IN THE COURT OF COMMON PLEAS OF
ERIE COUNTY, PENNSYLVANIA

MARK KIDDO; JOAN HORDUSKY; MIKE DZURKO; CHRISTINE ARNONE; JENNIE CLAY; MADELYN GROOVER; MELISSA GUZOWSKI; AND JEFF GRANGER,	:	Case No. 13144-18
	:	Judge Brabender
Plaintiffs,	:	
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; AND ERIE WATER WORKS,	:	
Defendants.	:	

COMMON PLEAS COURT
ERIE, PA
2019 JAN -7 AM 10:15
CLERK OF RECORDS
PROTHONOTARY

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Pennsylvania Rule of Civil Procedure 1531 and Erie County Local Rule 1531, Defendants American Federation of State, County and Municipal Employees, Local 2206; American Federation of State, County and Municipal Employees, District Council 85; Randy Procious; and Shane Clark (collectively, "Union Defendants") file this Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction.

I. INTRODUCTION AND PROCEDURAL HISTORY

In early December 2018, Mark Kiddo, Joan Hordusky, Mike Dzurko, Christine Arnone, Jennie Clay, Madelyn Groover, Melissa Guzowski, and Jeff Granger ("Plaintiffs") filed a Complaint against the Union Defendants and Erie Water Works ("EWW"), which Plaintiffs have included as a necessary party. (Compl. at p. 9, fn. 2). The Complaint arises out of negotiations between the Union and EWW for a successor collective bargaining agreement ("CBA") and EWW's final offer to the Union, which was subsequently ratified by the Union membership in January 2018. EWW has since refused to ratify the final offer.

Count I of the Complaint is brought against the Union Defendants (and EWW as a necessary party), for purportedly violating the duty of fair representation. Compl. ¶¶ 59-79. Plaintiffs allege that Union Defendants violated the duty of fair representation when they chose to submit for ratification by the Union membership one of EWW's two final offers, in accordance with the terms of EWW's final offer and the Union Defendants' authority as the bargaining representative.

Union Defendants were served with the Complaint on or about December 10, 2018. On December 13, 2018, Plaintiffs and Union Defendants agreed, pursuant to Pa. R.C.P. 248 and 1003, to extend the deadline for Union Defendants to respond to Plaintiffs' Complaint until January 25, 2019.

On December 18, 2018, Plaintiffs filed the instant Motion for Preliminary Injunction. The Court scheduled a hearing on the motion for December 27, 2018. However, the hearing was later rescheduled for February 26, 2019 at the joint request of all parties.

Plaintiffs ask the Court to enjoin EWW from executing the final offer that EWW presented to the Union and which the Union membership ratified. As Plaintiffs are aware, EWW has given no indication that it intends to execute that agreement. Quite to the contrary, what Plaintiffs fail to mention in their Motion is that, currently pending before the Pennsylvania Labor Relations Board ("PLRB" or "Board") is the Union's Unfair Labor Practice Charge ("Charge") against EWW, alleging that EWW committed unfair practices by, among other things, reneging on the understanding reached at the bargaining table regarding submission of EWW's final offer to a vote of the Union membership, and attempting to negotiate directly with the employees. As part of the remedy for EWW's unfair practices, the Union requested an order directing EWW to ratify and implement the agreement that the Union membership ratified. When a decision is eventually issued on the Charge, it will include a determination as to whether EWW committed the charged unfair practices and, if so, whether AFSCME is entitled to such a remedy. Thus, as discussed in greater detail below, Plaintiffs' Motion, as it pertains to EWW's execution of CBA, is plainly an improper attempt at an end-run around the PLRB's exclusive jurisdiction to determine whether the Union's requested order is appropriate to remedy any unfair practice it may find.

Plaintiffs also ask the Court to also enjoin AFSCME from imposing upon Plaintiffs "union discipline or charges related to or in response to the subject matter of this action." See Motion for Preliminary Injunction, pp. 10-11. However, Plaintiffs allege no facts to suggest that such action is threatened, much less immediate. In fact, on December 20, 2018, Union Defendants confirmed to Plaintiffs that Union Defendants

will not initiate any internal union charges against Plaintiffs arising out of the events at issue in the above-referenced litigation for the pendency of the litigation.

