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Sewer Authority Sales and Post-Closing Litigation

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On June 15, 2022, the Pennsylvania Commonwealth Court issued an unreported opinion addressing the sale of the McKeesport Authority's assets to Pennsylvania American Water for \$156 million. The sale drew a union grievance concerning the treatment of earned but unpaid sick leave and vacation benefits. An Arbitrator awarded the former Authority's union employees vacation pay and sick benefits. On appeal, the Commonwealth Court affirmed the Arbitrator's decision.

Starting in 2015, the City of McKeesport sought to sell its Authority's wastewater system. Knowing of the City's intentions, the City's Authority and the Union negotiated and signed a Collective Bargaining Agreement (CBA) in 2017 to replace one that was expiring. The 2017 CBA had a provision that "required sick leave and vacation benefits be earned in a year prior to the year in which they were to be taken." Under the CBA, then, Authority employees who were Union members earned sick leave and vacation benefits during 2017 that could then be taken in 2018.

In late 2017, as the City prepared to sell its facilities to Pennsylvania American Water Company (PAWC) for \$156 million, the Union Steward filed a grievance asserting that the City remained liable after the sale for earned but unpaid benefits that accrued during 2017. On December 18, 2017,

the City dissolved the Authority, terminated the Authority's employees, and sold the Authority's assets to PAWC. At the time of the sale, the Union's grievance was unresolved.

Later in 2018, the Union filed an action in the Court of Common Pleas on several theories, and the court sent the matter to arbitration. The Arbitrator sustained the Union's grievance, thus requiring the City to pay sick leave and vacation benefits the Authority's employees earned during 2017. The City filed a petition in the Court of Common Pleas to vacate the Arbitrator's award. The court denied the petition to vacate the award and the City appealed to the Pennsylvania Commonwealth Court.



Appeals from an ACT 195 Arbitration award afford the Arbitrator's decision great deference under the "essence test." That test requires that if the issue decided by the Arbitrator falls within the scope of the CBA, the arbitration award can be vacated only if it "indisputably and genuinely is without foundation in, or fails to

logically flow from, the CBA." If the essence test is met, as it was here, the court cannot vacate the Arbitrator's award unless the enforcement of the award would contravene a "well-defined and dominant public policy."

On June 15, 2022, the Commonwealth Court affirmed the trial court's refusal to vacate the award. The award remains in place and now requires the City to make good on the benefits owing to the Authority's former employees as of the date of the asset sale to PAWC. The City may seek an allowance of appeal to the Pennsylvania Supreme Court, but such a path has – statistically speaking – a very low likelihood of success.

The sale of system assets often is structured whereby the incorporating municipality dissolves the Authority and then immediately sells the system's assets to an investor-owned utility. This case, once again, shows that such a deal structure does not necessarily avoid significant residual claims.

Several other system sales resulted in material after-the-fact litigation.

The 2016 sale of the Scranton Sewer Authority assets to PAWC spawned several lawsuits including a class action by landowners concerning 619 missing sewer line easements and an objection regarding the disbursement of \$87 million of the sale's proceeds. The litigation created a lack of finality with respect to the deal for years.

In 2014, Middletown Borough and its Authority entered into a concession and lease agreement for its water and sewer system.

The deal spawned litigation that has continued for over six years. The Borough and a class of affected individuals assert

damages of more than \$150 million, according to the third amended complaint, which of course, is being vigorously contested. However that case is finally resolved, the point here is that a sale or even lease is not necessarily the final financial fix the parties may hope for in negotiating and completing a transaction.

These cases teach us that after a deal is signed and the funds transferred, the closing may not be the final chapter. Municipalities contemplating the sale of an authority's assets are well served to contemplate that they may merely be trading one set of problems for another.

