LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Issue 1, 2021

Greetings from the Director:

Greetings to everyone from snowy central Pennsylvania. We here at the Commission have assembled a handful of appellate cases from the last quarter of 2020 for your perusal as we await Spring, including matters involving open record access to employee names, land use, and tax limitations in home rule municipalities. We have also included some notable bills moving through the General Assembly during this very busy early session.

-David Greene, Executive Director of the Local Government Commission

Legislative Updates:

House Bills **276 (PN247)**, **277 (PN248)**, and **278 (PN249)** amend the First Class Township Code, Second Class Township Code, and Titles 8 and 11 of the Pennsylvania Consolidated Statutes, respectively, to authorize municipalities to dedicate up to three mills to support their municipal police department, following a referendum.

Senate Bills **84 (PN66)**, **85 (PN67)**, and **86 (PN68)** amend the County Code, Second Class County Code, and Title 53 of the Pennsylvania Consolidated Statutes, respectively, to specify the first assistant district attorney to fill a vacancy for district attorney for class 2 through 8th class counties and home rule counties until the next municipal election.

Continued on page 5 >>

Keep up with the latest from the Local Government Commission:
@PA_LGC
www.lgc.state.pa.us

Civil Rights

Durham v. City of Philadelphia, 2020 WL 6940021 (E.D. Pa. November 25, 2020). Disabled Plaintiff sued City of Philadelphia for municipal liability following an arrest by John Doe officers. City moved to dismiss, and District Court granted motion to dismiss without prejudice. Plaintiff was arrested by Philadelphia police officers. During the arrest, officers placed Plaintiff's wheelchair in police vehicle to transport Plaintiff to police station. Officers ordered Plaintiff to stand for mug shot and forcibly lifted him after he said he could not stand. Officers then let go of Plaintiff, causing him to fall to the floor and fracture his leg. Officers did not provide medical care, and Plaintiff was released two days later. Plaintiff sued officers for excessive force, failure to intervene, and assault and battery, and sued City for municipal liability. District Court granted City's motion to dismiss, holding that Plaintiff failed to "allege facts allowing [Court] to find the City has a custom or practice of disregarding handicapped persons' needs upon arrest or during intake at police stations" nor did he "allege the John Doe officers interact with physically disabled individuals with sufficient frequency to create a need for the City to create a specific training program to handle these situations appropriately. He fails to plead facts which may allow us to plausibly infer municipal liability under *Monell*."

Philadelphia Vietnam Veterans Memorial Society v. Kenney, 2020 WL 7640930 (E.D. Pa., December 23, 2020). Citizens group contested unofficial policy of defendant City to suspend ordinary permit process for public demonstrations adopted by City during Covid-19 pandemic as well as the subsequent executive order establishing gathering limits. City initially determined that it would not issue any gathering permits for groups more than 50, but also would not disperse gatherings asserting First Amendment rights without a permit – essentially removing the necessity that the city sanction a larger gathering, without totally removing the First Amendment rights of a larger group. The later executive order established gathering limits based on the space

that would be available for the anticipated participants in the gathering. Trial court declined to issue a preliminary injunction against City partially on the basis that the unofficial policy was ultimately rendered moot by a later executive order establishing the specific standard, and that the plaintiffs would have a low likelihood of success on the merits because the city had adopted a content neutral regulation on assembly to advance a significant government interest to reduce the likelihood of viral spread during the event, and that the remaining channels of communication were adequate to provide a reasonable opportunity to convey the speaker's message.

