VOL. 172 NO. 2 JANUARY 26, 2024

# PITTSBURGH LEGAL JOURNAL

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## OPINIONS

### ALLEGHENY COUNTY COURT OF COMMON PLEAS



*Arbitration Award*

*This Opinion supports the September 7, 2023 Order of Court, which upheld an arbitration award in favor of the Fraternal Order of Police Fort Pitt Lodge No. 1 ("FOP"), which has been appealed to the Commonwealth Court of Pennsylvania. In 2017 the FOP filed a grievance against the City of Pittsburgh ("the City") challenging the healthcare premium equivalency rates charged to active duty and retired police officers. The FOP and City agreed to bifurcate the issues into rates charged to active duty officers and rates charged to retired officers. In 2018 an arbitration award was issued regarding the active duty rates; the arbitrator explicitly retained jurisdiction over retiree rates. The arbitration award was affirmed on appeal and in November of 2020 the parties signed a Memorandum of Understanding, which again provided that the arbitrator retained jurisdiction over retiree health insurance. In February of 2021, the Union filed an Unfair Labor Practice charge with the Pennsylvania Labor Relations Board alleging that, effective January 1, 2021, the City unilaterally raised retiree healthcare contributions. The Union withdrew the charge in November of 2021 and the parties continued discussions regarding retiree healthcare contributions. Ultimately, from March of 2021 to November of 2022 three arbitration hearings were held before arbitrator Jane Desimone regarding the retiree healthcare aspect of the 2017 grievance. On April 21, 2023 Arbitrator Desimone sustained the Union's grievance. Arbitrator Desimone found that the City overcharged retirees for healthcare in 2017 by $257,333 and 2018 by $233,090, and ordered that the Union be reimbursed for affected members. On May 1, 2023, the City filed a statutory appeal in the Court of Common Pleas. On September 7, 2023, the Court denied the City's statutory appeal and upheld the arbitrator's award. The City appealed this Order to the Commonwealth Court of Pennsylvania and filed a timely Concise Statement of Errors Complained of on Appeal ("Concise Statement"), which the Court addresses in its Opinion.*

**Judges who would like to submit their opinions for publication can do so by emailing their opinions as a Microsoft Word document to opinions@acba.org. Paper copies of opinions and .pdf versions of opinions cannot be considered for publication.**

# PLJ
The Pittsburgh Legal Journal Opinions are
published fortnightly by the
Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
412-261-6255
www.acba.org




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# Opinions

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# IN RE: ESTATE OF JOSEPH CALIHAN, Deceased, No. 0024 of 2021

*Inheritance tax*

*Pennsylvania statute, 24 P.S. Section 6901.316(b) exempts only Pennsylvania 529 Plans from Pennsylvania inheritance tax. As the Pennsylvania constitution provides for the uniformity of taxes, a statute imposing inheritance tax on out-of-state created 529 Plans, but not on in-state created 529 Plans, is unconstitutional.*

In the Court of Common Pleas of Allegheny County, Pennsylvania. Orphan's Court Division. O'Toole, J.

## MEMORANDUM OPINION AND ORDER OF COURT

### BACKGROUND

The Decedent died testate on May 21, 2020. His Will was not admitted to probate as Decedent had no probate assets to administer. On December 15, 2020, the Pennsylvania Inheritance Tax Return (REV-1500) was timely filed.

During his lifetime, the Decedent was listed as the "Participant" on ten (10) 529 Plan Accounts for the benefit of the Decedent's grandchildren. These accounts are listed as items 2 through 11 on Schedule G of the Tax Return (as filed on January 6, 2021). Prior to his death, the Decedent transferred control of Accounts listed as items 6 through 11 to a Successor Participant. Thus, at the time of his death, the Decedent was listed as the Participant only on the Accounts listed as items 2 through 5, into which he had made a portion of the contributions. On May 6, 2021, the Department of Revenue issued its Notice of Inheritance Tax Appraisement, Allowance, or Disallowance of Deductions and Assessment of Tax, wherein the Department assessed inheritance tax on the full value of all ten (10) of the 529 Plan Accounts, resulting in a tax liability of $176,308.56 on these Accounts. The Explanation of Change states as follows: "the 529 Accounts are fully taxable since the Decedent is the account participant and retained control of the account and retained the ability to change the beneficiary".

On July 1, 2021, the Estate timely filed a Protest Letter with the Department of Revenue. On November 29, 2022, the Board of Appeals issued a Decision and Order disallowing the calculation as set forth on the Inheritance Tax Return and including the full value of the 529 Plans as subject to Pennsylvania Inheritance Tax, less a $3,000 deduction for each of the six (6) Accounts that had been transferred prior to the Decedent's death, which upheld the additional tax assessment as set forth on the Notice.

The matter came before this Court on a Petition and Amended Petition to Overturn a Determination of the Board of Appeals of the Pennsylvania Department of Revenue filed by Matthew J. Calihan, as Personal Representative of the Estate of his late Father, on January 30, 2023. The Petitioner's position is that only the portions of the 529 Plan Accounts that are attributable to the Decedent's contributions are taxable in the Decedent's estate. The portions of the Accounts that were contributed by persons other than the Decedent are not taxable in the Decedent's estate. The Respondent's (PA Department of Revenue) response is that the accounts were held with Fidelity Investments and not with the "Pennsylvania Treasury 529 Pennsylvania College Savings Program"; as such, they do not qualify for a tax exemption under 24 P.S. §6901.316.

After a conference with the Court, Briefs were filed by both parties and oral argument was heard on September 28, 2023.

### DISCUSSION

The Personal Representative presents three arguments in favor of the position of the Estate that all of the funds in the 529 Plans should not be included as an asset of the Decedent for inheritance tax purposes.

First, the Estate argues that the statute, 24 P.S. §6901.316, exempting only Pennsylvania 529 Plans (i.,e, Tuition Account Program Contracts), and not 529 Plans established in other states, from Pennsylvania Inheritance Tax is unconstitutional. The Court agrees for the following reasons: First, the policy, as stated by the Legislature, is to promote savings for higher education. The policy, as set forth in 24 P.S. §6901.301, does not contain any geographic limitations. Second, the 529 Plans established in each of the states are very similar and all of them are exempt from Federal estate inheritance tax. Third, the Pennsylvania Constitution provides for the uniformity of all taxes. The statute violates this uniformity clause in that it imposes inheritance tax on out-of-state created 529 Plans, but not on in-state created 529 Plans. Fourth, there is no legitimate distinction between the class of persons who create out-of-state 529 Plans and the persons who create in-state 529m Plans; and thus, imposing a tax burden on those persons creating out-of-state 529 Plans, but not on those persons creating in-person 529 Plans results in an unconstitutional tax.

Second, the Estate equates the 529 Plans to retirement plans, which are not taxable under Pennsylvania Inheritance Tax laws. This argument is rejected, as the Court does not agree with the correlation between the two types of accounts.

Third, the Estate agues that the Decedent held the funds as a constructive trust for the persons who actually deposited the funds into the 529 Plans. The Court also rejects this argument.

Based on the foregoing, the Court issues the following Order:

### ORDER OF COURT

AND NOW, this 29th day of November, 2023, upon consideration of the Motion for Reconsideration, and the November 7, 2023, Order of Court which was docketed on November 8, 2023, having been vacated by a separate Order of Court, it is hereby ORDERED as follows:

(1) The decision of the Pennsylvania Department of Revenue including the full value of the ten (10) 529 Plans on which the Decedent was named as the Participant is overturned and the Pennsylvania Department of Revenue shall refund the amount of $176,308.56.

(2) 24 P.S. §6901.316(b) is unconstitutional as written. In order to effectuate the intent of the Pennsylvania Legislature as stated in 24 P.S. §6901.301 and the presumption that the Legislature did not intend to violate the Constitution of this Commonwealth, 24 P.S. §6901.316(b) is interpreted as follows: For the purposes of this subsection (24 P.S. §6901.316(b)), all qualified State tuition programs, as defined by section 529 of the Internal Revenue Code of 1986, as amended, shall be treated the same as a Tuition Account Program Contract.

BY THE COURT:
The Hon. Lawrence J. O'Toole

# ANTHONY F. JESELNIK, Appellant/Petitioner, v. RICHARD P. JOSEPH, an Individual, and ALIGNED PARTNERS TRUST COMPANY, a Pennsylvania Trust Company, Appellees/Respondents

*Estate escrow accounts*

*The court did not commit any errors or abuse discretion in denying Mr. Jeselnik's Motion for Preliminary Injunction requesting that the court restrict access to a Beaver County estate escrow account for lack of jurisdiction and directing him to file his injunction with the Beaver County Orphans' Court to seek redress regarding the estate escrow account. Applying the law to the record, the court found the subject estate escrow account to be the property of the Decedent, John J. Thomas, which is subject to the jurisdiction of the Beaver County Orphan's Court Division at Case No. 04-14-1068. While the court's action does not affect or dismiss Mr. Jeselnik's underlying breach of contract claim, it does preclude him from filing any demand for equitable relief regarding an estate escrow account in Allegheny County Court of Common Pleas Civil Division that is subject to Beaver County Orphans' Court's mandatory jurisdiction.*

Case No.: GD-21-09947. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, Jr., J. December 14, 2023.

## Pa.R.A.P. 1925 (b) OPINION

### PROCEDURAL HISTORY

On 10/12/2023, the Appellant/Petitioner, Anthony F. Jeselnik, Esquire ("Mr. Jeselnik") filed an appeal to my 10/04/2023 Order denying his Motion for a Preliminary Injunction ("Motion") to enjoin the Appellees/Respondents from releasing of funds from an estate escrow account. I directed Mr. Jeselnik to file his injunction in the Beaver County Orphans' Court Division, where the estate is located.

Mr. Jeselnik is an attorney admitted to practice law in Pennsylvania and filed a Complaint In Equity against the Appellee/Respondent, Richard P. Joseph, Esquire ("Mr. Joseph"), an attorney admitted to practice law in Pennsylvania, and the Appellee/Respondent, Aligned Partners Trust Company ("Aligned Partners"), a trust company doing business in Pennsylvania. The Complaint contains claims for breach of contract, promissory estoppel, quantum merit, unjust enrichment, injunctive relief, and declaratory relief. All counts relate to Mr. Jeselnik's claim that he performed legal work for Mr. Joseph in the Estate of John J. Thomas at No. 04-14-1068, concerning a will contest in Beaver County Orphans' Court.

In the underlying Beaver County estate case, the Orphans' Court issued a consent order directing one million, four hundred eighty-five thousand dollars ($1,485,000.00) to be placed into an escrow account with Aligned Partners. On 8/31/2023, the Beaver County Orphans' Court Judge issued an order awarding Mr. Joseph an attorney fee in the amount of eight hundred fifty-one thousand, five hundred five dollars ($851,505.00) and forty percent (40%) of any assets belonging to the Estate of John J. Thomas.

The next day, on 9/01/2023, Mr. Jeselnik filed a Motion for Preliminary Injunction, in Allegheny County which was presented to me on 9/13/2023. The Motion requested that I enjoin Aligned from paying any money to Mr. Joseph, or otherwise distributing to him any money from the estate escrow account maintained by Aligned Partners in excess of four hundred thousand dollars ($400,000.00). Additionally, Mr. Jeselnik requested that I prohibit Mr. Joseph from filing any further actions in Beaver County Orphans' Court to pursue or attempt to secure release of the Beaver County estate escrowed moneys held by Aligned Partners. During the presentation of the Motion, Mr. Jeselnik requested that the matter be continued to allow him an opportunity to file a response to Mr. Joseph's Answer and Brief in Support in Opposition to the Injunction. Over Mr. Joseph's objection, I granted Mr. Jeselnik's request for a continuance and ordered him to file a response brief within seven (7) days and permitted Mr. Joseph seven (7) days to file any response if he chose to do so.

On 10/04/2023, after all parties filed their response briefs and answers, I denied Mr. Jeselnik's Motion, finding that I did not have jurisdiction and authority to enjoin Aligned from paying Mr. Joseph $851,505.00, authorized by Beaver County Orphans' Court Order dated 8/31/2023. I believed that it was more appropriate for Mr. Jeselnik's Motion to be brought and heard in Beaver County Orphans' Court. It was clear to me that the Aligned Partners' escrow account and authorized payment from it to Mr. Joseph, were created and authorized by the Beaver County Orphan's Court Orders. Any restrictions on the use of this account fall plainly within the administration of the Estate of John J. Thomas and is the proper jurisdiction of the Beaver County Orphans' Court. Claims pertaining to the estate escrow account and payments from it must be brought in Beaver County Orphans' Court Division since Allegheny County Court of Common Pleas, Civil Division ("Allegheny Civil Court") lacks jurisdiction.

Lastly, I did not analyze or consider whether Mr. Jeselnik's Motion would meet the six (6) prongs necessary to grant a preliminary injunction since I lacked subject-matter jurisdiction.

### STANDARD OF REVIEW

Before ruling on the substance of Mr. Jeselnik's Motion, I first had to consider whether I had proper jurisdiction to enjoin Mr. Joseph, the estate's legal counsel, from receiving monies from the estate escrow account. "It is well-settled that the question of subject matter jurisdiction may be raised at any time, by any party, or by the court sua sponte." B.J.D. v. D.L.C., 19 A.3d 1081, 1082 (Pa. Super. 2011) (quoting Grom v. Burgoon, 672 A.2d 823, 824–25 (Pa. Super. 1996)); In re Est. of Ciuccarelli, 81 A.3d 953, 958 (Pa. Super. 2013).

> "Jurisdiction is the capacity to pronounce a judgment of the law on an issue brought before the court through due process of law. It is the right to adjudicate concerning the subject matter in a given case.... Without such jurisdiction, there is no authority to give judgment and one so entered is without force or effect. The trial court has jurisdiction if it is competent to hear or determine controversies of the general nature of the matter involved sub judice. Jurisdiction lies if the court had power to enter upon the inquiry, not whether it might ultimately decide that it could not give relief in the particular case."

Aronson v. Sprint Spectrum, L.P., 767 A.2d 564, 568 (Pa. Super. 2001) (quoting Bernhard v. Bernhard, 668 A.2d 546, 548 (Pa. Super. 1995)).

Pursuant to 20 Pa.C.S.A. § 711(1), the Orphans' Court has mandatory and exclusive jurisdiction over "[t]he administration and distribution of the real and personal property of decedents' estates." The Orphans' Court also has mandatory and exclusive jurisdiction over "[t]he appointment, control, settlement of the accounts of, removal and discharge of, and allowance to and allocation of compensation among, all fiduciaries of estates and trusts[.]" 20 Pa.C.S.A. § 711(12). Taken together, these provisions mandate that the Orphans' Court has "exclusive jurisdiction of the administration and distribution of decedents' estates, of the control of estate fiduciaries, and of the settlement of their accounts." Ostroff v. Yaslyk, 213 A.2d 272, 274 (Pa. 1965), citing Horner v. First Penna. Banking & Trust Co., 194 A.2d 335, 338–39 (Pa. 1963); Cole v. Wells, 177 A.2d 77, 81 (Pa. 1962); Trout v. Lukey, 166 A.2d 654, 655 (Pa. 1961); In re Est. of Ciuccarelli, 81 A.3d at 958.

Under 20 Pa. C.S.A. § 711, which addresses the mandatory exercise of jurisdiction through Orphans' Court Division, generally, states:

> "[e]xcept as provided in section 712 (relating to nonmandatory exercise of jurisdiction through the orphans' court division) and section 713 (relating to special provisions for Philadelphia County), the jurisdiction of the court of common pleas over the following shall be exercised through its orphans' court division: (1) Decedents' estates.--The administration and distribution of the real and personal property of decedents' estates and the control of the decedent's burial.

**DISCUSSION**

Mr. Jeselnik's statement of errors mistakenly avers the filing of a complaint for a breach of contract in the Allegheny Civil Court which has not been litigated to verdict or judgement, confers jurisdiction to the Allegheny Civil Court to enjoin the transfer of funds from a Beaver County estate escrow account. The record is clear that this account was expressly created by an Order of Court issued by the Beaver County Orphans' Court. Further, Mr. Jeselnik avers that I have the jurisdiction to prohibit Mr. Joseph from filing any further actions in the Beaver County Orphans' Court to obtain the release of the funds held in the estate's escrow account.

It appears on the face of Mr. Jeselnik's pleadings, that the subject escrow estate account held by Aligned Partners was created by a Beaver County Orphans' Court Order. The subject account exclusively contains funds of the Estate of John J. Thomas and is controlled by the estate's personal representative and any payments or distributions would be part of his or her administrative duties and regulated by the Beaver County Orphans' Court.

Pursuant to the Pennsylvania Decedents, Estates, and Fiduciaries Code § 711, general mandatory exercise of jurisdiction through Beaver County Orphans' Court, Mr. Jeselnik's Motion regarding the use and restrictions on the escrow account of the Estate of John J. Thomas falls squarely within the four corners of § 711(1), mandating that an Orphans' Court has "exclusive jurisdiction of the administration and distribution of decedents' estates, of the control of estate fiduciaries, and of the settlement of their accounts". In re Est. of Ciuccarelli, 81 A.3d at 958. The regulation of this account clearly involves the administration and distribution of personal property of a decedent. The filing of a breach of contract complaint in the Allegheny Civil Court does not give me jurisdiction to limit or restrict the distribution of funds held in a Beaver County estate escrow account.

Furthermore, Mr. Jeselnik is requesting that I exercise jurisdiction over the estate escrow account before his underlying breach of contract complaint has been litigated and reduced to judgement in his favor. I believe Mr. Jeselnik has "jumped the gun" in prematurely filing his injunction in Allegheny County. To have jurisdiction in the Allegheny Civil Court, Mr. Jeselnik needed to wait until Mr. Joseph was paid his fee out of the estate account and then deposited the fee into his personal or business account before I maybe would have jurisdiction.

**CONCLUSION**

Therefore, I found that I did not commit any errors or abuse my discretion in denying Mr. Jeselnik's Motion for Preliminary Injunction requesting that I restrict access to a Beaver County estate escrow account for lack of jurisdiction and directing him to file his injunction with the Beaver County Orphans' Court to seek redress regarding the estate escrow account. Applying the law to the record, I found the subject estate escrow account to be the property of the Decedent, John J. Thomas, which is subject to the jurisdiction of the Beaver County Orphan's Court Division at Case No. 04-14-1068. While my action does not affect or dismiss Mr. Jeselnik's underlying breach of contract claim, it does preclude him from filing any demand for equitable relief regarding an estate escrow account in Allegheny County Court of Common Pleas Civil Division that is subject to Beaver County Orphans' Court's mandatory jurisdiction.

BY THE COURT:
The Hon. John T. McVay, Jr.

## THOMAS and STACEY ANSELL; TRAVIS and BRITTNI BAIR; BRITTNI CADAMORE n/k/a Brittni Bair; DANIEL GARRIGAN; THOMAS and PATRICIA GARRIGAN; KEVIN KEENER and SUZANNE PRICE; JOE and CAITLIN KERN; SHAWN MOORE and ROSE PARIS; LINDA SCHAFFER; DONALD J. VASIL, JR., and VICTORIA CHRISTY, Plaintiffs, v. CHARAH SOLUTIONS; CONTROLLED DEMOLITION, INC.; GRANT MACKAY DEMOLITION COMPANY, INC.; CIVIL & ENVIRONMENTAL CONSULTANTS, INC., Defendants

*Preliminary injunction*

*The Plaintiffs filed a Petition for Preliminary Injunction on September 15, 2023, seeking to prevent the Defendants from imploding the boiler house at the Cheswick Power Station set for September 22, 2023. The Court granted in part the Plaintiff's Emergency Motion for Preliminary*

*Injunction. A preliminary injunction hearing was then held intermittently beginning two days later on September 20, 2023 and not concluding until November 15, 2023, due to the parties' and witnesses' unavailability. For the reasons set forth in the findings of fact and conclusions of law, the Court granted the Preliminary Injunction and denied the Defendant's Motion to Dissolve its September 18, 2023 Order of Court. The Court also denied the Plaintiffs' request to permanently enjoin the implosion of the boiler house.*

Case No.: GD-23-010793. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, Jr., J. December 10, 2023.

## FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER GRANTING THE PLAINTIFF'S PETITION FOR PRELIMINARY INJUNCTION AND DENYING DEFENDANT'S MOTION TO DISSOLVE MY SEPTEMBER 18, 2023 ORDER OF COURT

The Plaintiffs, Thomas and Stacy Ansell, Travis and Brittni Bair, Brittni Cadamore n/k/a Brittni Bair, Daniel Garrigan, Thomas and Patricia Garrigan, Kevin Keener and Suzanne Price, Joe and Caitlin Kern, Shawn Moore and Rose Paris, Linda Schaffer, Donald J. Vasil, Jr., and Victoria Christy ("the Plaintiffs"), filed a Petition for Preliminary Injunction on September 15, 2023, seeking to prevent the Defendants, Charah Solutions, Controlled Demolition, Inc., Grant Mackay Demolition Company, Inc., and Civil & Environmental Consultants, Inc. ("the Defendants"), from imploding the boiler house at the Cheswick Power Station (the "Power Plant") set for September 22, 2023. By Order of Court dated September 18, 2023, I granted in part the Plaintiff's Emergency Motion for Preliminary Injunction. A preliminary injunction hearing was then held intermittently beginning two (2) days later on September 20, 2023 and not concluding until November 15, 2023, due to the parties' and witnesses' unavailability. For the reasons set forth in the following findings of fact and conclusions of law, I am granting the Preliminary Injunction and denying the Defendant's Motion to Dissolve my September 18, 2023 Order of Court. I am also denying the Plaintiffs' request to permanently enjoin the implosion of the boiler house.

### FINDINGS OF FACT

As ordered, both the Plaintiffs and the Defendants submitted proposed findings of fact and conclusions of law at the end of the business day of Friday, December 2, 2023. My review of their proposed findings indicates that the parties naturally proposed facts that were evidentiarily supportive of their arguments and contained mixed conclusions of law with those proposed facts. While I do not recall any specific proposed facts to not necessarily be supported by the record, I accept both submissions as proposed to the extent that they are indeed facts and not conclusions of law. I reserve the right in the event of an appeal to explain, and more specifically delineate, those matters that are factually significant and conclusory, or a matter of weight. Recognizing and understanding that both parties have asked me to rule as quickly as possible after twelve (12) days of testimony contained in nine (9) volumes[1] of transcripts, numerous exhibits, and more significantly, the importance of my decision to all parties, I am condensing a specific itemized fact finding with record citations for purposes of this order and analysis.[2] The essential facts upon which I have made my decision are largely uncontroverted and significantly based upon my observations of the videos presented during the hearing, as cited below. I find the facts as follows:

1. The Cheswick Power Plant was formerly a 565 MW coal-fired power station located in Springdale, Pennsylvania, and apparently, the only one in Allegheny County. (Compl. ¶ 15).
2. On June 2, 2023, Grant Mackay Demolition Company, Inc. ("Grant Mackay)", the general contractor, and Controlled Demolition, Inc. ("CDI"), the demolition sub-contractor, imploded two (2) chimney stacks located at the Cheswick Power Plant, which is now owned by Charah Solutions. (Compl. ¶ 28).
3. CDI was responsible for obtaining a Blasting Activity Permit from the Pennsylvania Department of Environmental Protection Agency (the "DEP"), designing and felling the chimneys, handling explosives, transporting explosives to the site, and felling the chimneys in the specified area. (H.T. Vol. VII at 20).
4. Mark Loizeaux ("Mr. Loizeaux"), President of CDI, admitted that on June 2, 2023, the chimneys were imploded and although one (1) chimney fell as designed to fall, the 750' (the second) chimney created an air blast that damaged a tree, which fell into a power line, and projected dust and debris outside of the project site and into the surrounding residential neighborhood. (H.T. Vol. VII at 30).
5. CDI recorded the seismic activity during the chimney stacks implosion and provided the recorded ground vibration and air overpressure readings to the DEP. (H.T. Vol. VII at 35-36).
6. Mr. Loizeaux admitted that when the chimneys were imploded, they were expected to break apart forty percent (40%) of the way up, which creates an opening to vent air pressure, and the 750' chimney did not break apart, consequently, the air pressure was forced out the end of the chimney. (H.T. Vol. VII at 50-51).
7. Mr. Loizeaux further admitted that he was "shocked and surprised" about the way the 750' chimney, steel liner, and shell performed during the implosion. (H.T. Vol. VII at 81).
8. Mr. Loizeaux admitted that following the chimney stacks implosion, the DEP issued citations to CDI on the basis that during the chimney implosion CDI exceeded permitted air blast limits and that the implosion resulted in damage to private property, caused flyrock, and damaged overhead utility lines. (H.T. Vol. VII at 39, 42).
9. Adam Snyder ("Mr. Snyder"), Blasting and Explosives Inspector for the New Stanton District Office of the DEP, admitted that the DEP received a corrective action plan, addressing both the chimney implosion and the planned boiler house implosion, from CDI in relation to the citations that were issued. (H.T. Vol. I at 75).
10. The June 2, 2023 demolition of the chimney stacks released dust, insulation, flyrock, and debris into the air, resulting in the formation of a cloud of dust, which include toxic Resource Recovery and Conservation Act ("RCRA") metals. (Compl. ¶ 29).
11. This fugitive dust cloud traveled outward from the Power Plant property, into the homes and onto yards of the Plaintiffs and other residents surrounding the Power Plant in the Springdale Borough community. (Pl. Ex. 88, 89).
12. The evidence submitted showed that the cloud of visible fugitive dust encompassed the entire surrounding area. It is undisputed that fugitive dust from the chimney implosions traversed the property of the Power Plant into the homes and onto the property of

the Plaintiffs and other surrounding residents. (Pl. Ex. 88, 89).

13. Two (2) videos of the implosion, which were presented, were quite persuasive regarding the dispersion of the fugitive dust throughout the community. These videos presented views from inside the dust cloud, as well as the vantage point across the river from the Power Plant. The dust cloud enveloped the whole community. (Id.)
14. The dust visibly lingered in the area for several minutes, showing a cloud hanging over the entire area. Photographs of the aftermath showed dust covering the street, grass, cars, and every surface on which dust could land. (Id., Pl. Ex. 5).
15. The Plaintiffs' expert, S. Thomas Dydek, Ph.D. ("Dr. Dydek"), testified that even after the dust visibly settled onto the ground and/or surfaces, invisible dust remained in the area further increasing the risk of harm. (H.T. Vol. IX at 201).
16. Following the implosion, clean-up methods may not have alleviated the risk. Individuals used leaf blowers and power washers to remove dust from the surfaces on which it was visible. (H.T. Vol. VII at 139-140).
17. Dr. Dydek testified that these methods re-distributed the dust throughout the community, and that the clean up methods did not remove all the dust; the fact that dust may not have been visible in the days after the implosion did not necessarily eliminate the risk of harm from that dust. (H.T. Vol. IX at 201-206).
18. It is uncontroverted that dust sampled taken by the Plaintiffs, from furniture inside the homes revealed various RCRA metals, such as lead and arsenic. The sample indicated that the dust (including the RCRA metals) from the Power Plant got into the homes of the Plaintiffs. (Id.)
19. Dr. Dydek testified that the dust that spread into the homes of the Plaintiffs, also settled on their yards, and the videos and photographs certainly corroborate these facts. (Id.)
20. Approximately 200 claims of damage resulted from the chimney implosions. (H.T. Vol VII at 162-163).
21. Further photograph evidence showed that the chimney implosion caused property damage included: knocked down power lines, broken windows, displaced door jams, displaced window frames, cracks in walls, floors, and ceilings, displaced support beams, damaged chimneys, damaged porches, displaced soffit and facia; various electrical items owned by nearby residents were shorted out, damaged, and/or broken; homes damaged by RCRA metals being deposited into their property; homes damaged by dust generally; clean-up methods caused additional damages; personal property within the homes was covered in dust, including RCRA metal dust; and undoubtedly home values damaged by those homes that were impacted by the dust cloud. The Plaintiffs will have to disclose the deposit of heavy metals and other contaminants upon resale which will have an impact on their property values. (Pl. Ex. 5, 92-96).
22. In addition to property damage, the Plaintiffs' expert, Dr. Ajay Khurana ("Dr. Khurana"), testified that the chimney implosions caused personal injuries to multiple Plaintiffs. Specifically, those injuries included eye irritation and respiratory issues. (H.T. Vol. IV at 248).
23. Multiple individuals had eye injuries occur not only shortly after the implosion but continued thereafter and throughout the hearing. (Id.).
24. Dr. Dydek also admitted that the effects that the Plaintiffs reported either in their testimony or in medical records are consistent with overexposure to the RCRA metals and fibrous materials. (H.T. Vol. IX at 248).
25. Many of the released contaminants in the fugitive dust are carcinogens and have potentially increased the risk of cancer to the residents depending on doses and exposure. As cancer is a latent disease, the extent of the harm from the chimney implosions will not be known for some time. (H.T. Vol. IX at 181-190).
26. On September 15, 2023, CDI was granted a second blasting permit by the DEP, and the implosion of the boiler house was set for one (1) week later, on September 22, 2023. (Def. Ex. 3).
27. Prior to receiving the blasting permit, the Defendants weakened and partially loaded with explosives the boiler house structure, and these actions limited the available remedies by the parties and myself. (H.T. Vol. VII at 76-77).
28. Upon learning that the blasting permit was issued, the Plaintiffs sought to enjoin the Defendants from continued blasting activities given the damage already sustained by the Plaintiffs and the Springdale community from the chimney implosion.
29. Mr. Snyder was responsible for reviewing the blasting permit application for the chimney implosion. (H.T. Vol. I at 25-26).
30. Mr. Snyder admitted that "every permit has to stand on the merits of that permit, so that's how we review them." He further conceded that he cited sixteen (16) violations from the chimney implosion and that those violations were not noted in that application, so they would not have been considered. (H.T. Vol. I at 53).
31. Mr. Snyder admitted that he makes his decision to permit the blasting permit "based on the application, as well as whether or not they've met the technical and administrative requirements to get the permit" only. (H.T. Vol. I at 63-64).
32. Mr. Snyder admitted that the DEP defers to the ACHD regarding air quality regulations and that any air quality issues that occurred from the moment of blasting forward is outside of the DEP, in Allegheny County. (H.T. Vol. I at 44).
33. Mr. Snyder admitted that the DEP received a "letter" from the ACHD which conditionally approved the dust mitigation and control plan that was submitted by Grant Mackay, but that he had no knowledge or information as to what the ACHD considered. (H.T. Vol. I at 67).
34. When considering the application, Mr. Snyder admitted that he "would not as a blasting specialist" consider the materials that are contained within the structure that is being imploded "because I don't deal with…things like asbestos or chemicals, that type of thing." He further stated that if the blast were to distribute anything from the structure it is deferred to the ACHD. (H.T. Vol. I at 70).
35. Allason Holt ("Ms. Holt"), Program Manager for the Air Quality Compliance and Enforcement Program of the AHCD, admitted that the ACHD is concerned about asbestos and nothing else. Further, she admitted that no one was looking to determine whether other hazards would be contained within a cloud of dust generated from the implosion of the boiler house (H.T. Vol. III at 55-56).
36. Ms. Holt admitted that the ACHD did not currently "have any plans to do air monitoring in regard to this demolition or really any demolition." (Id.).
37. The DEP admitted that in order to provide clearance, the ACHD had to close the open permits regarding asbestos abatement. No evidence was presented that either agency reviewed the information to determine whether all open permits were appropriate, and whether any additional permits should be opened or considered. (H.T. Vol I. at 56).

38. Ms. Holt admitted that "three sides of the boiler house had the Galbestos on it, and the total of 1600 square feet." She further admitted that the Galbestos was removed from the three (3) sides of the boiler house during the period of the Defendants' permit. (H.T. Vol. III at 12-14).
39. Ms. Holt admitted that she was not familiar with the inside of the boiler house and had no knowledge whether there was thermal asbestos insulation inside. (H.T. Vol. III at 14).
40. The asbestos survey provided a list of all the asbestos materials that were inside the boiler house, including friable asbestos materials and various asbestos-containing products such as amosite and chrysotile. Ms. Holt conceded that there are types of asbestos fibers, and further admitted that these are "easily inhalable and hazardous." (H.T. Vol. III at 14-16).
41. Ms. Holt admitted that she did not know if asbestos insulation was removed from the boiler house. (H.T. Vol. III at 17).
42. Ms. Holt admitted that the permit for the Galbestos asbestos fence was closed without explanation (H.T. Vol. III at 91).
43. There was insufficient evidence presented as to the way in which the removal of asbestos was tracked. The asbestos survey was the document that was designated to list all of the asbestos products, and the clearance of asbestos weas through evaluating each open permit. The permits did not coincide exactly with the asbestos survey. There was no evidence presented that the ACHD went through the survey and verified whether each specific item was removed. The ACHD admitted that it only went through the open permits to determine if the permit could be closed. (Id.).
44. No testimony was presented as to whether any agency would consider whether having the galbestos fence surrounding an implosion site was appropriate.
45. The Defendants argued that the Galbestos fence was still in place after the chimney implosion, but no evidence was presented that any agency was to consider whether the fence should be removed. (H.T. Vol. IV at 49-50).
46. The Defendants argue that the circumstances surrounding the chimney implosion will not be repeated if they are permitted to implode the boiler house. The Defendants' primary argument is that the boiler house is a different building from the chimneys, and that the differences in size and shape of the boiler house versus the chimney stacks will produce a different result if the boiler house is imploded. The Defendants contend that the cone-like shape of the chimney stacks caused the dust from the implosion to shoot out like a cannon, and that the boiler house would create a different result.
47. Graham Miller ("Mr. Miller"), Corporate Safety Officer for Grant Mackay, admitted that he has been involved in thousands of demolition projects, but only four (4) that used explosives. (H.T. Vol VII at 129).
48. Mr. Miller admitted that "dust is an unpreventable byproduct of all types of demolition." Mr. Miller conceded that he did not "know if it is the same" amount of dust from an implosion that would be released as is released in conventional demolition. (H.T. Vol. VII at 141, 147).
49. Mr. Loizeaux admitted that there would be a substantial quantity of dust and insulation dispersed by collapsing the boiler house. (H.T. Vol. VII at 59).
50. Mr. Loizeaux testified that implosion is the safest manner of demolishing the boiler house with respect to the community, as it will shorten the duration of exposure to demolition dust and noise. (H.T. Vol. VII at 96).
51. Chad Allen Meyer ("Mr. Meyer"), Environmental Program Manager for the New Stanton District Mining Office of the DEP, admitted that the dust from the boiler house implosion would not be concentrated in one direction, but he would still "anticipate" dust "being squeezed out" of the boiler house. (H.T. Vol. I at 12).
52. Mr. Meyer admitted that residents on Porter Street, across the street from the Power Plant property, had their windows boarded up to provide additional protection from the chimney implosion. (H.T. Vol. I at 75).
53. The videos taken by the ACHD show that the dust did not simply spew out in a cone-like fashion in one direction, but rather the dust cloud grew and contaminated the entire community. The videos showed that the dust did not move in the direction in which the chimneys fell. (Pl. Ex. 88, 89).
54. Christopher Catalano ("Mr. Catalano"), Chief from the Explosives Safety Section of the DEP, wrote a memo outlining that the buildings in the community had been weakened from the chimney implosion, were compromised, and that the imploding the boiler house could have unforeseen consequences. (Def. Ex. 4).
55. Within that memo, Mr. Catalano admitted that "since the elements of these structures could already be weakened, further exposure to levels at the fringes of safe limit criteria could result in further threshold damage." (Id.).
56. The Plaintiffs presented evidence that showed asbestos containing products still may be present at the Power Plant. (Pl. Ex. 98).
57. In addition, the Plaintiffs provided records showing that innumerable asbestos-containing products were installed in the boiler house when it was constructed in the late 1960s. A large asbestos abatement project was undertaken in 2022, removing tens of thousands of square feet of asbestos products, but no mention of gaskets or packing.
58. Sam Miller, Cheswick Power Plant Manager, was the only Defense witness to discuss asbestos gaskets, and admitted that there were "thousands" of valves as of "late March, early April" and "hundreds" of strainers and pumps. (H.T. Vol. VIII at 121-123).
59. The Plaintiffs' safety expert, Jon Pina ("Mr. Pina"), Certified Safety Professional, testified that due to construction of the boiler house in the late 1960s, he guaranteed that all the gaskets used at that time were asbestos. (H.T. Vol IX at 82, 97).
60. There was no evidence presented regarding the specific abatement of the gaskets, inferring that the more dusty and dangerous friable asbestos pipe insulation was replaced. (Id.).
61. Furthermore, Mr. Pina testified that proper abatement of asbestos gaskets does not occur through the opening or breaking open of the flanges where the gaskets are present. He testified that in his experience, the proper abatement of gaskets occurs by first wrapping the asbestos pipe insulation in plastic and then the metal piping itself is snipped in the middle of the pipe, and away from where the joint is located; breaking open the flange would release asbestos fibers and would be improper abatement. (H.T. Vol. IX at 64).
62. The Defendants conceded that they had weakened the boiler house structure by making cuts in the beams to destabilize the boiler house, and that these actions were taken before the DEP issued its blasting permit to the Defendants.
63. Mr. Pina testified that all asbestos must be removed from a building that is set for demolition, and that all equipment should be removed as well, not just asbestos-containing equipment. Further, he testified that mercury, the most dangerous of the RCRA metals, was found inside the Plaintiffs' homes due to the chimney implosion, and that such things are mercury switches should be

removed because those hazards scatter about during demolition. (H.T. Vol. IX at 64).

64. Sam Miller admitted that the boiler house still retains a surplus of equipment. (H.T. Vol. VIII).
65. Ms. Holt admitted that the implosion of the chimneys was scheduled and planned, but that there was no final clearance letter issued by the ACHD. (H.T. Vol. III at 56).
66. The chimney implosion did not require a written dust mitigation plan and the only reference to dust was a one (1) page outline, containing three (3) sentences, located within the six (6) page preliminary plan and procedure. "Conditions Following the Demolition: Dust, an unpreventable byproduct of any type of demolition operation, will last in the general vicinity for five (5) to ten (10) minutes following the demolition. The duration of the airborne dust will be a direct function of the wind direction and velocity at the time of the implosion." (Pl. Ex. 11).
67. The DEP and the ACHD admitted that RCRA metals emanate from a power station, in general, and specifically from the chimney implosion.
68. Ms. Holt further admitted that there is a concern that fugitive dust will be released and will become airborne and disseminated if the boiler house is imploded. She admitted that the only way to know what would be contained in that dust would be air sampling. However, she also admitted that the ACHD had no intention of determining what would be in that dust. (H.T. Vol. III at 56-57).
69. Ms. Holt also conceded that she only deals with material once it becomes airborne, and stated that "once the dust settles, it is no longer fugitive dust." No evidence was presented to contradict that dust on the ground could become airborne from an implosion, nor that testing of dust on the ground would occur to identify whether RCRA metals were released from the chimney implosion, because "the dust is not airborne yet." (H.T. Vol. III at 32).
70. Ms. Holt admitted that she was aware that arsenic could be a byproduct produced "during operation of a coal-fired power station," and that there are "various heavy metals that are associated with coal-powered power plants." No evidence was presented that testing would be performed to determine if arsenic and other heavy metals will be released from imploding the boiler house because no one is assigned responsibility. (Id.).
71. Mr. Catalano admitted that the ACHD would not sample the dust released from the chimney implosion, presumably because once it landed on the ground it was no longer the ACHD's responsibility. (Def. Ex. 4).
72. Mr. Loizeaux admitted that CDI would not perform testing of the dust because it is "outside of our scope…Dust was not our responsibility on the project." (H.T. Vol. I. at 34-35).
73. The DEP eventually tested some of the dust in the Plaintiffs' yards and found levels that were unsafe. No evidence was presented that this information was used in any evaluations of the boiler house implosion by anyone involved.
74. Neither the DEP nor the ACHD will be monitoring any non-airborne dust for asbestos or RCRA metals and chemicals, anywhere.
75. There was insufficient evidence presented as to the Springdale communities' involvement prior to the chimney implosion. Specifically, there was evidence presented that there was no public meeting held to allow the residents the opportunity to be heard. (H.T. Vol. II).
76. Mr. Miller was responsible for warning the residents of Springdale Borough regarding the chimney implosion. Mr. Miller's warning responsibilities included door-to-door verbal and written notification to property owners, coordination with the police, and providing a dust mitigation plan. (H.T. Vol. VII at 125, 130, 132-133).
77. Mr. Miller admitted that the residents were provided with two weeks' notice regarding the upcoming implosion. (Id.)
78. A draft version of the flyer that was provided by the Defendants to the DEP concerned that "heavy dust" would leave the power station premises and into "the block immediately surrounding the demolition site." The flyer also conceded that the residents who have "any respiratory conditions that would be aggravated by the dust [should] please stay indoors during demolition." (H.T. Vol. VII at 151).
79. Mr. Miller conceded that he gave warning to approximately one hundred (100) residents, to close "all windows, doors, and intakes," and "if they felt it was necessary" to turn off "air conditioners and cover them with a trash bag" so that the dust from the implosion was not pulled into the vents of the homes. (H.T. Vol. VII at 148-149).
80. Mr. Miller admitted that the residents would only know "if it was necessary" to close windows and air conditioners "if they felt it was", and that he did not recommend to them that he felt it was necessary. (Id.)
81. Mr. Miller further indicated that he did not know which residents would need these precautions and which would not, and that he left it to the residents. (Id.)
82. Mr. Miller further admitted that when residents would ask how much dust was going to be created, he would "just tell them there will be dust. We don't know, depending on wind direction, what it is going to be." He denied using the phrases "heavy or significant dust." (H.T. Vol. VII at 152).
83. Plaintiff, Brittni Bair, testified that she reached out to the ACHD prior to the chimney implosion regarding her concerns for the health and safety of her family and the lack of information provided by the Defendants. (H.T. Vol. III at 60-61.).
84. Evidence was presented that as early as 2022, the Defendants began efforts to enact demolition of various buildings on the Power Plant premises. But no evidence was presented that public meetings would be scheduled or planned.
85. The permit was issued on January 17, 2023, but the permit was never voted on by the Springdale Borough Council. (H.T. Vol. VIII at 64-65).
86. Antoinette Robbins ("Ms. Robbins") and Shawn Fitzgerald ("Mr. Fitzgerald"), Chair and Co-Chair of the Springdale Borough Council ("the Council"), admitted that they oversee code enforcement on the Council and had no knowledge that the permit was issued. (H.T. Vol. VIII at 63-64, 79).
87. Ed Crates ("Mr. Crates"), Code Enforcement Officer for the Springdale Borough, admitted that he is responsible for issuing permits in the borough, and he signed and issued the permit authorizing the demolition of the Power Plant to the Defendants. (H.T. Vol. VIII at 12-13).
88. Mr. Crates further admitted that he did not advise Ms. Robbins or Mr. Fitzgerald that he had issued the permit, but that he did discuss the issuing of the permit with the President of the Council, Mitchell Karaica, who in turn authorized him to issue the permit. (Id.).
89. Dr. Dydek testified that he relied on the comprehensive program initiated by the City of Chicago following an event similar to the

chimney implosion. (H.T. Vol. IX at 292).

90. Dr. Dydek testified that the City of Chicago wanted information on the composition of the building and "the dispersement area. That is the fallout of dust from the demolition." Further, he testified that a limit was set so that "all owners and occupants of all buildings within a thousand feet should be notified about the fact that there could be an implosion happening." (H.T. Vol. IX at 292-297).
91. Dr. Dydek testified that his recommendation is that "there should be an evaluation of the soil that is on the property at which the demolition is scheduled to occur prior to any building or structure being demolished, and the reason there is to identify all materials such as lead, asbestos, or other hazardous waste to ensure that those materials have been removed prior to demolition work. There's also part of the plan that would include an air dispersion model which would show that direction and extent of the plume of dust that would be caused by demolition. Surface soils sampling should be done before and after the implosion, and also a noise and vibration assessment should be carried out. Air monitoring for particulate matter that could be leaving the site…" (H.T. Vol. IX at 292-299).
92. Dr. Dydek testified that more coordination of activities, such as the Division of Water management ensuring that dust generated did not make its way into the water supply or sewer systems. Further, informing the public was crucial. He pointed out that while the comprehensive plan was being developed, all implosions in the City of Chicago were halted. (Id.).

## STANDARD OF REVIEW

Foremost, I begin my analysis recognizing that the standard of review that I must apply when determining whether to grant this preliminary injunction requested by the Plaintiffs is enumerated as follows:

> (1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction than from granting it, and, concomitantly, issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the activity to be restrained is actionable, the right to relief is clear, and the wrong is manifest, or, in other words, the party seeking the injunction is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not adversely affect the public interest. Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 646-647 (Pa. 2003).

As argued at the conclusion of the hearing and the Defendant's Motion to Dissolve the existing injunction, this analysis is an "all or nothing" sequential test. If I find that only one of the six (6) prongs is not met, then the Plaintiffs have not met their burden and the existing injunction that I granted on September 18, 2023 should be dissolved. The underlying causes of action are private nuisance, trespass, and public nuisance. The harms to be prevented by the granting of the injunction, as identified by the Plaintiffs, include the harm to both the immediate and long-term health of the Plaintiffs and the nearby residents of Springdale, Pennsylvania, and the harm of the significant nearby property damage as was caused by the implosion of the two (2) Power Plant chimneys on June 2, 2023. Additionally, I am concerned about the potential harm to any and all workers associated with the demolition process. Finally, the harm as identified by the Defendants, is the harm of an unplanned collapse and economic damages to the Defendants' themselves, which I also must consider.

## ANALYSIS/CONCLUSIONS OF LAW

I begin by emphasizing that what is being opposed by the Plaintiffs is primarily the implosion, but not necessarily the demolition of a retired coal-fired power plant located in immediate proximity to their homes and residential neighborhood. Their concerns and legitimate fears arise out of the failure of the previous implosion of two (2) Power Plant chimney stacks of varying heights to go according to plan. The Defendants contend that this is a different type of implosion in that the boiler house is a different sized and shaped structure, i.e., not large cylindrical chimney stacks, and located further away from the Plaintiffs' homes. However, I remain highly concerned, like the Plaintiffs, that all reasonable pre- and post-demolition precautions must be taken before any demolition shall occur, to prevent significant harm to the Plaintiffs, public health and welfare, and the properties within the Springdale community.

Furthermore, I am highly concerned that there appears to be very little government regulation required of coal plant demolitions in Pennsylvania, let alone in the unique circumstance of being located in a Pennsylvania residential neighborhood. I am by no means knowledgeable of the number of coal-fired power plants in the United States or Pennsylvania for that matter, or whether the vast majority of these plants are located in rural or non-residential areas. But I am generally aware and take judicial notice of the recent trend toward the decommissioning of these plants as we move towards the use of more renewable forms of energy and attempt to become less dependent on carbon fuels. This trend likely means more power plant demolitions, and it does not appear to me that the Pennsylvania legislature has caught up with this trend by implementing specific regulations to ensure public health protection and awareness in what some environmentalists might consider contaminated and potentially toxic sites. There are no specific regulations for coal plant demolition in Pennsylvania that I am aware of, and the only two (2) governmental agencies required to be involved at all here are the DEP and the ACHD. Both agencies appear to be somewhat limited to permitting in their pre-implosion involvement, and the regulatory focus is on mitigating potential air blast damage to property without consideration of implosion specific follow up of air, soil, and water. The DEP's role pre-demolition is to authorize the use of explosives required to implode and enforce corresponding air blast regulations, and the ACHD monitors and permits asbestos identification and removal, and monitors air quality generally. Never before, however, have the two (2) agencies had to coordinate a coal plant demolition together and there are no existing regulations in place to guide them.

