

COLLECTIVE BARGAINING AND MUNICIPAL DISTRESS: STATE PROBLEM, STATE SOLUTION

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The limited authority that municipalities have over the costs of police and fire personnel is a primary cause of fiscal distress in local governments in Pennsylvania. This article argues that the state legislature must amend Act 111 to give local governments and uniformed-employee unions equal standing under the law. The currently inequitable standing between a police or firefighters' union and a local government during negotiation and arbitration is the flaw in Act 111. The root of this flaw lies in the historical relationship between the state legislature and local governments and the parallel history that led to the passage of Act 111 in 1968. The defect in Act 111 is a prime cause of the substantial growth in the cost of local governments' municipal police pensions. The state legislature recognized the legal deficiency of Act 111 by enacting the Municipalities Financial Recovery Act, known as Act 47, which is the state program for municipal bankruptcy. To curtail the pending municipal fiscal crisis, the state legislature must amend Act 111. The amendments proposed in this article would correct the defect in Act 111 by granting equal standing under the law to local governments and police and firefighters' unions.

Introduction

A primary cause of fiscal distress in local governments in Pennsylvania is the limited authority that municipalities have over the costs of police and fire personnel. The collective bargaining law for police and firefighters, known as Act 111, grants employee unions authority to negotiate for almost every term and condition of employment; but the law does not provide local

governments with any explicit managerial rights. If the parties cannot reach a negotiated agreement, the law empowers an arbitral chair to set the terms and conditions for employment without a mandatory consideration of a municipality's financial position.

This article argues that Act 111 must be amended to curtail the municipal financial crisis in Pennsylvania. It begins with an overview of the relationship between the state legislature and local governments and the parallel history that led to the passage of Act 111 in 1968. After analyzing the unequal standing between public-employee unions and local governments under the law, the article argues that Act 111 is a primary cause of the expansive growth of municipal police-pension liabilities when the law is combined with the Municipal Police Pension Law (Pennsylvania General Assembly 1955). The state legislature recognized the flaw in Act 111 when it passed the Municipalities Financial Recovery Act, known as Act 47.

The article ends with a set of proposed amendments to correct Act 111 by granting local governments and police and firefighters' unions equal standing under the law during negotiation and arbitration. The proposed amendments are: (1) require an arbitration panel to assess a municipality's financial position before and during the term of a collective bargaining agreement; (2) require that an arbitral award be confined to the limits of a municipality's multiyear financial plan, if available; and (3) require the arbitral chair to write an opinion that specifically articulates how a municipality will pay for all the provisions in an award. These amendments would equalize the standing of the parties under the law during negotiation and arbitration, thereby ensuring fair compensation to police and firefighters at a reasonable cost to local governments and, ultimately, taxpayers.

State Supremacy and Limited Local Governance

Pennsylvania's political culture is rooted in a strong belief in the philosophy that government closest to the people is best. This belief is reflected in the existence of over 2,500 local governments across the state. Nonetheless, the state legislature has a long tradition of limiting—either directly or indirectly—the powers of political subdivisions. Act 111 and its functional predecessor, the Act of June 30, 1947, are byproducts of the evolving relationship between the state legislature and municipalities. This relationship explains why Act 111 vests an arbitrator with power over municipal fiscal affairs. This section summarizes how that relationship developed and how it functions today.

In 1874, local governments in Pennsylvania were shielded under Article 3 § 20 of the Pennsylvania Constitution from any act of the legislature empowering a third party with authority over municipal affairs. This protection, adopted during the Constitutional Convention of 1873, mandated

that “the General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever” (Pennsylvania Constitution 1873, art. 3 § 20). In addition, the constitution set a limit on the amount of debt that a municipality may incur: “No debt shall be contracted or liability incurred by any municipal commission, except in pursuance of an appropriation previously made therefore by the municipal government” (Pennsylvania Constitution 1873, art. 15, § 2). This clause prevented local governments from entering into contracts until appropriations to pay for them were secured, and it prohibited any increase of a municipality’s debt until the local government identified the means to pay for the obligation. Articles 3 and 15 of the Pennsylvania Constitution seemed to provide an adequate structure for municipal financial regulation, while shielding local governments from legislative acts intruding into local fiscal affairs. Unfortunately, Pennsylvania’s supreme court did not adopt this interpretation.

In 1870, the state legislature established the Pennsylvania Commission for the Erection of Public Buildings. Four years later, the Pennsylvania Supreme Court granted a writ of mandamus ordering the City of Philadelphia to fund the development of a building requested by the Commission. The city refused to do so. In 1878, the Commission sought a writ of mandamus to compel the General Council of Philadelphia to requisition the necessary funds to construct the building. The writ sought funding for the building from either Philadelphia’s general fund or a special tax that the city would be ordered to levy. Despite the perceived constitutional protections for local government from such actions under Article 3§ 20 of the state constitution, the state supreme court overturned the trial court’s decision and granted the writ. The supreme court reviewed the legislative history of Article 3 § 20 and held that “section 20, article 3, voids no law relative to any commission created prior to 1874” (*Perkins v. Slack* 1878, 279). The court reasoned that the legislature would have inserted specific language to nullify all such commissions that existed before enactment of the constitutional amendment had it intended to strip those commissions of their powers. The court ordered Philadelphia to provide the necessary funds to finance a building for the benefit of the legislature’s commission (*Perkins v. Slack* 1878, 279). The Commission for the Erection of Public Buildings is an early example of the willingness of the legislature and the Pennsylvania Supreme Court to grant power to third parties over municipal fiscal affairs.

