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Two Roads Diverged in a Yellow Wood - The Pennsylvania Supreme Court's Seven Year Walk to Arrive Right Back at the Fork: *Gehring v. Pennsylvania Labor Relations Board*

Timothy D. Houston

Two Roads Diverged in a Yellow Wood—The Pennsylvania Supreme Court's Seven Year Walk to Arrive Right Back at the Fork: *Gehring v. Pennsylvania Labor Relations Board*

In less than three years, Pennsylvania Supreme Court decisions in *Upper Makefield Township v. Pennsylvania Labor Relations Board*,[1] *Township of Sugarloaf v. Bowling*,[2] and *Pennsylvania*

1. 753 A.2d 803 (Pa. 2000).

State Police v. Pennsylvania Labor Relations Board[3] deprived probationary police officers and firemen of collective bargaining rights, granted some collective bargaining rights, and again took those rights away. While *Gehring v. Pennsylvania Labor Relations Board*[4] offers a much-needed explanation after the confounding decisions in *Upper Makefield*, *Sugarloaf*, and *Pennsylvania State Police* by re-extending collective bargaining rights under Act 111[5] to probationary police officers and firemen, *Gehring* is just the first step in what will prove to be a long road to the revitalization of labor and employment law in Pennsylvania.

In an attempt to reconcile *Gehring* with extant Pennsylvania Supreme Court jurisprudence that ostensibly undermines the very ground upon which the decision is based, Section I of this comment discusses Act 111's enactment, and, correspondingly, the enactment of its *in pari materia*[6] counterpart, the Pennsylvania Labor Relations Act.[7] Section II analyzes the trio of cases that preceded *Gehring—Upper Makefield*, *Sugarloaf*, and *Pennsylvania State Police*—and their respective contributions toward sending labor and employment law in Pennsylvania further and further down the rabbit hole. Section III briefly describes the landscape from which *Gehring* arose to revitalize Pennsylvania labor and employment law. Finally, Section IV addresses the important legal implications that the decision holds, and offers a forward-looking view of other hurdles on the horizon that must be overcome to ensure that the intellectual and legal quandary that *Gehring* left behind remains a distant hill in the rearview mirror.

My hope in writing this comment is that learned hands and young practitioners alike will take note of the vital importance that *Gehring* has to both labor and employment law in Pennsylvania, but also the extraterritorial influence that bad Pennsylvania law can have in shaping the legal landscapes of neighboring states that often look to the Commonwealth for guidance. As my first-year Torts professor told the class, one day the light bulb will come on, and for the Supreme Court of Pennsylvania, that day came in April 2007 when *Gehring* was handed down. As current

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2. 759 A.2d 913 (Pa. 2000).
3. 810 A.2d 1240 (Pa. 2002) (per curiam).
4. 920 A.2d 181 (Pa. 2007).
5. Act of June 24, 1968, No. 111, 1968 Pa. Laws 237 (1968) (codified as amended at 43 PA. STAT. ANN. §§ 217.1-.10 (West 1992)).
6. *See* Philadelphia Fire Officers Ass'n v. Pa. Labor Relations Bd., 369 A.2d 259, 261 (Pa. 1977).
7. 43 PA. STAT. ANN. §§ 211.1-.13 (West 1992).

and future practitioners, our duty as officers of the court is to ensure that that light stays on.

With that thought in mind, let us begin.

I. ACT 111 AND THE PENNSYLVANIA LABOR RELATIONS ACT

A. *The Enactment of Act 111*

Title 43, Chapter 7, of the Pennsylvania Statutes, formally known as "Trade Unions and Labor Disputes, Collective Bargaining by Policemen or Firemen," houses one of the main actors in this comment: Act 111.[8] Short in length but broad in coverage, Act 111 conferred upon police officers and firemen the right to collectively bargain, while at the same time prohibiting, for public policy reasons, the right to strike.[9] The enactment of Act 111 was the culmination of years of unrest and instability between police officers and firemen and their respective employers, and reflected a legislative intent to return the employment relationship to the status quo.[10]

In an effort to streamline resolution of employment disputes and contract bargaining, the legislature all but obviated the involvement of the judiciary. Act 111 contains a mandatory binding interest arbitration provision, invokable by either party upon a stalemate in the collective bargaining process.[11]

B. *The Pennsylvania Labor Relations Act and Act 111: In Pari Materia*

Act 111 does three things: it (i) affords police officers and firemen the right to collectively bargain,[12] (ii) secures the public interest in maintaining the police and fire services through mandatory binding interest arbitration to foreclose stalemates in the bargaining process and any accompanying strikes,[13] and (iii) con-

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8. *See id.* §§ 217.1-.10.

9. *Id.* §§ 217.1-.2. *See Philadelphia Fire Officers Ass'n*, 369 A.2d at 260-61; *Upper Makefield Twp.*, 753 A.2d at 805 n.1.

