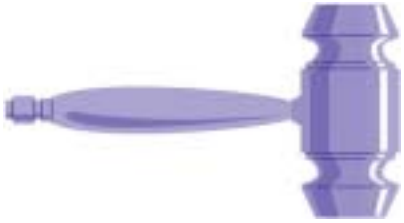
Legal Corner



By Michael Levin, Esq., PAESSP Chief Legal Counsel

The Sanctity of Retiree Health Care Benefits — Don't Count On It

It is not uncommon for public school entities to agree to provide retiree health care benefits in their administrative compensation plans, collective bargaining agreements or policy. With scarce financial resources for public schools becoming even scarcer and health care premiums escalating rapidly, public school entities are considering the elimination or curtailment of such benefits to retirees. This raises the question whether public school entities have the power or authority to eliminate or curtail health care benefits to retirees. Whether public school entities can eliminate or shrink such benefits depends upon the specific facts and circumstances in any particular case. Moreover, the law is not entirely clear or consistent on the relevant issues.

Administrative compensation plans have been required since the enactment of Act 93 in 1984. 24 P.S. §11-1164. Act 93 requires public school entities to "meet and discuss in good faith with administrators on administrator compensation[1] prior to adoption of the compensation plan." 24 P.S. §11-1164(c). Act 93 further provides that public school entities "shall be required to adopt written administrator compensation plans which shall apply to all eligible school administrators[2] . . . and which shall continue in effect until a time specified in the compensation plan, but in no event for less than one school year." 24 P.S. §11-1164 (d)(italics added). In the only case interpreting Act 93, the Commonwealth Court ruled that administrator compensation plans are "binding, once adopted, for the life of the plan." Curley vs. Greater Johnstown School District, 63 Pa. Cmwlth. 648, 641 A.2d 719 (1994).

In light of the statutory language and the court's decision in Curley, there are a number of general observations that can be made. First, the effectiveness of an administrator compensation plan is for a discreet period of time. Once the term or duration of the plan expires, the plan is no longer legally effective and its provisions may be changed by the public school entity. Second, there is no requirement in Act 93 that it contain provisions for retirees. Act 93 only applies to "school administrator[s]" — i.e., employees.[3] As a result, it is unclear whether retirees can enforce an administrative compensation plan that may contain retiree benefit provisions or whether the school entity can alter or eliminate retiree benefits mid-term of an administrative compensation plan.

Although the foregoing general observations can be made, they do little to answer the question whether retiree health care benefits can be eliminated or reduced in any given case. Instead, as the law is developing in this area, to answer that question, there must be a determination whether the benefits being provided to retirees are "vested." If the benefits are "vested," public school entities may not alter or eliminate the benefits. If the benefits are not "vested," public school entities may alter or eliminate such benefits entirely, perhaps even during the term of an administrator compensation plan, but certainly once the term of the applicable administrator compensation plan expires. What is not clear are the standards for determining when retiree health care benefits are "vested" and when they are not. The cases arguably announce inconsistent rules.

In International Union, United Automobile, Aerospace & Agricultural Implement Workers of America vs. Skinner Engine Company, 188 F.3d 130 (3rd Cir. 1999), the court ruled: **(1)** that no presumption exists that parties to a collective bargaining agreement intend retiree welfare benefits to continue for life; and **(2)** that provisions in a collective bargaining agreement that the employer "will continue" to provide medical benefits and that such benefits "shall remain" at a certain figure did not cause such benefits to vest. In coming to these conclusions, the court recognized that there is a distinction between pension plans on the one hand and health and welfare plans on the other. Pension plans typically contain specific rules for vesting. In contrast, health and welfare plans are otherwise. Noting this difference, the court said:

> "Employers are 'generally free . . . for any reason at any time, to adopt, modify, or terminate welfare plans. They may agree of course to relinquish their right to unilaterally

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> terminate those benefits and provide for lifetime vesting. [But], this court has made clear that the 'plan participant bears the burden of proving, by a preponderance of the evidence, that the employer intended the welfare benefits to be vested.
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> In applying these standards, it must be remembered that to vest benefits is to render them forever unalterable. Because vesting of welfare plan benefits constitutes an extra-ERISA commitment,[4] an employer's commitment to vest such benefits is not to be inferred lightly and must be stated in clear and express language. * * * These cautionary principles apply without regard as to whether the employee welfare benefits are provided under a collective bargaining agreement, SPD [summary plan description] or other plan document; the same underlying considerations are present irrespective of the particular type of document at issue." Id. at 138-139.

