

THE PUBLIC SECTOR LEADER

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IT'S THAT TIME OF YEAR AGAIN:

Act 195 and Act 111 Collective Bargaining Deadlines

by: Stephanie Fera & Christopher Gabriel

County and municipal employers in Pennsylvania have employees who can be represented by unions and bargain over terms and conditions of employment. The two main laws at play in those situations are Act 195 (for most public employees) and Act 111 (for police, firefighters and county detectives). Each Act has its own requirements and timelines, which are critically important for employers to understand.

Under Act 195, if, after a reasonable period of negotiation, a public employer and its employees decide that a dispute or impasse exists in the bargaining process they may voluntarily submit to mediation. If no agreement has been reached by the parties within 21 days after negotiations have commenced, but in no event later than 150 days prior to the budget submission date of the public employer (which is December 31st for most public employers), both parties are required to request the service of the Pennsylvania Bureau of Mediation in writing (unless the parties have already submitted to voluntary mediation). Mediation is required to commence no later than **August 3rd** (unless the employer has a budget submission date that is different than December 31st).

If an agreement has still not been reached within 21 days after mediation commences or in no event later than 130 days prior to the budget submission date (which is August 23rd for a budget submission date of December 31st), the Bureau of Mediation must notify the Pennsylvania Labor Relations Board (PLRB) of this fact.

Act 195 provides for binding interest arbitration if an impasse has been reached in collective bargaining relating to guards and employees necessary to the functioning of state courts. Section 805 of Act 195, which addresses arbitration, does not expressly set forth any specific timeframes regarding when arbitration demands must be made but rather provides that if the parties "have reached an impasse in collective bargaining and mediation as required in section 801 of this article has not resolved the dispute, the impasse shall be submitted to a panel of arbitrators whose decision shall be final and binding upon both parties..."¹ Although Section 805 does not explicitly provide a deadline for demanding arbitration, the courts and PLRB have interpreted this section to require that the mediation procedures be properly commenced (i.e., mediation actually occurred by August 3rd) and the demand for arbitration occur no more than 130 days prior to the employer's budget submission date (**August 23** for a budget submission date of December 31). These timelines are mandatory for any party seeking to demand arbitration.

Under the mandatory Act 111 timetable, bargaining must begin at least six (6) months before the start of the employer's fiscal year (which is generally June 30). The employer is not required to commence negotiations before that date. However, if the employer has proposals that it desires to achieve in the process and wants to preserve its ability to demand arbitration, the employer must be sure to begin the negotiations at least six (6) months before the start of the fiscal year. Some

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GAME CHANGER

STEPHANIE FERA
NAMED SUPER LAWYERS
RISING STAR



CODE ENFORCEMENT OFFICERS UNION MEMBERS?



AROUND THE COMMONWEALTH



SOLICITOR'S CORNER



LEGISLATION WATCH



SUPREME COURT RULES ON FAIR SHARE FEES

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GAME CHANGER: STEPHANIE FERA

NAMED SUPER LAWYERS RISING STAR

Our people are our strength and they give you the edge, the game changer, you need in your legal matters.

We are proud to announce that Stephanie Fera has again been named a **Pennsylvania Super Lawyers Rising Star in the Labor and Employment category for 2018**. Super Lawyers (www.superlawyers.com) has an extremely rigorous selection process and only 2.5% of Pennsylvania's Lawyers are named to the Rising Stars category.



Stephanie Fera works in our Labor, Employment and Municipal Group. She provides representation to counties, cities, townships, boroughs, civil service commissions, zoning hearing boards and authorities. Stephanie has experience in collective bargaining and interest arbitration, grievance arbitration, employment litigation, representation before the Pennsylvania Labor Relations Board, personnel matter counseling and representation as a solicitor. She is one of the reasons we are the Leader in the Public Sector.

Congratulations Stephanie!

YOU CAN REACH STEPHANIE AT 412-515-8916 OR SFERA@CFWWS.COM

ARE YOUR CODE ENFORCEMENT OFFICERS UNION MEMBERS?