10. *Twp. of Sugarloaf*, 759 A.2d at 915. The Pennsylvania Supreme Court noted that "[t]he central goal of the legislature in crafting this act was to return these critical labor forces to a state of stability." *Id.*

11. *Id.*; *see* 43 PA. STAT. ANN. § 217.4 (West 1992). A "stalemate," for purposes of Act 111, occurs when "the parties do not reach a settlement of the issue or issues in dispute by way of a written agreement within *thirty days* after collective bargaining proceedings have been initiated." 43 PA. STAT. ANN. § 217.4(a) (West 1992) (emphasis added).

12. 43 PA. STAT. ANN. § 217.1 (West 1992).

13. *Id.* § 217.4.

tains explicit provisions as to how the interest arbitration process will be effectuated.[14] However, Act 111 is inherently devoid of "the specific provisions normally found in a collective bargaining statute," specifically the "procedure . . . for [the] selection of the bargaining representative."[15]

In *Philadelphia Fire Officers Association v. Pennsylvania Labor Relations Board*,[16] the Supreme Court of Pennsylvania offered a viable solution to Act 111's apparent deficiency in enabling legislation. More than thirty years prior to the enactment of Act 111, the Pennsylvania legislature had enacted the Pennsylvania Labor Relations Act (PLRA).[17] The PLRA created the Pennsylvania Labor Relations Board (PLRB), and in doing so, charged the Board with the novel task of "determining bargaining representatives and conducting hearings on unfair labor practice complaints."[18]

The *Philadelphia Fire Officers* court appraised the purpose and legislative intent behind both Act 111 and the PLRA, finding that the PLRA dealt extensively with the procedural aspect of selecting bargaining representatives.[19] While Act 111 addressed the collective bargaining rights of public employees, it lacked the necessary statutory guidance as to how the collective bargaining rights of public employees would be effectuated.[20] Conversely, the PLRA provides the procedural mechanisms necessary for collective bargaining but expressly *excludes* public employers—and thus, collective bargaining between public employers and employees—from the Act's scope.[21] In reconciling the procedural dichotomy between the two statutes, the Supreme Court of Pennsylvania drew upon the Statutory Construction Act of 1972.[22] The Statutory

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14. *Id.* §§ 217.4-.8.

15. *Philadelphia Fire Officers Ass'n*, 369 A.2d at 261. The Supreme Court of Pennsylvania noted that

> [p]olicemen and firemen have the right to select a bargaining representative, and through it to bargain collectively, *but no procedure is set forth in the statute for the selection of the bargaining representative.* The Act states only that "labor organizations or other representatives designated by fifty percent or more of such policemen or firemen" have the right to bargain collectively.

Id. (emphasis added).

16. 369 A.2d 259 (1977).

17. Pennsylvania Labor Relations Act, No. 294, 1937 Pa. Laws 1168 (1937) (codified as amended at 43 PA. STAT. ANN. §§ 211.1-.13 (West 1992)).

18. *Philadelphia Fire Officers Ass'n*, 369 A.2d at 260. *See also* 43 PA. STAT. ANN. § 211.4 (West 1992) (creating Pennsylvania Labor Relations Board); *id.* § 211.9(a) (authorizing judicial review of alleged unfair labor practices).

19. *Philadelphia Fire Officers Ass'n*, 369 A.2d at 261.

20. *Id.*

21. *Id.* at 260 (citing 43 PA. STAT. ANN. § 211.3(c) (West 1992)).

22. *Id.*; Statutory Construction Act, 1 PA. CONS. STAT. ANN. §§ 1901-1991 (West 2008).

Construction Act provides that statutes that are *in pari materia*[23] should, whenever possible, be read together as a single statute.[24] The court did not hesitate in isolating the logical nexus between Act 111 and the PLRA: both statutes pertain to collective bargaining.[25]

The conjoining of Act 111 with the PLRA, while apparently facially repugnant because of the PLRA's express exclusion of bargaining between public employers and employees, was achieved by the preemption provision contained in the original enactment of Act 111: "[a]ll acts or parts of acts inconsistent herewith are hereby repealed."[26] As such, the *Philadelphia Fire Officers* court (i) succeeded in channeling the procedural mandates of the PLRA, an act expressly excluding collective bargaining between public employers and employees, to Act 111, an act designed specifically for collective bargaining in the public sector, and (ii) contemporaneously preserved the provisions of Act 111—notably the mandatory binding interest arbitration provision—that served as the nexus to achieving the legislative intent behind Act 111.

II. *UPPER MAKEFIELD, SUGARLOAF,* AND *PENNSYLVANIA STATE POLICE*

Between June 2000 and November 2002, the Supreme Court of Pennsylvania, under the forceful hand of Justice Russell M. Ni-

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23. *In pari materia* is Latin for "in the same matter," and is defined by BLACK'S LAW DICTIONARY as "[o]n the same subject; relating to the same matter. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." BLACK'S LAW DICTIONARY 807 (8th ed. 2004).

