[J-20A-V-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 47 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1379CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401164.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: WAYNE R. WILSON	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 48 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1380CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401165.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: JOHN H. BRILHART	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 49 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1381CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401166.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: GARY S. KUKLER	:	

UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 50 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1382CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401167.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: STEPHEN A. WILLIAMS	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 51 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1383CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401168.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: CHARLES L. GOURN	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 52 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1384CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401169.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: ROBERT J. COLABIANCHI	:	

UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 53 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1385CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401170.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: DANIEL J. KOON	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 54 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1386CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401171.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: JOHN P. KISIELNICKI	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 55 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1387CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401172.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: LEROY J. DAVIS	:	

UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 56 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1388CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401173.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: RICHARD W. HANNEGAN	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 57 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1389CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401174.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: LEONARD C. STOKES	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 58 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1390CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401175.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: JAY P. GRAFT	:	

UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 59 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1391CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401176.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: JAMES GRAJCAR	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 60 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1392CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401177.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: RICHARD J. HOUGH	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 61 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1393CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401178.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: WILLIAM C. STOFFEL	:	

UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 62 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1394CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401179.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: THOMAS J. NORMAN	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 63 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered on March 6, 2003 at No. 1395CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401180.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: ANTON J. KOTAR	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 64 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1396CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401181.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: DANNY J. JANCUSKI	:	

UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 65 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1397CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401182.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: SAMUEL L. FONNER	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 66 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1398CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401183.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: GARY L. FINE	:	
UNITED STATES STEEL CORPORATION (USX CLAIRTON WORKS)	:	No. 67 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered March 6, 2003 at No. 1399CD2002, reversing the Order of the UCBR entered May 16, 2002 at NoB-401184.
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW	:	
APPEAL OF: JOSEPH A. JENCO	:	ARGUED: March 3, 2004

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: SEPTEMBER 22, 2004**

Because I cannot agree with the Majority's conclusion that employees must lose credit for the payment of wages to their pension fund, where, as here, an employer, due to legal necessity, wrote the check that contributed employees' wages to employees' pension fund, I respectfully dissent.

The facts of this case are not in dispute. A 1977 agreement between the United Steelworkers of America (Union) and United States Steel Corporation (Employer) provided for a $.33 per hour cost-of-living adjustment (COLA) on May 1, 1980. On April 15, 1980, Union agreed that employees would forego their $.33 per hour contractually guaranteed COLA in exchange for an immediate and direct Employer contribution to the U.S. Steel Carnegie Pension Fund (Fund), which provided pension benefits for both current and future employees. Employer then made the lump sum payment directly to the Fund.[1]

In 2001, Appellant[2] was retired from Employer and receiving a monthly pension benefit from the Fund when he applied for and was awarded unemployment

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[1] As pointed out by the Majority, the Fund is non-contributory and contributions to the Fund can only be made by Employer. Thus, employees did not have the option of accepting their COLA and contributing it to the Fund through payroll deduction or otherwise. The record does not reflect the mathematical computations of the Union's salary concession or the employer's pension contribution. However, there is no dispute that this was a *quid pro quo* exchange.

[2] While this case was brought by multiple parties, each presents the identical factual matrix. Accordingly, for ease of discussion, I will refer to Appellant(s) in the singular, as did the Majority Opinion.

compensation.[3] Thus, the question presented herein is whether Appellant's forbearance of his entitlement to a pay raise in direct consideration for Employer's contribution of the foregone raise to the Fund equates to an employee contribution to the Fund for purposes of Section 404(d)(2)(ii) of the Unemployment Compensation Law, 43 P.S. §804(d)(2)(ii).[4] If so, in accordance with the above provision of the Unemployment Compensation Law, it is uncontested that Appellant is entitled to 100 percent of his compensation benefits. If not, it is uncontested that he is entitled to only 50 percent of such benefits.

A fundamental axiom of contract law is that any bargained-for exercise, such as forbearance of a legal right, is valid consideration. Restatement (Second) of Contracts §71 (1981);[5] Hillcrest Foundation, Inc. v. McFeaters, 2 A.2d 775 (Pa. 1938) (holding that

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[3] It is not clear from the record how it came to be that so many employees were receiving retirement pensions and were, nevertheless, eligible for unemployment compensation. However, this fact is uncontested.

[4] Section 404(d)(2)(ii) of the Unemployment Compensation Law, 43 P.S. §804(d)(2)(ii), provides as follows:

> If the pension is entirely contributed to by the employer, then one hundred per centum (100%) of the pro-rated weekly amount of the pension shall be deducted. If the pension is contributed to by the individual, in any amount, then fifty per centum (50%) of the pro-rated weekly amount of the pension shall be deducted.