By: Stephanie Fera

In many municipalities Code Enforcement Officers are included in non-professional bargaining units. However, there are many cases from the Pennsylvania Labor Relations Board (PLRB) holding that Code Enforcement Officers are managerial employees that must be excluded from rank and file bargaining units.

The Public Employee Relations Act defines managerial employees as:

Any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employees above the first level of supervision.²

To determine if an employee satisfies the definition of managerial, the Board has created a three-part test, which is satisfied if the employee meets *any one* of the three parts:

1. Any individual who is directly involved in the determination of policy;
2. Any individual who directs the implementation of policy; or
3. Employees above the first level of supervision.³

The Board has held that a Code Enforcement Officer satisfies the test because they are responsible for implementing the employer's policies.⁴

Code enforcement officers have been excluded from bargaining units where it was shown that they perform ordinary code enforcement duties, such as:

- Enforcing building code and zoning ordinances;
- Prosecuting code violations;
- Exercising discretion to interpret and enforce municipal codes;
- Inspecting buildings to ensure compliance with building and zoning codes;
- Issuing building and zoning permits;
- Issuing citations for non-compliance with building and zoning codes or occupancy permits;
- Inspecting new construction for compliance with building plans and occupancy permits;



- Certifying properties for demolition;
- Initiating criminal complaints for code violations;
- Representing the employer as a witness and ensuring prosecution of a complaint before the district magistrate; and/or
- Appealing decisions of district magistrates.

It does not matter if some of the work performed by the Code Enforcement Officer is non-managerial in nature or if, at times, the employee's discretion may be limited by elected municipal officials. (That is true of all municipal employees).⁵ What is important is whether, in the field, Code Enforcement Officers "have the independent duty and authority to review a property and to determine if violations exist and issue violations when they deem appropriate."⁶ In fact, even where a municipality uses an outside entity to meet some part of its needs with respect to the duties of a managerial employee, it does not necessarily change the employee's managerial status under the Act.⁷

It goes without saying that in most circumstances having to collectively bargain with a labor union (not to mention process grievances and unfair practice charges) can be very expensive. Municipal employers should not do this for groups of employees where it is not required. If you have Code Enforcement Officers in your bargaining units, call us to discuss whether you should consider filing a Petition for Unit Clarification with the PLRB to have them removed due to their status as managerial employees.

+ The Administrative Office of the Pennsylvania Courts has become more active in intervening in County collective bargaining negotiations in recent years. Counties should take care that they are not simply run over by the courts insisting on changes to the bargaining agreements. Counties should seek legal advice to preserve the appropriate balance of power at play if the courts and/or AOPC demand changes to county labor agreements. At CFWW+S we have developed a good working relationship with AOPC and have experience guiding counties through the negotiation process in a way that satisfies the interests of both the commissioners and the judges. Take care to review the law regarding Section 1620 of the County Code before negotiations begin.

+ The Pennsylvania Supreme Court has ruled that a natural gas well company cannot drill on a residential-agricultural district in Lycoming County in Gorsline et. al. v. Board of Supervisors of Fairfield Township.

The majority opinion held that municipalities “may not ...permit oil and gas development in residential/agricultural districts without first enacting the necessary amendments.” With the advancement of the Atlantic Sunrise Pipeline project, natural gas development will continue to be a hot topic for local governments in Pennsylvania. Look to the Public Sector Leader to stay current on the latest information.

+ Check out our website, look at our bios, and find old issues of the Public Sector Leader at www.cfwws.com/psleader.

+ **COUNTIES:** If you are coming to the **CCAP Annual Conference in Gettysburg PA, be sure to stop by and see us under the Big Tent on Sunday, August 5!** We will have live music and food from 6:30 pm to 9:00 pm under the big tent in the central driveway outside the hotel. We hope to see you there!

+ WHERE IS IT?

This beautiful waterfall is found at the end of a short walk that gently winds its way along a stream that has carved a channel into the rocks.



Can you guess where it is?
(Find the Answer on the last page.)

By: Lynne L. Finnerty, Esq.

The possession of firearms is a crime and prohibited in a court facility, a place where laws are enforced and interpreted.⁸ The possession of firearms in the state capitol complex, where state legislation is debated and enacted, is prohibited.⁹ There is, however, no similar law that prohibits firearms at county and municipal buildings,¹⁰ where local legislation is debated and enacted. Further, while the law is not completely settled, a recent case may foreclose the possibility that county and municipal governments have the authority to prohibit firearms in their buildings.

The debate over whether local government has the authority to prohibit firearms in municipal buildings, including at a public meeting, originates from Section 6120(a) of the Uniform Firearms Act: “No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.”¹¹

It is this provision that some have argued prohibits local governments from enacting any firearm restrictions whatsoever, because the field has been preempted by the Commonwealth. They argue that municipalities cannot prohibit the possession of weapons anywhere, including in a municipal

building. Opponents to this view argue that local governments should have the ability as property owners to restrict the possession of firearms on their property, such as a municipal building.¹²

Recently, in *Firearm Owners Against Crime v. Lower Merion Township*, the Commonwealth Court determined that *Firearm Owners Against Crime* was entitled to a preliminary injunction against a local ordinance attempting to prohibit firearms in a township-owned park.¹³ Lower Merion Township argued, among other things, that it could regulate the possession of firearms in its parks because in a prior case called *Wolf v. Township of Salisbury*, the Court had allowed another township to put restrictions on hunting in parks that it owned.¹⁴ But the Court rejected that argument and distinguished *Wolfe* because the Game and Wildlife Code allowed for municipal regulations that were consistent with its provisions (it left room for municipal regulation), while the Uniform Firearms Act expressly prohibits “any manner” of municipal regulation.¹⁵

The decision of the Court in the *Lower Merion* case was not unanimous. Judge Pellegrini wrote a forceful dissent, suggesting that it may be possible that the door remains slightly ajar to allow municipalities to exercise their authority as property owners to prohibit firearms on municipal property.¹⁶ This argument for the ability to regulate guns as property owner did not win the day, but if

Judge Pellegrini’s dissent is any guide, it may generate additional litigation in the future. The Third Class City Code, for example, states that, “To the extent permitted by Federal and other State law, council may regulate, prohibit and prevent the discharge of guns and prevent the carrying of concealed deadly weapons.”¹⁷ It has not been tested whether this provision, together with the argument about property ownership may yet carry the day in allowing regulation of firearms.

Nevertheless, county and municipal clients must know that, owing to the current interpretation of the Uniform Firearms Act and absent any change in legislation at the state level, local governments are without authority to prohibit firearms at municipal meetings.

This is a contentious issue that one side views through the lens of fundamental rights, and many others view as a common-sense safety issue. In fact, there have unfortunately been incidents of gun violence at municipal meetings. Many local governments have police officers attend their meetings to address this, and there may be other strategies that can help. If you have questions about these cases or your right to regulate firearms at your meetings or on your property, please call us so that we can help you.

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union attorneys are encouraging unions in communities facing significant financial challenges to refrain from initiating bargaining or demanding Act 111 interest arbitration. If the union fears concessions may be imposed and believes the status quo is favorable, then the union may elect to simply waive the right to arbitrate. If the employer needs or wants to protect its right to arbitration, it should plan to initiate bargaining timely and demand arbitration before the deadline in case the union does not. The failure to timely initiate bargaining will preclude arbitration if either party objects.

A bargaining impasse is deemed to occur if a settlement is not reached within thirty (30) days after collective bargaining begins (which may be measured from the date the union or the employer initiates bargaining). This is the case regardless of the number of negotiation sessions that occur, if any. A demand for arbitration may be made by either party at any time after an impasse is reached, but it must be made at least one hundred ten (110) days before the start of the employer's fiscal year (typically **September 12**). The demand must be in writing and specify the issues in dispute. Once again, if a timely demand for arbitration is not made, then arbitration will be precluded upon objection. If the employees demand arbitration, the employer is then required to **respond within five**

(5) days of the employees' demand for arbitration and identify its issues in dispute if the employees fail to do so in their demand. These timetables are mandatory and the failure to comply may result in the employer's inability to seek changes to the contract. It will be important for the employer to immediately respond to any correspondence, most importantly the demand for arbitration. If this is not done, the employer not only forfeits its issues, it commits an unfair labor practice as well.