24. *Philadelphia Fire Officers Ass'n*, 369 A.2d at 261 (citing 1 PA. CONS. STAT. ANN. § 1932 (West 2008)). The Pennsylvania Supreme Court noted:

> We are instructed by the Statutory Construction Act of 1972, 1 Pa. C.S.A. § 1932, that statutes which are *in pari materia* are to be construed together, if possible, as one statute. We are of opinion that the PLRA and Act No. 111, which are both, after all, collective bargaining statutes, are *in pari materia* within the meaning of that provision. We believe, also, that it is entirely possible, and indeed salutary . . . to construe the two acts together as a single statute.

Id.

25. *Id.*

26. *Id.* at 260-61 (quoting Act of June 24, 1968, No. 111, § 11, 1968 Pa. Laws 237, 239 (1992)). The Supreme Court of Pennsylvania acknowledged that "[w]e cannot find that this repealer provision of Act No. 111 was ever reproduced in Purdon's Pennsylvania Statutes Annotated, 43 P.S. § 217 *et seq.*" *Id.* at 260 n.5. Nevertheless, the *Philadelphia Fire Officers* court concluded that "Act No. 111 repealed all 'parts of acts inconsistent' therewith. We think it reasonable to conclude that by imposing that duty in Act No. 111, the Legislature intended that the exclusion of public employers from the definition of 'employer' in the PLRA be *pro tanto* repealed." *Id.* at 261.

gro,[27] issued a series of opinions that diverged sharply from established federal law,[28] basic tenets of labor and employment law, and common sense. In June of 2000, the court issued its decision in *Upper Makefield Township v. PLRB* and, in one fell swoop, deprived probationary employees of protection under Act 111.[29] The Supreme Court of Pennsylvania later appeared to retreat from its holding in *Upper Makefield* in its October decision in *Township of Sugarloaf v. Bowling*,[30] but any regression was undone by the court's 2002 per curiam order in *Pennsylvania State Police v. PLRB*.[31]

A. Upper Makefield Township, *Probationary Employees, and the Dawn of Confusion*

Upper Makefield, like the Supreme Court of Pennsylvania's later holding in *Gehring*, began with a grievance. In *Upper Makefield*, Officer Matthew Schrum was hired as a full-time police officer and placed on probationary status for one year.[32] Officer Schrum was terminated during his probationary period and filed a grievance demanding arbitration under Act 111.[33] The collective bargaining agreement between Officer Schrum's bargaining unit, the Upper Makefield Police Association, and the Township did not require grievance arbitration.[34] The Township refused to arbitrate, and the Association filed an unfair labor practice. The PLRB found for the Association on the grounds that Act 111, as interpreted by the Supreme Court of Pennsylvania, "mandates binding arbitration of all grievances arising under collective bargaining agreements negotiated pursuant to Act 111."[35] On appeal, the Commonwealth Court reversed the PLRB's decision, finding

27. Justice Nigro wrote for the majority in *Upper Makefield Township v. Pennsylvania Labor Relations Board*, 753 A.2d 803 (2000), submitted a strongly argued dissent in *Township of Sugarloaf v. Bowling*, 759 A.2d 913 (Pa. 2000), and later saw his rationale carry the day in *Pennsylvania State Police v. Pennsylvania Labor Relations Board*, 810 A.2d 1240 (Pa. 2002) (per curiam), a case in which the Supreme Court of Pennsylvania affirmed the lower court's ruling with the ominous words "*See Upper Makefield Township v. PLRB*."

28. *See* National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000).

29. *Upper Makefield Twp.*, 753 A.2d at 807.

30. 759 A.2d 913 (Pa. 2000).

31. 810 A.2d 1240 (Pa. 2002) (per curiam).

32. *Upper Makefield Twp.*, 753 A.2d at 805.

33. *Id.*

34. *Id.*

35. *Id.*

that Act 111 lacked any express statutory directive requiring arbitration for grievances against public employers.[36]

Writing for the Pennsylvania Supreme Court, Justice Nigro circumvented a long, drawn-out discussion of whether Act 111 requires a public employer to arbitrate by succinctly stating "a probationary police officer such as Officer Schrum is *not* entitled to appeal his dismissal."[37] In essence, Justice Nigro equated "probationary" with "at-will."[38] The *Upper Makefield* court noted that the time limit for the probationary period, which in this instance is one year, is representative of a trial period during which a probationary employee must prove himself and at the conclusion of which the employee will either be retained or terminated.[39] Justice Nigro further distinguished between probationary and non-probationary employees: whereas the former is only entitled to register a grievance if such right is afforded under a collective bargaining agreement, the latter has "passed their probationary period satisfactorily and assume[d] a status protected by the right to bargain collectively and to have their grievances heard" under Act 111.[40]