As local governments grew bigger and wealthier, they began to challenge the authority of the state government over their fiscal affairs. At the turn of the nineteenth century, the U.S. Supreme Court affirmed the state legislature’s authority over local governments. The Pennsylvania Supreme

Court held in *In re Pittsburgh* (1907, 238) that “municipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed, and the extent of their powers determined by the legislature and subject to change, repeal, or total abolition at its will.” In this case a resident taxpayer challenged a statute enabling the City of Pittsburgh to consolidate with the City of Allegheny to form the current City of Pittsburgh. On appeal, the U.S. Supreme Court affirmed the state supreme court decision by holding that municipalities have no rights under federal law because they are creatures of the state legislature. The U.S. Supreme Court ruled that “municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State” (*Hunter v. Pittsburgh* 1907, 178). These federal and state court decisions clearly held that local governments had no immunity from the state legislature, and that the legislature may do as it pleases with local governments within the constraints of the state constitution (as interpreted by the courts).

The Pennsylvania Supreme Court has reviewed the authority of local government in light of two questions: does a local government have authority to take action, and if so, is there a limitation on that authority (Martinez and Libonati 2000, 70)? Municipalities draw their authority from statutes, and the breadth of that authority is decided under the Dillon Rule of statutory interpretation (Martinez and Libonati 2000). Under the Dillon Rule, Pennsylvania’s statutes are interpreted against the authority of the municipality. Municipalities possess and can exercise the following powers: those granted in express words, those necessarily or fairly implied in or incident to the powers expressly granted, and those essential—not simply convenient, but indispensable—to the accomplishment of the declared objects and purposes of the corporation. Any fair, reasonable, substantial doubt concerning the existence of a municipal power is resolved by the courts against a municipality and the power is denied (Martinez and Libonati 2000).

Although Pennsylvania has many diverse local governments, the state legislature established early a clear intent to limit the scope of their authority over their affairs and the judiciary has upheld that intent. The historical path to the passage of Act 111 in 1968 was a direct byproduct of the state legislature’s control over local governments’ fiscal affairs. An unintended consequence of that control, however, is the inability of local governments to control the growth of their financial obligations to police and firefighter unions.

The History of Act 111

The Pennsylvania Supreme Court's decisions in *Perkins* (1878) and *Hunter* (1907) limited the protections afforded to local governments from the actions of the state legislature under Article 3 § 20 of the state constitution. Yet the provision survived the Constitutional Convention of 1923. The conflict between the state legislature and local governments' authority reemerged in 1947 and was resolved in a dispute between a firefighters' union and a city council. This section discusses the events leading up to the passage of Act 111 in 1968.

On June 30, 1947, Pennsylvania's legislature passed a law prohibiting labor strikes by police and firefighters (Pennsylvania General Assembly 1947). The Act of 1947 also established a process to resolve disputes between a local government and its police and firefighters. Under the law, the parties had 30 days to negotiate. If no agreement was reached, a hearing would be held before a panel composed of one member from each party and a third member selected by the other two and designated as the panel's chair. If the two appointees could not agree within 15 days on who should chair the panel, the county Court of Common Pleas would select the chair. The panel's decision would be final and binding on both the union and the municipality. The chair of the panel had authority to decide how a municipality would compensate police and firefighters and to bind the municipality and the union to that decision.

The Act of 1947 governed without challenge until 1961 when the Erie City Council refused to accept a panel's decision for the resolution of a dispute with the Erie Firefighters Association (*Erie Firefighters Local No. 293 v. Gardner* 1962, 328). The panel's decision called for the establishment of a pension fund for survivor benefits that would have required the local government to enact a tax on residents to pay for the pension. The city council voted against implementation of the panel's award. The law did not prohibit court appeals, so the Firefighters Association filed suit.

The county Court of Common Pleas held that the state legislature's delegation of authority over municipal fiscal affairs to the panel's chair was unconstitutional under Article 3 § 20 of the state constitution (*Erie Firefighters Local No. 293 v. Gardner* 1962, 333). The state supreme court affirmed the decision of the trial court and adopted its opinion. The court identified the primary issue in *Erie* as whether it had "the duty and power to command the Council of the City of Erie to pass ordinances consonant with the findings of the negotiation panel" (*Erie Firefighters Local No. 293 v. Gardner* 1962, 333). In addition, the court considered whether "the power to fix municipal salaries and to create a pension plan is non-delegable under our [state] Constitution" (*Erie Firefighters Local No. 293 v. Gardner* 1962,

335). The court held that Article 3 § 20 fixed the power to decide municipal salaries and to create pensions for public employees as “pure municipal functions.” It also found the Act of 1947 unconstitutional and unenforceable in the case at hand. The legislature’s delegation of authority over municipal fiscal affairs to a third party was deemed to be a violation of the protections afforded to local governments under Article 3 § 20 of the state constitution.