Thus, the harm which Plaintiffs' Motion seeks to prevent is at this point purely speculative, and the injunctive relief requested would amount to an improper intrusion on the exclusive jurisdiction of the PLRB. For these and other reasons discussed in detail below, Plaintiffs cannot satisfy their burden to demonstrate that injunctive relief in this matter is necessary to prevent immediate, irreparable harm, that they have a clear right to relief, or any of the other essential prerequisites for a preliminary injunction. Accordingly, the Union Defendants request that the Court deny Plaintiffs' request for a preliminary injunction.

II. STATEMENT OF THE FACTS

A. AFSCME and EWW Negotiate for a Successor CBA and AFSCME Agrees to Submit EWW's Final Offer "Option 2" to the Membership for a Ratification Vote.

AFSCME District Council 85 ("AFSCME" or "Union") is the collective bargaining representative for a unit of approximately 20 employees, including all but one of the eight Plaintiffs, of Erie Water Works ("EWW" or "Employer").[1] Affidavit of Shane Clark ("Clark Aff."), ¶ 2.[2] AFSCME and EWW are parties to a CBA establishing the terms and conditions of employment for the bargaining unit employees. Clark Aff. ¶ 3. The CBA expired on December 31, 2017, and in anticipation of the expiration of the CBA, AFSCME and EWW engaged in collective bargaining negotiations for a successor agreement. Clark Aff. ¶ 4. AFSCME's chief negotiator was Shane Clark, an AFSCME

[1] One Plaintiff, Joan Hordusky, is no longer employed in the bargaining unit. Clark Aff. ¶ 2.
[2] The Affidavit of Shane Clark is filed contemporaneously with this Memorandum of Law.

District Council 85 Staff Representative. Various bargaining unit employees also served on the negotiating team, as well as officers of AFSCME Local 2206, including its President, Defendant Randy Procious. EWW was represented in the negotiations by outside counsel, Mark Wassell, Esq., Aaron Stankiewiz, EWW's Human Resources Manager, and another manager named Ronald Constantini. Clark Aff. ¶ 5.

At the last formal bargaining session, on December 22, 2017, EWW made a final offer that had two options, titled "Option 1" and "Option 2." EWW's proposal document stated that, "the Union will select one of the following options to apply to all of its members." Clark Aff. ¶ 6 and Exh. 1 thereto. At no point during the bargaining session did any EWW representative state that they intended for AFSCME to submit both Option 1 and Option 2 to the bargaining unit and have the bargaining unit employees choose between the two options. And, the Union never agreed to submit both options for a ratification vote by the bargaining unit members. Clark Aff. ¶ 7.

In keeping with the terms of EWW's offer, during the December 22 bargaining session the Union chose Option 2, and Mr. Clark informed EWW's negotiating team that the Union had decided to take Option 2 back to the membership for a ratification vote. He asked EWW's negotiating team to re-format the document so that it would show only Option 2, and the parties shook hands and the negotiating session ended. Clark Aff. ¶ 8.

B. **In an Effort to Bypass the Union's Duly Authorized Negotiators, EWW Insists that AFSCME Submit EWW's Final Offer Option 1 to the Membership for a Ratification Vote.**

On January 4, 2018, Mr. Wassell's office forwarded a cover letter and a reformatted proposal document to Mr. Clark by email. The proposal document included both Options 1 and 2. Mr. Wassell's cover letter stated, in part:

> As was explained, the Final Offer of Erie Water Works includes two options. The Employer is allowing the bargaining unit to decide which option to accept. If either of the options is accepted by January 10, 2018, the Agreement will be retroactive to January 1st.

The ratification deadline to ensure retroactivity was later extended to January 12, 2018. Clark Aff. ¶ 9 and Exh. 2 thereto. Mr. Clark responded by email to Mr. Wassell the following day, January 5, 2018, stating:

> I'm not sure where the confusion is coming from. At the last meeting the negotiating team made a very clear choice of option 2. At no time was there any discussion at that meeting that the option that was chosen by the team to take back to the membership was in question. I'm not sure why you have included two options at this time.