Government Accountability

Highlands School District v. Rittmeyer, 243 A.3d 755 (Pa. Cmwlth., December 3, 2020). Reporter sought information on school district employees placed on unpaid disciplinary leave. Reporter submitted Right-to-Know Law (RTKL) requests seeking information employees, and the district provided job title, length of employment, salary, but not the employees' name or the statement of the charges that resulted in the disciplinary action. Reporter appealed to the Office of Open Records (OOR), and the OOR granted Reporter's appeal and ordered disclosure of the names. Before the OOR, District argued that the RTKL excludes from disclosure, in relevant part, "records relating to an agency employee," including "[i]nformation regarding discipline, demotion or discharge contained in a personnel file." This exemption, however, "shall not apply to the final action of an agency that results in demotion or discharge." The OOR concluded that section 708(b)(7)(viii) was inapplicable because names alone were sought, not any record contained in personnel files. Reasoning that the names of public employees are generally considered public information and that District lists employee names on its website, the OOR concluded that names were not exempt from disclosure under section 708(b)(7)(viii) of the RTKL. The trial court reversed, holding that the purpose of the disciplinary exemption would be frustrated if the names involved could be disclosed, and that the leave decision was not a "final action," subject to disclosure. The trial court further held that a specific provision of the Public School Code did not supersede the RTKL. Commonwealth Court affirmed the trial court. In addition to agreeing that the Public School Code does not require the disclosure of the names, it further held that the 708(b)(7)(viii) exemption protects names until a "final decision," and that the "official action" and executive session provisions of the Sunshine Act, 65 Pa.C.S. §§704, 708 do not conflict with the RTKL by requiring disclosure prior to a final decision.

[Plaintiff] cannot state a claim by "[m]erely alleging ... a single injury 'could have been avoided if an employee ... had better or more training.'" To prevail under a single-violation theory, [Plaintiff] must instead "show that the need for the [City] to provide specific training in order to avoid constitutional injury was "highly predictable" or "patently obvious."

- Durham v. City of Philadelphia

Land Use

Republic First Bank v. Marple Twp. Zoning Hearing Bd., 2020 WL 7334364 (Pa. Cmwlth., December 14, 2020).** Republic First Bank d/b/a Republic Bank ("Bank") was denied a special exception to construct a bank by Marple Township Zoning Hearing Board ("Board"). Bank appealed Board's decision to Court of Common Pleas, which affirmed in part and reversed in part Board's decision. The court reversed Board's decision that the project did not meet most of the requirements for a special exception but affirmed Board's determination that the proposed bank would not be "less objectionable in external effects than the existing nonconforming use with respect to...appearance." Bank appealed and Commonwealth Court reversed lower court's

affirmation of Board's determination. The proposed new building would be made primarily of glass and steel "with a 'unique aesthetic character,' that is dramatically different in appearance than the existing nonconforming use." Board's denial of Bank's new building was predicated on the differences in design and appearance between the proposed project and the existing residential community. Commonwealth Court reversed, holding that "[b]ecause the sole remaining basis for denying the special exception is aesthetics, which precedent establishes cannot alone be the basis for denying zoning relief, we are constrained to reverse."

Municipal and Tax Claims

Nguyen v. Delaware County Tax Claim Bureau, 2020 WL 7703163 (Pa. Cmwlth., December 29, 2020). Appellant tax sale Purchaser appealed trial court decision affirming Objectors' petition to set aside the tax sale. The trial court determined that Objectors had standing as equitable owners of the property, and Bureau's deficiencies in providing notice of the tax sale to the prior owner of the property pursuant to the Real Estate Tax Sale Law (RETSL) constituted grounds to set aside the upset tax sale. The trial court conducted a hearing, accepted memoranda of law on the issue of Objectors' standing along with affidavits and a deed to the property. The court then held oral argument but conducted no further evidentiary hearing before issuing an order granting the petition. The trial court concluded that Objectors were equitable owners of the Property at the time of the upset tax sale due to their execution of an agreement to purchase the Property prior to the closing on September 13, 2018, presumably having relied on the pleadings and affidavits. Commonwealth Court vacated and remanded to the trial court with instructions. After discussing case law related to RETSL standing for equitable owners, Commonwealth Court held that deciding standing without an evidentiary hearing was inappropriate and the lack of such a hearing violated the due process of the Purchaser, who wished to present evidence of actual notice prior to the September 13th date.

