

[J-7A&B-2009]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

BOROUGH OF ELLWOOD CITY,	: No. 44 WAP 2008
	:
v.	: Appeal from the Order of the
	: Commonwealth Court entered January 4,
	: 2008 at No. 473 CD 2007, reversing the
	: Order of the Pennsylvania Labor Relations
	: Board entered February 20, 2007 at No.
PENNSYLVANIA LABOR RELATIONS	: PF-C-06-116-W
BOARD,	:
	:
	:
APPEAL OF: ELLWOOD CITY POLICE	: ARGUED: March 2, 2009
WAGE AND POLICY UNIT	:

BOROUGH OF ELLWOOD CITY,	: No. 45 WAP 2008
	:
Appellee	: Appeal from the Order of the
	: Commonwealth Court entered January 4,
v.	: 2008 at No. 473 CD 2007, reversing the
	: Order of the Pennsylvania Labor Relations
	: Board entered February 20, 2007 at No.
	: PF-C-06-116-W
PENNSYLVANIA LABOR RELATIONS	:
BOARD,	: ARGUED: March 2, 2009
	:
Appellant	:

CONCURRING OPINION

MR. JUSTICE McCaffery

DECIDED: JULY 21, 2010

I join in the majority's conclusion that the order of the Commonwealth Court must be reversed because a municipality's ban on the use of tobacco products by members of a

municipality's police labor organization is a mandatory subject of bargaining. Further, I join in, and applaud, the majority's determination that the Borough Code does not trump the provisions of Act 111, although, as I shall explain infra, I do not join in the majority's determination that courts, on a case-by case basis, must determine whether an ordinance may remove terms and conditions of employment of Act 111 employees from the bargaining table.

For the reasons set forth in my concurring and dissenting opinion in International Ass'n of Fire Fighters Local 22 v. City of Philadelphia, No. 39 EAP 2008 (filed _____) (McCaffery, J., concurring and dissenting), I respectfully cannot fully join in the majority's analysis. Where the majority has "no hesitation in recognizing that, although Act 111 does not speak to limitations on collective bargaining over subjects which implicate managerial prerogatives, [such matters] are not subject to mandatory collective bargaining,"¹ my hesitation in this matter is significant. In my concurring and dissenting opinion in City of Philadelphia, I express my concern that because Act 111, unlike the Public Employee Relations Act ("PERA"),² is silent on the issue of "managerial prerogatives," recognition by this Court of a robust "managerial prerogatives" component in Act 111 will cause a series of great harms. Chief among these is the effective and impermissible enlargement of the narrow certiorari scope of review, a result completely contrary to our previous case law. Further, I express my opinion that this Court's insertion into Act 111 of a "managerial prerogatives" component that invites judicial review regarding the limits of an Act 111 interest arbitration panel's consideration of disputes involving undisputed "terms and conditions of employment," effectively rewrites Act 111, does

¹ Slip op. at 15-16.

² Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §§1101.101-1101.2301.

violence to Sections 1 and 7 of that act, and is contrary to Act 111's purposes as repeatedly observed by this Court's previous case law.

Further, I respectfully believe that in this case, the majority's casual borrowings from PERA and case law interpreting that act are made without any analysis concerning the specific texts of each of the two acts, the similarities of and differences between the classes of individuals covered by these acts, or the legislative intent behind the establishment of each of these acts.³ Additionally, the majority completely fails to take into account how the "linchpin" of Act 111 -- its "no appeal" mandate -- would fare under the majority's analysis of and approach to Act 111. See Pennsylvania State Police v. Pennsylvania State Troopers' Ass'n (Betancourt), 656 A.2d 83, 89 (Pa. 1995) (recognizing that because the services of "police and fire personnel ... are so vital to an ordered society," and the "interests of labor and management, as well as those of the general public" are served by swift, non-appealable resolution of labor disputes concerning these critical public employees, Act 111's explicit "restraint on judicial activism is the linchpin of" the act).

³ The majority cites City of Washington v. Police Department of City of Washington, 259 A.2d 437 (Pa. 1969), as precedent for recognition of a "managerial prerogative" component in Act 111, based on a single sentence. See slip op. at 16. That sentence reads: "Public employers are in many respects more constrained in what they may do vis-à-vis their employees, and those limitations must be maintained." City of Washington, supra at 442. I believe it is a serious misinterpretation of City of Washington to conclude that this sentence is somehow recognition of managerial power. Reading City of Washington in its proper context, I believe that the above sentence simply expresses the reality that public employers may be constrained by relevant legislation and may not be forced by arbitration awards to commit illegal acts. Accordingly, we recognized that arbitrators do not have the authority to impose an award that would require, for example, a local municipality to violate a statute of the General Assembly. Indeed, City of Washington recognized "that the scope of the submission to the" arbitration panels involved the "legitimate terms and conditions of employment" and that an arbitration award may "mandate" the public employer to take whatever action is necessary, within the employer's power, to implement that award. Id. See also 43 P.S. § 217.7.