Clark Aff. ¶ 10 and Exh. 3 thereto.

In a January 8, 2018 email exchange between Mr. Stankiewiz and Mr. Clark, Mr. Clark noted in part that he had not received a response to his January 5 email, and again stated that "[t]he negotiating team chose option 2 and there seems to be some confusion from EWW." Clark Aff. ¶ 11 and Exh. 4 thereto.

Mr. Stankiewiz responded, stating as follows concerning the final offer:

> Regarding the final offer, what specific information are you requesting? I don't want to seem simple, but I understand you chose option #2 and asked us to provide the final offer in writing. Mark provided the final offer to you in writing, as you requested, with some minor clarifications you and I discussed. As I understand it, EWW can't control how this information is presented to your membership and we provided the final offer in writing as it was presented at our

> last meeting. Not sure what else you are seeking. Please provide some clarification.

Clark Aff. ¶ 12 and Exh. 4 thereto. Mr. Wassell then responded to this exchange by stating:

> The Final Offer contained two options. That was the offer. We would expect the Final Offer (which is comprised of two options) to be presented to the membership.

Clark Aff. ¶ 13 and Exh. 4 thereto.

In a final response, Mr. Clark stated:

> The negotiating team chose to take option two forward at the table. AFSCME will be presenting option two to the bargaining unit for ratification. We will do our best to hold the ratification vote by the end of this week.

Clark Aff. ¶ 14. Paul Vojtek, Chief Executive Officer/Chief Financial Officer for the Employer, and the members of the EWW's negotiating team were copied on this email exchange. Clark Aff. ¶ 15 and Exh. 4 thereto. None of them disputed Mr. Clark's statements that the AFSCME negotiating team only ever agreed to take Option 2 to the membership. Clark Aff. ¶ 15 and Exh. 4 thereto.

C. AFSCME's Membership Votes to Ratify Option 2, but EWW Refuses to Submit Option 2 to the Employer's Board and Instead Deals Directly the Employees Regarding Option 1.

On January 11, 2018, the Union presented Option 2 to the membership, and the membership ratified that proposal. The Union then notified Mr. Stankiewiz of the result. Clark Aff. ¶ 16. The EWW board meets monthly, but did not vote on Option 2 at its January meeting. Clark Aff. ¶ 17.

On February 8, 2018, Mr. Vojtek distributed to each bargaining unit employee a letter stating:

> On December 22, 2017, Erie Water Works (EWW) presented its best and final offer ("Final Offer") to the AFSCME Negotiating team. The Final Offer included two specific options for you and your fellow AFSCME members to consider.
>
> In January, the AFSCME negotiating team informed EWW that its members had voted to approve Option number 2 of the Final Offer. Subsequent to this vote, EWW became aware that the AFSCME negotiating team did not present both options of the Final Offer to all of its members, but instead only presented Option number 2.
>
> To ensure that all AFSCME members are provided an accurate and complete version of EWW's Final Offer, I have attached to this letter both Options 1 and 2 of the Final Offer, as they were submitted to the AFSCME negotiating team.
>
> Should you have any questions, please direct them to your AFSCME representatives. Be advised that EWW intends to submit the currently-approved version of Option 2 of the Final Offer for a ratification vote by the Board on February 15, 2018.

The letter enclosed two one-page summaries – one labeled Option 1 and the other labeled Option 2. Clark Aff. ¶ 18 and Exh. 5 thereto.

Although Mr. Vojtek's letter told employees that he was attaching "both Options 1 and 2 of the Final Offer as they were submitted to the AFSCME negotiating team," he did not attach the document presented to the Union on December 22, or the document provided by Mr. Wassell to Mr. Clark on January 4. Instead, he attached summaries that were different in substance from the actual options presented to the Union. Specifically, his summaries omitted the language stating that "the Union will select one of the following options to apply to all of its members;" changed the effective date, in Option 1, for implementation of a proposed new pension plan for new hires; and misstated the proposed change to the vacation provision included in both options. Clark Aff. ¶ 19 and Exhs. 1, 2 and 5 thereto.

