# Local Government Commission
## Quarterly Legal Update

*Summer 2018*

As summer closes, the latest edition of our Legal Update brings you federal cases on the First Amendment with regard to election law, municipal regulation of employment and public demonstrations, as well as state appellate clarifications of the apportionment of the Local Services Tax and quorum/voting law for municipal authorities. In our legislative corner, Commission bills authorizing public involvement in the decision to reduce the size of a borough council are noted.

- Philip Klotz, Executive Director of the Local Government Commission

## Legislative Updates:

**SB 1168, PN 1748, HB 2470, PN 3636**. Amends the Borough Code to require a court of common pleas to certify a ballot question for a decrease in size of borough council to be submitted to the voters of an eligible borough in the case where at least 5% of the registered electors of that Borough have petitioned the Court asking for such a reduction. SB 1168 was given second consideration by the Senate and re-referred to the Senate Appropriations Committee. HB 2470 was referred to the House Local Government Committee.

**HB 2271, PN 3386**. Creates the Tax-exempt Property Municipal Assistance Act to establish an annual state revenue sharing program to assist municipalities that have qualified tax-exempt property that equals or exceeds 15% of the total market value of assessed property within their corporate boundaries. HB 2271 was referred to the House Local Government Committee.

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## Authorities

*SEDA–COG Joint Rail Authority v. Carload Express, Inc.*, 185 A.3d 1232 (Pa. Cmwlth., May 3, 2018). Sixteen-member Authority board solicited proposals for rail operation agreement. All parties involved agreed that through recusal or abstention, no more than 10 members would be voting on the final selection. Authority informed operators that an affirmative vote of nine members would be required to award the contract. The requirement was not part of the request for proposals and Authority did not amend its by-laws to reflect this requirement. There were seven votes in favor of awarding the new operating agreement to Carload, three opposed, and six abstaining. Based on its prior announcement of the nine-vote requirement, Authority asserted that no selection had occurred. After Carload protested, Authority filed a declaratory action and the trial court agreed that a selection had not occurred. Commonwealth Court reversed. The Municipal Authorities Act specifies that an authority may act upon the vote of a majority of the members "present" at a meeting, unless the authority's bylaws contain a different voting provision. The Court held that this language did not deviate from the common law rule that a majority of those voting in the presence of a quorum is sufficient for action. Because Authority did not alter its by-laws to require a nine-vote approval, it could not impose that requirement on the operation agreement. Thus, the 7-3 vote, with six present and abstaining, was sufficient, despite the alleged acquiescence of Carload. Furthermore, Authority could not rely on a "reservation of rights" provision in the contract documents to avoid awarding the contract to Carload.

## Civil Rights

*Lozman v. City of Riviera Beach, Fla.*, 138 S.Ct. 1945 (U.S., June 18, 2018). Plaintiff, a public critic of City government and who was involved in litigation against it, sued City under §1983 for First Amendment retaliation after being arrested and removed from a public meeting. Five months prior to the arrest, the City council held a closed-door session, in part to discuss a lawsuit Plaintiff had recently had filed. According to the transcript of the meeting, a member suggested that council "intimidate" Plaintiff and others who had filed suit. Later in the meeting a different councilmember

asked whether there was "a consensus of what [the member] is saying," and others responded in the affirmative. The State's attorney determined that there was probable cause for the arrest, but charges were dismissed. At trial on §1983 claims, the jury returned a verdict in favor of the City. The Court of Appeals for the Eleventh Circuit affirmed. Under precedents that the Court of Appeals deemed controlling, the existence of probable cause defeated a First Amendment claim for retaliatory arrest. The Supreme Court reversed. The Court held that a plaintiff need not prove the absence of probable cause to maintain an action for retaliatory arrest against the government if he or she can prove an "official policy" of retaliation and the government cannot prove that it would have arrested plaintiff absent that policy.

*Minnesota Voters All. v. Mansky*, 138 S.Ct. 1876 (June 14, 2018). Minnesota regulation prohibiting entry into the polling place wearing "political" apparel was unreasonable because of the breadth of the term, the State's inability to adequately refine it, and the potential for such an "indeterminate prohibition" to carry the potential for abuse. The Court confirmed state power to prohibit certain apparel when entering polling place as appropriate regulation of a nonpublic forum, and though "narrow tailoring" was not required, the state must "[articulate] some sensible basis" for distinguishing what was permitted from what was prohibited.

