Per Curiam Opinion posits that the appropriate remedy here is to remand the matter to secure a complete and accurate cost study in support of the Union's proffered view of the Plan, doing so would not satisfy the requirements of Act 205, unless the Plan itself is invalidated. This is so because Act 205 requires a complete and accurate cost study to be secured "**Prior** to the adoption of any benefit plan modification[,]" so as to inform the governing body, **prior to such adoption**, as to "the impact of the proposed . . . modification on the future financial requirements of the pension plan and the future minimum obligation of the municipality." 53 P.S. § 895.305 (emphasis added). Anything less than that fails to satisfy Act 205. The courts are not authorized to manipulate the facts to ensure a windfall contrary to the legislative command. Requiring the Municipality to abide by a plan modification illegally adopted without being informed by a complete and accurate cost study, which the Per Curiam Opinion apparently does in the name of enforcing Act 205, simply does not satisfy Act 205's requirement of a "prior" cost study. Rather, that approach turns the Act on its head by mandating compliance with a plan modification made without the benefit of an accurate cost study,

and based on the completion of a **subsequent** cost study which did not inform the decision to adopt the plan modification at issue.

To be clear, the Union's proffered understanding of the plan modification at issue, which the Per Curiam Opinion concludes is the only plausible reading of the Plan as modified, requires an uncapped increase in benefits for early retirees, by way of an annual COLA, until the early retiree reaches an annual benefit of 90% of his final average monthly compensation. That is a very sweet deal. The Municipality not only disagrees with this reading, but never secured a cost study to support it. Therefore, if the 2000 plan modification is as understood by the Union and as insisted upon by the Per Curiam Opinion here, then the plan modification was illegally adopted in 2000 in violation of Act 205, and must be invalidated in order to give effect to Act 205's controlling requirements. Such an invalidation would certainly come with significant consequences.

I remain of the view that, "where a party to a CBA invokes a pre-existing statute to avoid the consequences of a provision included in the CBA, and where the issue involves a core employment term such as . . . pensions . . . then the CBA should be rescinded and the bargaining *status quo ante* restored." Borough of Ellwood City, 825 A.2d at 626 (Castille, J., concurring and dissenting). Here, however, the Municipality does not invoke Act 205 to avoid the consequences of its own understanding of the Plan provisions at issue, but does so to avoid the consequences of the Union's proffered contrary understanding. Furthermore, restoration of the bargaining *status quo ante* apparently works to the detriment of the Union because upon returning to the bargaining *status quo ante*, the Union stands to forfeit not only the disputed uncapped COLA increases for its early retirees, but also the entire bargained-for COLA for all retirees, at least arguably retroactive to 2000. The ramifications of the forfeiture of this

nearly fifteen-year-old bargained-for benefit may not be fully appreciable at this stage in proceedings. Certainly, the Union and individual officers have not requested this result, and presumably would find such "relief" to be undesirable. Nevertheless, the Commission's findings are clear that the parties to the relevant negotiations "did not specifically discuss how the COLA provision would apply to the Early Retirement Benefit[, and, as a result,] the 2000 Plan contains no language describing how, if at all, the COLA provision should be applied to retirees who elect the Early Retirement Benefit option." Commission F.F. No. 13. The Union proffers one understanding of the plan modification, but the Commission found that the Union had a contrary understanding based on a good faith belief concerning the proposed modification's specific operation under circumstances which were never discussed.

In my concurring and dissenting opinion in Borough of Ellwood City, supra, I made a number of points which I believe are also relevant here, separate and apart from the points I have already made concerning what is commanded by application of a proper standard of review of the Commission's findings, and in light of Act 205. For one, it is not desirable that we permit parties to unilaterally reap the unintended benefits of unforeseen and unaccounted-for circumstances. Further, our task may involve an obligation to protect parties from a mutual mistake in the bargaining process concerning core employment matters. Here, perhaps, the Union will insist that it made no mistake in the bargaining process and that it fully intended a plan modification that would include a significantly greater COLA for Union members who retire after a mere seven years than that which is payable to Union members who toil in public service more than three times as long. Leaving aside the obvious facial implausibility of that position, the inconvenient fact remains that the Union failed to verify that the requisite cost study reflected their understanding of how the proposed modification would apply to this

scenario, which the parties never specifically discussed. I believe the approach of the Commonwealth Court below best reconciles Act 205's mandatory requirements with our obligation to protect the parties from their mistake in failing to specifically negotiate concerning a cap on COLA increases for early retirees.