Municipal Authorities

East Dunkard Water Authority v. Southwestern Pa Water Authority, 2020 WL 6707503 (Pa. Cmwlth., November 16, 2020).** Commonwealth court reviewed a dispute between municipal authorities providing water service in adjacent territories. When appellee Southwestern Pennsylvania Water Authority (SPWA) proposed to extend service to an industrial site, appellant East Dunkard Water Authority (EDWA) contested that the proposed site was within territory EDWA had obtained by contract from a cooperative association and thus SPWA would be in violation of the prohibition on authorities competing against an existing service provider in the Municipal Authorities Act. Appellant contended that it was not required to seek Public Utility Commission (PUC) approval over its contract with the association to obtain service territory. The Commonwealth court found that, while true, neither the EDWA nor the association were public utilities, when extending beyond the territory of the municipal corporation incorporating the EDWA, it was a public utility for the purposes of its contract. Thus, Commonwealth court affirmed the trial court's dismissal of EDWA's complaint.

Police Power

Cigar Assoc. of America et al. v. City of Philadelphia et al., 2020 WL 6703583 (E.D. Pa., November 13, 2020). Plaintiff cigar association sought preliminary injunction against the city of Philadelphia to enjoin enforcement of the defendant's ban on the sale of flavored tobacco products. The city asserts that its ordinance, intended to curb tobacco use by minors, is entitled to a deferential interpretation by the court. Because the Commonwealth's preemption on local tobacco regulation points to a statute that lists only five Commonwealth rules, any perceived ambiguity as to the scope of the preemption should be resolved in favor of the locality's regulation. District Court, however, rejected the city's argument on the basis that it attempted to apply a standard based on an implied preemption, rather than the explicit preemption found in Title 53. Because local regulations relating to the "subject" of the Commonwealth's provisions of the Crimes Code intended to prevent the sale and consumption of tobacco products to minors *expressly* preempt local regulations, the City was not entitled to the

deferential standard applied to an implied preemption. Rather, even where the City argued that its ordinance would bar sales of flavored tobacco to anyone, minors or adults, because the ultimate ordinance "concerned" the limitation of sales to minors, the preemption applied -- at least so far as the preemption convinced the district court of the plaintiff's likelihood of success for the purposes of a preliminary injunction at this juncture.

Public Employment

Uwchlan Twp. v. Uwchlan Twp. Police Assoc., 2020 WL 5989879 (Pa. Cmwlth., October 9, 2020).** Appellant Township terminated a township police officer for conduct violations related to the officer performing an unwarranted search and then providing false statements about the search, leading to the premature dismissal of the investigation. Officer sought grievance arbitration protesting his termination, and the arbitrator reinstated his employment subject to a one-year suspension, finding that although the conduct violations were severe, this had been the officer's first offense, the township's investment in the office had been substantial, and the progressive discipline principles incorporated into the collective bargaining agreement could deter future violations. Township's appeals to trial court and Commonwealth court turned on interpretation of the Township's police manual and its determination that the Township's Board had final decision making authority on any administrative determination that does not affect an officer's pay. Arbitrator interpreted manual to find that a termination decision did, in fact, affect the officer's pay, and thus the decision was subject to the arbitrator's review. Because existing precedent determines that the court does not have the power to review the reasonableness of an arbitrator's interpretation of the collective bargaining agreement, the court affirmed the trial court decision upholding the arbitrator's decision.

O'Neill v. State Employees' Ret. Sys., 241 A.3d 117 (Pa. Cmwlth., October 19, 2020). Petitioner appealed order of the State Employees' Retirement System Board (Board) holding that Petitioner forfeited his pension benefit upon pleading guilty to two counts of the same federal crime. Commonwealth Court affirmed Board's decision. Per Section 3 of the Public Employee Pension Forfeiture Act (1978, P.L. 752, No. 140), the pension benefit of a public official or public employee is forfeited when that official or employee is convicted of a crime related to public office or public employment. The act further defines "[c]rimes related to public office or public employment" to include any federal crime substantially the same as one of the enumerated forfeiture-triggering state crimes, and explicitly lists Section 4906 of Title 18 of the Pennsylvania Consolidated Statutes as one of these enumerated crimes. Petitioner was convicted of violating Section 1001 of Title 18 of the United States Code (18 U.S.C.A. § 1001). Pursuant to the precedent set in *Merlino* and *Reilly*, Section 1001 is substantially the same as Section 4906 for purposes of the Public Employee Pension Forfeiture Act. Thus, the Court affirmed the Board's order that Petitioner forfeited his pension benefit when he pled guilty to violating Section 1001.

