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In the Commonwealth Court of Pennsylvania

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AMERICANS FOR FAIR TREATMENT,
Appellants,

v.

PHILADELPHIA FEDERATION OF TEACHERS, LOCAL 3, AFL-CIO; THE SCHOOL DISTRICT OF PHILADELPHIA; and SCHOOL REFORM COMMISSION,
Appellees.

APPELLANT'S REPLY BRIEF

Appeal from Final Orders of the Court of Common Pleas of Philadelphia County, Case No. 02928 (February Term 2015)

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SUMMARY OF ARGUMENT IN REPLY

The brief of Appellee Philadelphia Federation of Teachers, Local 3, AFL-CIO ("PFT") and the joint brief of the Appellees School District of Philadelphia and School Reform Commission (collectively, "District") repeat the error of the trial court below. Appellees recast Pennsylvania law as requiring an existing injury in order to establish standing, and they invite this Court to devise rules that insulate Appellees from challenge of any kind. This Court should identify and correct those errors, conclude that Appellant Americans for Fair Treatment ("Americans") established standing to seek a declaratory judgment concerning union work on school time,[1] and remand for further proceedings.

ARGUMENT IN REPLY

AMERICANS FOR FAIR TREATMENT DISCLOSED FACTS SUFFICIENT TO ESTABLISH STANDING TO CHALLENGE UNION WORK ON SCHOOL TIME

Appellees misapprehend Pennsylvania law concerning standing and seek to insulate themselves from review of any kind. In fact, Americans have standing to challenge union work on school time, and it has alleged the facts necessary to

1. As explained in the Amended Complaint, "union work on school time" is the practice of allowing public school employees to take indefinite "leave" from public employment for the purpose of working full time for a labor union, while receiving all incidences of public employment. Amended Complaint, at ¶¶ 20-27 (R. 18a-20a).

proceed to the merits. See Seeton v. Pennsylvania Game Comm'n, 937 A.2d 1028, 1032 n.4 (Pa. 2007) ("[I]n considering preliminary objections, '[the reviewing court] must accept the facts alleged in Appellants' complaint and all reasonable inferences that may be drawn therefrom as true.' ") (quoting Luke v. Cataldi, 932 A.2d 45, 49 n.3 (Pa. 2007).

A. Appellees Misapprehend the Requisite Harm for Establishing Standing

Appellees erroneously suggest that existing injury is a prerequisite to establishing standing in this case. PFT Brief, at p. 13 ("[T]here is no indication in the Amended Complaint what harm any member of [Americans] has suffered as a result of the Union Leave provision."); District Brief, at p. 6 ("[Americans] has not made any factual allegation of a direct injury to the interests of its members . . . ."). This Court should reject Appellees suggestion and the standing arguments built on that foundation.

In fact, in order to establish standing as an association, Americans "need merely allege that any of its members is suffering immediate or threatened injury resulting from the challenged action sufficient to satisfy the William Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269 (1975), standard." Pennsylvania Acad. of Chiropractic Physicians v. Commonwealth, Dep't of State, Bureau of Prof'l & Occupational Affairs, 564 A.2d 551, 553 (Pa. Cmwlth. 1989). The need for an

existing harm is even further removed in declaratory judgment actions. Joint Bargaining Comm. of Pennsylvania Social Servs. Union, Local No. 668, SEIU v. Commonwealth, 530 A.2d 962, 967 (Pa. Cmwlth. 1987) ("[T]he fact that no member of Petitioners' association has yet suffered harm is of no moment. Section 7532 of the Declaratory Judgments Act provides that a court may declare rights 'whether or not further relief is or could be obtained.' ") (internal citation omitted).