D. **At the Request of Plaintiff Mark Kiddo and Plaintiffs' Former Counsel, the EWW Board Indefinitely Postpones Voting on the CBA that AFSCME's Membership Ratified.**

On February 15, 2018, the date of the scheduled EWW board vote to ratify its proposal, bargaining unit employee and Plaintiff Mark Kiddo wrote to Mr. Vojtek, Mr. Stankiewiz, Mr. Constantini, Mr. Clark, and Mr. Procious, stating in pertinent part:

> To whom it may concern,
>
> Kindly note that the AFSCME contract ratification vote that occurred on January 11, 2018 was on a single option where unbeknownst to the voting members there was a second option to the entire final offer that was not presented or known about at the time of our vote. Since the vote we have learned of a second option of the entire offer had been made but not presented to us by our union negotiating team and leadership. Therefore I have received 13 emails from the following AFSCME members listed below who are requesting a chance to vote (revote) on the entire final offer which would include both options. I have emails of the following requesting a vote/revote on the entire final offer before the contract is ratified by the Erie Water Works today. . . .

Clark Aff. ¶ 20 and Exh. 6 thereto.

A few minutes later, without consulting or even waiting to hear a response from the Union, Mr. Vojtek replied as follows:

> Mark:
>
> Based on your email, I will hold off on presenting the contract to our Board today to afford you time to work out your concerns.

Clark Aff. ¶ 21 and Exh. 6 thereto.

To date, EWW has not moved forward with a vote of its board regarding its proposal. Clark Aff. ¶ 22.

E. **AFSCME Files an Unfair Labor Practice Charge with the PLRB and Requests as a Remedy that the PLRB Direct EWW to Ratify and Implement the CBA that the Membership Ratified.**

On March 8, 2018, AFSCME filed a Charge with the PLRB, alleging that EWW violated Sections 1201(a)(1) and (5) of the Public Employe Relations Act, 43 P.S. 43 P.S. § 1101.101, *et seq.* ("PERA"), and further engaged in independent violations of Section 1201(a)(1) of PERA, by reneging on the understanding reached at the bargaining table regarding submission of the Employer's final offer to a vote of the membership, instead demanding that the Union permit it to negotiate directly with the employees; engaging in direct dealing in an effort to overturn the Union's ratification vote after the fact; and refusing to ratify its own final offer. Clark Aff. ¶ 23 and Exh. 7 thereto.

A hearing on the Charge was held before a PLRB Hearing Examiner on July 11, 2018. Plaintiff Kiddo was present from the start of the hearing until the close of the Union's case in chief. Clark Aff. ¶ 24. During the Union's opening statement, counsel for AFSCME argued that, should the Hearing Examiner find that EWW committed the unfair practices alleged, the remedy should include an order directing EWW to ratify Option 2 and to make all bargaining unit employees whole by implementing Option 2, retroactive to January 1, 2018, with interest. During the Union's case in chief, Mr. Vojtek testified that he would not submit Option 2 to the EWW board for approval unless the bargaining unit employees are permitted to vote on both Options 1 and 2. He also testified that he has not presented Option 2 for a vote because of concerns that the employees may seek an injunction to prohibit EWW from doing so. According to his testimony, those concerns were based upon a letter he received from

George Schroeck, Esquire, the former attorney for the Plaintiffs in this case. Clark Aff. ¶ 25.

The PLRB Hearing Examiner has not yet issued his decision. If the Hearing Examiner finds that EWW violated PERA, AFSCME expects that the Hearing Examiner's ruling will also include a determination as to whether or not AFSCME is entitled to the remedy that it requested. Clark Aff. ¶ 26.

III. QUESTION PRESENTED

Whether the Motion for Preliminary Injunction must be denied because Plaintiffs have failed to establish any of the elements necessary to warrant such extraordinary relief?

(Suggested answer in the affirmative.)

IV. LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy," which the Court may grant only after finding that such relief is necessary after careful deliberation. See Hart v. O'Malley, 676 A.2d 222, 225 n.1 (Pa. 1996); Rush v. Airport Commercial Properties, Inc., 367 A.2d 370, 372 (Pa. Cmwlth. 1976).