The state supreme court’s holding in *Erie* was overturned by a constitutional amendment that protected the legislature’s empowerment of arbitral chairs over local fiscal affairs. The Constitutional Convention of 1967–68 provided a timely opportunity for the legislature to restate its prerogative to allow third-party arbitral chairs to settle disputes between a local government and public employees. In May 1967 the legislature adopted an amendment to Article 3 § 20 of the state constitution (Duquesne University, Pennsylvania Constitutional Conventions) exempting arbitration panels from the constitutional limitation upheld by the state supreme court (Pennsylvania Constitution 1967, art. 3 § 20). Known as the “ripper clause” (Porter 1969), the amendment empowered the General Assembly to enact laws regarding “the findings of panels or commissions, selected and acting in accordance with law . . . for collective bargaining between policemen and firemen and their public employers” (Pennsylvania Constitution 1967, art. 3 § 20). In addition, the legislature was empowered to grant a third party authority to make decisions that bind “upon all parties” and that “shall constitute a mandate to the head of the political subdivision which is the employer . . . and the lawmaking body of such political subdivision” (Pennsylvania Constitution 1967, art. 3 § 20). The constitutional amendment paved the way for the swift enactment in 1968 of Act 111, which the judiciary would decisively uphold.

Judicial Review

On June 24, 1968, the state legislature passed an act authorizing collective bargaining between police and firefighters and their public employers and providing for arbitration to settle disputes (Pennsylvania General Assembly 1968). The statutory authority given to an arbitral chair has received strong deference from the state supreme court. This section discusses how the court acquired jurisdiction to hear an appeal of an Act 111 award, the limited scope of judicial review, and the court’s rejection of an attempt by the state legislature to expand the jurisdiction of the court over arbitral awards.

The first lawsuit over the powers of an arbitral chair and the limited authority granted to local governments to protect their fiscal affairs under Act 111 reached the Pennsylvania Supreme Court in 1969. An arbitral award mandated that the City of Washington “at its sole expense, [provide] hospitalization coverage for the members of the family of each member

of the Police Department of the City of Washington, equal to the coverage now provided . . . for the member himself” (*Washington v. Police Dep’t of Washington* 1969, 439). Act 111 prohibits the appeal of an award to the courts, so the judiciary struggled to find a nexus for review (Pennsylvania General Assembly 1968, 43 P.S. § 217.7a). Acknowledging the authority of the legislature to preclude appeals, the court ruled that the state constitutional right of appeal did not apply to this law because “an arbitration panel is neither a court nor an administrative agency” (*Washington v. Police Dep’t of Washington* 1969, 440). The court declared that the city’s due process rights under the federal and state constitutions were not harmed by the prohibition against judicial appeal. The Pennsylvania Supreme Court upheld a trial court’s decision that Act 111 prevented the judiciary from acquiring subject matter jurisdiction to hear the local government’s appeal of the arbitrator’s decision. It also ruled that the city did not have a right to appeal, for “neither constitution [state or federal] requires that there be a right of appeal from an arbitration award” (*Washington v. Police Dep’t of Washington* 1969, 440).

The court nonetheless decided to grant the appeal of the award because of Pennsylvania Procedural Rule 68.5, which is the mechanism for protecting constitutional rights under Article 2 § 31. It set a narrow standard of review—that it still uses today—tied to these factors: (1) jurisdiction, (2) the regularity of the proceedings before the agency, (3) questions of excess in the exercise of powers, and (4) constitutional questions (*Washington v. Police Dep’t of Washington* 1969, 441).

The court began its analysis of the award granted in *Washington* by acknowledging that as “creature[s] of the legislature” local governments have no sovereignty and that the language of Act 111 contained “no explicit reference to the scope of the arbitrator’s power” (*Washington v. Police Dep’t of Washington* 1969, 441). The court then turned to Article 2 § 31 of the state constitution to acquire jurisdiction. It ruled that arbitrators are bound by the clause “acting in accordance with the law” and that courts may ensure that arbitrators “in conducting their hearings and making an award, may not violate the requirements of due process and must adhere to the mandates of the enabling legislation” (*Washington v. Police Dep’t of Washington* 1969, 442).

The City of Washington had argued that the award exceeded the power granted to the arbitrator, so the Pennsylvania Supreme Court also set the test for defining an excessive exercise of arbitral power. The excessive power test asked whether the local government was mandated to “carry out an illegal act” (*Washington v. Police Dep’t of Washington* 1969, 442). An illegal act was defined by combining several considerations, including the general legal standing of municipalities, the language of Act 111, and Article 2 § 31 of the Pennsylvania Constitution. In a conflicting final decision, the supreme court held that it lacked subject-matter jurisdiction to hear this dispute, but it excluded the hospitalization coverage for the family of

retirees as a violation of the Third Class City code. The court noted that the constitutional provision applied in this case, Article 2 §31, did not delineate the statutory authority granted to an arbitrator under Act 111 (*Washington v. Police Dep't of Washington* 1969, 442).

