

**[J-132-2002]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

BOROUGH OF ELLWOOD CITY, A	:	No. 27 WAP 2002
MUNICIPAL CORPORATION,	:	
	:	Appeal from the Order of the
Appellee,	:	Commonwealth Court entered November
	:	8, 2001 at No149CD2001, reversing the
v.	:	Order of the Court of Common Pleas of
	:	Lawrence County entered December 21,
	:	2000 at No10904of1999CA.
	:	
ELLWOOD CITY POLICE DEPARTMENT	:	786 A.2d 342 (Pa. Cmwlth. 2001)
WAGE AND POLICY UNIT,	:	
	:	ARGUED: September 11, 2002
Appellant.	:	

**CONCURRING OPINION**

**MADAME JUSTICE NEWMAN**

**DECIDED: JUNE 2, 2003**

I join the Opinion of the Majority, which correctly determined that the finding contained in the Act 205 Actuarial Report, that the Pension Fund was unsound, required the Bargaining Unit members to contribute to the Fund, despite the existence of an arbitrator's definition of actuarial soundness as being one in which Fund assets exceed Fund liabilities. However, I write separately to note that (1) there is no provision in either Act 600 or Act 205 that supports this definition, and (2) the CBA explicitly recognizes that member contributions are required when an actuary determines that the Fund is unsound.

First, neither Act 600 nor Act 205 permits the elimination of employee contributions to a municipal pension plan merely because the Fund's assets exceed its liabilities. Instead, both Acts require that an independent actuary in an Act 205 Actuarial Report make

the determination of actuarial soundness. 53 P.S. § 895.201(a), (b); 55 P.S. § 772(c). At the time of the 1992 McDaniel Award, we cannot tell whether the Pension Fund was actuarially sound; we only are aware of the fact that the arbitrator was called upon to make that determination.

The Bargaining Unit asserts that the definition of actuarial soundness is set forth in the 1992 McDaniel Arbitral Award and controls any determination concerning whether member contributions are required. It further states that its position is supported by the fact that the 1993, 1995, and 1997 successor agreements made no change to the definition and these agreements limit the meaning of the term. However, this issue was previously challenged by the Bargaining Unit and resolved against it. Indeed, in 1995, the Borough implemented an eight percent pension contribution because an Act 205 Actuarial Report called the actuarial soundness of the Pension Fund into question. The Bargaining Unit challenged the authority of the Borough to implement this contribution before the Pennsylvania Labor Relations Board (PLRB). It claimed that the interpretation of the McDaniel Award controlled and that the Borough had not bargained the 1995 agreement in good faith because it had included a contribution requirement. The PLRB dismissed the complaint, rejecting the arguments of the Bargaining Unit. The Bargaining Unit failed to appeal this determination.

Second, pursuant to Section 6 of Act 600,<sup>1</sup> only the Borough has the authority to eliminate or reduce member contributions based on the soundness of the Fund. 55 P.S. §

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<sup>1</sup> Section 6 of Act 600 provides, in pertinent part:

(c) If an actuarial study shows that the condition of the police pension fund of any borough . . . police department is such that the payments into the fund by members may be reduced below the minimum percentages hereinbefore prescribed, or eliminated, and that if such payments are reduced or eliminated contributions by the borough . . . will not be required to keep the

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772(c). That authority is discretionary. Section 6 provides that "the borough **may**, on an annual basis . . . reduce or eliminate payments into the fund by its members." 53 P.S. § 772(c) (emphasis added). The exercise of the Borough's discretion to eliminate or reduce member contributions is governed primarily by the Act 205 Actuarial Report. When the actuary determines that the Pension Fund is actuarially unsound, and so states in the Act 205 Actuarial Report, the Borough has no discretion to either reduce or eliminate member contributions. It is only when the Pension Fund is actuarially sound that the Borough may exercise its discretion to alter those contributions.

In the instant matter, the CBA explicitly recognizes that member contributions must be made when an actuary determines that the Fund is unsound. Article V, Section G(3) of the CBA provides:

(3) In the event it is **actuarially determined** that the amount of annual contribution is not keeping the Plan actuarially sound, then such contribution shall be increased at a percentage necessary to make the Pension fund again actuarially sound.

(Emphasis added). Because the actuary in this case determined that the Fund was unsound and mandated that member contributions be required in the amount of 5.6%, the Bargaining Unit members must contribute. The language of the CBA itself requires an **actuarial** determination, not a Borough or arbitral determination, that member contributions are required. Thus, I do not believe that the McDaniel Award is applicable, but is reserved

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fund actuarially sound[,] the governing body of the borough . . . may, on an annual basis, by ordinance or resolution reduce or eliminate payments into the fund by its members.

55 P.S. § 772(c).

for those instances in which the actuary has not declared the Pension Fund unsound and the Borough has not reduced the contributions required. That is not the factual predicate before us; here, it was "actuarially determined" that contributions were required.

Finally, I observe that the basis for our decision today is that the imposition of a 5.6% Pension Fund contribution is consistent with Act 205, Act 600, and the CBA. There is no term of employment set forth in the CBA in this case that was agreed to by the Borough to obtain a favorable bargaining position. The Bargaining Unit has always been required to accept the imposition of member contributions to the Pension Fund when it is "actuarially determined" that such contributions are required.