Although I disagree with the majority's analysis, I welcome our review of this case because it helps to illustrate one of the central points in my concurring and dissenting opinion in International Ass'n of Fire Fighters. Act 111 was devised to ensure "the swift resolution of disputes" in order to "decrease[] the chance that the workforce would be destabilized by protracted litigation, a state harmful to all parties." Town of McCandless v. McCandless Police Officers Association, 901 A.2d 991, 997 (Pa. 2006). In order to achieve this goal, "the legislature dictated a restraint on judicial activity ... and forbade appeals from an arbitration award." Id.⁴ See also Betancourt, supra at 89 ("[A]n Act 111 arbitration panel's resolution of the dispute must be sure and swift[; otherwise,] much of its effectiveness would be lost if the mandate of its decision could be delayed indefinitely through protracted litigation. ... **The legislature's intent was to prevent Act 111 arbitration awards from miring down in litigation.**") (emphasis added).⁵

How have the courts of this Commonwealth treated the "no appeal" mandate in Act 111 and how have they otherwise sought to implement the legislature's intent? What

⁴ Section 7 of Act 111 provides, in relevant part: "The determination of the majority of the board of arbitration thus established shall be final on the issue or issues in dispute and shall be binding upon the public employer and the policemen or firemen involved. Such determination shall be in writing and a copy thereof shall be forwarded to both parties to the dispute. No appeal therefrom shall be allowed to any court." 43 P.S. § 217.7.

⁵ I understand both that the present case is on appeal from a decision of the PLRB based on the Union's filing of a charge of unfair labor practices, and that decisions of the PLRB are not subject to the Act 111 "no appeal" mandate. However, there can be no doubt that the majority's interpretation of Act 111 will be applied to the endless stream of future appeals from "non-appealable" Act 111 arbitration awards. Thus, I believe this case is illustrative of the ridiculous extent to which the concept of "managerial prerogatives," imported into the sphere of Act 111, has rendered virtually meaningless an essential component of Act 111, its "no appeal" mandate. Now, on appeal, courts are endlessly determining whether a subject in contention falls on one or the other side of the imaginary, judicially-created line that separates "managerial prerogatives" from "bargainable" terms and conditions of employment. Once again, I submit that this Court is required to interpret Act 111 in a manner that applies, and makes meaningful, its actual provisions.

weighty issues of state have prompted the courts to set aside Act 111's clear mandate against judicial review in order to safeguard the critical workings of government and the public weal? Consider the following language from the majority's opinion in the instant case, which I quote with respect:

[W]e note that no one disputes that ... police officers were permitted to smoke and use other tobacco products in Borough buildings, vehicles, and equipment. Additionally, ... tobacco usage in the workplace is germane to the work environment. Furthermore, we find that the topic of workplace tobacco usage is unlike those significant core entrepreneurial topics that are more naturally considered to be inherently managerial in nature such as decisions regarding the programs of the employer, standards of service, overall budget, use of technologies, organizational structure, and selection and direction of employees. See [Section 702 of PERA,] 43 P.S. § 1101.702. Thus, we conclude that collective bargaining over the policy regarding tobacco usage does not unduly infringe upon employer's inherent managerial decision making. Therefore, in these circumstances, the Borough's ban on tobacco products was not a managerial prerogative, and, thus, was subject to mandatory collective bargaining.

Slip op. at 17-18.

Now, in this case, the Commonwealth Court and this Court have devoted their considerable resources and attention to figure out whether general smokeless tobacco usage and limited smoking by police officers is an issue subject to collective bargaining or whether it resides in the amorphous gelatin of "managerial prerogatives." I believe I rest on solid ground in opining that such judicial review is not exactly what the General Assembly had in mind when it enacted Act 111. Rather, in my opinion, it is beyond peradventure that issues such as the one in the instant case begin with the collective bargaining process and should end with the arbitrator's decision. "No appeal therefrom shall be allowed to any court." 43 P.S. § 217.7. Thus, I believe that the majority's perception of a broad

managerial prerogative component in Act 111 cases, and its casual view of the role of appellate courts to determine the reach of managerial prerogative on a case-by-case basis, wholly ignores both the letter and intent of Act 111. Worse still, the majority has now, out of the blue, regrettably added the concept of “entrepreneurial topics” to define the public employer’s “managerial prerogatives,”⁶ thus expanding even farther the reach of “managerial prerogative,” a concept non-existent in the actual language of Act 111. For these reasons and the additional reasons I set forth in my concurring and dissenting opinion in City of Philadelphia, I cannot join the majority in this “rewriting” of Act 111.

Additionally, for these same reasons, I cannot join in the majority’s determination that courts, on a case-by case basis, must determine whether an ordinance may remove terms and conditions of employment of Act 111 employees from the bargaining table. See slip op. at 19. In my respectful opinion, municipalities may not avoid bargaining over terms and conditions of employment with Act 111 employees by passing ordinances that purportedly preempt consideration of matters that would otherwise be clearly bargainable. “We emphasize that [a public employer may] **not** ... hide behind self-imposed legal restrictions.” City of Washington v. Police Department of City of Washington, 259 A.2d 437, 442 (Pa. 1969) (emphasis in original). Act 111 does not restrict the extent or nature of “terms and conditions” of employment subject to bargaining.

⁶ Slip op. at 17.