Although the state supreme court established a scope of review for Act 111 awards, it declined to expand its jurisdiction over arbitral awards. In 1980, the legislature amended the Uniform Arbitration Act (UAA) (Pennsylvania General Assembly 1980, 43 Pa. C.S. § 7301). The new law applied to all arbitration awards and expanded the judicial scope of review of the awards. Under the UAA, a court may “modify or correct the award where the award is contrary to law and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict” (Pennsylvania General Assembly 1980). The language of the statute would allow a court to review the fact-finding of the arbitral chair and to decide whether another award would be more suitable under the facts. In 1985, the Pennsylvania Supreme Court rejected the broader analysis as applied to Act 111 awards (*Township of Moon v. Police Officers of the Township of Moon* 1985). In analyzing whether the UAA applied to its scope of review of Act 111 awards, the court acknowledged that Act 111 has no provisions for judicial review, that the legislature did not add a scope of review to Act 111 when it amended the Act in 1974, and that a provision of the UAA stated a legislative intent not to change an existing scope of review. The court reasoned that the legislature was aware of *Washington* (1969) and its progeny when it enacted the UAA, and it interpreted the lack of explicit language to mean that the legislature was satisfied with judicial precedent. In addition, the court argued that the rules of statutory interpretation state that when courts attempt to ascertain the intention of the General Assembly, the presumption is that “language used in a statute [and] in subsequent statutes on the same subject matter intends the same construction to be placed upon such language” (Pennsylvania General Assembly 1972). Adhering to the legislative intent, the Pennsylvania Supreme Court held that arbitration decisions under Act 111 are to be given considerable deference and limited review.

The judiciary sustained the broad authority of the arbitral chair to set the terms and conditions of employment under Act 111, which gives employee unions the power to negotiate almost every aspect of the terms and conditions of employment. The local governments’ limited control over personnel expenses for police and fire unions under Act 111 spurred a municipal pension and fiscal crisis.

The Act 111 Process

Since 1947, police and fire units have been prohibited by law from labor strikes (Pennsylvania General Assembly 1947). Similar to the law of June 30,

1947, Act 111 requires an employee union and a municipality to negotiate a labor contract. If they cannot reach agreement, a panel of arbitrators is convened with the arbitral chair empowered to make a final decision binding on the parties. The broad authority and judicial deference given to the arbitral chair encumbers the negotiations between the parties because Act 111 does not require the arbitral chair to consider for the terms and conditions of employment the financial position of a local government and its ability to pay. This section reviews the provisions of Act 111 and highlights the structural inequities between the negotiating parties and the statutory flaws of the arbitration process that spurred the municipal pension crisis.

Under the law, a local government and an employee union must begin negotiations six months before the expiration of the current contract (Pennsylvania General Assembly 1968). Act 111 permits the union to negotiate with the local government over the union's "compensation, hours, working conditions, retirement, pensions and other benefits" (Pennsylvania General Assembly 1968). The law does not define these terms and conditions of employment. Courts have mandated negotiation over any topic that is "rationally related" to those issues (*FOP Rose of Sharon Lodge No. 3 v. Pennsylvania Labor Rels. Bd.* 1999, 1281).

Moreover, Act 111 does not explicitly set any terms or conditions of employment as the managerial prerogative of the local government (*Guthrie v. Wilkinsburg* 1985). Courts have deemed some terms and conditions of employment to be the managerial prerogative of local government, but those judicial stipulations have not prompted the state legislature to amend the provisions of Act 111. Therefore, local governments have limited ability to control the costs of police and fire personnel. Act 111 allows the employee unions to set the terms and conditions of their employment.

The law imposes a duty on parties to bargain in good faith during negotiations, with the determination of whether that duty has been fulfilled being dependent on whether "reasonable efforts" have been made to do so (Pennsylvania General Assembly 1968, 43 P.S. § 217.2). Neither Act 111 nor the judiciary has provided a clear definition of "reasonable efforts" at good-faith bargaining between a local government and an employee union.¹ It would be reasonable under Act 111 and current case law for a union to state its position on "compensation, hours, working conditions, retirement, pensions and other benefits" and, if its demands are not met, to declare an impasse and proceed to arbitration. The only prohibition against either party declaring the negotiations to be at an impasse is the mandatory 30-day negotiation period (Pennsylvania General Assembly 1968, 43 P.S. § 217.4). To date, there is no case law based on a plaintiff's claim that the other party failed to negotiate in good faith.

Act 111 also places on local governments the financial burden of arbitration by requiring that "the compensation of the two other arbitrators,

as well as all stenographic and other expenses incurred by the arbitration panel in connection with the arbitration proceedings, shall be paid by the political subdivision” (Pennsylvania General Assembly 1968, 43 P.S. § 217). The employee union is responsible only for the costs of its arbitrator, and because this cost is borne by the members of the Fraternal Order of Police or the firefighters’ union, it is not a financial impediment to declaring an impasse to the negotiations and proceeding to arbitration.

Once an impasse or stalemate is declared, the parties select their arbitrators and the arbitrators choose the arbitral chair. Under Act 111, the arbitration panel is composed of one member from each party and those two select a third to act as chair of the panel (Pennsylvania General Assembly 1968, 43 P.S. § 217.4b). If the two members cannot agree on who should chair the panel, the Pennsylvania Labor Relations Board (PLRB) provides a list of three persons from which the two arbitrators would pick a chair (Pennsylvania General Assembly 1968, 43 P.S. § 217.4b). Each party has the option of striking a name, in which case the remaining person becomes the arbitral chair.

The list provided by the PLRB is primarily composed of people who have previously served as arbitral chairs. Act 111 does not structure how the pool of eligible arbitral chairs would be developed, nor does it explicitly empower a state agency to determine such criteria by regulation. The law does not require the arbitral chair to have any competencies, knowledge, or training, nor does it set the terms or conditions of employment for the arbitral chair. It requires only that an arbitral chair be a “resident of Pennsylvania” (Pennsylvania General Assembly 1968, 43 P.S. § 217.4b). An arbitral chair may thus make a career of dispute resolution, but Act 111 provides no minimal qualifications for that practice.