Plaintiffs have a "heavy burden of persuasion" in proving the following six essential prerequisites of a preliminary injunction: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury will result from refusing the injunction than from granting it and will not substantially harm other interested parties in the proceedings; (3) the injunction restores the parties to status quo ante; (4) the party seeking injunctive relief

has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the preliminary injunction will not adversely affect the public interest. Warehime v. Warehime, 860 A.2d 41, 46-47 (Pa. 2004); Singzon v. Commonwealth, 436 A.2d 125, 126 (Pa. 1981). If the Plaintiffs fail to establish any one of the six prerequisites, there is no need for the Court to address the other prerequisites, and the Court must deny the request for the injunction. County of Allegheny v. Commonwealth, 544 A.2d 1305, 1307 (Pa. 1988).

In considering whether to grant a preliminary injunction, the Court may act on the basis of the averments of the pleadings and consider affidavits of parties or third persons, or any other proof which the Court may require. See Pa. R.C.P. 1531(a).

V. ARGUMENT

Plaintiffs cannot establish any of the elements required to support their request for preliminary injunctive relief. Accordingly, the Court must deny Plaintiffs' motion.

A. Plaintiffs Cannot Show Immediate, Irreparable Harm.

Plaintiffs ask this Court to enjoin EWW from executing the ratified CBA and to enjoin Union Defendants from imposing union discipline or charges upon Plaintiffs regarding "the subject matter of this action." See Motion for Preliminary Injunction, at pp. 10-11. As discussed in detail below, neither of these actions is impending at this time, and so Plaintiffs cannot show that this Court's equitable intervention is necessary to prevent immediate irreparable harm. See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount., Inc., 828 A.2d 995, 1001 (Pa. 2003).

1. Plaintiffs Cannot Show Immediate, Irreparable Harm with Respect to the Internal Union Discipline Issue.

Plaintiff has set forth no "concrete evidence" showing that the Union Defendants have any intention of imposing internal union discipline or charges *upon* Plaintiffs. Shoe Show of Rocky Mount., Inc., 828 A.2d at 1003 (affirming trial court's denial of request for preliminary injunction in part because there was no "concrete evidence" showing immediate and irreparable harm). Plaintiffs allege merely that, because they are members of the Union, "they may be subjected to union discipline or charges should AFSCME believe Plaintiffs' exercise of their rights in this matter are contrary to AFSCME's interests . . . ." Motion for Preliminary Injunction, ¶ 18. They allege no facts to suggest that such discipline is impending, much less immediate. Nor do such facts exist. As reflected in the parties' Joint Motion to Modify Hearing Date, filed on December 27, 2018, Union Defendants confirmed to Plaintiffs that they will not initiate any internal union charges against Plaintiffs arising out of the events at issue in the above-referenced litigation for the pendency of the litigation.

Therefore, Plaintiffs' claims regarding such alleged harm are purely speculative. It is well-settled that speculative harms cannot form the basis of a preliminary injunction. 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"); Shoe Show of Rocky Mount., Inc., 828 A.2d at 1000 (preliminary injunction denied in part on grounds that the harm was speculative).

Therefore, Plaintiffs have failed to meet the "heavy burden" to show that it is necessary for this Court to enter an injunction to prevent immediate and *irreparable*

harm. See Singzon, 436 A.2d at 126. Accordingly, the Court should deny Plaintiffs' request for a preliminary injunction against the Union Defendants.

