Notes of Testimony for 6/12/14 for

John P. McLaughlin, labor attorney,
Ballard Spahr LLP
1735 Market Street, Philadelphia PA 19103
215-864-8241
mclaughlinj@ballardspahr.com

Thank you for the opportunity to submit these written comments and to testify before the committee.

HB 1845 and SB 1111 are critically important to local tax payers and local business. In its current form, Act 111 fails to adequately protect the local taxpayer or to allow municipalities to control their own finances. Due to ever-increasing costs of public safety personnel, there are significant issues regarding the sustainability of public services without back breaking and unrealistic tax increases that smother local economic development. In its current form, Act 111 handcuffs local officials, preventing them from making decisions regarding the appropriate cost and financing of public safety services within each municipality. HB 1845 and SB 1111 are critical and necessary in order to allow local officials and taxpayers the ability to address those local concerns. No business could survive, let alone flourish, under such an arrangement and local taxpayers should not be required to do so either.

The legislature is addressing legacy costs and other personnel costs facing the Commonwealth. Due to Act 111, however, local municipalities are too often handcuffed from doing the same. The narrow, reasonable and targeted changes proposed in HB 1845 and SB 1111 are designed to enable municipalities to have more ability to do the same.

While opponents of this legislation may try to argue that these bills are "anti-union" or "anti-collective bargaining", nothing could be further from the truth. To the contrary, the bills will promote collective bargaining while providing greater flexibility for democratically elected officials to control and address the increasing costs of public safety. The bills will restore local control over decisions relating to public services and will allow local taxpayers to exercise control over their own destiny.

Act 111 has not been amended in more than 45 years and it is time to act before it is too late. The following are my written comments regarding HB 1845 and SB 1111:

- **The Need for the Amendment to Act 111**:

1 The biggest threat to fiscal stability for many municipalities in the Commonwealth of Pennsylvania is the escalating personnel costs associated with uniformed personnel.

2 Many people think this problem is limited to third class cities or urban areas, but the problem is felt in municipalities across the Commonwealth. This is not an issue about union rights or the right to collectively bargain. Those rights will remain

unrestricted and uninhibited after HB 1845 and SB 1111 pass. Instead, this is purely a financial issue: Will this legislature amend a 45-year old outdated law in order to allow municipalities control their financial future and that of their taxpayers and residents?

3 A vote against reforming Act 111 and against the bills in question is essentially a **vote in favor of raising taxes on local residents** for a number of reasons:

- Public safety is the largest cost facing municipalities that have paid fire or police departments. Personnel costs are by far the largest portion of public safety costs.
- The inability to control those rising costs presents a serious road block to economic development and the sustainability of all public services in the future. Municipalities have a limited source of revenue and in most municipalities, revenue from all sources have been declining.
- Due to rising personnel costs, municipalities too often are faced with cutting public services that increase the quality of life for their residents, businesses and taxpayers in order to be able to fund the cost, particularly the legacy costs, of public safety.
- Municipalities have no choice but to pass these mandated costs on to taxpayers through unwanted and damaging tax increases.

4 The ability to control personnel costs in a meaningful way is critically important in order to keep local police and fire services sustainable. This is critically important for all Pennsylvania residents and businesses, but especially the 41% of Pennsylvania's population who live in a fiscally distressed community.

- As the legislative body in Pennsylvania which can impact the well-being of Pennsylvania municipalities and help the citizens of those fiscally distressed municipalities, it is a legislative obligation to seriously consider and pass the proposed amendments to Act 111.

- **Necessary Reform that Promotes and Enhances Real Collective Bargaining**

1 HB 1845 and SB 1111 are ***not*** attacks on public sector collective bargaining in Pennsylvania. They do not seek to implement anti-union policies such as outlawing collective bargaining or more subtle anti-union and anti-collective bargaining legislation such as the elimination of fair share or automatic dues deduction. This is not the type of legislation that we saw in the past several years in Wisconsin and Ohio.