*Any number of associations, educational institutions, businesses, and religious organizations could have an opinion on an "issue[ ] confronting voters in a given election." For instance, the American Civil Liberties Union, the AARP, the World Wildlife Fund, and Ben & Jerry's all have stated positions on matters of public concern. If the views of those groups align or conflict with the position of a candidate or party on the ballot, does that mean that their insignia are banned? . . . Take another example: In the run-up to the 2012 election, Presidential candidates of both major parties issued public statements regarding the then-existing policy of the Boy Scouts of America to exclude members on the basis of sexual orientation. Should a Scout leader in 2012 stopping to vote on his way to a troop meeting have been asked to cover up his uniform?*

- *Minnesota Voters All. v. Mansky*

*Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, 2018 WL 2010596 (E.D. Pa., April 30, 2018). Chamber moved for preliminary injunction to bar enforcement of City ordinance seeking to remedy discriminatory wage disparity as violating the First Amendment. The ordinance prohibited employer inquiries of wage history of applicants (the Inquiry Provision) and prohibited reliance on wage history to set employee salaries (the Reliance Provision). The District Court granted the motion in part and denied it in part. The Inquiry Provision was an attempt to regulate commercial speech and even under a relaxed intermediate standard, the City could not provide sufficient evidence to establish the alleged harm of discriminatory wages being perpetuated in subsequent wages such that they contribute to a discriminatory wage gap. Without such evidence, the Court was compelled to conclude that the Inquiry Provision did not directly advance the substantial government interest of reducing wage disparity. The Reliance Provision, alternatively, was a regulation of conduct not speech and was not enjoined. Although the Inquiry Provision was enjoined, the ordinance was not unconstitutionally vague, did not violate due process rights, and was consistent with Pennsylvania home rule law.

*Wilmoth v. Secretary of New Jersey*, 2018 WL 1876021 (3d Cir., April 19, 2018). Appellant "professional circulators of election petitions" challenged New Jersey requirement that circulators for candidates to national office be residents of the state. The District Court dismissed challenge. The Third Circuit vacated, finding that residency requirements implicate "core" First Amendment rights and thus were subject to a strict scrutiny analysis. The Court remanded for development of a record for examination of the gravity of any asserted state interest and the scope of the regulation.

*Pomicter v. Luzerne Cty. Convention Ctr. Authority*, 2018 WL 1733307 (M.D. Pa. April 4, 2018). Authority arena operated by contractor was sued by animal rights activists for violation of First and Fourteenth Amendments to the United States Constitution and Article 1, Section 7 of the Pennsylvania Constitution through enforcement of restrictions on protests and demonstrations. Judgment issued in favor of the plaintiffs. The Authority property was considered a nonpublic forum. Activists protesting circus event were relegated to a designated area and prohibited from approaching patrons for leafletting, prohibited from using sound amplification, prohibited from using "profanity and vulgarity," and prohibited from carrying signs outside of designated area. Generally, all the restrictions were invalidated because the authority failed to present evidence that the policy was reasonably-tailored to promote the purpose of the forum.

## Employment

*City of Pittsburgh v. Fraternal Order of Police Fort Pitt Lodge No. 1*, 2018 WL 3058769 (Pa. Cmwlth., June 21, 2018). Union filed a grievance alleging that officers were underpaid for mandatory call out duty for City event. Although the collective bargaining agreement (CBA) contained a provision for call out compensation, it contained no separate compensation provision for cancelled days off as a result of a call out. The arbitrator held that officers were entitled to eight hours of overtime pay for being called out to work on a pass day because they were deprived of having a full day off and the normal workday is eight hours. The common pleas court vacated the arbitrator's award on the ground that it was unsupported by anything in the CBA. Commonwealth Court affirmed. The fashioning of a remedy not contemplated within the language of the CBA was a reformation of the contract and involved terms of employment properly the subject of interest arbitration, not grievance arbitration.