2. Plaintiffs Cannot Show Immediate, Irreparable Harm with Respect to the Employer's Execution of the CBA.

Plaintiffs have also failed to demonstrate that they will suffer immediate and irreparable harm unless this Court enjoins EWW from executing the ratified CBA. Plaintiffs allege that EWW "is in a position to execute" a CBA reflecting the terms of Option 2, and that "[o]n information and belief, AFSCME has requested that EWW execute [Option 2], which has now been ratified by AFSCME membership." See Motion for Preliminary Injunction, ¶¶ 3, 16. However, Plaintiffs are well aware that, at the request of Plaintiff Kiddo, and based in part upon the threat by Plaintiffs' former counsel to seek a preliminary injunction, the Employer has refused to even submit the agreement to a vote of its board, much less to execute it. Further, as Plaintiffs and their current counsel are aware, this and other conduct by EWW is presently the subject of an unfair labor practice pending before the PLRB. As set forth in detail in Section II.E, supra, on March 8, 2018, the Union filed a Charge against EWW, and as a remedy, requested that the PLRB Hearing Examiner direct EWW to ratify Option 2, and to make the bargaining unit employees whole by implementing Option 2 retroactive to January 1, 2018, with interest. See Clark Aff., ¶¶ 23, 24. The PLRB Hearing Examiner has not yet issued his decision, and therefore he has not yet determined whether the Union's Charge has merit and, if so, whether the Union is entitled to the requested remedy.

Given these indisputable facts, it is evident that Plaintiffs' real concern is that EWW may ultimately be ordered by the Hearing Examiner to ratify and implement Option 2 in order to remedy its unfair labor practices. Thus, what Plaintiffs are actually

requesting of this Court is an injunction to prohibit the Employer from complying with an order which may or may not be issued by the Hearing Examiner. Because that order has yet to be issued, the harm that Plaintiffs assert is at this juncture purely speculative, and so cannot form the basis for granting a preliminary injunction. See Novak, 523 A.2d at 320.

Even if that were not the case, the type of harm that Plaintiffs assert would flow from EWW's execution of Option 2 is not sufficient to support a grant of preliminary injunctive relief. They allege that, if EWW were to execute Option 2, it would result in "lost salaries" and other undefined "benefits." See Motion for Preliminary Injunction, ¶¶ 28-30. The Pennsylvania Supreme Court has held that such potential economic losses are purely speculative and so do not support issuance of preliminary injunctive relief. See Novak, 523 A.2d at 320. In Novak, the party seeking a preliminary injunction asserted that there was immediate and irreparable harm in the form of lost wages and benefits resulting, in that case, from the potential loss of employment. The Pennsylvania Supreme Court rejected that argument, holding that a preliminary injunction to "avert alleged harms that might ensue from a termination of employment . . . are at best speculative considerations which cannot form the basis for issuing the extraordinary relief sought." Id. at 320.

Plaintiffs further assert that, if EWW is directed to execute Option 2, it would put the Union in a worse bargaining position for future collective bargaining negotiations. See Motion for Preliminary Injunction, ¶¶ 31, 32. This is purely conjecture by the Plaintiffs, as not only has the Union's requested remedy that EWW be directed to ratify Option 2 not been decided by the PLRB Hearing Examiner, but the negotiations

for a future collective bargaining agreement and the substance of those negotiations would not occur for years to come.

Plaintiffs also assert that they would suffer irreparable harm if EWW was directed to execute a CBA with the Union "about which there is a good faith doubt of its majority status." See Motion for Preliminary Injunction, ¶ 26. Plaintiffs set forth no facts whatsoever to support their apparent assertion that AFSCME does not have majority status within the bargaining unit, much less the sort of "concrete evidence" required to establish immediate and irreparable harm. See Shoe Show of Rocky Mount., Inc., 828 A.2d at 1003.

Plaintiffs finally assert that, if EWW were to execute Option 2, "the status quo would be altered, labor peace would be disrupted, and collective bargaining would be undermined." See Motion for Preliminary Injunction, ¶ 27. As an initial matter, Plaintiffs set forth no facts to indicate how "labor peace" and "collective bargaining" would be affected, much less the "concrete evidence" required to establish immediate and irreparable harm. See Shoe Show of Rocky Mount., Inc., 828 A.2d at 1003. Additionally, as explained above, the action that Plaintiffs complain would alter the "status quo" is purely speculative, as the Hearing Examiner has not yet ruled on the Union's Charge. See Novak, 523 A.2d at 320. Furthermore, the case that Plaintiffs cite in support of their "status quo" argument, Cent. Dauphin Educ. Ass'n v. Cent Dauphin Sch. Dist., 792 A.2d 691 (Pa. Cmwlth. 2001) is inapposite to this issue. There, a school district was properly enjoined from unilaterally imposing terms and conditions of employment during the "status quo" period following the expiration of the applicable CBA while the Union was negotiating a successor CBA. See id. at 698. The court