- To the contrary, HB 1845 and SB 1111 seek to amend a law that has not been amended in more than 45 years.

- The amendments are necessary to address concerns and issues that have arisen during that 45-year history and need to be addressed. The proposed amendments are reasonable and targeted to address those concerns.

- The amendments do not favor either side in the collective bargaining process, neither unions or management. The amendments merely require a more thoughtful and careful fiscal analysis before an award is issued. It requires that the panel consider the impact on the local taxpayers and businesses who have to finance the award. This is sound and logical fiscal policy.

- **The proposed amendments favor and will actually encourage real collective bargaining and are designed to lead to more realistic resolutions, either arbitration awards or negotiated agreements, that more accurately reflect the present and future fiscal condition of the municipality and the future consequences of such a resolution.**

2 Any contention that HB 1845 and SB 1111 hurt collective bargaining or are anti-union is simply not credible. Any such claim ignores:

- The targeted wording and reasonable nature of the amendments;

- The significant challenge that municipalities face with maintaining public safety and keeping municipal services sustainable;

- The interests and concerns of your constituents, the local taxpayers, who have to pay for these awards through higher taxes; and

- A vote against these bills is a vote in favor of higher local taxes and less local control over a municipality's fiscal destiny and is not supported by any sound or reasonable public policy.

- **<u>The Reasonableness/Purpose of the Amendments</u>**

Although municipalities would ask for more sweeping changes than those contained in HB 1845 and SB 1111, the changes proposed in the current amendments are reasonable and targeted to address specific issues. All of the changes contained in HB 1845 and SB 1111 are necessary; however, I would like to focus on four of those changes:

  - The new Fiscal Analysis Requirement that arbitration awards contain "specific findings of fact and conclusions of law with regard to each of the issues presented to the board by the parties", including a "complete, accurate and detailed analysis …of the cost of the award to the political subdivision and the impact it will have on the finances and services provided by the political subdivision; the relationship between projected revenues of the political subdivision and the ability of the

political subdivision to pay all of the costs of the award…; and the impact of the award on the future financial stability of the political subdivision." *[Hereinafter this section will be referred to as the "**Fiscal Analysis Requirement**".]*

- Allowance of an appeal if the arbitration determination does not comply with the Fiscal Analysis Requirement.
- The sharing of costs of the arbitration proceeding between employer and the union.
- The prohibition on continuing or adding unlawful pension benefits.

- All four of these proposals are reasonable, do not impact collective bargaining rights, and are "no brainers" as far as good public policy is concerned. The only question that needs to be asked with respect to these proposals is not should it be done, but why has it not been done already?

1. The Fiscal Analysis Requirement.

There should be no controversy or question regarding the necessity of the Fiscal Analysis Requirement. This section provides a glaring omission from the original Act 111 bill of 45 years ago. This is the type of analysis that:

- Individuals and taxpayers and businesses perform every day before entering into any purchase, especially any significant purchase or contract;
- Private sector employers conduct before entering into any financial commitment or agreeing to a collective bargaining agreement;
- Public sector entities conduct before entering into any financial commitment or collective bargaining agreement;
- Since the arbitration panel in Act 111 interest arbitration is essentially stepping into the shoes of the municipality, the panel should be required to conduct the same detailed analysis.

The fact that Act 111 does not currently require this type of analysis is regrettable and allows an Act 111 arbitration panel to operate freely and without constraint or the need to consider the plight of the taxpayers and how the cost of the arbitration award will be funded. Essentially, Act 111, in its current form, delegates the solemn responsibility of dedicating a large portion of a municipality's budget and committing a municipality to long-term financial commitments and debt to an unelected individual who is not answerable to the taxpayers, the courts or the legislature. This is bad public policy. No business would operate in such a manner or tolerate such an arrangement and local taxpayers and municipalities should not be required to do so either.

As a result, numerous municipalities have been saddled with significant debt and unfunded liabilities and Act 111 arbitrators have refused to address these concerns. In addition, municipalities have been put in a position where it cannot take the necessary steps to stop the bleeding and address its fiscal concerns. The inability to address such fiscal concerns only compounds the fiscal issues and ultimately will lead to fiscal distress.