As part of the existing demolition permitting procedure, a general preliminary plan is required to be approved by the DEP. The first preliminary plan apparently did not include any attached written dust mitigation plan. As a result of the first chimney implosion failure, the DEP conditioned the approval of the boiler house implosion permit on an ACHD approved dust mitigation plan. The DEP has delegated the enforcement responsibility to the ACHD for dust mitigation, but again, there are no special or uniquely designated pre- or post-demolition monitoring requirements for the demolition of coal-fired power plants in Pennsylvania. Because there are no specific regulations and this appears, for the first time, to be a unique implosion for both the DEP and the ACHD to figure out, it is critical that all reasonable safety measures be employed to protect both the Plaintiffs and the public. The permits approved and the decisions made by the DEP and the ACHD must be premised on them having all available information, and I am presently concerned and have reason to believe that neither agency has been afforded the concerns of the Plaintiffs' toxicologist and asbestos safety expert. At a minimum, the DEP and the ACHD should review and consider the Plaintiffs' specific concerns.

**I. An injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.**

Exposure to toxic chemicals and asbestos fibers can undeniably be harmful to one's health, and depending upon dose and exposure, undoubtedly irreparably harmful. Upon observation of the chimney implosion videos and photographs submitted by the Plaintiffs of the fugitive dust dispersion aftermath, I would submit fugitive dust alone, whether it contains these substances or not, especially in the amount that was dispersed and clearly observable off site in some Plaintiffs' homes and on their properties, indeed caused harm to the Plaintiffs' health and personal property. To simply suggest that the Plaintiffs could be adequately compensated by money damages should these harms occur again in the future, is in effect asking the Plaintiffs to choose between their individual health, both short and long term, and money. Every attempt to mitigate potential health risks and property damage should be made to prevent this irreparable and immediate harm to the Plaintiffs and the public.

While the possible long-term effects of these chemicals and asbestos exposures may not manifest until many years in the future and initially may appear to contradict the requirement of immediate harm, the harm begins with the dust dispersion and possible exposure of chemicals or asbestos particles to the Plaintiffs and public. As a result, every attempt to eliminate or at least mitigate the initiation of fugitive dust dispersion and potential harm should be implemented. Stated another way, the harm begins upon implosion and fugitive dust dispersion despite the fact that full harm manifestation to individuals' health may not occur until many years later.

Additionally, the Plaintiffs raise the concern that the Sunshine Act of Pennsylvania was violated by the process employed in securing the Springdale Borough demolition permit, and if true, then irreparable harm is established per se and as a matter of law. While I agree that if a Sunshine Act violation had indeed occurred then irreparable harm is established, I decline to undertake the analysis, nor do I believe it is necessary to do so in lieu of my finding that irreparable harm already exists. Further, I have included a requirement for a public meeting in my Order which substantially and generally coincides with the Sunshine Act's requirements for transparency and public opportunity to be heard.

Therefore, I conclude that the immediate and irreparable harm requirement is met upon implosion and the initiation of an uncontrolled fugitive dust dispersion and possible toxic exposure to the Plaintiffs' health and property, as well as that of the public.

**II. Greater injury would result from refusing an injunction than from granting it, and, concomitantly, issuance of an injunction will not substantially harm other interested parties in the proceedings.**

When considering whether refusing to grant the injunction would result in greater injury than granting it, I must first recognize what it is that the Plaintiffs are asking me to do. I believe it is fair to state that the relief argued for in the Plaintiffs' brief is more limited and specific than what they presented evidentiarily and argued for at the hearing. During the testimony, there was at least one (1) admission by a Plaintiff that indeed the Power Plant needed to be to be demolished and the objection is to implosion. Certainly, the Plaintiffs argued for and presented their safety expert to testify to mechanical demolition as the safer method of demolition when compared to implosion. Further, the Plaintiffs' toxicologist's bootstrapping testimony was that the toxicological harm was greater with implosion than mechanical demolition.

While the Plaintiffs now apparently want me to analyze the second prong of greater injury in granting versus denying the implosion as simply an "either or" of permitting the use of explosives, a clearly dangerous and potentially harmful activity or doing absolutely nothing, of course the analysis is not that simple or one-sided. Regardless, I would still have to weigh the harm of an unplanned collapse and economic damage to the Defendants. Perhaps the Plaintiffs anticipated that while I recognized their safety expert as knowledgeable and experienced in safety and asbestos, that I would also find his opinion that mechanical demolition is safer than implosion to be outdated, and largely unpersuasive.

Interestingly, and maybe ironically, I note that both parties agree that it is the DEP permitting requirement to use explosives that triggered any significant oversight by the DEP and the ACHD. There was extensive testimony regarding the mechanical demolition of the SCR building and precipitators and how they were demolished without any permitting, inferring little involvement from either government agency. (H.T. 108-135). I point this out in conjunction with the fundamental missions of both agencies to be the protection of public health and welfare and I implore their further involvement to fulfill those missions here. Furthermore, the inescapable conclusion to me is that a regulated and controlled implosion demolition is much more likely to be a safer scenario for all interests involved when compared to an unregulated mechanical demolition, or even much more concerning, an unplanned collapse of the boiler house.

While I rejected the Plaintiffs suggested harm-balancing analysis under this prong as being more complex than just to use explosives or not, the Defendants are also guilty of oversimplifying this multi-layered complex harm analysis by identifying the effect of granting the injunction as solely being that the boiler house will ultimately collapse on its own, i.e., the "unplanned collapse" scenario. Despite the fact that as property owners and contractors the Defendants should anticipate and plan accordingly, especially upon their acknowledgment that they themselves weakened the boiler house structure by making cuts in the beams in advance of DEP approval, an unplanned collapse is not the only effect of granting an injunction. Perhaps they would be compelled to pursue other demolition options by consulting a structural engineer and demolish mechanically, as they have maintained all along it was their right to do. Neither party presented any opinion evidence from a structural engineer as to the immediacy of an unplanned collapse scenario or otherwise comparative safety demolition methodology. An unplanned collapse is not automatically the scenario for me to consider when granting the injunction as the Defendants proposed without the testimony of a structural engineer, nor is it the only one to balance; it depends on the type of injunction and of course when the injunction is dissolved.

Regardless, an unplanned collapse could be catastrophic and must be prevented. Additionally, an unregulated mechanical demolition is an option that I do not believe serves the best overall interests of any of the parties nearly as well as a DEP and ACHD regulated and monitored implosion of the boiler house. Conceptually, a demolition by any methodology is essentially a planned controlled collapse. It seems that the Plaintiffs harms to be prevented by their injunctive request are completely unprotected in the event of an unplanned collapse which would likely occur eventually with a weakened boiler house, if as the Plaintiffs request, I do nothing further but grant the injunction to prevent implosion. Similarly, leaving the Defendants to proceed on their own without DEP and ACHD oversight of an uncontrolled mechanical demolition and presumably without requiring dust mitigation, air and soil monitoring, etc., would also likely increase the Plaintiffs potential exposure to toxic materials, fugitive dust, and personal property damage, when compared to a regulated controlled implosion.

Moreover, it is actually the harm to the Defendants that I am supposed to be considering when analyzing this injunction requirement and any substantial harm to other interested parties. While I am concerned and want to prevent an unplanned collapse, and it is certainly not my intention to minimize the harm to the Defendants, I conclude that the harm to the Defendants is primarily economic and while the economic damage to the Defendants will possibly be significant it is still less than the harm to be prevented to both the Plaintiffs' and the public's short and long-term health, and their real and personal property by not granting a well-tailored specific injunction.

Finally, the testimony before me from Mr. Loizeaux indicated that implosion is the only alternative and mechanical demolition would be unsafe for demolition workers. Serious previous mechanical demolition accidents had occurred including death and personal injury to the workers, the "widow-maker" reference to this type of suspended boiler with mechanical demolition. I did find the Plaintiffs' safety expert to lack current knowledge regarding demolition, despite finding him credible as to asbestos and safety generally.

**III. A preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct.**

Regarding the status quo, my September 18, 2023 Order preserved the present circumstances, in that the implosion was halted. Prior to that date, however, the Defendants had already begun the process of demolition when they performed cuts weakening the boiler house beams and placed some explosives, all before the DEP blasting permit approval. I will note that the Defendants immediately removed all explosives upon notice of my Order. The alleged "wrongful conduct" for me to consider is the private and public nuisance and trespass potentially caused by the implosion of the boiler house and the resulting exposure of significant smoke and dust to the Plaintiffs, which is harmful to their health and personal property, as well as to nearby residents.

In their Motion to Dissolve, the Defendants argued that the status quo cannot and should not be maintained by any injunction because the boiler house has been weakened. Again, I reiterate my highest concern and agree with the Defendants that because of their weakening of the boiler house structure, the implosion should occur soon but emphasize that my Order was intended to preserve a more limited status quo concept. My Order was intended to preserve the status quo of ensuring that a fully informed demolition decision with a comprehensive safety plan was in place and then presented to both the Plaintiffs and the public before demolition occurred.

Thus, I conclude that my September 18, 2023 Order, and this narrowly tailored Order granting the preliminary injunction satisfies this prong by enjoining the implosion until safety is made the highest priority and the residents are provided notice and an opportunity to be heard.