Consistent with these notions, the court in Boyd vs. Rockwood Area School District, 105 Fed.Appx. 382, 2004 WL 1636258 (3rd Cir. 2004)(unpublished[5]), ruled that retired employees of a school district had no property right in retiree health care benefits. In that case, the school district changed retiree health care benefits when it entered into a new collective bargaining agreement. The retirees argued that the school district made representations regarding future health care coverage and that they relied upon those representations in deciding to take early retirement. In rejecting the argument, the court stated that:

> "We have previously stated that retirement decisions are presumed to be voluntary. Accordingly, we assume that the plaintiffs' decision to take early retirement was voluntary. However, the presumption can be overcome by evidence of coercion or misrepresentation of facts material to the retirees' decision. The plaintiffs argue that their retirement was involuntary because [the school district] misrepresented a material fact to them.
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> We apply an objective test to determine if a retirement decision is voluntary. Under the test, we do not inquire into the subjective perceptions of the employee or the subjective intentions of the employer. Rather, the plaintiff need only prove that a reasonable person would have been misled by the agency's statements." Id. at 385.

Analyzing the particular facts in Boyd, the court found that the employees should not have been misled and should have understood that the health care benefits could be altered.

In the case of In re Unisys Corporation Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896 (3rd Cir. 1995), the court, like the court in Skinner, stated the principles that: **(1)** employers are generally free at any time, to adopt, modify or terminate welfare plans; **(2)** employers may agree to give up those rights, which may include an agreement for lifetime vesting; **(3)** the plan participant bears the burden of proving, by a preponderance of the evidence, that the employer intended the welfare benefits to be vested; and **(4)** a retiree's right to vesting of benefits can only be established by the terms of the document in question "in clear and express language." Id. at 901-902. According to the court, the written terms "control and cannot be modified or superseded by the employer's oral undertakings." Id. at 902.

In addition to these principles, there is another principle that is applicable to the public sector -- to wit, the principle that one governmental board generally cannot bind a subsequent governmental board with respect to governmental matters, absent statutory authority to the contrary. The Pennsylvania Supreme Court, in Lobolito, Inc. vs. North Pocono School District, 755 A.2d 1287 (Pa. 2000), said:

> With respect to those agreements involving municipal or legislative bodies that encompass governmental functions, we have repeatedly held that governing bodies cannot bind their successors. See, e.g., Mitchell v. Chester Housing Auth., 389 Pa. 314, 328, 132 A.2d 873, 880 (1957); Commonwealth ex rel. Fortney for Use of Volunteer Fire Dep't v. Bartol, 342 Pa. 172, 174-75, 20 A.2d 313, 314 (1941); Born v. City of Pittsburgh, 266 Pa. 128, 132- 33, 109 A. 614, 615 (1920); Moore v. Luzerne County, 262 Pa. 216, 220-22, 105 A.2d 94, 94-96 (1918). In Fortney we explained:
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> > In the performance of sovereign or governmental, as distinguished from business or proprietary, functions, no legislative body, or municipal board having legislative authority, can take action which will bind its successors. It cannot enter into a contract which will extend beyond the term for which the members of the body were elected. Commonwealth ex rel.

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> Fortney, 342 Pa. at 175, 20 A.2d at 314 (citations omitted).

In Mitchell, we described the public policy behind this rule of law in the following terms:

> The obvious purpose of the rule is to permit a newly appointed governmental body to function freely on behalf of the public and in response to the governmental power or body politic by which it was appointed or elected, unhampered by the policies of the predecessors who have since been replaced by the appointing or electing power. To permit the outgoing body to 'hamstring' its successors by imposing upon them a policy implementing [sic] and to some extent, policymaking [sic] machinery, which is not attuned to the new body or its policies, would be to most effectively circumvent the rule. Mitchell, 389 Pa. at 324, 132 A.2d at 878."