Recent examples of Act 111 arbitration panels handcuffing a municipality and not allowing it to address its fiscal issues without providing any analysis or consideration of the impact of the award on taxpayers, are plentiful. Some of the more egregious recent examples include the following:

- The City of Chester, a third class city in Delaware County that is in Fiscal Distress under Act 47 had unfunded liabilities for post-retirement health and other insurance of more than $100,000,000 (for police and fire personnel), an annual required contribution to fund those benefits of more than $8,000,000, and an annual "pay as you go" funding requirement of almost $2,000,000. In addition, the City has an unfunded pension liability of more than $20,000,000. The City also has had difficulty balancing its annual budget. An Act 111 interest arbitration panel in 2012 issued a 10-year award, 5 years retroactive and 5 years prospective, for the firefighter bargaining unit totaling 34 percent (not compounded) in base pay alone, implemented a new minimum manning provision, provided two additional personal days, and increased pension benefits.

  The police Act 111 Award for the same city provided 3% pay raises in each year of a five (5) year contract, increased sick leave, added an additional holiday, increased pension benefits and awarded an additional annual 1.5% base wage adjustment (on top of the 3% raise) to "each member of the bargaining unit" which was referred to as "Violent Duty Recognition Adjustment."

  All of the foregoing provisions were provided without any detailed explanation or analysis of the fiscal plight of the City or the impact the provisions will have on the City's budget. It does not even appear that the fiscal situation of the City was seriously considered.

- Last year, Bristol Township, a municipality in Bucks County, entered Act 111 arbitration seeking relief from $85,800,00 in unfunded liabilities, including $77,000,000 in Post-Retirement Health obligations. The arbitrator not only ignored this issue, but he awarded 4% and 3.5% pay raises, a DROP and a minimum manning requirement. As a result, the unfunded liabilities increased to approximately $90,000,000 and the Township has fewer police officers.

- In 2009, at the height of the Great Recession, Cheltenham Township, a First Class Township in Montgomery County went into Act 111 arbitration seeking relief from its astonishing and continually-growing unfunded liability for post-retirement medical benefits (OPEB liability). At the time, its unfunded OPEB liability for police was $31,915,229 and total Township liability was $66,747,059. The police pension fund also had unfunded pension liability of $1,000,000.

  The Act 111 arbitration panel did not address the Township's unfunded liability. Instead, notwithstanding the huge unfunded liabilities of the taxpayers and the declining revenues, the panel awarded wage increases of 3.25% in 2010, 3.5% in 2011 and 3.75% in 2012. Although the arbitrator provided a token contribution for healthcare for current employees, the panel's refusal to address the unfunded liability of the Township was not addressed or explained in any way. Neither was the impact of the wage increases, which would be considered high wage increases at any time, but especially in 2009 at the height of the Great Recession.

  As a result of the panel's refusal to address the unfunded liability issues and issuance of other provisions favorable to the union in 2009, the total Township OPEB liability is now $75,108,044. The total township pension unfunded liability went from $18,830,000 in 2011 to $22,970,000 in 2013.

- The City of Coatesville, a small third class city in Chester County, which has been balancing its budget by transferring millions of dollars annually from a cash reserve, had pay increases of 3% and 3.5% imposed upon it. The wage increase compounded the deficit spending and handcuffed the City from being able to address its inability to sustain its public safety services, notwithstanding wage freezes accepted by other employees and previous layoffs and attrition of other positions in the City. The City has the lowest median house value, lowest median household income and highest poverty rate in the County. Simply put, the City cannot afford such pay raises.

All of the foregoing awards were issued without any fiscal analysis or consideration of the finances of the municipality. The foregoing awards highlight why Act 111 is making public services unsustainable and how such awards handcuff, if not doom,

the municipality well into the future. For example, in 2004, the City of Allentown, a third class city in Lehigh County received an arbitration award that significantly increased pension benefits for current and future employees. Primarily as a result of the award, the City now faces a situation where 25% of its general fund budget will be dedicated to funding its minimum municipal pension funding obligation, forcing the consideration of funding the pension fund through the sale of assets and other drastic one-time funding measures. This is an unsustainable practice. The other municipalities described above face a similar fate.

At the very least, prior to issuing the foregoing awards, the arbitration panel should have to perform the Fiscal Analysis Requirement required by the new legislation. That analysis will have to be accurate and thorough. If such an analysis was performed, it is unlikely that the municipalities discussed above would be as handcuffed as they are today as a result of the awards.

2. **The Allowance of Appeal if the Fiscal Analysis is Not Performed.**

Currently, there is virtually no review of interest arbitration awards in Pennsylvania. The justification for this is that uniformed personnel do not have the right to strike and there is a policy of promptly resolving labor disputes. There also is a strong policy in Pennsylvania favoring the arbitration of labor disputes.

Binding interest arbitration, however, is not real collective bargaining where two parties have to negotiate an agreement. In real collective bargaining, a third person, who is not answerable to anyone, does not have the ability to impose his or her will at any cost and without any controls. No one is advocating that public safety personnel should have the right to strike, but the ruse that Act 111 interest arbitration is somehow real collective bargaining must be exposed and the statute should be amended accordingly. It makes little sense to allow an unelected body to make decisions that impact the fiscal well-being of municipalities and the lives of the taxpayers.

The review envisioned by this law continues the narrow certiorari scope of review that currently exists, but it expands that review only if the arbitration panel fails to comply with the Fiscal Analysis Requirement mentioned above. This will give meaning to that provision, which in my opinion, is the most important section of HB 1845 and SB 1111. Without this avenue of review, the narrow but reasonable and necessary amendments envisioned by HB 1845 and SB 1111 will be meaningless.

Act 111 has serious consequences for local communities, local businesses and local taxpayers. It removes what should be exclusively local decisions from residents and their elected officials. At the very least, an Act 111 panel should be required to perform a fiscal analysis and that analysis must be subject to review by the courts.

3. **The Sharing of the Cost of the Neutral Arbitrator**.

Currently, only the employer (the municipality) pays the cost of the neutral arbitrator. It is not only bad policy and unfair to require the taxpayers to pay all of the costs of the neutral arbitrator, but it has created a system in which it is not uncommon for police unions to not even meet with municipalities, let alone to bargain in good faith prior to arbitration. This requirement is particularly damaging to smaller municipalities, who have fewer resources. Small municipalities are being forced into Act 111 and paying the full cost of the arbitration even though they cannot afford to do so. The only alternative is to agree to a settlement. This is an unacceptable option and one that is unfair to taxpayers.

In no other aspect of public labor relations is the employer statutorily required to pay the costs of the arbitration. Both parties are required to arbitrate and both parties should have to share the costs of the arbitrator. In grievance arbitration, both parties split the costs of the arbitrator. The same should apply in interest arbitration.

4. **The Prohibition on Continuing Unlawful Pension Benefits**.

HB 1845 and SB 1111 prohibits an arbitration panel from granting or continuing any pension benefit that has been found to be unauthorized or unlawful or excessive by the Department of the Auditor General (DAG) or any court of law. This provision is important because it is not uncommon for the DAG to find that a municipality is providing an unlawful pension benefit and to cite the municipality for doing so as part of an audit finding. The DAG will also mandate that the municipality eliminate the unlawful benefit, and the municipality is required to do so in the next round of collective bargaining. Often, however, arbitrators will not take the necessary action to address the issue and the municipality is required to maintain the unlawful pension benefit.

We would actually want this provision to be stronger so that such unlawful benefits would be automatically eliminated, but at the very least, Act 111 should be amended to include this provision.

Respectfully submitted,

John P. McLaughlin
Ballard Spahr LLP
1735 Market Street
Philadelphia, PA 19103
Mclaughlinj@ballardspahr.com
215-864-8241