*Ihlein v. Unemployment Compensation Bd. of Review*, 2018 WL 2106886 (Pa. Cmwlth., May 8, 2018) (UNREPORTED-See 210 Pa. Code §69.414). Manager of borough ceased employment for undetermined reasons and sought unemployment compensation. Both the referee and the Unemployment Compensation Board of Review determined that claimant held a "nontenured policymaking or advisory position rendering him ineligible for benefits." Commonwealth Court affirmed. Because the ordinance creating the management position vested the manager with the duty to "advise" council and "make recommendations," it "communicated the concept that the Manager had an advisory role to the Council." Furthermore, the ordinance established that the manager could be removed at any time by council, and thus was consonant with the purpose behind the purpose of the exclusion.

*Acosta v. County of Northumberland*, 2018 WL 1878570 (M.D. Pa., April 19, 2018). County held to be an "enterprise" that violated the Fair Labor Standards Act by not paying Area Agency on Aging, Children and Youth Services, and Behavioral Health/ Intellectual Disability Services on-call case workers for time spent on telephone calls and paperwork and by not properly recording this time. Summary judgment on behalf of the Secretary denied on the issue of liquidated damages.

## Liquor

*Haugh v. Pennsylvania Liquor Control Bd.*, 185 A.3d 469 (Pa. Cmwlth., April 30, 2018). Objectors petitioned the Commonwealth Court for review of the Pennsylvania Liquor Control Board's order approving Township's petition for an exemption from the Board's amplified sound restrictions pursuant to the Liquor Code. Commonwealth Court affirmed. So long as the Township intended to enforce a noise ordinance, the ordinance could have standards that were less stringent than those of the Board. Furthermore, the Board did not abuse its discretion in finding that granting the petition would not have an "adverse effect on the welfare, health, peace and morals of the residents living in the vicinity of the identified area," and the fact that objectors resided in a different municipality did not undermine the Township evidence that it would, and did, enforce the noise ordinance regardless of the location of the complainant.

## Open Records

*California Borough v. Rothey*, 185 A.3d 456 (Pa. Cmwlth., April 25, 2018). Borough appealed trail court decision affirming a final determination of the Office of Open Records (OOR) that a video recording confrontation between a police officer and a detainee in a holding cell at the Borough Police Department was disclosable. After the confrontation, the police chief downloaded the video and took it to the district attorney for review. The district attorney and chief agreed that the officer's "actions were criminal in nature," and chief filed criminal charges against the officer, who was subsequently fired. The chief permitted a member of the media to review the video. OOR held that the video was not a "criminal investigative record" because it was not created for the purpose of furthering an investigation. Commonwealth Court reversed. Initially the court held that the issue of who was the proper appeals officer, the OOR or an appointee of the district attorney, was moot because in either case the matter would be, and was, appealed to the court of common pleas. The court further held that a record need not be created for the purpose of an investigation in order for it to be exempt as an investigative record under the Right-to-Know Law, and the video in this matter was also information "assembled" for the purpose of investigation by the chief through download and forwarding to the district attorney. This made the video exempt from disclosure except to criminal justice agencies under the Criminal History Record Information Act.

## Public Office

*In re Truss*, 2018 WL 1833521 (Pa. Cmwlth., April 18, 2018) (UNREPORTED-See 210 Pa. Code §69.414). Following Review Board determination that constable should be removed for failure to maintain appropriate residence, the trial court accepted the board's findings and ordered the removal. Constable appealed to Commonwealth Court and petitioned for transfer to the Pennsylvania Supreme Court pursuant to 42 Pa.C.S. §722(2), which vests exclusive jurisdiction in the Supreme Court for appeals from trial court orders regarding the "right to public office." Commonwealth court held that the relevant section has been restricted to those public offices with "policy-making authority," and the office of constable is vested with no such authority. Consequently, the appropriate venue for the appeal is Superior Court, the court which has historically heard removal actions.

## Taxation

*Township of Washington v. Township of Upper Burrell*, 184 A.3d 1083 (Pa. Cmwlth. April 11, 2018). In a case of first impression, a commercial property straddled the boundary between two townships each of which levied a $52 annual local services tax paid by each of the 750 employees who worked

*The question remains as to what is the appropriate standard for [Local Service Tax] allocation under the [Local Tax Enabling Act] for integrated facilities that span more than one political subdivision. In other words, how should the local services tax be shared between them? . . . [An] equal division allocation has no relation to the actual "place of employment." Although the place of employment is located in two townships, the dividing line between Washington and Upper Burrell Township is not equal. Because the place of employment encompasses the whole facility, not just the building, the proper tax allocation must relate to the division between the townships. . . . Moreover, "[t]he specific boundary line between the townships herein has been established in previous litigation regarding real estate taxes, by the consent of the townships. . . . Applying this formula here, Washington Township is entitled to taxes levied for 28 percent of the . . . employees and Upper Burrell Township is entitled to taxes levied for 72 percent of the . . . employees.*

- *Twp. of Washington v. Twp. of Upper Burrell*

at the property. Prior to this litigation, all of the local services tax collected was levied, assessed and retained by Upper Burrell Township. Washington Township asserted it was entitled to half the tax and consequently initiated the court action. The trial court held that the local services tax is determined based upon the "specific" place of employment for each of the employees where they performed the functions of their employment on the first day that the person became subject to the tax for that payroll period. Commonwealth Court reversed and remanded. The Court found that the "place of employment" must be treated as a whole, not a collection of individual workstations within the facility as employees work in both townships not just the specific location where the employee stands or sits on the first day of the payroll period. The Court held that the proper allocation is based on the percentage of the property within each township. Thus, Washington Township was entitled to the local services taxes levied for 28 percent of the 750 employees and Upper Burrell Township was entitled to taxes levied for the remaining 72 percent of employees.

## Tax Claims

*In re County of Carbon Tax Claim Bureau Judicial Sale*, 187 A.3d 280 (Pa. Cmwlth., May 18, 2018). School districts appealed order of trial court denying exceptions to petition for confirmation of judicial sales and distributions of proceeds. Districts chose to collect tax claims through a private collector under the Municipal Claim and Tax Liens Law (MCTLL) rather than use the Bureau in accordance with the Real Estate Tax Sale Law (RETSL). Bureau conducted judicial sales of properties and prioritized the claims of the districts as fourth-priority liens rather than second-priority tax claims. The Commonwealth Court reversed and remanded. Because both MCTLL and RETSL expressly provided that tax claims are a "first lien" subordinate to only Commonwealth liens, and because the acts are to be read together, proceeds were due as a second-priority to the districts.

## Wards

*Varner v. Swatara Township Board of Commissioners*, 185 A.3d 295 (Pa., June 1, 2018). Township residents and commissioner filed declaratory petition challenging validity of ordinance by which township board of commissioners purported to change one-ward five-commissioner at-large system back to a nine-commissioner by-ward system without judicial approval as specified in the First Class Township Code. The Board asserted that court approval was not required because the ordinance was enacted pursuant to Article IX, Section 11 of the Pennsylvania Constitution, entitled "Local Reapportionment," and the Municipal Reapportionment Act (the Act), 53 Pa.C.S. §§ 901–908. The trial court concluded that, prior to the ordinance, the Board was "entirely elected at large" and its attempt to return to the by-ward system was not an act of reapportionment. According to the court, judicial approval was therefore required pursuant to Section 401 of the Code and in the absence of such approval, Ordinance 2016–7 was void ab initio. Post-trial relief was denied and the Board filed an appeal. The Pennsylvania Supreme Court affirmed. The Court agreed with Commonwealth Court that moving from at-large voting to a ward configuration was not a "reapportionment," and consequently the Code applied.

## Legislative Updates:

*Continued from page 1*

**HB 2620, PN 3959**. Amends Title 3 (Agriculture) of the Pennsylvania Consolidated Statutes to repeal most of the changes made to the fireworks law by Act 43 of 2017, including the legalization and taxation of "Class C" or "consumer-grade" fireworks, and restore the former statutory provisions as they existed prior to the passage of Act 43. House Bill 2620 was referred to the House Agricultural and Rural Affairs Committee.