As chair of the arbitration panel, the third arbitrator is the ultimate decision maker for resolving a dispute between a local government and an employee union. Like a judge’s ruling, an arbitrator’s decision is enforceable by the state. Unlike a judicial proceeding, however, Act 111 prohibits the parties from appealing an arbitral award to a higher court (Pennsylvania General Assembly 1968, 43 P.S. § 217.7a). Therefore, under provisions of Act 111, the decision of the arbitral chair on what wages and pensions a local government will pay its police and firefighters is final, even though the arbitral chair is not required by law to consider a municipality’s financial position.

Although arbitral chairs are not required by law to consider a local government’s financial strength, a chair does not want municipalities to litigate the panel’s decision or have it scrutinized by the courts. Many local governments will argue that they have limited resources to pay for high wages and fringe benefits. An award that provides the majority of benefits through long-term costs such as pensions, as opposed to immediate costs

such as salaries and vacation time, is more attractive to an elected body. Furthermore, political reality makes it easier for a mayor, township, or borough council to balance the annual budget and show public support for police and firefighters than to consider the multiyear effects of the award on the municipality's finances. Accordingly, arbitration awards that extend pension benefits by taking advantage of the permissions granted by the pension laws, such as Act 600 of 1955, are more frequent than grants of high salaries, vacation days, or other immediate costs. Nonetheless, an arbitral chair may decide to grant wage increases, minimum manning provisions, and fringe benefits despite a local government's lack of funds because courts have readily deferred to such decisions absent the "excess in the exercise of powers" granted by Act 111 (*Washington v. Police Dep't of Washington* 1969, 442).

Police and firefighters' unions throughout Pennsylvania have a consistent set of representatives and common issues before the PLRB's set of arbitral chairs. The Pennsylvania Lodge of the Fraternal Order of Police represents the 1,053 local police departments across the state (Pennsylvania Fraternal Order of Police 2010). The International Association of Firefighters is the statewide organization for the 25 paid fire departments throughout Pennsylvania (Intr'l Association of Fire Fighters 2010). By contrast, local governments throughout Pennsylvania do not have a consistent set of representatives before the select group of arbitral chairs. The 1,053 local governments that engage in collective bargaining under Act 111 have election cycles that may bring a new solicitor or contract for legal services. Therefore, a professional arbitrator on the PLRB's list interacts with a consistent group of representatives for police and firefighters' unions, whereas the representation of local governments varies, as do the issues driven by each municipality's financial position.

Additionally, the fragmentation of local governments throughout the state creates regions of similarly situated municipalities. A decision in one municipality may set the basis for a decision in neighboring municipalities, for the common union representatives argue before a consistent set of arbitral chairs for similar wages and benefits throughout a region. In 2008, Richard Friedberg of the Pennsylvania League of Cities and Municipalities (PLCM) testified before the state senate's Urban Affairs Committee that "arbitrators making the decision are not required to take into account what a municipality can afford," and they may "award items that were not a part of the initial negotiation sessions," with benefits given in one municipality having "a domino effect in the neighboring communities" (Friedberg 2008). Friedberg argued that "unequivocally, Act 111 has had a tremendous impact on the pension benefits police and fire unions received and costs incurred by municipal employers" (Friedberg 2008).

The Pension Crisis

Act 111 arbitral awards are a significant factor in the development of municipal pension distress. When the procedural law of Act 111 is combined with the substantive law of pensions, specifically the Municipal Police Pension Law, known as Act 600 of 1955, the optional pension benefits become mandatory costs for a municipality. This combination has increased the pension liabilities for many municipalities without increasing—or even considering—the local governments' ability to pay for the costs. This section analyzes how Act 600, when combined with Act 111, sparked an uncontrollable growth in pension liabilities.

Cities and boroughs were required to provide pensions to police officers as early as the 1930s, and this requirement is reflected in the Act of June 1947 discussed above. Early municipal codes set the minimum pension benefits for police and paid firefighters, limited expansion of pension benefits, and established funding requirements. The Municipal Police Pension Law of 1955, known colloquially as Act 600 (Pennsylvania General Assembly 1955), changed the pension landscape by setting the criteria for providing police with pension benefits. The law had few mandates but many optional benefits, and it did not require funding adjustments to maintain actuarial soundness.

Act 600 governs police pensions in all cities, boroughs, and townships employing three or more full-time police officers. There are more than 3,160 municipal-employee pension plans in Pennsylvania, of which police and firefighter pensions comprise one-third (Pennsylvania Employee Retirement Commission 2008). Every city in the Commonwealth has a pension program for police, and most cities fund a firefighters' pension as well.

Notwithstanding the large urban plans, more than 98% of the pension plans in Pennsylvania can be characterized as small (Pennsylvania Employees Retirement Commission 2008). Borough police pensions make up over half the total number of municipal police pensions in the state (485 out of 965). The vast majority of borough and township pension plans for police have fewer than eight members. About two-thirds of municipal pension plans have ten or fewer active members and 29% of them have three or fewer active members (Pennsylvania Employee Retirement Commission 2010).

