IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN R. KABLER, JR.,	:	
	:	No. 1:19-CV-0395
Plaintiff,	:	
	:	Judge Rambo
v.	:	
	:	BRIEF IN RESPONSE
UNITED FOOD AND COMMERCIAL	:	TO PLAINTIFF'S
WORKERS UNION, LOCAL 1776	:	CROSS MOTION
KEYSTON STATE, et al.,	:	FOR PARTIAL
	:	SUMMARY JUDGMENT
Defendants.	:	
	:	(Electronically Filed)
		Complaint Filed 03/06/19
		Trial Date: Not set.

RESPONSE BRIEF OF COMMONWEALTH DEFENDANTS
IN OPPOSITION TO PLAINTIFF'S CROSS MOTION
FOR PARTIAL SUMMARY JUDGMENT

Defendants, Pennsylvania Liquor Control Board, Thomas W. Wolf, Timothy Holden, Michael Newsome and Anna Marie Kiehl ("Commonwealth Defendants"), file the within Response Brief in Opposition to Plaintiff's Cross Motion for Partial Summary Judgment and for any and all of the reasons that follow, respectfully request that this Honorable Court deny that Motion.

I. INTRODUCTION AND PROCEDURAL HISTORY

On May 7, 2019, Commonwealth Defendants filed a Motion to Dismiss Plaintiff's complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Doc. No. 17). This Honorable Court issued an Order to Show Cause

as to why the pending Motion to Dismiss should not be converted to a Motion for Summary Judgment under Federal Rule of Civil Procedure 12(d). (Doc. No. 22). On May 30, 2019, Defendants filed a joint letter agreeing that the pending Motions to Dismiss should be converted into Motions for Summary Judgment. (Doc. No. 26).

On July 19, all Defendants filed Amended Motions for Summary Judgment with Briefs in Support, and a Joint Statement of facts. (Docket Nos. 35-38). Plaintiff also filed a Cross Motion for Partial Summary Judgment with a Brief in Support, along with a Statement of Facts on July 19, 2019. (Docket Nos. 39-41).

II. COUNTER STATEMENT OF MATERIAL FACTS IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Commonwealth Defendants rely on Defendants' Joint Statement of Material Facts Not in Dispute filed on July 19, 2019 at Doc. No. 36, and Defendants' Joint Counter Statement of Material Facts filed on August 30, 2019.

III. ARGUMENT

A. Plaintiff's claims are moot and Plaintiff lacks standing.

The inability of courts to review claims that are moot "derives from the requirement of Article III of the Constitution[,] under which the exercise of [courts'] judicial power depends[,] [of] the existence of a case or controversy." *New Jersey Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 30-31 (3d Cir.

1985) (citations omitted). In order to avoid dismissal for mootness, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id*. (citations omitted). A case is moot where "(1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 31.

Voluntary cessation of an official activity or policy satisfies the first element of mootness where the likelihood that a defendant will resume the same allegedly unlawful conduct is speculative. *Thompson v. U.S. Dep't of Labor*, 813 F.2d 48, 51 (3d Cir. 1987). For instance, in *Marcavage v. Nat'l Park Service*, a protester who was arrested and issued a citation for violating a term or condition of a permit for protesting on a sidewalk that was not designated as a First Amendment area under Independence National Historical Park regulations alleged that his arrest violated his First, Fourth, and Fourteenth Amendment rights. 666 F.3d 856, 857-858 (3d Cir. 2012). The United States Court of Appeals for the Third Circuit affirmed the dismissal of his claims for declaratory and injunctive relief, holding that the violation could not reasonably be expected to recur given subsequent changes to the regulations and the plaintiff's failure to overcome the presumption that the regulatory changes were made in good faith. *Marcavage*, 666 F.3d at 861. A plaintiff "cannot reasonably be expected to suffer another . . . violation" when

that alleged violation depends on her taking affirmative steps. *See Sands v. N.L.R.B.*, 825 F.3d 778, 784-85 (D.C. Cir. 2016) (holding that case was moot when Plaintiff was not likely to return to work at former employer and subsequent change of law prohibited alleged violation against other employees).