The most tenuous portion of Justice Nigro's opinion, however, is his illusory statement that "the language of Act 111 does not explicitly define the police and fire fighters it was enacted to protect to include probationary employees."[41] In order to ascertain the legislative intent behind the breadth of Act 111's coverage, and thereby bolster Justice Nigro's narrow reading of Act 111, the court relied upon the Police Tenure Act.[42] Section 812 of the Police Tenure Act, entitled "Removals," states in pertinent part:

> No person employed as a regular full time police officer in any department of any township of the second class, or any borough or township of the first class within the scope of this act, with the exception of policemen appointed for a probationary

36. *Id.* at 805. As noted by the Supreme Court of Pennsylvania, "[t]he Commonwealth Court . . . concluded that Act 111 does not compel a public employer to proceed to arbitration." *Id.*

37. *Upper Makefield Twp.*, 753 A.2d at 806 (emphasis added).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Upper Makefield Twp.*, 753 A.2d at 806-07 (citing Police Tenure Act, No. 144, 1951 Pa. Laws 586 (1951) (codified as amended at 53 PA. STAT. ANN. §§ 811-815 (West 1997))).

> period of one year or less, shall be suspended, removed or reduced in rank except for the following reasons . . . .[43]

Upper Makefield's reliance upon the Police Tenure Act to excise probationary employees from Act 111 marks a notable, albeit confounding, schism with the definition of "employee" under the National Labor Relations Act[44] (NLRA) as well the Pennsylvania Labor Relations Act.[45] Notably, neither the PLRA nor the NLRA distinguishes between probationary and non-probationary employees. Despite his quixotic construction of Act 111, Justice Nigro's message in *Upper Makefield* was abundantly clear: the protections available under Act 111—and, by implication, the PLRA—do *not* extend to probationary police officers and firemen.[46]

B. Township of Sugarloaf *Limits the* Upper Makefield *Doctrine*

In *Township of Sugarloaf v. PLRB*, the Supreme Court of Pennsylvania revisited an issue that it had successfully skirted in *Upper Makefield*: the arbitrability of a grievance filed by a police officer. Writing for the court, Justice Cappy held that under Act 111,

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43. *Id.* at 806 (quoting 53 PA. STAT. ANN. § 812 (West 1997)).

44. 29 U.S.C. §§ 151-169 (2000). The National Labor Relations Act defines "employee" as:

> *any employee*, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, *but shall not include* any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Id. § 152(3) (citation omitted) (emphasis added).

45. 43 PA. STAT. ANN. §§ 211.3-.13 (West 1992). The PLRA defines employee as:

> *any* employe, and shall not be limited to the employes of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute, or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall *not include* any individual employed as an agricultural laborer, or in the domestic service of any person in the home of such person, or any individual employed by his parent or spouse.

Id. § 211.3(d) (emphasis added).

46. *Upper Makefield Twp.*, 753 A.2d at 807.

an issue's arbitrability—and consequently the arbitrator's jurisdiction—is a matter for the arbitrator to decide.[47]

The facts in *Sugarloaf* are analogous to those in *Upper Makefield.* In *Sugarloaf*, the Township hired Anthony Bowling as a probationary police officer for an undetermined probationary period.[48] More than one year after Officer Bowling's probationary period commenced, the Township extended the probationary period and subsequently terminated Officer Bowling.[49] Officer Bowling requested arbitration over his termination, but the Township refused on the ground that probationary employees were not covered under the collective bargaining agreement.[50] Thereafter, Officer Bowling attempted to force arbitration through the Arbitration Association of America, in turn compelling the Township to seek injunctive relief from the judiciary.[51]

The trial court asserted jurisdiction to determine arbitrability on the ground that the terms of the parties' agreement under the collective bargaining agreement were a contract issue over which the court had jurisdiction.[52] On appeal to the Commonwealth Court, the trial court's judgment was vacated and the case remanded.[53]

1. Justice Cappy's Majority Opinion

On appeal, the Supreme Court of Pennsylvania paid particular attention to the dual legislative purposes behind Act 111: (i) the expeditious settlement of labor disputes involving police officers and firemen, and (ii) the intentionally proscribed role of the judiciary to effectuate Act 111's purpose of ensuring timely resolution of labor disputes.[54] Viewing the issue as one of jurisdiction rather

47. *Twp. of Sugarloaf*, 759 A.2d at 914. In holding that an arbitrator has jurisdiction to decide his or her own jurisdiction, the *Sugarloaf* court noted that "the issue of whether a particular matter is arbitrable pursuant to Act 111 is an issue which must be submitted first to the arbitrator, and . . . it is error to bring the issue of jurisdiction first to the trial court." *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Twp. of Sugarloaf*, 759 A.2d at 914. Asserting jurisdiction, the trial court concluded that "Officer Bowling was not covered by the collective bargaining agreement and was not entitled to proceed to arbitration over his grievance." *Id. But see* Pa. Labor Relations Bd. v. Bald Eagle Area Sch. Dist., 451 A.2d 671 (Pa. 1982) (holding that the arbitrator is charged with determining the arbitrability of issues arising under the Pennsylvania Employee Relations Act, 43 PA. STAT. ANN. §§ 1101.101-.2301 (West 1992)).