Act 600 contained only a few mandatory provisions, most notably that pension recipients must complete 25 years of service in the same municipality and that the monthly pension benefit must be at least 50% of the average monthly salary (Pennsylvania General Assembly 1955). In addition to the mandates, the law contained a series of optional provisions to expand the pension benefits offered by a municipality. The optional provisions under Act 600 far outnumber the mandates. They include

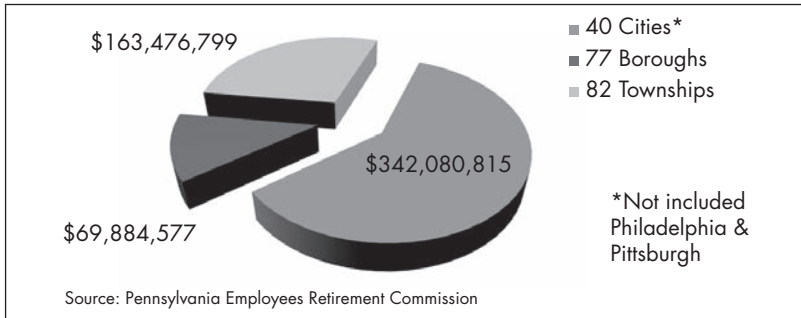
reducing the age of retirement to 50, which could make municipalities liable for an average of 25 years of pension payments; reducing the Social Security offset to zero, which could raise the local government's monthly payments per retiree; reducing the service time for vesting in the fund to just 12 years, which could significantly reduce the total contributions per employee while expanding the period of liability for the municipality; reducing employee contributions to the fund to zero, thereby leaving the local government with the full responsibility for the costs of the fund; and granting early retirement after 20 years of service, which could significantly extend the duration of monthly payments for the municipality. The law also authorized cost-of-living adjustments (COLAs) based on 75% of the average salary, a level that could be exceeded if the fund is actuarially sound in a year when the decision to enact an increase is made.²

Although some options require the plan to be actuarially sound before benefits may be expanded, actuarial soundness rests on uncertain economic assumptions (Peterson 1953). For example, enacting an arbitral award with a cost-of-living adjustment in 2007 when the stock market was on the upswing could have destabilized the fund in 2008 after the stock market crashed. Many municipalities throughout Pennsylvania are currently struggling with this predicament because Act 600 does not require local governments to have the funds to pay for the growth of pension liability. Consequently, pension benefits for employees can be expanded without the constraint of affordability by the municipality. Arbitral chairs have used their authority to turn the optional benefits under Act 600 into mandates without considering whether local governments can pay for the added benefits.

As of 2008, almost 50 years after the state supreme court's decision in *Erie Firefighters Local No. 293 v. Gardner* (1962), the City of Erie had almost \$40 million in unfunded pension liabilities for its police and firefighters (Pennsylvania Employee Retirement Commission 2010). Erie is not alone. The Pennsylvania Employees Retirement Commission (PERC) reports that statewide there is \$2,674,894,695 in unfunded liabilities for municipal police and firefighter pensions. Not counting Pittsburgh and Philadelphia, the total comes to \$1,112,412,667 in unfunded pension liabilities for over 400 medium and small municipalities across the state (Pennsylvania Employee Retirement Commission 2010).

About one-third of Pennsylvanians live in a municipality with a distressed pension, and poor stock market performance in 2008 likely increased that number despite the market's subsequent rebound. Estimating the impact of the economic downturn on the pensions of approximately 600 municipalities, PERC found that almost 200 of them would see their minimum municipal obligation (MMO)³ at least double, 80 would see their MMO at least triple, and 32 would see their MMO at least quadruple. The minimum municipal obligations for these municipalities would increase by an average of \$500,000

Figure 1
Total Unfunded Liabilities Police & Fire Pensions Under Act 600
(liability per muni < \$300k).



a year (Pennsylvania Employee Retirement Commission 2008). Figure 1 below represents 199 municipalities (ranging from boroughs to Third Class cities) that have \$300,000 to over \$1 million in unfunded pension liabilities for police and firefighter unions. This group of municipalities collectively owes \$513,341,430 to the pension plans for these unions. That total does not include Philadelphia and Pittsburgh, which collectively owe over \$2 billion in unfunded pension liabilities to their police and firefighter unions (Pennsylvania Employee Retirement Commission 2010).

In response to municipal pension distress, the Pennsylvania legislature passed the Municipal Pension Funding Standard and Recovery Act, known as Act 44 of 2009. Act 44 was an amendment to the original Municipal Pension Plan Funding Standard and Recovery Act of 1984, known as Act 205 (Pennsylvania General Assembly 1984 and 2009). Act 205 was the first action by the state legislature to provide municipalities experiencing fiscal distress with options and funding to reduce the burden of their employee-pension obligations. Act 44 is the latest attempt by the state legislature to offer local governments experiencing fiscal distress due to their pension obligations options like extending the amortization of the pension to reduce immediate costs. Act 44 also grades pension funds in terms of the level of unfunded liability, and it requires the consolidation of severely distressed pensions into the Pennsylvania Municipal Retirement System. These municipal pension recovery acts demonstrate the legislature's recognition of the problem of funding municipal employee pensions, a problem due in part to the combination of Act 111 and Act 600.

The legislature enacted the Municipal Police Pension Law to empower local governments to provide retirement pensions for police officers. The pension options may have improved the employee recruitment opportunities for municipalities, which in turn may have provided for better service to taxpayers. Yet the permissible options under Act 600, when combined

with Act 111, were turned into overwhelming costs for local governments. Although recovery laws for funding municipal pensions have provided a means for addressing severely distressed municipal pensions, the laws do not fix the problem that is causing municipal fiscal and pension distress. Local governments still have only limited authority to control police and fire personnel expenses under Act 111.