Post-*Janus* cases concerning substantially similar claims have been dismissed as moot or for lack of standing by federal courts nationwide, including in the Middle District of Pennsylvania. *See Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). In *Molina v. Pa. Social Servs. Union*, ___ F. Supp. 3d ____, No. 1:19-cv-0019, 2019 WL 3240170 (M.D. Pa. July 18, 2019) (attached as Exhibit "A" hereto), the plaintiff asserted that maintenance of membership violated the First and Fourteenth Amendments, as Plaintiff asserts here. The court concluded that it lacked subject-matter jurisdiction over the claims for prospective declaratory and injunctive relief because the plaintiff "lack[ed] standing for purposes of these claims . . . ." *Id.* at *8.

In determining the plaintiff lacked standing, the court relied on the facts that he was no longer a member of the union, and was no longer employed with the county despite the possibility of reinstatement of his employment. *Id.* Finding his "request for prospective relief" was "based on an unknown event at some unknown time," the court was "unpersuaded that there is a live case or controversy as to [Molina's] claims through which he seeks prospective declaratory and injunctive

relief." *Id.* (internal quotations and citations omitted). *See also Smith v. Superior Court*, No. 18-cv-05472, 2018 WL 6072806 (N.D. Cal. Nov. 16, 2018) (attached as Exhibit "B" hereto) (denying motion for preliminary injunction, holding plaintiff was unlikely to succeed on the merits because he had consented to join the union and pay dues, that *Janus* does not "stand for the proposition that any union member can change his mind at the drop of a hat, invoke the First Amendment, and renege on his contractual obligation to pay dues," and that he could not "now invoke the First Amendment to wriggle out of his contractual duties."); *O'Callaghan v. Regents of the Univ. of Cal.*, No. 19-02289, 2019 WL 2635585 (C.D. Cal. June 10, 2019) (attached as Exhibit "C" hereto) (denying motion for preliminary injunction, holding plaintiffs could be made to pay dues pursuant to a maintenance of membership provision because they had voluntarily consented to join the union and pay dues, and determining plaintiffs' request to be let out of the union moot as it had already been honored); *Seager v. United Teachers Los Angeles*, No 2:19-cv-00469, 2019 WL 3822001 (C.D. Cal. Aug. 14, 2019) (attached as Exhibit "D" hereto) (granting defendants' motions for judgment on the pleadings, holding request for injunctive relief to cease dues deductions was moot, as plaintiff had already been released from her dues authorization and would have to rejoin the union for the claim to be live, and claim for return of dues on the theory that her consent was nonconsensual failed as a matter of law because pre-

Janus consent was not coerced), *appeal docketed*, No. 19-55977 (9th Cir. Aug. 21, 2019).

Here, as in *Molina*, there is no basis to believe that Plaintiff would ever again be subject to the challenged provisions of PERA or the CBA. As soon as the Commonwealth was notified that Plaintiff had been released from his membership agreement with Local 1776, it stopped collecting union dues. Plaintiff voluntarily joined Local 1776 and gave consent before any dues were deducted, and would have to sign another application before being considered a member of the Union again. Under the CBA, the Commonwealth is constrained from collecting any dues or fees in the future *unless Plaintiff first decides to authorize their collection*. Given the presumption of good faith afforded government actors–which Plaintiff does not offer any evidence to rebut–any allegation that the Commonwealth will recommence collecting union dues after the Complaint is dismissed is factually impossible, unless Plaintiff himself becomes a member, authorizes dues deductions, changes his mind again, requests resignation and is denied that request–an attenuated and highly unlikely possibility. Because Plaintiff is no longer a member, the maintenance of membership provisions of PERA and the CBA will not be applied; in fact, the current CBA omitted the challenged maintenance of membership provision, ensuring it cannot be applied again.

The second element of mootness examines whether adjudication of an issue can provide a Plaintiff with any actual relief. *See Matter of Kulp Foundry, Inc.*, 691 F.2d 1125, 1128-29 (3d Cir. 1982); *Int'l Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers v. Kelly*, 815 F.2d 912, 915 (3d Cir. 1987). Plaintiff seeks declaratory and injunctive relief, as well as monetary damages. To the extent that Plaintiff seeks any retroactive relief, his claims are barred as to the Commonwealth Defendants by the Eleventh Amendment to the United States Constitution. *Pennhurst State Sch.*, 465 U.S. at 102-03 ("When a Plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief."). Plaintiff's Complaint, thus, only seeks prospective relief against the Commonwealth Defendants. It is clear, however, that there is no ongoing or imminent violation for which Plaintiff is entitled to prospective relief.