53. *Twp. of Sugarloaf*, 759 A.2d at 914-15.

54. *Id.* at 916 n.5.

than substance, Justice Cappy opined that whether jurisdiction exists is a question that "transcends *Upper Makefield* and any specific reason for or against arbitrability. It impacts the framework of labor dispute resolution proceedings."[55]

In ruling that the question of arbitrability is one best left to the arbitrator rather than the judiciary, the *Sugarloaf* court stressed the importance of removing the interpretation of the labor agreements from judicial proceedings and preserving the less costly and more expeditious medium of arbitration.[56] The holding in *Sugarloaf* effectively limited *Upper Makefield* and circumvented the per se rule precluding probationary employees from protection under Act 111 by reframing the issue as one of jurisdiction that resides outside the scope of the judiciary.

2. *Justice Nigro's Dissent*

In his dissent, Justice Nigro framed the issue as one of fact rather than jurisdiction, i.e., "whether . . . Bowling is a police officer protected by Act 111 and/or the collective bargaining agreement."[57] Justice Nigro argued that before the question of arbitration should even arise, a finding of fact as to whether the individual in question is even eligible for protection under Act 111 should be addressed by the judiciary.[58] Drawing substantially on his majority opinion in *Upper Makefield*, Justice Nigro concluded that to the extent an employee is probationary, Act 111 is not implicated and the issue of arbitrability therefore irrelevant.[59]

C. Pennsylvania State Police v. PLRB *and an Unexplained Per Curiam Affirmance*

The final decision in the trilogy that set the stage for *Gehring* came two years after *Sugarloaf* in what was later likened to an "unexplained *per curiam* affirmance."[60] In *Pennsylvania State Police v. PLRB*, the Supreme Court of Pennsylvania succinctly

55. *Id.*
56. *Id.*
57. *Id.* at 918 (Nigro, J., dissenting).
58. *Twp. of Sugarloaf*, 759 A.2d at 918 (Nigro, J., dissenting).
59. *Id.*
60. *See* Gehring v. Pa. Labor Relations Bd. (*Gehring II*), 920 A.2d 181, 185, n.8 (Pa. 2007) (citing Pa. State Police v. Pa. Labor Relations Bd. (*Pa. State Police II*), 810 A.2d 1240 (2002) (per curiam)).

affirmed the ruling of the Commonwealth Court, injecting new life into *Upper Makefield*.[61]

In *Pennsylvania State Police*, a probationary police officer was discharged after his probationary period was extended by the Commonwealth.[62] The probationary employee's bargaining agent filed a grievance, complaining that the probationary employee had been dismissed without a Probationary Trooper Review Panel (PTRP) hearing.[63] The PLRB ruled in favor of the probationary employee, finding that the PTRP hearing bore a rational relationship to a probationary employee's duties.[64]

On appeal, the Commonwealth Court reversed the PLRB's decision. Drawing upon the Administrative Code of 1929, the Commonwealth Court recognized a statutory grant of discretion to the State Police Commissioner to dismiss probationary troopers, thereby excluding PTRP hearings from the scope of bargaining.[65]

Furthermore, the Commonwealth Court relied substantially upon the Supreme Court of Pennsylvania's holding in *Upper Makefield*. The Commonwealth Court noted that "[u]nless the terms of an officer's probationary period *specifically* grant him avenues of redress, the relationship is terminable by either side during the probationary period."[66] As the probationary employee's collective bargaining agreement did not provide for a PTRP hearing prior to termination, the probationary employee had no legal redress.[67]

On appeal to the Supreme Court of Pennsylvania, the Commonwealth Court's decision was affirmed in unexplained fashion. In a per curiam order, the Supreme Court of Pennsylvania stated: "[a]nd now, this 25th day of November 2002, the Order of the

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61. *Pa. State Police II*, 810 A.2d at 1240.

62. Pa. State Police v. Pa. Labor Relations Bd. (*Pa. State Police I*), 764 A.2d 92, 93 (Pa. Commw. Ct. 2000).

63. *Pa. State Police I*, 764 A.2d at 93.

64. *Id.*

65. *Id.* at 94. The Pennsylvania Commonwealth Court noted that "[t]he collective bargaining agreement . . . between the Commonwealth and the Association includes probationary troopers. Nevertheless, Section 205(f) of the Administrative Code of 1929 grants the Commonwealth's State Police Commissioner discretion to dismiss a probationary trooper. Thus, the Commonwealth's unilateral cessation of PTRP hearings was not a bargainable issue." *Id.*

66. *Id.* at 95. The visage of Justice Nigro's earlier grouping of "probationary" employees with "at-will" employees in *Upper Makefield* is unmistakable. *See Upper Makefield Twp.*, 753 A.2d at 806.

67. *Pa. State Police I*, 764 A.2d at 95.

Commonwealth Court is hereby AFFIRMED. *See Upper Makefield Township v. PLRB.*"[68]

III. *GEHRING V. PLRB*: RIGHTING THE COURSE OF PUBLIC SECTOR LABOR AND EMPLOYMENT LAW IN PENNSYLVANIA

As discussed at length in Section II above, between 2000 and 2002 the Supreme Court of Pennsylvania took the road less traveled in its decisions in *Upper Makefield Township v. PLRB* and the subsequent per curiam affirmance in *Pennsylvania State Police v. PLRB.* At the time *Gehring* was decided, the status of probationary employees under Act 111 was that of second-class citizens, the culmination of an unnatural regression that caused a schism with the traditional understanding of "employee" under the NLRA and the PLRA. As would become abundantly clear in the procedural record of *Gehring* before it finally came to rest on the doorstep of the Supreme Court of Pennsylvania, ill-founded prior decisions had forced the hand of administrative agencies and lower courts in going against both established federal statutes and basic tenets of labor and employment law.

A. *Seniority, a Grievance, and an Angry Police Chief—From Whence* Gehring *Came*

Roger Gehring, the grievant, plaintiff, and, later victorious appellant, was employed by the Borough of Hamburg, Pennsylvania as a part-time police officer.[69] In February 2003, Gehring was sworn in as a full-time probationary police officer and simultaneously informed that the duration of his part-time employment would not be considered in determining Gehring's seniority, thereby placing him in a position of less seniority than newly hired police officers that had never before been employed by the Borough.[70]

The Hamburg Police Officers' Association grieved on Gehring's behalf, which in turn incurred the ire of the Borough's police chief.[71] In late March, nearly two months after being sworn in,

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68. *Pa. State Police II*, 810 A.2d at 1240.

69. Gehring v. Pa. Labor Relations Bd. (*Gehring I*), 850 A.2d 805, 805-06 (Pa. Commw. Ct. 2004).

70. *Gehring I*, 850 A.2d at 806.

71. *Id.* The Commonwealth Court noted that

> Gehring had several conversations with Chief of Police Zelinsky, who informed [Gehring] that the filing of the grievance "will look bad for [Gehring]" and that it would not help his career. Chief Zelinsky also told the Mayor of Hamburg

Gehring was placed on suspension and subsequently terminated in mid-April.[72] Gehring filed an unfair labor practice against the Borough under the Pennsylvania Labor Relations Act, alleging that his position as a probationary police officer was terminated because of animus toward the protected union activity in which Gehring had engaged.[73]

B. The Binding Effect of Upper Makefield

Initially, Gehring's unfair labor practice claim was dismissed by the PLRB.[74] By letter dated June 5, 2003, Patricia Crawford, Secretary of the Pennsylvania Labor Relations Board, informed Gehring that:

> [t]he Pennsylvania Supreme Court in *Upper Makefield Township v. PLRB* held that the protections of Act 111 and PLRA only apply to employes who have successfully completed their probation. *See also, Pennsylvania State Police v. PLRB.* Because the courts of the Commonwealth have held that the protection of the labor laws does not apply until police officers have successfully completed the probation [sic], no cause of action is stated in the Charge of Unfair Labor Practices. Accordingly, your charge is dismissed.[75]

Notable about Secretary Crawford's letter is that the limited progress achieved in *Sugarloaf* had, in effect, been trumped by *Upper Makefield* and *Pennsylvania State Police.* Justice Nigro's prediction in his dissenting opinion in *Sugarloaf*, that the true threshold inquiry was whether the grieving employee had in fact satisfied the probationary period, had come to fruition.[76]

Gehring filed timely exceptions to the Board's dismissal, arguing that the Board had failed to consider the Supreme Court of Pennsylvania's decision in *Township of Sugarloaf v. Bowling.*[77] In an August 19, 2003 Final Order, the PLRB, echoing Justice Ni-

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> that "he [Zelinsky] doesn't want an officer working for him that is going to file a grievance against him."

Id. (citations omitted).

72. *Id.*

73. Gehring v. Pa. Labor Relations Bd. (*Gehring II*), 920 A.2d 181, 182 (Pa. 2007); *see also* 43 PA. STAT. ANN. §§ 211.6 (1947), 211.8 (1939).

74. Letter from Patricia Crawford to Roger Gehring 1 (June 5, 2003) (attached to Appellant's Brief as App. A, 2003 WL 23874002).