**IV. The activity to be restrained is actionable, the right to relief is clear, and the wrong is manifest, or, in other words, the party seeking the injunction is likely to prevail on the merits.**

Perhaps more than any other requirement, I find it easy to legally conclude that if another implosion goes against the anticipated plan, then the Plaintiffs' right to relief is clear and they would be highly likely to prevail on their underlying nuisance and trespass claims. I find the argument that the Defendants are demolishing an existing nuisance to be non-responsive to the analysis of this prong. The Defendants' different implosion argument is saying that the Plaintiff's right to relief is not clear. However, this is essentially an argument that the trespass or nuisance will not happen this time and I am not nearly as confident of that without at least a presentation of the Plaintiffs' latest concerns to the DEP and the ACHD for further pre- and post-implosion analysis and monitoring. Stated differently, the Plaintiffs would clearly have a right to relief for their underlying claims if what happened with the first implosion happens with the boiler house, and everything should be done to prevent or mitigate against that occurring again.

**V. The injunction is reasonably suited to abate the offending activity.**

The next element that the Plaintiffs must establish is that the injunction is reasonably suited to abate the offending activity. The Defendants contend that it is not reasonably suited because the first implosion of the chimneys is an entirely different "offending activity" than the boiler house implosion. The Plaintiffs brief contains little analysis of the issue, but essentially contends that the offending activity is the implosion and nothing more. My understanding is that the offending activity is essentially the equivalent of the underlying cause of action or the alleged torts of private and public nuisance and trespass. A hypothetically tort free implosion should not be enjoined, but an implosion that went awry like the chimneys should be prevented at all costs and it is with this intent that my Order is narrowly tailored.

To say that what happened with the chimney implosion is impossible in the boiler house implosion is limiting the focus of the query to how the first nuisance was believed to be caused, i.e., the squeezed toothpaste tube effect on the large chimney. This ignores the fact that it was "shocking" to the CDI President, the DEP, and others that this occurred at all, along with the certainty that for this implosion will cause dust dispersion, and therefore, the potential for nuisance and trespass. It is easy to conclude that an injunction will abate the potential nuisance, but to be reasonably suited to abate, the injunction must be based upon the completion of a full review by both the DEP and the ACHD of all the concerns regarding asbestos and chemicals. It is not apparent to me that the recommendations of the Plaintiffs' experts regarding asbestos and toxic chemicals were ever fully presented by the Plaintiffs to these agencies for their consideration and of permit approval being conditioned upon a more comprehensive safety plan as to asbestos, RCRA metals, and fugitive dust dispersion.

Specifically, I conclude that the agencies lacked the information that I heard in court regarding asbestos possibly remaining in the boiler house and that there is no boiler house specific soil and air monitoring required post boiler house implosion. Essentially, the Plaintiffs should be given the opportunity to raise all their concerns for a second review and ask that the next implosion permit approval be conditioned upon all or most of their concerns being addressed. This is reasonable to me and could still be accomplished before final implosion approval by the DEP and the ACHD, the agencies responsible for protecting public health and welfare. Equally important, this comprehensive safety plan must be presented to the interested residents of Springdale.

**VI. A preliminary injunction will not adversely affect the public interest.**

The last prong that the Plaintiffs must prove in order to continue the enjoining of the Power Plant implosion is that the preliminary injunction will not adversely affect the public interest, i.e., the injunction if granted will do no harm to the public interest. I conclude that

the Plaintiffs have exceeded their burden and have established that the granting of the injunction will further the public interest by ensuring that the best safety plan has been implemented and presented to the residents and that everything possible to protect the future health and property of both the Plaintiffs and residents is being done by the parties and government agencies. The Defendants argue that the public interest to be protected against is an unplanned collapse and again, I would emphasize that I am highly concerned about that event too but believe that allowing implosion to proceed only after review of the Plaintiffs' asbestos and fugitive dust concerns by the DEP and the ACHD is essential.

Another determination should be made as to whether more mitigation efforts are necessary before explosives are used for implosion and whether the permit should be conditioned on any or all the concerns raised by the Plaintiffs, including post-implosion soil and air sampling. It is axiomatic that every effort to mitigate the release of possible toxic chemicals and asbestos into the surrounding air, soil, and water should be abated as much as reasonably possible and regularly monitored through air, soil, and water testing post-demolition. The specifics of the abatement and mitigation along with the post-implosion monitoring should be determined by the Plaintiffs' experts, the DEP, and the ACHD, after review of all concerns raised by the Plaintiffs and their experts.

## CONCLUSION

The Plaintiffs are highly concerned with what they believe is a lack of organization, communication, and coordination between the DEP, ACHD, and the Defendants. While I find every employee of the DEP and the ACHD, and every defense witness for that matter to be sincerely concerned that any implosion occurs safely and not go like the chimney implosions, I am concerned that there are no regulatory specifics from the Pennsylvania legislature regarding coal plant decommissioning and demolition mandating the monitoring of environmental consequences. Further, it is not unfair to say that the current employees, who indeed are dedicated to their respective agency missions of protecting public health, are largely left to figure the process out for themselves under limited existing law.

As far as I can tell, this demolition of a power plant is the first in Allegheny County, and therefore, no precedent exists for the DEP and the ACHD employees to rely upon for planning. Moreover, the proximate location of the Power Plant to residential homes complicates the planning, and so does the structure being demolished. There have been many successful implosions performed by CDI and many of us can recall the implosion of Three Rivers Stadium. But what is being demolished matters, and the implosion of the Three Rivers Stadium is not equivalent to the implosion of a coal-fired power plant since it has the greater potential for release of coal burned by-products with the latter and the resulting environmental consequences.

In summary, I am asking that the responsible government agencies take a second look at the proposed boiler house implosion because, in fairness, they have not yet been presented with the specific concerns raised by the Plaintiffs' experts during the hearing. I do not think anyone can say with absolute certainty that there is no longer asbestos in the boiler house, and I am concerned that there probably is. Regardless, I am doubtful that further asbestos remediation attempts could be conducted now given the boiler house's weakened state. Additionally, I am concerned that more follow-up monitoring requirements have not been implemented as a condition of implosion, much like the dust mitigation plan, that was added as a pre-requisite for the boiler house permit approval. Despite my concerns, I also must admit that I am not an expert. But I do not think it is unreasonable to ask that the government experts charged with protecting public health to look at what the Plaintiffs' experts have to say before making the final decision to approve the boiler house blasting permit.

## ORDER OF COURT

AND NOW, this 10th day of December 2023, upon consideration of Plaintiffs' Motion for a Preliminary Injunction, a full and complete evidentiary hearing held intermittently beginning on September 20, 2023 and concluding on November 15, 2023, pursuant to Pa. R.C.P. 1531, it is ORDERED, ADJUDGED, and DECREED, that the Preliminary Injunction is GRANTED. Additionally, the Defendants' Motion to Dissolve and the Plaintiffs' Motion to Permanently Enjoin the Use of Explosives, are DENIED. Specifically, I find and order the following:

1. I find that the Plaintiffs have met the six (6) elements required to issue a preliminary injunction as a matter of law.
2. The Parties are to meet and discuss a joint comprehensive safety plan for the implosion of the boiler house and attempt to reach an agreement within ten (10) days of this Order.
3. The joint comprehensive safety plan shall be submitted to the DEP and the ACHD for review and input, and the Parties shall request both the DEP and the ACHD to attend and participate in a public meeting.
4. The Plaintiffs shall request that the DEP condition the approval of the blasting permit on meeting all of terms of the joint comprehensive safety plan, plus any and all terms that the Plaintiffs believe necessary to safely implode the boiler house.
5. The public meeting shall be held to provide the Plaintiffs and the residents with notice and the opportunity to be heard regarding the comprehensive safety plan.
6. Pursuant to Pa. R.C.P. 1531, upon submission of the joint comprehensive safety plan, plus any and all terms that the Plaintiffs believe necessary to implode the boiler house, and after the public meeting is held, the Parties shall Praecipe for a conciliation/hearing for me to consider dissolution of the injunction.
7. The bond requirement in my previous Order shall remain in effect.

It must be emphasized that filing a document with the Department of Court Records ("DCR") is NOT notice to anyone. All filings should be filed with the Allegheny County Department of Court Records, served on the opposing party, AND emailed to the judicial staff at evolz@alleghenycourts.us and amcvay@alleghenycourts.us. Please do not mail anything to Judge McVay's chambers unless it is the only means of providing Judge McVay with a copy.

Additionally, all parties are to review Judge McVay's Operating Procedures that are located on the Fifth Judicial District's Website.

BY THE COURT:
The Hon. John T. McVay, Jr.

[1]The twelve (12) days of testimony contained in nine (9) volumes are referenced as follows: September 20, 2023 (Vol. I); September 21, 2023 (Vol. II); September 22, 2023 (Vol. III); September 26, 2023 (Vol. IV); October 4, 2023 (Vol. V); October 5, 2023 (Vol. VI); October 16,

2023 (Vol. VII); October 17, 2023 (Vol. VIII); October 18, 2023 (Vol. VIII); November 13, 2023 (Vol. IX); November 14, 2023 (Vol. IX); and November 15, 2023 (Vol. IX).

[2]All references to testimony ("H.T.") are to testimony taken intermittently from September 20, 2023 to November 15, 2023 at a preliminary injunction hearing ("Hearing") in Courtroom 709, City-County Building, before me, Judge John T. McVay, Jr.