A Plaintiff must demonstrate "sufficient immediacy and reality" of harm to obtain declaratory judgment under the Declaratory Judgment Act. *Golden v. Zwickler*, 394 U.S. 103, 108-09 (1983); 28 U.S.C. § 2201. Where it is "highly unlikely" that a challenged policy will be applied to the Plaintiff again, declaratory relief is inappropriate. *Versarge v. Township of Clinton*, 984 F.2d 1359, 1369-70 (3d Cir. 1993). In *Versarge*, a volunteer firefighter sought declaratory judgment

that an article of a volunteer fire department's constitution prohibiting the use of "insulting language to an officer in command . . . any conduct calculated to bring disgrace on the [volunteer fire department], or divulg[ing] any transactions or business of same to persons not members" violated the First Amendment. 984 F.2d at 1362-63. Because it was highly unlikely the terminated firefighter would ever again be a member of the volunteer fire company, declaratory judgment was therefore inappropriate. *Id.* at 1369-70. The court commented that because the chance that the provision would ever be applied to him again was so remote, his claim lacked "sufficient immediacy and reality" to permit a declaratory judgment order, "even if the infirmity did not exist when the action was initiated." *Id.* (internal citations omitted).

Similarly, abstract injury is insufficient to demonstrate that a plaintiff is entitled to injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). A plaintiff must show that he is likely to suffer future injury from a defendant's conduct to obtain injunctive relief. *Roe v. Operation Rescue*, 919 F.2d 857, 864 (3d Cir. 1990). Past wrongs alone do not amount to the real and immediate threat of injury required to obtain injunctive relief. *Lyons*, 461 U.S. at 103; *see also Lundy v. Hochberg*, 91 F. App'x 739, 743 (3d Cir. Oct. 22, 2003) (holding that an attorney was not entitled to seek injunction against a former partner for

unauthorized practice of law because there was no risk of future injury where re-forming the partnership was highly unlikely).

Plaintiff resigned his membership and no further dues deductions have been taken since his release from his dues authorization. As in *Versarge* and *Lundy*, it is highly unlikely that Plaintiff will ever again be a member of Local 1776, be subjected to dues deductions under the terms of a CBA, or to the challenged provisions of PERA; thus, the only circumstance under which the scenario could occur is if Plaintiff chooses to rejoin Local 1776 and reauthorize dues deductions. Any threat of injury Plaintiff may identify is simply too conjectural for declaratory judgment or injunctive relief to be appropriate.

Plaintiff's argument rests on a single case granting a preliminary injunction with no subsequent history, which opined that a maintenance of membership provision that does not differentiate between *membership* and *dues deductions* might implicate the First Amendment. *See McCahon v. Pennsylvania Tpk. Comm'n*, 491 F. Supp. 2d 522 (M.D. Pa. 2007). That analysis and Plaintiff's claims confound two related but distinct issues: (1) Plaintiff's membership in Local 1776 and (2) Plaintiff's obligation to pay dues to Local 1776 in conformance with his contractual obligation as appears on his dues authorization. Local 1776 never objected to, attempted to prohibit, or provided permission for Plaintiff to resign his membership in the Union; that was his prerogative. Instead, this dispute revolves

around the dues authorization card and Plaintiff's "invo[cation of] the First Amendment to wriggle out of his contractual duties." *Smith*, 2018 WL 6072806 at *1.

As Defendants' Counter Statement of Material Facts makes clear, Plaintiff's dues authorization form said nothing of his membership, and the CBA required the Commonwealth to honor the dues deduction authorization, unless and until notified by Local 1776. Plaintiff's membership in Local 1776 was another matter entirely, and Plaintiff was free to declare himself a nonmember at any time under PERA and the CBA. Despite the clear language of the dues authorization, Local 1776 allowed Plaintiff to revoke the authorization, and notified the Commonwealth to that effect. Dues deductions immediately ceased.

B. The Eleventh Amendment bars Plaintiff's claims against the Commonwealth Defendants.

Eleventh Amendment sovereign immunity bars citizens from bringing an action in federal court against a state. *Pennhurst State Sch.*, 465 U.S. at 100. That bar extends to suits against departments or agencies of the state having no existence apart from the state. *Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981). The United States Court of Appeals for the Third Circuit recognizes three principal exceptions to Eleventh Amendment immunity: congressional abrogation; waiver by the state; and suits against individual state officers for prospective

injunctive and declaratory relief to end an ongoing violation of federal law. *Pa. Fed. of Sportsmen's Clubs, Inc.*, 297 F.3d at 323.