Strict compliance with these timetables is mandated by the statutes. Counties, municipalities and authorities should seek legal counsel to navigate these requirements properly. At **CFWW+S** we have years of experience helping public employers do just that. If you have questions about these issues, or if your contracts expire at the end of this year, please call us so we can help!



SUPREME COURT RULES Fair Share Fees Unconstitutional

By: Stephanie Fera & Christopher Gabriel

Following up on our story in the last edition of the Public Sector Leader, on June 27, 2018, the United States Supreme Court held that requiring non-members of public sector unions to pay fair share fees violates the First Amendment in *Janus v. AFSCME*.³ Justice Alito writing for the majority concluded that requiring fair share fees "violates the free speech rights of non-members by compelling them to subsidize private speech on matters of substantial public concern." In so holding, the Court overturned its 1977 decision in *Abood v. Detroit Board of Education*⁴ stating that it was "poorly reasoned." Public employers and their unions can no longer take agency (fair share) fees without the consent of employees.

It will take time to fully understand the ramifications of this decision and its impact on unions. However, what is clear is that public employers with union contracts containing fair share provisions (which is most of them) need to immediately take action to stop withholding those fees from employees who are not union members. This decision will not impact employees paying full union dues, which should continue to be paid in accordance with your collective bargaining agreements.

You should review your collective bargaining agreements and employee lists to determine which employees are paying fair share fees as opposed to full union dues. No fair share fees or other payment to the union should be deducted from the wages of non-members absent the affirmative consent of the employee. You should also advise your local unions that you have ceased withholding the fair share fees effective June 27, 2018 in accordance with the Court's holding. If you have questions on what action needs to be taken, please contact us for assistance.

WHERE IS IT ANSWER:

This is the waterfall at the end of the Hell's Hollow Trail at McConnells Mill State Park in Lawrence County. www.dcnr.pa.gov/statepark/mcconnellsmillstatepark

STAY DILIGENT IN YOUR EFFORTS Watch for Legislation that May Affect You

By: Neva L. Stotler

County and municipal managers should pay attention to what the Pennsylvania General Assembly is doing. If you don't, you pass on the opportunity to weigh in on new legislative provisions that may impose new requirements, take away your authority on important subjects or add to your responsibilities. There were at least two bills introduced last session that were noteworthy: **House Bill 466**, which sought to define the law enforcement authority of deputy sheriffs, and **Senate Bill 251**, which would have permitted local police to use radar.

Both of these bills failed to make it to the Governor's desk this time, but we can expect to see them again. It is easy to understand the host of issues created by allowing local police to use radar, but the bill about deputy sheriffs may be worth a closer look. In *Commonwealth v. Leet*,¹⁸ the Pennsylvania Supreme Court held that a deputy sheriff has power to make warrantless arrests for breaches of the peace committed in his presence, which includes violations of the Vehicle Code. In several other cases since that time, however, our courts have severely restricted the law enforcement authority of deputy sheriffs, even holding that they have no more law enforcement powers than an ordinary citizen.¹⁹

HB 466 initially set out to expand sheriff deputy powers, but its language was cut down to merely defining their authority when they are on duty and see a crime committed right in front of them. The County Commissioners Association has urged commissioners to support the bill, but the press and others still talk as if it expands the law enforcement authority of deputies. Given that, it is worth examining the language before it is reintroduced. Both Commissioners and local elected officials who have police departments of their own should have no interest in deputy sheriffs becoming cross-jurisdictional police officers, and this was the initial intent of the bill. As always, it is good to stay in tune with bills having to do with your area of local government as they get introduced and wind their way through the legislature. Look for these two to get reintroduced next session.

All article citations can be found at www.cfwws/psleader.



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