# CITY OF PITTSBURGH, Plaintiff, v. FRATERNAL ORDER OF POLICE FORT PITT LODGE NO. 1, Defendant

*Arbitration Award*

*This Opinion supports the September 7, 2023 Order of Court, which upheld an arbitration award in favor of the Fraternal Order of Police Fort Pitt Lodge No. 1 ("FOP"), which has been appealed to the Commonwealth Court of Pennsylvania. In 2017 the FOP filed a grievance against the City of Pittsburgh ("the City") challenging the healthcare premium equivalency rates charged to active duty and retired police officers. The FOP and City agreed to bifurcate the issues into rates charged to active duty officers and rates charged to retired officers. In 2018 an arbitration award was issued regarding the active duty rates; the arbitrator explicitly retained jurisdiction over retiree rates. The arbitration award was affirmed on appeal and in November of 2020 the parties signed a Memorandum of Understanding, which again provided that the arbitrator retained jurisdiction over retiree health insurance. In February of 2021, the Union filed an Unfair Labor Practice charge with the Pennsylvania Labor Relations Board alleging that, effective January 1, 2021, the City unilaterally raised retiree healthcare contributions. The Union withdrew the charge in November of 2021 and the parties continued discussions regarding retiree healthcare contributions. Ultimately, from March of 2021 to November of 2022 three arbitration hearings were held before arbitrator Jane Desimone regarding the retiree healthcare aspect of the 2017 grievance. On April 21, 2023 Arbitrator Desimone sustained the Union's grievance. Arbitrator Desimone found that the City overcharged retirees for healthcare in 2017 by $257,333 and 2018 by $233,090, and ordered that the Union be reimbursed for affected members. On May 1, 2023, the City filed a statutory appeal in the Court of Common Pleas. On September 7, 2023, the Court denied the City's statutory appeal and upheld the arbitrator's award. The City appealed this Order to the Commonwealth Court of Pennsylvania and filed a timely Concise Statement of Errors Complained of on Appeal ("Concise Statement"), which the Court addresses in its Opinion.*

1174 CD 2023, SA 23-262. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. December 13, 2023.

## OPINION

This Opinion supports my September 7, 2023 Order of Court, which upheld an arbitration award in favor of the Fraternal Order of Police Fort Pitt Lodge No. 1 ("FOP"), which has been appealed to the Commonwealth Court of Pennsylvania. In 2017 the FOP filed a grievance against the City of Pittsburgh ("the City") challenging the healthcare premium equivalency rates charged to active duty and retired police officers. The FOP and City agreed to bifurcate the issues into rates charged to active duty officers and rates charged to retired officers. In 2018 an arbitration award was issued regarding the active duty rates; the arbitrator explicitly retained jurisdiction over retiree rates. The arbitration award was affirmed on appeal and in November of 2020 the parties signed a Memorandum of Understanding, which again provided that the arbitrator retained jurisdiction over retiree health insurance. In February of 2021, the Union filed an Unfair Labor Practice charge with the Pennsylvania Labor Relations Board alleging that, effective January 1, 2021, the City unilaterally raised retiree healthcare contributions. The Union withdrew the charge in November of 2021 and the parties continued discussions regarding retiree healthcare contributions. Ultimately, from March of 2021 to November of 2022 three arbitration hearings were held before arbitrator Jane Desimone regarding the retiree healthcare aspect of the 2017 grievance. On April 21, 2023 Arbitrator Desimone sustained the Union's grievance. Arbitrator Desimone found that the City overcharged retirees for healthcare in 2017 by $257,333 and 2018 by $233,090, and ordered that the Union be reimbursed for affected members. On May 1, 2023, the City filed a statutory appeal in the Court of Common Pleas. On September 7, 2023, I denied the City's statutory appeal and upheld the arbitrator's award. The City appealed this Order to the Commonwealth Court of Pennsylvania and filed a timely Concise Statement of Errors Complained of on Appeal ("Concise Statement"), which I will address in this Opinion.

In Paragraphs 1 and 2 of its Concise Statement, the City alleges that I erred "by failing to apply a plenary scope of review to the issue of the arbitrator's jurisdiction" and by "finding the arbitrator had jurisdiction to resolve an issue not explicitly raised in the Union's demand for arbitration…." It is well established that Act 111 arbitration awards are subject only to a narrow certiorari scope of review and thus a reviewing court can only review questions of 1) the jurisdiction of the arbitrators; 2) the regularity of the proceedings; 3) an excess of the arbitrator's powers; and 4) deprivation of constitutional rights. Pennsylvania State Police v. Pennsylvania State Troopers Association, 540 Pa. 66, 71, 656 A.2d 83, 86 (1995). "Where resolution of the issue turns on a pure question of law, or the application of law to undisputed facts, our review is plenary. However, when it depends upon fact-finding or upon interpretation of the collective bargaining agreement, we apply the extreme standard of deference applicable to Act 111 awards; that is, we are bound by the arbitrator's determination of these matters even though we may find them to be incorrect." Pennsylvania State Police v. Pennsylvania State Troopers Ass'n, 840 A.2d 1059, 1062 (Pa. Commw. Ct. 2004). When determining whether an arbitrator has jurisdiction to hear a dispute the court must ask "…did the decision maker in the adjudicatory process act in the general class of controversies that the law empowers it to consider." City of Philadelphia v. International Association of Firefighters, Local 22, 606 Pa. 447, 462 (Pa.2010) citing Dauphin Deposit Trust Co. v. Myers, 388 Pa. 444 (Pa.1957). Specifically, Act 111 grants an arbitrator the jurisdiction to adjudicate any dispute between a public employer and policemen "…that arise out of the collective bargaining process…" Id. At 463. Further, the jurisdiction of an arbitrator only extends to "…issues that the parties identify as disputed." Id. At 464. Here the 2017 grievance regarding health care premiums for officers and retirees filed by the Union clearly falls within the jurisdiction of the arbitrator as it arises out of the parties' collective bargaining agreement (the Interest arbitration agreement or the "2016 Miller award"). The October 5, 2018 arbitration award resolved the 2017 grievance as it related to healthcare contribution rates for active duty police officers, but retained jurisdiction "for the bifurcated issue as it relates to retiree benefits."

The City filed a statutory appeal of the 2018 arbitration award, which was denied. Following the denial of the statutory appeal, the City and the Union entered into a Memorandum of Understanding in November of 2020, which again provided that the arbitrator "retains jurisdiction to address retiree health insurance…." Following the Memorandum of Understanding the parties continued to discuss the issue of retiree healthcare until the commencement of the arbitration hearing at issue here. At no time between the 2020 Memorandum of Understanding and the commencement of the arbitration hearing in November of 2022, did the City object to the retention of jurisdiction by the arbitrator. The jurisdiction of the arbitrator was rightly vested when the 2017 grievance challenged healthcare premiums and continued when it was explicitly retained regarding retiree healthcare benefits in both 2018 and 2020. Also, the 2017 grievance specifically requested the remedies of ceasing "health care…premium increases to…retired FOP members,…refund overpayments,…and issue a make whole remedy…."R.R. 3a and R.R. 446a in Documents 6 and 7, Reproduced Record, Allegheny County Department of Court Records docket. Therefore, the arbitrator had jurisdiction to hear the Union's grievance regarding retiree healthcare benefits and I committed no error.

The City next alleges in Paragraphs 3 and 4 of its Concise Statement that I erred by upholding the arbitrator's award that violated due process mandates where the grievance challenged the accuracy of premium equivalency rates relative to the terms of the 2016 Arbitration decision, the record evidence about the definition of premium equivalency rates was undisputed, and the issue for which the Award granted relief could not be inferred from the demand for arbitration. The City effectively attempts to argue that it had no notice that an arbitration hearing on "rate setting" for retiree healthcare premiums would include the issue of the City's contribution to the retiree's premium ("the subsidy") and how the subsidy can or cannot be used to determine the retiree's contribution rate. The 2016 Miller Award did not alter retiree health insurance under the 2010-2014 collective bargaining agreement, which provides that "the City shall contribute towards the cost of this husband and wife coverage…an amount equal to the amount charged…on the date of his/her retirement…." The essential elements of due process are notice and the opportunity to be heard in a full and fair hearing before an impartial decision maker. Fraternal Order of Police No. 5 ex. Rel. Costello v. City of Philadelphia, 725 A.2d 206, 210 (Pa. Commw. Ct. 1999). Clearly, the issue of the subsidy is inextricably entwined with the issue of retiree healthcare premiums as raised in the 2017 grievance filed by the Union requesting a refund of overpayments and in the subsequent discussions between the parties to sufficiently put the City on notice that the subsidy would be at issue at arbitration. In addition, for active police, the City and FOP conferred and produced the November, 2020 Memorandum of Understanding that required the City to reimburse 2017 and 2018 "medical contributions" to be consistent with the FOP's expert analysis. R.R. 436a-437a. In addition, the fact that premium equivalency rates, recalculated pursuant to the 2018 arbitration award, ended up being undisputed left the City unable to contest that retirees were overcharged $242,456 in 2017 and $213,091 in 2018. See R.R. 39a. The arbitrator is entitled to extreme deference in her decision to utilize the FOP expert analysis that overcharges instead were $257,333 and $233,090. Last, the Miller award gives the FOP the right to grieve the City's determination that a new health plan is comparable within 14 days of presentation of the plan. As noted in the 2017 grievance, the FOP requested the new premium equivalent and comparable rates multiple times, which the City refused to provide. See R.R. 446a. Without the necessary information about the new retiree rates, the FOP based its grievance on the information it had available to it, which was the increased premium. The City cannot attempt to benefit from its own violation of the 2016 Miller Award by turning around and arguing that the grievance was not specific enough in challenging the rate calculation, when it refused to provide the FOP with the method for calculating the rates. Therefore, the City had sufficient notice of the issues to be adjudicated at the arbitration hearing to meet the standards of due process, the issue was well within the demand for arbitration and I committed no error by denying the City's statutory appeal from the arbitration award.

BY THE COURT:
The Hon. Alan Hertzberg