Section 1983 does not abrogate Eleventh Amendment immunity or subject states to suits for money damages. 42 U.S.C. § 1983; s*ee Burns v. Alexander*, 776 F. Supp. 2d 57, 72 (W.D. Pa. 2011) (citing *Quern v. Jordan*, 440 U.S. 332, 342-43 (1979) and *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 62-71 (1989)). The Commonwealth of Pennsylvania has expressly declined to waive its Eleventh Amendment immunity. 42 Pa. Cons. Stat. § 8521.

The third exception to Eleventh Amendment immunity allows an action to proceed where a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Pa. Fed. of Sportsmen's Clubs, Inc.*, 297 F.3d at 324. However, even where a complaint properly invokes the exception, there must be "a close official connection" between the state official and the enforcement of the law in order for the exception to apply to a Commonwealth defendant. *See Ex parte Young*, 209 U.S. 123, 156 (1908). A sufficient connection exists where the defendant has a duty to enforce a challenged law or regulation, not merely a general power to review or approve it. *Plaza at 835 W. Hamilton Street LP v. Allentown Neighborhood Improvement Zone Dev. Auth.*, No. 15-6616, 2017 WL 4049237, at *7 (E.D. Pa. Sept. 12, 2017) (citing *Rode v. Dellarciprete*, 845

F.2d 1195, 1208 (3d Cir. 1980); *1st Westco Corp. v. School Dist. of Phila.*, 6 F.3d 108, 112–116 (3d Cir. 1993)).

Assuming, *arguendo*, that the Commonwealth Defendants have a sufficient connection to the challenged statutory and contractual provisions, there is no reasonable likelihood that any challenged provision of PERA or the CBA will be applied to the Plaintiff. Again, Plaintiff was released from his dues agreement with Local 1776 and, thereafter, the Commonwealth stopped deducting dues from his wages. The only way any challenged provision of PERA or the CBA could ever be applied to Plaintiff in the future is if he voluntarily enters into a new dues authorization with Local 1776. No injunction this Court could enter against Commonwealth Defendants would provide relief to Plaintiff.

None of the Commonwealth Defendants has a connection to the enforcement of the challenged provisions of PERA or the CBA that would create a sufficient nexus to except them from Eleventh Amendment immunity. However, even if they did, any chance that any of the provisions would be applied against Plaintiff is speculative at best. Therefore, all Commonwealth Defendants are shielded from any liability in the instant action by the Eleventh Amendment.

IV. CONCLUSION

For the reasons set forth above, the Commonwealth Defendants respectfully request that this Honorable Court dismiss the Complaint with prejudice.

Dated: August 30, 2019

Respectfully Submitted,

JOSH SHAPIRO
Attorney General

By: */s/ Nancy A. Walker*

Nancy A. Walker
Chief Deputy Attorney General
Attorney I.D. 66816

Caleb Enerson
Deputy Attorney General
Attorney I.D. 313832

Keli Neary
Chief Deputy Attorney General
Attorney I.D. 205178

Office of Attorney General
1600 Arch Street, Ste. 300
Philadelphia, PA 19003

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN R. KABLER, JR.,	:	
	:	No. 1:19-CV-0395
Plaintiff,	:	
	:	Judge Rambo
v.	:	
	:	BRIEF IN SUPPORT
UNITED FOOD AND COMMERCIAL	:	OF COMMONWEALTH
WORKERS UNION, LOCAL 1776	:	DEFENDANTS'
KEYSTON STATE, et al.,	:	AMENDED MOTION
	:	TO DISMISS
Defendants.	:	
	:	(Electronically Filed)
		Complaint Filed 03/06/19
		Trial Date: Not set.

CERTIFICATE OF SERVICE

I, Nancy A. Walker, hereby certify that the foregoing Brief in Support of Motion to Dismiss by Commonwealth Defendants has been filed electronically on August 30, 2019 and is available for viewing and downloading from the Court's Electronic Case Filing system by all counsel of record.

Dated: August 30, 2019 By: */s/ Nancy A. Walker*

Office of Attorney General
1600 Arch Street, Ste. 300
Philadelphia, PA 19003

Nancy A. Walker
Chief Deputy Attorney General
Attorney I.D. 66816