In several of the cases cited above, employment agreements were held to be within the governmental, as opposed to the proprietary, functioning of municipal government. Therefore, under these concepts, it is arguable that the adoption of an administrator compensation plan by one school board could not tie the hands of a subsequent school board if the subsequent school board determined to eliminate or reduce retiree health care benefits. There is an exception to the general rule — if the legislature empowers a municipal governmental board to take action that will bind a subsequent board, then the board can act. See, e.g., Scott vs. Philadelphia Parking Authority, supra.; McCormick vs. Hanover Township, 246 Pa. 169, 92 A. 195 (1914). For example, under the School Code, the granting of tenure to a professional employee by one school board will be binding on subsequent school boards. Similarly, if the procedures set forth in the School Code are met, then one school board hiring a district superintendent for a five-year term can certainly bind the subsequent school boards.[6] Therefore, it is arguable that benefits to retirees cannot vest in a way which binds a subsequent school board unless there is statutory authority that allows the action to be taken.

As stated previously, if benefits are intended to be "vested" according to the terms of the plan, then retiree health benefits cannot be eliminated or reduced without the agreement of the retiree or in accordance with the terms of the plan. A review of the limited case law on point in Pennsylvania state courts, however, does not thoroughly discuss the issues or provide any clear analysis that would aid in the evaluation whether retiree benefits are vested in any given situation.

In Newport Township vs. Margolis, 110 Pa.Cmwlth. 611, 532 A.2d 1263 (1987), a retired township employee filed suit to compel the payment of medical insurance retirement benefits. The employee began employment with the township on July 16, 1948. On October 2, 1972, the township commissioners adopted the following resolution:

> "That the Township continue to carry on its Blue Cross/Blue Shield and Major Medical Plan, at the cost of the Township, for a period of ten years, for any full-time employee or employee receiving a salary for a period of fifteen years, who retires because of age or disability." Id. at 612.

On March 31, 1982, with almost 34 years of service with the township, the plaintiff retired. Five days later, the commissioners adopted a resolution to discontinue the retiree health care benefits. The employee filed suit and the court ruled in favor of the employee. The court said:

> "[P]ublic employee retirement benefits in Pennsylvania are viewed as being part of a contractual agreement between the public employer and the employee to defer part of the employee's compensation, paid in the form of retirement benefits, to some future date. Generally, once a public employee has entered a retirement benefit system, he is entitled to receive such benefits as prevail at the time, and the public employer generally may not abolish or reduce such benefits. Furthermore, as was first articulated by our Supreme Court in Harvey vs. Allegheny County Retirement Board, 392 Pa. 421, 431, 141 A.2d 197 (1958):
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> > An employee who has complied with all conditions necessary to receive a retirement allowance cannot be affected adversely by subsequent legislation which changes the terms of the retirement contract.
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> Thus, the Township could not abolish the benefits due to [the retiree]." Id. at 614.

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The validity of the result in Margolis arguably is questionable. First, there was no analysis by the court of what the township commissioners intended in terms of vesting when they adopted the resolution. There was, for example, no consideration by the court of the language, if any, in the plan descriptions or insurance contracts and whether such language stated that benefits could be eliminated or modified. Second, all of the cases cited by the court dealt with retirement benefits as distinguished from health and welfare benefits. The court assumed that there was vesting without going through the analysis of determining whether there was a legal commitment by the employer for vesting. Third, there was no consideration of the rule that one board of commissioners cannot bind a subsequent board of commissioners.

What does all of this mean? Allow me to set forth some random thoughts in light of the foregoing discussion.