75. *Id.*

76. *See Twp. of Sugarloaf*, 759 A.2d at 918 (Nigro, J., dissenting).

77. PLRB Final Order 1, attached to Appellant's Brief as App. B, 2003 WL 23874002.

gro's dissent, dispatched Gehring's reliance upon *Sugarloaf* by classifying the issue as concerning "the statutory unfair labor practice protections afforded a probationary police officer under Act 111 and the PLRA," an issue squarely addressed in *Upper Makefield.*[78] The Board reasoned that in light of *Upper Makefield* and *Pennsylvania State Police*, it was "constrained to hold that a probationary police officer, as a matter of law, does not come within the ambit of Act 111 protections. As such, the Board is without jurisdiction to hear Mr. Gehring's claims of alleged discrimination, and the Secretary did not err in dismissing the charge."[79]

C. *The Commonwealth Court's Decision*

On appeal to the Commonwealth Court, Judge Cohn, writing for the court, vacated the Final Order of the Pennsylvania Labor Relations Board.[80] Judge Cohn read *Upper Makefield Township* narrowly and limited its holding to the principle that Act 111, unlike the PLRA, does not grant rights to probationary employees. As the probationary employee in *Upper Makefield* had asserted a substantive right under Act 111, no action could stand because there was no underlying substantive right to sustain an action.[81]

Similarly, Judge Cohn limited *Pennsylvania State Police v. PLRB* to bar a probationary employee's charge of an unfair labor practice that arises from a past practice.[82] The Commonwealth Court distinguished Gehring's cause of action as derived from a substantive right under the PLRA, rather than Act 111 or a past employment practice.[83] In its analysis, the Commonwealth Court, in effect, adopted two separate and distinct definitions of "employee" under Act 111 and the PLRA. The court noted:

> [t]he precise issue is whether, even though Gehring is a probationary police officer, it is an unfair labor practice, *based on the substantive provision appearing in Section 5 of the PLRA*, for the Borough to discharge him for engaging in union activities. Act 111 does not, in any way, address this issue; consequently, case law that addresses substantive rights emanat-

78. *Id.*
79. *Id.* (internal quotations omitted).
80. *Gehring I*, 850 A.2d at 805, 810-11.
81. *Id.* at 809.
82. *Id.* at 809-10.
83. *Id.* at 810.

ing from that act is of limited value. The PLRA however, does address this issue. The provisions concerning unfair labor practices set forth in the PLRA are applicable to "employees," and, as noted earlier, that term does not exclude probationary police officers.[84]

Having found that the PLRB had jurisdiction, the Commonwealth Court vacated the Board's Final Order and remanded the case for disposition on the merits. The Supreme Court of Pennsylvania granted discretionary review.[85]

IV. THE SUPREME COURT OF PENNSYLVANIA'S DECISION IN *GEHRING V. PLRB* AND ITS EFFECT ON LABOR LAW IN PENNSYLVANIA

Justice Saylor, writing on behalf of the court, opened with the wise observation that "the parties contend that the law governing the collecting bargaining rights of probationary officers is in need of clarification."[86] Significantly, both Gehring and the Board articulated concerns that the Commonwealth Court's decision had (i) split the definition of "employee" under the PLRA and Act 111 into two distinct concepts, and (ii) demoted the rights granted under Act 111 to illusory status—thereby creating a quandary in which probationary employees *seem* to possess "the statutory right to organize for purposes of collective bargaining, but of nevertheless being denied collective bargaining rights."[87]

Gehring called into question the logic of the Commonwealth Court's opinion, and by implication, the Pennsylvania Supreme Court's earlier holding in *Upper Makefield*. The Commonwealth Court directly applied the provisions of the PLRA to public employees (i.e., probationary police officers).[88] However, such application, according to the Pennsylvania Supreme Court, was improper, as evidenced by the PLRA's express exclusion of public employees from the act's coverage.[89] To the extent that PLRA is applicable to public employees, it is by virtue of the *in pari materia* construction afforded by the *Philadelphia Fire Officers Asso-*

84. *Id.*
85. *See* Gehring v. Pennsylvania, 882 A.2d 1007 (Pa. 2005). Notably, Gehring joined the Board in its appeal.
86. *Gehring II*, 920 A.2d at 183.
87. *Id.* at 183-84.
88. *Id.* at 185.
89. *Id.* at 185.

ciation v. Pennsylvania Labor Relations Board.[90] If Act 111, as construted by the Supreme Court of Pennsylvania, does not afford a specific right to a public employee, it is axiomatic that lower courts cannot fill that void through direct reliance and application of PLRA, especially when Act 111's preemption language elevates the statute over conflicting law.[91]

Turning its attention to *Upper Makefield*, the *Gehring* court clarified the coverage of Act 111 and the collective bargaining rights available through PLRA. Such coverage, and the right to collectively bargain incident to that coverage, is available without qualification or limitation to policemen and firemen employed by the Commonwealth or a political subdivision, regardless of probationary status.[92]