Americans made clear that its teachers suffer immediate and threatened injury as a result of union work on school time. Amended Complaint, at ¶¶ 7-8, 19. First, Philadelphia teachers[2] lost seniority as a result of union work on school time, an obvious and established injury. See Bertulli v. Indep. Ass'n of Cont'l Pilots, 242 F.3d 290, 295 (5th Cir. 2001) ("Loss of seniority is an injury within a commonsense understanding of the term, and one that is suffered by the plaintiffs themselves. It

2. Contrary to the District's suggestion that Americans' teachers "could actually be instructors at a college or university in Philadelphia or teachers working for a non-public, private school or charter school within the city," District's Brief, at p. 7, American's teachers teach within the District. And a fair reading of the Amended Complaint makes clear that this is the case. For example, Americans alleged that its teachers are deprived of "assistance, leadership, and valuable service from those teachers performing union work on school time" or lack seniority relative to union workers, allegations that would not make any sense if Americans' teachers were in fact outside of the District. Amended Complaint, at ¶ 7 (R. 16a); see Seeton, 937 A.2d at 1032 n.4 ("[I]n considering preliminary objections, '[the reviewing court] must accept the facts alleged in Appellants' complaint and all reasonable inferences that may be drawn therefrom as true.' ") (quoting Luke, 932 A.2d at 49 n.3) (emphasis added).

carries with it the possibility of several forms of concrete injury, such as slower promotion, greater likelihood of being laid off, and lower benefits."). Americans should not have to wait to obtain a declaration as to their rights only after they are actually furloughed.[3] Likewise, Americans alleged that union work on school time deprives its teachers of assistance, leadership, and valuable service of those teachers who, as a result of union work on school time, are no longer in Philadelphia schools, Amended Complaint, at ¶ 7 (R. 16a), a harm acknowledged by PFT in its brief but brushed off as "inconsequential," PFT Brief, at p. 14. As alleged in the Amended Complaint, the District was scrambling to fill 217 teacher vacancies, a gap that only grows as the result of union work on school time.[4] Id. at ¶ 18 (R. 18a).

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3. PFT accuses Americans of offering "no details about . . . how long [Americans' teacher-member(s)] worked as a teacher for the School District." PFT Brief, at p. 19. On the contrary, Americans alleged in its Amended Complaint that its "membership rolls include Philadelphia teachers who have had less accrued seniority than many of the teachers who have left the classroom to perform union work on school time." Amended Complaint, at ¶ 7 (R. 16a). The important allegation for purposes of seniority preferences is not total years of service, but a teachers' seniority relative to others. See id. at ¶ 19 (R. 18a) ("In addition to other seniority preferences, the CBA mandates a 'LIFO' policy under which longer-tenured employees are—regardless of their performance and in spite of their higher costs—protected against layoffs and have rights to be transferred or recalled before other employees.").

4. For this reason, the details sought by PFT on Americans' membership, PFT Brief, at p. 14, would not enhance the Amended Complaint for purposes of

Finally, Americans adequately alleged immediate or threatened harm to its taxpayers, whose taxes are placed at risk by the practice of union work on school time. Id. at ¶ 8 (R. 16a). As Americans alleged, "PFT is not contractually obligated to reimburse the District for the cost of salary, benefits, insurance coverage, seniority, or pension," yet union work on school time continues to require that the District provide them to union workers. Id. at ¶¶ 24-25 (R. 19a). Americans' argument for taxpayer standing closely tracks that validated by this Court in Rizzo v. City of Philadelphia, 582 A.2d 1128, 1130 (Pa. Cmwlth. 1990), when it held that a taxpayer had standing to challenge the provision of pension benefits to a city employee:

> Here, Tucker's application for retirement benefits was supported by the City and approved by the Pension Board. No party was aggrieved by the Pension Board's decision, and thus a challenge to its decision was not made by any original party. A challenge would therefore only arise by taxpayer intervention. Rizzo, as a taxpayer, instituted a challenge by bringing the present action in equity. Pursuant to Biester[5] and Sprague,[6] Rizzo has standing to do so.

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standing. Returning union workers to any classroom in Philadelphia would allow the District to place new hires where they are most needed.

5. In re Application of Biester, 409 A.2d 848 (Pa. 1979).

6. Sprague v. Casey, 550 A.2d 184 (Pa. 1988).

Similarly, here, the District is the most directly and immediately affected by the provision requiring it to hand over its employees to PFT, yet, because it is a party to the contract, it is not inclined to challenge it. Amended Complaint, at ¶ 8 (R. 16a). Americans do not advocate for a novel theory of taxpayer standing, as PFT suggests. PFT's Brief, at pp. 10, 16.

Accordingly, this Court should reject Appellees' arguments and hold that Americans has established standing sufficient to challenge union work on school time.