found that a preliminary injunction was necessary to prevent the school district from causing immediate and irreparable harm because the employer unilaterally imposed new terms and conditions of employment without bargaining with the union, in violation of Section 1201(a)(5) PERA . See id. Here, if EWW were directed to ratify and implement Option 2, it would be because the Hearing Examiner determined that the employer is unlawfully refusing to implement an agreement which it has negotiated with the Union. Furthermore, such direction would come from the administrative agency that has exclusive jurisdiction to rule on unfair practices and "to take such reasonable affirmative action . . . as will effectuate the policies of [PERA].". See 43 P.S. §§ 1101.1301, 1101.1303.

For the foregoing reasons, Plaintiffs have failed to sustain their heavy burden, by establishing with concrete evidence that an order enjoining EWW from executing Option 2 is necessary to avoid immediate and irreparable harm. Accordingly, the Court should deny the requested preliminary injunction.

B. Plaintiffs Have Failed to Establish a Clear Right to Relief.

Plaintiffs must show that they have a clear right to relief with "concrete evidence." Greenmoor, Inc. v. Burchick Const., 908 A.2d 310, 314 (Pa. Super. 2006). Their claim must be more than merely viable or plausible. Ambrogi v. Reber, 932 A.2d 969, 980 (Pa. Super. 2007). Here, as set forth in detail below, Plaintiffs have no right to relief whatsoever, much less a clear right to relief. Accordingly, the Court should deny Plaintiffs' request for a preliminary injunction.

1. Plaintiffs Cannot Show a Clear Right to Relief with Respect to the Internal Union Discipline Issue.

Plaintiffs have set forth no evidence whatsoever showing a right to relief, much less a clear right to relief, as to the imposition of union discipline or charges regarding the "subject matter of this action." See Motion for Preliminary Injunction, ¶¶ 46-48, 55(b). Indeed, as set forth above, this allegation is purely speculative. Thus, Plaintiffs have failed to meet their "heavy burden" to show a clear right to relief on this issue. See Singzon, 436 A.2d at 126; Greenmoor, Inc., 908 A.2d at 314; Ambrogi, 932 A.2d at 980. Accordingly, the Court should deny Plaintiffs' request for a preliminary injunction.

2. Plaintiffs Cannot Show a Clear Right to Relief with Respect to the Employer's Execution of the CBA.

As set forth in detail in Section II.E, supra, on March 8, 2018, the Union filed a Charge against EWW, and as a remedy, requested that the PLRB Hearing Examiner direct EWW to ratify Option 2, and to make the bargaining unit employees whole by implementing Option 2 retroactive to January 1, 2018, with interest. See Clark Aff., ¶¶ 23, 24. As discussed above, what Plaintiffs are in actuality requesting of this Court is an order enjoining EWW from complying with such a remedy, should it be issued by the Hearing Examiner. To do so would improperly intrude upon the exclusive jurisdiction of the PLRB, and so Plaintiffs' request for such relief must be denied.

The PLRB is delegated the exclusive function to decide unfair practice cases arising under PERA. PLRB v. Williamsport Area Sch. Dist., 406 A.2d 329, 331 (Pa. 1979). PERA itself provides that, with respect to unfair labor practice charges:

> The PLRB is empowered. . .to prevent any person from engaging in any unfair practice listed in Article XII of this act. This power shall be

> exclusive and shall not be affected by any other means of adjustment or prevention that have been or may be established by agreement, law, or otherwise.

PERA, 43 P.S. § 1101.1301 (emphasis added). In carrying out this function, the legislature delegated to the PLRB the authority to remedy unfair labor practices that it finds:

> If, upon all the testimony taken, the board shall determine that any person named in the complaint has engaged in or is engaging in any such unfair practice, the board shall state its findings of fact, and issue and cause to be served on such person an order requiring such person to cease and desist from such unfair practice, and to take such reasonable affirmative action, including reinstatement of employes, discharged in violation of Article XII of this act, with or without back pay, as will effectuate the policies of this act. . . .