Although *Gehring* qualified, without overruling, *Upper Makefield*, it does not (i) vest a property interest in continued employment that did not previously exist, or (ii) strip public employers of their right to terminate a probationary employee for any number of reasons.[93] Additionally, the principle upon which *Upper Makefield* was initially premised but from which it ultimately diverged—i.e., that Act 111 does not, as stand-alone legislation, afford an outlet for grieving an employer's decision—is still a cognizable point of law. In that same vein, "termination restrictions and grievance procedures available under a collective bargaining agreement may extend to probationary employees *only* upon explicit prescription,"[94] meaning that absent an express contractual provision to the contrary, a probationary employee cannot challenge his termination.

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90. *Id.* at 185 n.7 (citing Philadelphia Fire Officers Ass'n v. Pa. Labor Relations Bd., 369 A.2d 259, 261 (Pa. 1977)).

91. *Gehring* II, 920 A.2d at 185. To-wit, the *Gehring* Court made a point of noting that:

> [i]ndeed, it is apparent that the effort to compensate for *Upper Makefield*'s suggestion that Act 111 has no application to probationary employees has created undue disharmony, as, for example, in the Commonwealth Court's [sic] indication in the present case that the PLRA's unfair labor practices provisions apply directly and independently to probationary employees . . . when those terms are facially inapplicable to government employers.

Id.

92. *Id.* The *Gehring* court further noted that "Act 111's coverage is made expressly available on an unqualified basis to 'policemen' and 'firemen' employed by the Commonwealth or a political subdivision, and its general conferral of a right to bargain collectively is facially available to probationary officers and may be vindicated through their authorized representatives." *Id.* (citation omitted).

93. *Id.*

94. *Id.*

In total, *Gehring* effectuates a return to the status quo of labor and employment law in Pennsylvania before *Upper Makefield*. To the extent that the Pennsylvania Supreme Court foreshadows an abuse in the bargaining process and grievance procedure ("we recognize that our decision here opens a potential for misuse"),[95] a return to the status quo is no more of a threat than the court's initial decision in *Township of Sugarloaf*. Whereas the unequivocal right to bargain collectively had again been vested in "policemen" and "firemen," irrespective of their seniority or probationary status, the issue of arbitrability, as mandated by Act 111, was, and still is, vested exclusively in the arbitrator, subject of course to the *Gehring* holding.

The fallout from *Gehring* has, to date, been of little consequence. In a July 2007 opinion in *Borough of Jenkintown v. Hall*,[96] the Commonwealth Court solidified the *Gehring* holding. The *Hall* court vacated an arbitration award on the basis that the arbitrator lacked jurisdiction to decide the case.[97] The Commonwealth Court held that the employee, a probationary, could not, in the absence of express language affording such a right in the collective bargaining agreement, challenge the validity of his termination during the probationary period.[98]

What, then, is further required if *Gehring* has brought labor and employment law in public sector employment, specifically with respect to police officers and firemen, full circle? The answer lies in one word: legislation. Whereas Act 111 was conceived with a dual purpose—i.e., (i) preserving the integrity of society's emergency response system by eroding any basis for prolonged labor disputes, and (ii) removing the judiciary from the bargaining process—that purpose has run aground. The intent of the legislature, objectively manifested through the inclusion of a mandatory binding interest arbitration provision, has given way to almost a seven-year stretch of judicially mandated confusion. The answer to obviate another *Upper Makefield* is through further statutory clarification—perhaps to the extent of codifying provisions similar to those contained in the PLRA within the very framework of Act 111.

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95. *Id.*
96. 930 A.2d 618 (Pa. Commw. Ct. 2007).
97. *Borough of Jenkintown*, 930 A.2d at 627.
98. *Id.* at 626.

V. CONCLUSION

When Act 111 was initially enacted, it ushered into the legal arena a fine-tuned dispute resolution machine. Act 111 expressly granted collective bargaining rights, thereby alleviating years of bargaining strain that had befallen the relationship between the police officers and firemen of the Commonwealth and their respective employers. At the same time, Act 111 was a conduit for what all legislation should aim to achieve: it succeeded in securing the public welfare by implementing mandatory interest arbitration between the unions and employers at the onset of a stalemate.

In one ill-founded decision, this security was wrested from the bargaining class, creating a rift in the very group that Act 111 was intended to unify. For nearly seven years, the bargaining rights of police officers and firemen were awash in a sea of illogical precedent, forcing lower courts and administrative agencies to adhere to *stare decisis*, and in doing so, bolster bad law. The Pennsylvania Supreme Court's decision in *Gehring v. PLRB*, however, marked the turning of the tide for police officers and firemen in the Commonwealth; the next step, however, is statutory reform.

Timothy D. Houston