The Local Tax Enabling Act's (LTEA) inapplicability here is clear. [LTEA] applies only to specified categories of municipalities. Although it applies to Second Class A cities – Scranton's former status – it does not apply to home rule municipalities.... Thus, [LTEA]'s aggregate tax limitation is likewise inapplicable to home rule municipalities. Taxpayers argue that [LTEA] should be construed as applicable to home rule municipalities because it applies in every part of the Commonwealth, even though it facially does not apply to home rule municipalities. This argument is without merit.

- Gary St. Fleur, et al. v. City of Scranton, et al.

Taxation and Finance

Gary St. Fleur, et al. v. City of Scranton, et al., 2020 WL 6265865 (Pa. Cmwlth., October 26, 2020).** Appellant City contests that a trial court decision applying the aggregate tax limitation contained in the Local Tax Enabling Act (LTEA) was erroneous. A municipality authorized to levy taxes under the LTEA, and subject to its limitations, may collect an amount of tax, in aggregate, equal to no more than 1.2% of the total market value of real estate in the municipality. However, the City argued, and the court found, that a home rule municipality may levy the subjects of taxation it would be authorized to levy by the LTEA, but it is not restricted to the act's limitations on rates because of the provisions of the Home Rule and Optional Plans law. Further, even if the Court accepted the appellee's argument that aggregate tax cap was not a limitation on rates, its applicability as a regulatory mechanism on the home rule municipality would not be mandatory because the LTEA does not preempt home rule municipal power as an act applicable in every part of the Commonwealth. Although not essential to the holding and ultimately dicta, the court expressed skepticism that the City's rates were authorized and justified by its financial recovery plan alone, absent evidence specifically demonstrating that the application of the tax limitation would have frustrated the City's recovery objectives.

Indiana University of Pennsylvania v. Jefferson County Board of Assessment Appeals, 243 A.3d 745 (Pa. Cmwlth., December 3, 2020). University acquired properties partially subject to commercial leases and used by private businesses. University notified Assessment Office that the properties should be removed from the County's tax rolls because they were not subject to local taxation. Assessment Board denied the University's application with respect to most of the properties. The University appealed, and the trial court concluded that the University was immune from paying local property tax on the land underlying the buildings and the vacant space in each building, but it was subject to taxation on the portions of the buildings encumbered by commercial leases. The trial court noted that law authorizes the University to lease property to commercial third parties, but it concluded that the University's primary mission of educational instruction is "in no way furthered by its maintenance of the commercial leases here at issue." Commonwealth Court reversed. Noting that the Pennsylvania Supreme Court held that the "pivotal factor" in determining tax immunity is "whether the institution's real property is so thoroughly under the control of the Commonwealth that, effectively, the institution's property functions as Commonwealth property," the court observed that the University cannot sell or transfer any of its property without legislative approval. The court concluded that because the University-owned real estate at issue in this case is effectively under the control of the Commonwealth government, it is presumptively immune from local taxation. The majority decision overruled the Court's prior unreported decisions in *Pennsylvania State System of Higher Education v. Indiana Area School District*, 2012 WL 8667893 (Pa. Cmwlth., 2012), *aff'd per curiam*, 69 A.3d 236 (2013), and *Indiana University of Pennsylvania v. Indiana County Board of Assessment Appeals*, 2015 WL 5671153 (Pa. Cmwlth., 2015), *appeal denied*, 140 A.3d 14 (2016).

Legislative Updates: *(Continued from page 1)*

Senate Bill **117 (PN90)** amends the Election Code to reduce the number of required signatures on a nominating ballot for candidates running in a primary for public or party offices in third class cities from 100 to ten. This reduction would bring the requirement for third class cities to the same minimum that currently exists for boroughs, towns, and first and second class townships. The bill also eliminates the $25 filing fee for nominations, as the above referenced municipal classifications do not require filing fees.

** Indicates that this case is UNREPORTED. *See* 210 Pa. Code § 69.414