[5] Restatement (Second) of Contracts §71 (1981) provides:

> (1) To constitute consideration, a performance or a return promise must be bargained for.
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
> (3) The performance may consist of
>
> *****
>
> (b) a forbearance

valid "consideration" confers a benefit upon the promisor or causes a detriment to the promisee and must be an act, forbearance or return promise bargained for and given in exchange for the original promise); Cardamone v. University of Pittsburgh, 384 A.2d 1228, 1232 (Pa. Super. 1978) (citing Hillcrest Foundation); see also 3 Williston on Contracts § 7:43 (4th ed.) (2004) (noting that just as a promisor may make an agreement for acts or promises to act, so he may bargain for forbearances or promises to forbear. Forbearance from exercising a right or doing an act which one has a right to do is legal consideration). This simple, fundamental, and legally uncontestable rule is applicable to this case.

One of Union's primary goals during the 1980 negotiations was enhancement of the Fund. To accomplish this goal, Union voluntarily relinquished its members', including Appellant's, contractually vested right to a wage increase, in exchange for Employer's contribution to the Fund. The *quid pro quo* in this instance is unique because it involved the give-back of a specific wage increase vested three years earlier in exchange for a specific contribution of a substantially similar, if not identical, amount to the Fund. If the law had permitted, Appellant could simply have accepted his COLA and contributed it directly to the Fund. Because direct contributions were not permitted, the Union representing Appellant was forced to resort to the mechanism of foregoing the pay raise and constructively contributing it to the Fund, necessarily having it pass through Employer's hands. This legal necessity should not obfuscate or subvert what is substantively a simple and straightforward transaction through which Appellant contributed his forthcoming raise to his pension fund.

The majority supports its conclusion, in part, by noting that almost all negotiations involve two sides trading wages for benefits, however, the case *sub judice* is wholly distinguishable from such a general exchange in this regard. It did not involve either vague assertions or a union directed contribution of employer's funds. Rather, here

Appellant ceding his absolute right to the COLA that three years earlier had been guaranteed to him in return for the contribution of that COLA to his pension fund.

The Majority justifies its position of ignoring the contract between Union and Employer by repeatedly asserting the importance of ensuring continued federal certification of Pennsylvania's Unemployment Compensation Fund.[6] As the Majority notes, the United States Department of Labor issued a program letter within which the following question was asked and, in pertinent part, answered:

> **Question 4:** During a collective bargaining process, employees may give up pay raises or cost of living adjustments in return for an increased employer contribution to the pension plan. May states consider these employer payments to be "contributions made by the individual?
>
> **Answer:** No. The controlling factor is whether the individual actually made any direct contributions to the plan. A direct contribution is one made by payroll deduction or otherwise from an employee's personal funds. A wage agreement that results in increased employer contributions to a retirement plan in exchange for a surrender in wages does not constitute a direct contribution to the pension plan by the employees….

The Majority apparently considers this question and answer as controlling Pennsylvania's fate *vis-à-vis* federal unemployment compensation funds. I do not. This case does not involve the general forbearance of a pay raise or COLA in exchange for an increased contribution to a pension as part of a new collective bargaining agreement. Instead, a COLA specifically agreed to three years earlier and otherwise unrelated to the ongoing bargaining process was relinquished solely to permit such monies to be contributed to the Fund.

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[6] As explained in the Majority Opinion, under the joint federal-state undertaking of unemployment compensation, states reap substantial benefits so long as their unemployment laws remain in compliance with federal requirements as determined by the United States Secretary of Labor.

Moreover, the answer to Question 4 amplifies the federal government's misunderstanding of the situation. It opines that a direct contribution can only be made through a payroll deduction from employee's paycheck. However, as already noted, under the facts of this case Appellant can never direct that personal funds be contributed through a payroll deduction. If it were otherwise, Union would not have had to employ the mechanism that has resulted in Appellant's current situation. I do not believe that the federal program letter represents a clear answer to the facts before us or the answer that would necessarily be provided by a federal court considering this matter.

In conclusion, I would again note that this is an atypical contribution arising from unique negotiations. The Union wished to give back its COLA so that the pension fund would be bolstered. Employer was willing to act as the conduit to permit this to occur. It is erroneous to ignore the intent of the parties. Likewise, it is erroneous to compare this case to one where vague promises of benefits are exchanged for speculative wage increases. Appellant relinquished not a mere bargaining position, but an actual amount of money with present value that Employer was obligated to pay him. Thus, in my view, the COLA give-back should be considered an employee contribution to the pension fund, and Appellant is entitled to have the offset against his unemployment benefits reduced from 100% to 50%.[7]

[7] By holding that the COLA give-back is not an employee contribution, the majority implicitly approves the Commonwealth Court's reversal of its prior decision in Ehman v. UCBS, 776 A.2d 1031 (Pa. Cmwlth. 2001). I recognize that Ehman's reasoning is consistent with my view, and believe that the Commonwealth Court handled this issue correctly the first time it considered this matter.