Viewing the larger picture presented in this case: (1) the Union wanted a COLA for retirees; (2) the Municipality agreed to the COLA, calculated at a rate which would cap COLAs at a 15% increase for normal retirees, without any discussion of an alternate cap in increases for early retirees - leaving the parties without a meeting of the minds concerning the latter; (3) the Municipality secured a cost study as required by law in order to proceed with a plan modification adding the COLA; (4) the cost study is accurate and complete if the agreed-upon modification is as it is understood by the Municipality, but inaccurate and incomplete if the modification is as it is understood by the Union; (5) the Municipality and Union proceeded with the plan modification, adding a COLA; (6) if the Union's understanding is correct, the COLA modification is unsupported by a complete and accurate cost study and is, therefore, invalid; (7) consequently, all of the Union's retirees (early and otherwise) forfeit their bargained-for COLA under the Union's understanding of the plan modification. While securing a complete and accurate cost study concerning the proposed modification as written was the responsibility of the Municipality, the Municipality apparently stands to benefit from having failed to do so by escaping the COLA payment burden, having acted in good faith. Rather than invalidate the plan modification which included the COLA benefit, the Commonwealth Court appropriately, in my view, looked to give the Union the benefit of its bargain to the extent permissible under Act 205, *i.e.*, a plan modification to include a COLA for retirees with increases for all participants capped as calculated in the requisite cost estimate. Under the parameters established by Act 205, there was no other means

by which the Commonwealth Court could allow the Union to retain the bargained-for COLA. Considering the Municipality's understanding of the plan modification and the Union's proffered interpretation of the same, the only understanding which could possibly survive scrutiny under Act 205 was the Municipality's interpretation, the only interpretation possibly supported by a complete and accurate cost study secured prior to approval of the plan modification.

In terms of interpreting the contractual language at issue, the Per Curiam Opinion concludes that the language at issue is unambiguous and must therefore be applied as written. As I have pointed out, however, application of the Plan language as understood by the Per Curiam Opinion here is a legal impossibility because Act 205 does not allow it. Contract terms do not exist in a legal vacuum, but must be construed in light of all applicable laws. Empire Sanitary Landfill, Inc. v. Dep't of Envtl. Res., 684 A.2d 1047, 1059 (Pa. 1996) ("The laws that are in force at the time parties enter into a contract are merged with the other obligations that are specifically set forth in the agreement."). "The fundamental rule in interpreting a contract is to ascertain and give effect to the intent of the contracting parties." Crawford Cent. Sch. Dist. v. Com., 888 A.2d 616, 623 (Pa. 2005). Moreover, "[t]he intention of the parties must necessarily govern in the construction of all contracts, and it will never be presumed that persons occupying a contractual relation intend that an impossible thing shall be done." Bingell v. Royal Ins. Co., 87 A. 955, 957 (Pa. 1913). Here, the Court should not presume a contractual intention to disregard and violate Act 205. It is clear that the parties intended that the Union should receive some form of a COLA benefit, and presumed that the parties intended compliance with Act 205. Under the circumstances, therefore, rather than invalidate the plan modification and strip the Union of its bargained-for COLA provisions, causing the parties to grapple with the ramifications and uncertainty that

comes along with invalidating a modification some fifteen years after the fact, I would affirm the Commonwealth Court's decision, and leave the parties to bargain to resolve their misunderstanding going forward. The Commonwealth Court was correct that, as between the two proffered interpretations, only one was lawful under Act 205. The interpretation that would award a windfall, and one that is of comparative absurdity (given the greater service of those employees who do not retire early), cannot stand.

For these reasons, I respectfully dissent.

Mr. Justice Eakin joins this dissenting opinion.