B. Appellees Seek to Insulate Union Work on School Time From Challenge

At root, Appellees are trying to insulate their practices from review of any kind. And they ask this Court to adopt illogical standing principles to make it possible. This Court should not accept the invitation.

PFT asks this Court to adopt a standing doctrine that would literally preclude standing for everyone: all members of a collective bargaining unit—and all those who are not members of a collective bargaining unit. PFT's Brief, at pp. 15-16. Of course, the cases cited by PFT do not create such a paradox. Contrary to PFT's assertions, this Court in Lee v. Municipality of Bethel Park, 626 A.2d 1260 (Pa. Cmwlth. 1993), did not hold that employees have no standing to challenge their

unions' practices unless allowed by a collective bargaining agreement.[7] Instead, this Court held that individual police and firemen lack statutory standing under Act 111, 43 P.S. §§ 217.1 - 217.10, to challenge an arbitration award. Lee, 626 A.2d at 1262 n.3. This Court in Lee, having disposed of that basis for standing, actually engaged in traditional and taxpayer standing analysis before holding that the plaintiffs' had merely failed to plead sufficient facts in that case. Id. at 1263-65. In other words, Lee does not create the blanket rule PFT fabricates in its brief. See id.

Interestingly, PFT cites the same case for the proposition that individuals also lack standing if they are not members of a collective bargaining unit.[8] PFT's Brief, at p. 16. But again, this Court's actual decision in Lee betrays PFT's understanding. In reaching its holding that individual police and firemen lack statutory standing under Act 111 to challenge an arbitration award, this Court in Lee merely remarked

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7. Nor does the Pennsylvania Supreme Court's decision in Upper Bucks County Vocational-Technical School Education Ass'n v. Upper Bucks County Vocational-Technical School Joint Committee, 474 A.2d 1120 (Pa. 1984), stand for such a proposition. Instead, the Pennsylvania Supreme Court held that teachers and their union lacked standing to force their school district to revise its collective bargaining agreement midstream to qualify for a state subsidy. Id. at 1121-23.

8. PFT also cites Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Bd., 916 A.2d 624 (Pa. 2007), but that case does not even touch on the relevance of collective bargaining unit membership to establishing standing. Instead, the Pennsylvania Supreme Court in that case merely held that an individual and citizens' organization lacked a direct interest or taxpayer standing to initiate a non-party appeal, absent intervention in administrative proceedings, of a licensing determination under the Administrative Agency Law, 2 Pa.C.S. § 702. Id. at 628-29.

that, if existing police and firemen lacked standing in that situation, former police and firemen would also lack that form of standing. Lee, 626 A.2d at 1262 n.3. Again, this Court was fully willing to engage in traditional and taxpayer standing analyses and never created a blanket rule precluding standing for all those who are outside of a collective bargaining unit. Id. at 1263-65.

Additionally, both PFT and the District urge this Court to adopt an associational standing rule that would require associations to disclose its membership, whether by providing members' names or information essentially identifying its members. See, e.g., District's Brief, at p. 8 ("[Americans] cannot establish standing . . . by simply claiming that its membership includes unspecified 'Philadelphia teachers' that may or may not have been adversely impacted."); PFT Brief, at p. 14 ("Without any specifics about the age, work history, level of seniority or any other details about a particular member of [Americans], these averments are woefully deficient . . . ."). However, such a requirement would be constitutionally unenforceable, see NAACP v. Alabama, 357 U.S. 449 (1958), and contrary to general principles underlying associational standing, see, e.g., Disability Rights Wisconsin, Inc. v. Walworth Cnty. Bd. of Supervisors, 522 F.3d 796, 802 (7th Cir. 2008) ("This [associational standing] requirement, however, still allows for the member on whose behalf the suit is filed to remain unnamed by the

organization."); Bldg. & Constr. Trades Council of Buffalo, New York and Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 145 (2d Cir. 2006) ("An association bringing suit on behalf of its members must allege that one or more of its members has suffered a concrete and particularized injury, . . . as the plaintiffs do. But the defendants cite to no authority—nor are we aware of any—that supports the proposition that an association must 'name names' in a complaint in order properly to allege injury in fact to its members.").

Therefore, this Court should reverse the trial court's ruling.

CONCLUSION

In sum, this Court should hold that the trial court erred, conclude that Americans established standing to seek a declaratory judgment concerning union work on school time, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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