Municipalities Financial Recovery Act

The state legislature recognized the need to limit the financial impact of Act 111 awards when it enacted the Municipalities Financial Recovery Act in 1987 (Pennsylvania General Assembly 1987). Known colloquially as Act 47, the law establishes a state program for financially distressed municipalities that sets dollar limits on an arbitrator's collective bargaining awards as determined by a municipality's multiyear financial recovery plan. Under the law the Department of Community and Economic Development (DCED) declares a municipality distressed if it meets a variety of financial conditions, such as expenditures outpacing revenues for more than three years, inability to make minimum municipal obligations for employee pension funds, and operating expenses exceeding revenues in the current fiscal year (Pennsylvania General Assembly 1987). If any of the requisite conditions are met, DCED may declare a local government fiscally distressed. The program requires a municipality to work with a consultant to develop a multiyear fiscal plan that will set the terms for financial recovery under the oversight of the state government (Pennsylvania General Assembly 1987, 53 P.S. § 11701.221). The program promotes substantive changes to collective bargaining agreements to help local governments return to balanced budgets and avoid future fiscal crises (Pennsylvania General Assembly 1987, 53 P.S. § 11701.241). The terms for financial recovery thus include limits on the wages and pension benefits of police and firefighters awarded by an arbitral chair under Act 111 (Pennsylvania General Assembly 1987).

Pennsylvania's courts have heeded the legislature's intent to afford distressed local governments fiscal protections under Act 111. The first appellate court case concerning the intersection between Acts 111 and 47 occurred in 1989 and involved the Wilksburg Borough Police Officers Association (*Wilksburg Police Officers Ass'n v. Commonwealth* 1989). The police union argued that the limits on bargaining agreements imposed by Act 47 violated the state constitution's requirement that "municipalities engage in collective bargaining" (Pennsylvania Constitution 1968, art. 3 § 31). The Pennsylvania Supreme Court affirmed the appellate court's decision that Act 47 may amend Act 111 because Act 111 is a permissible statute, although its provisions are not constitutionally protected (*Wilksburg Police Officers Ass'n v. Commonwealth* 1993, 137).

In 2005, the state's Commonwealth Court held that "Act 47 allows a coordinator to include in a recovery plan recommendations proposing changes to collective bargaining agreements that could alleviate a municipality's financial distress. . . . Once a plan is adopted, no collective bargaining agreement adopted thereafter may violate, expand or diminish the plan's provisions" (*Pittsburgh Fire Fighters, Local No. 1, et al. v. Commonwealth of Pennsylvania, et al.* 2005, 669). The court also ruled that the state legislature had constitutional authority to "limit or contract the rights it has bestowed," and it held that "plans developed pursuant to Act 47 represent such a limitation" (*Pittsburgh Fire Fighters, Local No. 1, et al. v. Commonwealth of Pennsylvania, et al.* 2005, 671).

In October 2011 the Pennsylvania Supreme Court rescinded the limitations imposed by an Act 47 Recovery Plan on an arbitral decision, effectively severing Act 111 from Act 47 (*Scranton v. Firefighters Local Union No. 60 of the IAFF* 2011). The legislature swiftly addressed the technical issues raised by the court by adopting Act 133 of 2012. This legislative response did not return a Recovery Plan's predominance over collective bargaining for police and firefighters. Instead, Act 133 granted the Recovery Plan Coordinator the power to set a financial limit on a distressed municipality's total expenditure on an employee union and on the union's right of appeal to a Court of Common Pleas under a *de novo* standard if an arbitral award should exceed the cap on expenses (Pennsylvania General Assembly 2012). In addition, the cap set by the coordinator must include a list of economic considerations that may be difficult to calculate, a requirement that may limit the constraints imposed by the cap.

The Municipalities Financial Recovery Act illustrates the Pennsylvania legislature's recognition of the municipal fiscal crisis sparked by Act 111. As amended, Act 47 requires the arbitral chair to give consideration to a municipality's fiscal status, as dictated by the multiyear financial plan, equal to the terms and conditions of employment demanded by a police or firefighter union. Pennsylvania's courts have followed the legislative intent of Act 47 and confined arbitral awards to the limits set forth in a municipality's multiyear financial recovery plan because the legislature "forecasted the chaos that would ensue if a municipality collapsed as a result of financial distress" (Desanto 1991).

Recommendations for Improving Act 111

The limits on Act 111 arbitral awards imposed by Act 47 show the state legislature's willingness to require an arbitral chair to weigh equally a municipality's financial position and an employee union's terms and conditions of employment before and during the term of a collective bargaining agreement. The state legislature must now provide equal standing

for local governments and uniformed-employee unions under Act 111 before a municipality may enter the state bankruptcy program. Accordingly, I propose the following amendments to Act 111:

1. Require an arbitration panel to assess a municipality's financial position before and during the term of a collective bargaining agreement;
2. Require that an arbitral award be confined to the limits of a municipality's multiyear financial plan, if available;
3. Require the arbitral chair to write an opinion that specifically articulates how a municipality would pay for the provisions in an award.