1. Act 93 expressly allows school boards to adopt administrator compensation plans that contain "early retirement programs." 24 P.S. §11-1164(a). Therefore, if a school board agreed to adopt an administrator compensation plan that encouraged early retirement and administrators retired early in reliance on the plan in order to obtain the benefits detailed in the early retirement plan, such benefits would likely be enforced, even if they affect and are binding upon subsequent school boards. Similarly, if an administrator compensation plan simply provided for retiree benefits that were not part of a plan to induce or encourage early retirement, then it would appear that subsequent boards would be able to terminate or reduce the benefits to retirees, at least at the conclusion of the term of the administrator compensation plan.
2. Whether retiree health benefits are vested and binding on a subsequent school board may depend upon what is or is not stated in the plan and plan documents. If, for example, the plan or plan documents contains express language allowing for the elimination or modification of retiree benefits, then it is clear that changes can be made that are consistent with the applicable language.
3. If the administrator compensation plan contains a promise for the payment of retiree health care benefits that is not intended as an early retirement incentive, similar to the language of the resolution in Margolis, supra, and there is no language in the plan or benefit documents describing whether the benefits are "vested," there is arguably an open question whether the employer retains the right to discontinue or reduce the benefits in light of the decisions in Skinner, supra, and Unisys, supra, or whether the benefits must continue in light of the decision in Margolis, supra.

In the final analysis, whether public school entities may terminate or reduce retiree health care benefits will depend on the facts and circumstances in each case and, ultimately, what the Pennsylvania judiciary adopts as the applicable legal standard. Because of the different cases decided on this issue, the legal rules are not entirely clear and there is little predictability how the courts will deal with a specific fact scenario.

Footnotes

1 Administrator compensation means "administrator salaries and fringe benefits and shall include any board decision that directly affects administrative evaluation and early retirement programs." 24 P.S. §11-1164(a).

2 The term "school administrator" is defined as "any *employee* of the school entity below the rank of district superintendent, executive director, director of vocational-technical school, assistant district superintendent or assistant executive director, but including the rank of first level supervisor, who by virtue of assigned duties is not in a bargaining unit of public employees as created under the act of July 23, 1970 (P.L. 563, No. 195), known as the 'Public Employee Relations Act.' However, this definition shall not apply to anyone who has the duties and responsibilities of the position of business manager or personnel director, but not to include principals." 24 P.S. §11-1164(a)(italics added).

3 In *Allied Chemical & Alkali Workers of America vs. Pittsburgh Plate Glass Company*, 404 U.S. 157 (1971), the United States Supreme Court recognized the distinction between active employees and retirees. In interpreting the term "employee" in the National Labor Relations Act ("NLRA"), the court ruled that it applied to someone who works for another for hire and does not include retirees. Therefore, the Supreme Court ruled that retirees could not be included in a collective bargaining unit under the NLRA. The court also ruled that retiree benefits are not a mandatory subject of bargaining under the NLRA and that it was not an unfair labor practice for the employer to change the retiree health care benefits unilaterally and mid-term of a collective bargaining agreement. There are no cases interpreting Act 93 which gives us any guidance whether a similar analysis will be applied to Act 93—but if a similar analysis were given, it is arguable that school entities may be able to alter retiree benefits mid-term of an administrative compensation plan.

4 "ERISA" is an acronym for the Employee Retirement Income Security Act—a law which generally applies in the private sector, but which is generally inapplicable to public employees. The *Skinner* case involved the private sector and the court properly noted that ERISA does not require the vesting of health and welfare plans. Discussing Congress's intent in not requiring the vesting of health and welfare plan benefits under ERISA, the court stated that "Congress recognized the need for flexibility with respect to an employer's right to change medical plans." *Id.* at 138. Another court observed: "[a]utomatic vesting [of health and welfare plan benefits] was rejected [by Congress] because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation. These unstable variables prevent accurate prediction of future needs and costs." *Moore vs. Metropolitan Life Insurance Co.,* 856 F.2d 488, 492 (2d. Cir. 1988).

5 Unpublished opinions are not precedential and may not be cited in legal proceedings as precedent. However, unpublished decisions do provide some guidance to practitioners as to how courts view the issues under consideration.

6 At the time that this article was written, the Court of Common Pleas of Washington County in the case of *Burger vs. McGuffy School District* ruled that superintendents have no statutory job protection and may be summarily discharged at the pleasure of the school board. The court concluded that superintendents are appointed civil officers for purposes of Article VI, §7 of the Pennsylvania Constitution, which provides that "[a]ppointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed."