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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 468 C.D. 2019

MARK KIDDO; JOAN HORDUSKY; MIKE DZURKO; CHRISTINE ARNONE; JENNIE CLAY; MADELYN GROOVER; MELISSA GUZOWSKI; AND JEFF GRANGER,

Appellees,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2206; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 85; RANDY PROCIOUS IN HIS OFFICIAL CAPACITY; SHANE CLARK IN HIS OFFICIAL CAPACITY,

Appellants,

and

ERIE WATER WORKS,

Appellee.

REPLY BRIEF OF APPELLANTS

Appeal from the March 19, 2019 Order of the
Erie County Court of Common Pleas, Case No. 13144-18
Granting Motion and Renewed Motion for Preliminary Injunction

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I. INTRODUCTION

Pursuant to Pa. R.A.P. 2113(a) and 2185(a)(1), the American Federation of State, County and Municipal Employees, District Council 85 ("District Council 85"); the American Federation of State, County and Municipal Employees, Local 2206; Shane Clark; and Randy Procious (referred to collectively as "AFSCME" or "Appellants") submit this Reply Brief to respond to the matters raised by Appellee-Plaintiffs' Brief, which were not addressed in AFSCME's initial brief in this appeal.[1]

[1] Appellee-Employer did not file a Brief.

II. SUMMARY OF ARGUMENT IN REPLY

In their brief, Appellee-Plaintiffs raise several arguments not already addressed in Appellants' initial brief. First, on the issue of the trial court's failure to defer to the AFSCME International Judicial Panel's interpretation of its Constitution, they argue that no deference was required because (a) the Judicial Panel did not decide whether AFSCME breached its duty of fair representation; (b) no Pennsylvania court has adopted the federal practice of deference when interpreting a union constitution; and (c) in their view, the Judicial Panel's interpretation was patently unreasonable. However, the Judicial Panel did decide whether or not AFSCME violated Paragraph 7 of the AFSCME International Constitution's Bill of Rights, which is one of the asserted bases for Appellee-Plaintiffs' duty of fair representation claim. Further, an *en banc* panel of this Court has held, in a case involving a challenge to a public employee union's ratification procedures, that unions are entitled to govern their internal affairs, including ratification procedures such as those at issue here, without judicial interference. *PLRB v. Eastern Lancaster Cty. Educ. Ass'n*, 427 A.2d 305, 308 (Pa. Cmwlth. 1981) ("*Eastern Lancaster Cty. Educ. Ass'n*"). And our appellate courts regularly look to guidance from the federal courts on matters involving public employee collective bargaining. Finally, the

Judicial Panel's interpretation of the Constitution was not patently unreasonable, and therefore is not subject to challenge in the courts.

Second, on the question of immediate and irreparable harm, Appellee-Plaintiffs rely upon the proposition that a vote of a governmental entity procured through unlawful conduct constitutes irreparable harm. However, the cases relied upon by Appellee-Plaintiffs are inapposite to this case and do not support their argument that the vote at issue here, which was ordered by a Pennsylvania Labor Relations Board Hearing Examiner, constituted immediate irreparable harm.

Third, the Appellee-Plaintiffs' reliance upon the Supreme Court's ruling in *Phila. v. Dist. Council 33, AFSCME*, 598 A.2d 256 (Pa. 1991) ("*Dist. Council 33*") is misplaced, since the vote on Option 2 would not have resulted in the diminution of any of Appellee-Plaintiffs' existing terms and conditions of employment. On the contrary, that ruling supports AFSCME's justification for rejecting Option 1, in order to preserve the defined benefit pension plan for all employees covered by the collective bargaining agreement.

III. ARGUMENT

A. The Trial Court Erred in Failing to Defer to the AFSCME International Union Judicial Panel's Interpretation of its Constitution.

Appellee-Plaintiffs contend that the trial court was not required to defer to the AFSCME International Union Judicial Panel's interpretation of Paragraph 7 first, because the Panel did not decide whether AFSCME breached its duty of fair representation specifically. Appellees' Br. at p. 29. While Appellee-Plaintiffs are correct that a duty of fair representation claim was not before the Judicial Panel, that distinction does not make the Judicial Panel's decision any less relevant. Appellee-Plaintiffs' duty of fair representation claim, as set forth in their Complaint, is based in part on a purported violation by AFSCME of Paragraph 7 of the Bill of Rights. For Appellee-Plaintiffs to obtain a preliminary injunction from the trial court, they were required to demonstrate a clear right to relief on their duty of fair representation claim, including demonstrating that AFSCME violated Paragraph 7. Accordingly, the Judicial Panel's interpretation of Paragraph 7 was absolutely relevant to determining whether Appellee-Plaintiffs sufficiently demonstrated to the trial court a clear right to relief on the duty of fair representation claim.

Next, Appellee-Plaintiffs contend that the trial court did not err because "no state court in Pennsylvania has ever adopted the federal practice of

deference when interpreting a union constitution." Appellees' Br. at p. 30. It may be technically true that there is no reported decision from a Pennsylvania court adopting the specific federal rule of deference to a union's interpretation of its constitution unless that interpretation is patently unreasonable. However, Appellee-Plaintiffs have utterly ignored the adoption, by an *en banc* panel of this Court, of an even more deferential rule in *Eastern Lancaster Cty. Educ. Ass'n*. The Court in that case considered a public employee's challenge to his union's application of the ratification provisions in its constitution. The Court affirmed the trial court's dismissal of the challenge, holding in part that unions have a well-established right to govern their internal affairs "without judicial interference and . . . the procedure applicable to the ratification of collective bargaining agreements is an internal union matter." *Eastern Lancaster Cty. Educ. Ass'n*, 427 A.2d at 308.

Further, while it is true that cases from the federal courts interpreting federal labor laws are not technically binding upon the trial court, Pennsylvania courts regularly look to the instruction of Federal courts for guidance in the context of public employee collective bargaining. As the Pennsylvania Supreme Court has noted, "our Court has not hesitated to consider, and to follow" federal labor law. *See Office of Admin. v. Pa. Labor Relations Bd.*, 916 A.2d 541, 550 (Pa. 2007). A panel of this Court recently observed that

Pennsylvania courts may follow federal law, "due to the similarity between the federal labor law and our own laws dealing with labor relations. . . ." *City of Phila. v. AFSCME Dist. Council 47, Local 2187*, No. 939 C.D. 2017, 2019 Pa. Commw. Unpub. LEXIS 77, at *24 (Pa. Cmwlth. Feb. 7, 2019) (internal citations omitted). *See also Dailey v. Pa. Labor Relations Bd.*, 148 A.3d 920, 929 (Pa. Cmwlth. 2016) ("When, as here, no state law precedent is directly controlling, we are counseled by our Supreme Court to look to federal interpretations of the NLRA addressing provisions similar to those found in PERA.").

Appellee-Plaintiffs cite *Martino v. Transp. Workers Union of Phila., Local 234*, 480 A.2d 242, 249 (Pa. 1984) for the proposition that "federal caselaw arising under federal labor law is instructive but not authoritative on state courts deciding issues of state law." Appellees' Br. at p. 31. However, the Supreme Court's rejection of federal law in that case was limited to the question of the appropriate remedy for a proven breach of the duty of fair representation

by a public employee union.[2, 3] In cases such as this one, where the substantive issue is whether or not the standard for the breach of the duty of fair representation is satisfied, the Pennsylvania courts have explicitly adopted the federal standard. *See Casner v. AFSCME*, 658 A.2d 865, 871 (Pa. Cmwlth. 1995) (citing the standard set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967) to establish breach of duty of fair representation); *Hughes v. Council 13, AFSCME*, 629 A.2d 194, 195 (Pa. Cmwlth. 1993) (same). *See also Eastern Lancaster Cty. Educ. Ass'n*, 427 A.2d at 307-308 (citing *Vaca*, among other federal authorities, for the proposition that a union owes a duty of fair representation to all bargaining unit employees). Indeed, in *Eastern Lancaster Cty. Educ. Ass'n*, this Court relied upon federal decisional law in support of its conclusion that

[2] The Pennsylvania Supreme Court rejected the federal model which allows for the possibility of a damages remedy in most such cases. Rather, it adopted a remedial framework that provides, as a general rule, an equitable remedy in the nature of specific performance. *See Martino*, 480 A.2d at 249-251. It is for this reason that, as Appellee-Plaintiffs note, the employer is joined in a duty of fair representation case as an indispensable party. *See* Appellees' Br. at p. 29, citing *Martino*, 480 A.2d at 245.

[3] The sole exception to this general rule precluding damages is when a plaintiff establishes "by specific facts that the employer actively participated in the union's bad faith or that the employer conspired or colluded with the union to deny the employee his rights under the labor contract." *Garzella v. Borough of Dunmore*, 62 A.3d 486, 494 (Pa. Cmwlth. 2013) (citations omitted); *see also Martino*, 480 A.2d at 251-52 n.16 (monetary damages available only when "it appears to the [court] that the employer actively participated with the union in its bad faith deprivation of the employee's right to protection under the collective bargaining agreement") (citing *Ziccardi v. Commonwealth*, 456 A.2d 979, 981 (Pa. 1982)); *Waklet-Riker v. Sayre Area Educ. Ass'n,* 656 A.2d 138, 141 (Pa. Super. 1995); *Speer v. Philadelphia Housing Auth.*, 533 A.2d 504, 506 (Pa. Cmwlth. 1987).

Pennsylvania courts should not interfere in the internal governance of public employee unions.

Finally, Appellee-Plaintiffs claim that the trial court was not required to defer to the Judicial Panel's interpretation of Paragraph 7 because its interpretation was patently unreasonable. Appellees' Br. at pp. 31-33. The Third Circuit has explained that this standard "is undeniably a high one as courts are reluctant to substitute their judgment for that of union officials in the interpretation of the union's constitution. . ." *Exec. Bd., Local 234 v. Transp. Workers Union of Am.*, 338 F.3d 166, 170 (3d Cir. 2003) (emphasis added) (internal quotations omitted). That high standard is not met in this case.

The Judicial Panel explained that the Union's negotiating team did not violate Paragraph 7 by failing to present Option 1 for a ratification vote because:

> [T]he bargaining team was vested with the authority to use judgment to enter into tentative agreements on issues raised at the bargaining table, subject to a ratification vote of the membership once collective bargaining was concluded. In the present case, the union's bargaining team exercised its authority appropriately. . . [T]hey considered Option 2 and concluded that they could recommend the terms and conditions contained in Option 2 to the membership and recommend ratification. That exercise in bargaining team authority was entirely appropriate. . . . It is not only trivial offers which the bargaining team does not have to bring back to the membership for their consideration, it is offers which the

> bargaining team may deem unacceptable or even harmful to the members.

R. 615a-617a.

Accordingly, consistent with the language in Paragraph 7, the Judicial Panel determined that the right to "pertinent information" for membership participation in union decision-making does not include a requirement to present the various offers and proposals exchanged between the union and the employer during bargaining (as Appellee-Plaintiffs concede), including final offers that the negotiating team expressly rejects. It is only a proposal that the negotiators are prepared to accept which must be presented to the membership for its acceptance or rejection.

Appellee-Plaintiffs interpret Paragraph 7 to require that the Union's negotiators present a rejected offer to the Union membership for their approval. The plain wording of Paragraph 7 does not support that interpretation. Indeed, Paragraph 7 does not require that any "proposal" be presented for ratification. Rather, it is only "collective bargaining contracts, memoranda of understanding, or any other agreements affecting their wages, hours or other terms and conditions of employment" (emphasis added) which must be submitted to a membership vote. By definition, there can be no collective bargaining contract or other agreement here without acceptance by AFSCME, even if AFSCME's acceptance is conditioned upon ratification by the Union membership. Thus, the

Judicial Panel's interpretation that Paragraph 7 requires a ratification vote only with respect to a proposal that AFSCME's negotiators are prepared to accept is entirely consistent with the wording of Paragraph 7, and so is not patently unreasonable.

Nonetheless, Appellee-Plaintiffs argue that because Option 1 contained terms and conditions of employment, AFSCME was required to present Option 1 to the Union membership at the ratification meeting. They assert that "AFSCME admitted as much," citing to page 509a of the Reproduced Record. Appellee-Plaintiffs mischaracterize the record in citing to page 509a. The full exchange between counsel for Appellee-Plaintiffs and AFSCME District Council 85 Staff Representative Shane Clark is as follows:

> Q. Okay. You did not present Option 1, correct?
>
> A. No.
>
> Q. Okay. Now, you would agree that Option 1 contains terms and conditions of employment, correct?
>
> A. Yes.
>
> Q. Those terms and conditions of employment affects things like wages, right?
>
> A. Yes.
>
> Q. Okay. That would be information, of course, that's relevant to an individual who's deciding whether to approve a final offer or reject it, right?

A. Correct.

R. 509a. Mr. Clark's only "admission" was that wages in a final offer are relevant to determining whether to approve or reject that final offer. Contrary to Appellee-Plaintiffs' claim, the exchange is not an admission by Mr. Clark that the wages (or any other provision) in a rejected offer (Option 1) were relevant to determining whether to vote to approve or reject an offer that the union negotiators were prepared to accept, if ratified (Option 2). Indeed, every proposal made during the bargaining process would necessarily relate to wages, hours and other terms and conditions of employment. Yet it is undisputed that Paragraph 7 does not require that every proposal that is rejected by the Union's negotiators must be presented to the membership for a vote. *See* Appellant's Br. at p. 33.

Accordingly, Appellee-Plaintiffs have failed to establish that the Judicial Panel's interpretation of the AFSCME International Union Constitution was patently unreasonable. As a result, the trial court should have deferred to that interpretation, in accordance with this Court's instruction in *Eastern Lancaster Cty. Educ. Ass'n* and the guidance from the federal courts on this subject.

B. The Trial Court Erred in Concluding that the Injunction was Necessary to Prevent Immediate and Irreparable Harm.

As discussed at length in AFSCME's initial brief, the fact that the Erie Water Works ("EWW") Board of Directors had scheduled a vote on Option 2 for March 21, 2019 is not grounds for granting a preliminary injunction because the asserted harm was purely speculative, as neither Appellee-Plaintiffs nor AFSCME knew whether the EWW Board would vote to accept and execute Option 2 or reject Option 2. *See Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) ("It is established, however, that speculative considerations cannot form the basis for issuing a preliminary injunction"). In their Brief, Appellee-Plaintiffs argue that because the vote before the EWW Board was "procured through unlawful conduct," the injunction was appropriate to prevent the vote from taking place. In support of this argument, Appellee-Plaintiffs rely upon *Hempfield Sch. Dist. v. Election Bd. of Lancaster Cty.*, 574 A.2d 1190 (Pa. Cmwlth. 1990) ("*Hempfield Sch. Dist.*") and *Pa. Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255 (Pa. 2007) ("*Gaming Control Bd.*"). As set forth below, neither of these cases demonstrate that Appellee-Plaintiffs' asserted harm is anything but speculative.

In *Hempfield Sch. Dist.*, the Commonwealth Court enjoined the Lancaster County Election Board from including a non-binding referendum question on a ballot because the Election Board had no legal authority to place

the question on the ballot. *See Hempfield Sch. Dist.*, 574 A.2d at 1192-93. Here, unlike the Election Board, the EWW Board of Directors did not violate its statutory authority under PERA in scheduling a vote on Option 2. As the employer's governing body, the EWW Board of Directors was, as a general matter, authorized to conduct all business of EWW by majority vote. 53 Pa. C.S. § 5610(e). That business includes entering into contracts. 53 Pa. C.S. § 5607(d)(13). Thus, any collective bargaining agreement is subject to approval of the EWW Board of Directors by majority vote. Further, the PLRB Hearing Examiner's January 31, 2019 Proposed Decision and Order specifically directed the EWW Board of Directors to schedule a vote on Option 2 in order to remedy its unfair labor practices against AFSCME. Accordingly, this Court's conclusion in *Hempfield Sch. Dist.* has no application here, where the EWW Board of Directors acted fully consistent with its statutory authority, and its statutory obligation under PERA, in scheduling a vote on Option 2.

Gaming Control Bd. is similarly inapposite. In *Gaming Control Bd.*, the Pennsylvania Supreme Court held that an ordinance that purported to allow the Philadelphia electorate to usurp the Pennsylvania Gaming Control Board's statutory authority to locate certain licensed facilities in the city, via a ballot question vote, was unlawful. *See Gaming Control Bd.*, 928 A.2d at 1267. As in *Hempfield Sch. Dist.*, the reason that the Supreme Court enjoined the

ballot question from being voted upon is because the city of Philadelphia acted beyond its statutory and constitutional authority in passing the ordinance that permitted the question to be put on the ballot. Here, however, the EWW Board of Directors acted fully consistent with its statutory authority and obligation under PERA in scheduling a vote on Option 2.

For all of the foregoing reasons, the arguments asserted by Appellee-Plaintiffs are meritless, and there are no reasonable grounds to find that the injunction was required to prevent irreparable and immediate harm.

C. *Phila. v. Dist. Council 33, AFSCME* Does Not Support the Trial Court's Issuance of the Preliminary Injunction.

Appellee-Plaintiffs cite *Dist. Council 33* as support for the issuance of the preliminary injunction in this case, arguing that "[p]otential loss of retirement benefits and undermining of the collective bargaining process represent threats of harm supporting entry of a preliminary injunction." Appellees' Br. at p. 15. However, *Dist. Council 33* actually demonstrates the reasonableness of AFSCME's rejection of Option 1 in favor of Option 2.

In *Dist. Council 33*, the Supreme Court upheld the issuance of an injunction to prevent immediate and irreparable harm caused by a city ordinance that unilaterally reduced the pension benefits for bargaining unit employees. *Id.* at 259, 260. Here, if Option 2 were to become the collective bargaining agreement, it would not result in the diminution of any of the terms and conditions of employment set forth in the expiring collective bargaining agreement. On the contrary, Option 2 provides increased wages and preserves existing pension benefits for all bargaining unit employees covered under the collective bargaining agreement.

To the extent that Appellee-Plaintiffs contend that *Dist. Council 33* applies to this case because if Option 2 were to become the collective bargaining agreement, they would lose any opportunity to vote on Option 1, as discussed above, Option 1 was never accepted by the Union's negotiators. Thus, the

injunction did nothing to diminish the terms of Option 1, because they were never agreed to. Accordingly, the ruling and rationale of *Dist. Council 33* do not justify the issuance of the preliminary injunction in this case.

In fact, *Dist. Council 33* actually supports the Appellants' position. There, the Supreme Court found that the diminution of pension benefits constituted irreparable harm. The diminution of pension benefits is exactly what Option 1 would have done, by reducing pension benefits for new hires. *Dist. Council 33* illustrates the importance of maintaining the current level of pension benefits to unions and the employees they represent. Accordingly, *Dist. Council 33* demonstrates the reasonableness of the negotiating team's decision to choose Option 2 over Option 1 in order to maintain the defined benefit pension plan for all employees working under the collective bargaining agreement.

IV. CONCLUSION

For all of the foregoing reasons, as well as those set forth in the initial Brief of Appellants, AFSCME respectfully requests that the Court reverse the trial court's March 19, 2019 Order and vacate the preliminary injunction in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO Pa. R.A.P. 2135

The undersigned certifies that the preceding Reply Brief of Appellant (containing 3,235 words) complies with the word count limitation set forth in Pa. R.A.P. 2135 in that the brief does not exceed 7,000 words based upon the word processing system used to prepare the brief.

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CERTIFICATE OF COMPLIANCE PURSUANT TO Pa. R.A.P. 127

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of the Commonwealth of Pennsylvania: Case Records of Appellate and Trial Courts that require filing of confidential information and documents differently than nonconfidential information and documents.

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