Under the first proposed amendment, arbitrators ought to begin their analysis by determining whether a local government has a structural deficit. A strong measure of municipal fiscal health is the ratio of the growth in revenue to expenditures over three or more years. Retirement pensions, healthcare expenditures, and ill-advised municipal bonds and notes are the traditional causes of structural deficits, for each year they set the fixed costs of a municipality for a long time regardless of the growth or decline in revenues. Recent economic stagnation is causing an unremitting decline in tax revenues (mainly from property taxes and the earned income tax) while municipal expenditures for employee wages, retirement pensions, and healthcare costs continue to rise. Recurring fluctuations in stock market prices undermine predictions of the minimum municipal obligation that local governments will owe to their employee pensions. Moreover, the growth of other post-employment benefits (OPEB)—and the lack of funding for those benefits—further strains annual municipal operating budgets.

Absent a structural deficit, an assessment of a local government's financial position ought to focus on projected revenues compared with expenditures during the term of the collective bargaining agreement. Expenses for police and fire personnel account for more than half the total expenditures of local governments. Even though a local government may not currently have a structural deficit, employee wages and the costs of pension benefits ought not to expand beyond what that jurisdiction can reasonably afford in light of its tax base, taxing options, and revenue projections. The arbitrators' analysis then ought to turn to a municipality's use of revenue options available under the law, including permissible taxes and fees to pay for the services it is required to provide under the various municipal codes. In addition, the Municipalities Financial Recovery Act provides specific criteria that may be the basis of the panel's assessment, along with various financial ratios that could help determine a local government's financial position.

This proposed amendment recognizes that government accounting, financing, and budgeting are complex processes that use a series of funds

to manage revenue, pay expenses, and securitize debt. The diversity of municipalities (in structure, size, and authority) in Pennsylvania also demands a practical understanding of local governance that includes taxpayer services, municipal operations, and law. The PLRB could work closely with the Center for Local Government at the Department of Community and Economic Development to train arbitrators to assess municipal finances.

Under the second proposed amendment, arbitrators would link their awards to the limits of a municipality's multiyear financial plan, if available. Police and fire protection are two of the fundamental and likely most expensive services that local governments provide. Municipalities that take the initiative to plan for these costs alongside other expenditures over a multiyear period have done the hard work of assessing their financial position. The opportunities or limitations posed by a municipality's projected revenues in relation to its expenses ought to confine the decision of the arbitral chair on the wages and pension benefits of police and firefighters, similar to the process under Act 47.

Under the third proposed amendment, the arbitral chair would write an opinion specifically articulating how a municipality would pay for the provisions in an award. Currently, some arbitral chairs provide a written award that lists the chair's findings and reasons for a decision, even though Act 111 does not require such action. A written opinion stating the basis for the arbitral chair's decision is prudent, given the mandatory analysis of a municipality's financial position compared with the terms and conditions demanded by an employee union.

These three proposed amendments to Act 111 would equalize the standing of municipalities and public employee unions during negotiation and arbitration. Police and firefighter unions would remain able to set the terms and conditions of employment, but local governments would be able to control their expenditures. As a result, taxpayers would receive quality—yet affordable—public services.

Conclusion

Local governments in Pennsylvania exist at the will of the state legislature to administer programs and services for local taxpayers. Police and fire protection are two of these primary services. The legislature prohibited police and firefighter unions from engaging in labor strikes, and it passed Act 111 to settle disputes between unions and the local governments that employ them. Act 111 empowered arbitral chairs to set the terms and conditions of employment, but it failed to require chairs to consider the financial impact of their decisions on local governments. Although the state legislature has attempted to mitigate the impact of this flaw on municipal pensions and finances, such alleviation does not correct the underlying problem.

Amending collective-bargaining laws for public employees is a painstaking process, as evidenced by events in Wisconsin, Minnesota, and Michigan between 2010 and 2012, events that brought the issue of paying for public-employee pensions and wages into our national discourse. In Pennsylvania, the pension crisis affecting local governments is slowly being recognized as more newspapers, magazines, news websites, chambers of commerce, and regional and local “good government” organizations tell the story about the current and future municipal fiscal crisis.⁴ The complexity of the crisis, aggravated by recent political fights over employee unions, has hindered the enactment of aggressive legislation to solve the problem. Nonetheless, the amendments to Act 111 proposed here are feasible because the state legislature has already shown a willingness to mitigate the impact of the law’s defects. The legislature’s minor improvements are not sufficient, however. It must provide a direct path to permanently alleviating municipal fiscal distress by formally amending Act 111.

Notes

1 Such is the case absent a unilateral action by the local government on an issue that is subject to collective bargaining (*City of Bethlehem v. Pennsylvania Labor Relations Bd.* 1993) or an outright refusal to bargain (*City of Coatesville v. Com., Pennsylvania Labor Relations Bd.* 1983).

2 Although the law has been amended to limit some of the optional provisions, many of these provisions existed for more than 35 years.

3 The minimum municipal obligation is the state-mandated smallest amount a municipality must contribute to any pension plan established for its employees. The amount is calculated using actuarial science.

4 Among the articles that have addressed the pension crisis are: <http://readingeagle.com/Article.aspx?id=220704>, http://www.pittsburghlive.com/x/pittsburghtrib/news/s_685786.html, <http://www.delcotimes.com/articles/2010/02/28/news/doc4b89f385eb4f6465512232.txt>, <http://www.alleghenyconference.org/MunicipalPension.asp>

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