43 P.S. § 1101.1303.

"[T]he law is that the courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud capricious action or abuse of power; and that they will not inquire into the wisdom of the acts of such agencies." Teamsters Local Union v. PLRB, 312 A.2d 845, 847 (Pa. Cmwlth. 1973) (denying motion for preliminary injunction). Additionally, courts are "particularly chary" of granting preliminary injunctions where doing so would cause an "interference with an administrative function of state government." See id., 312 A.2d at 847.

Here, Plaintiffs' request that the Court enjoin EWW from executing Option 2 is effectively a request that the Court enjoin the PLRB from exercising its exclusive statutory authority to determine whether EWW violated PERA and, if so, whether the Union is entitled to its requested remedy. The decision of whether that remedy is appropriate lies within the exclusive jurisdiction of the PLRB. See Williamsport Area

Sch. Dist., 406 A.2d at 331; 43 P.S. §§ 1101.1301, 1101.1303. Therefore, Plaintiffs' request that the Court enjoin EWW from executing Option 2 would "interfere with the administrative function" of the PLRB because it would conflict with a requested remedy which the PLRB alone must decide whether it is appropriate to issue. Plaintiffs' request that the Court enjoin the EWW from executing Option 2 is also effectively a request that the Court "review" the administrative process that is already in motion and pending before the PLRB Hearing Examiner, in violation of the well-settled law of this Commonwealth. To grant this request would violate the settled law of this Commonwealth. See Teamsters Local Union, 312 A.2d at 847. Furthermore, it is the Commonwealth Court, not the courts of common pleas, that has jurisdiction to review decisions of the PLRB. See 42 Pa. C.S. § 763.

Additionally, contrary to Plaintiffs' assertions, there is no evidence that AFSCME's selection of Option 2 for presentation to a ratification vote was in some way unlawful. AFSCME had no obligation under PERA to submit to a vote of the membership a proposal that it is not willing to accept. Int'l Bhd. of Painters and Allied Trades, Local 1968, 38 PPER ¶ 128, 2007 WL 7563573 (Final Order, 2007). Because the Union was not willing to accept Option 1, it did not violate its duties under PERA in declining to submit that option to a ratification vote. Thus, Plaintiffs cannot establish a clear right to relief because implementation of Option 2, if ordered by the Hearing Examiner, would not flow from any breach of the Union's duties under PERA.

For the foregoing reasons, Plaintiffs have failed to sustain their heavy burden, by establishing with concrete evidence that there is a clear right to relief in

support of the preliminary injunction against EWW. Accordingly, the Court should deny the requested preliminary injunction.

C. Plaintiffs Cannot Show Greater Injury from Refusing the Injunction than from Granting it.

Plaintiffs assert that greater injury will result if the injunction is denied because EWW would be forced to execute a CBA that "reflects inadequate representation" and "has been ratified only due to AFSCME's breach of its duty of fair representation." See Motion for Preliminary Injunction, ¶ 35. Contrary to Plaintiffs' assertions, Option 2 is the result of collective bargaining negotiations between the Union and EWW, and which the bargaining unit membership voted to ratify. Because AFSCME was under no obligation to submit Option 1 for ratification at all, it cannot be said that Option 2 "reflects inadequate representation" or was ratified "due to AFSCME's breach of its duty of fair representation."

Plaintiffs further assert that granting the injunction will cause no injury to AFSCME. See Motion for Preliminary Injunction, ¶ 38. Plaintiffs have utterly ignored the fact that the propriety of the Employer's conduct in insisting that the membership vote on both Options 1 and 2 is currently the subject of the unfair labor practice proceeding before the PLRB. Again, contrary to Plaintiffs' assertion, if the Court grants the injunction, it will certainly harm the Union Defendants because it will effectively foreclose the Union's right to seek a remedy for an unfair labor practice charge before the PLRB and to potentially be awarded that remedy. Moreover, to grant the requested injunction against EWW would do harm to the PLRB, whose exclusive statutory authority would be abrogated in an action to which it is not even a party. Finally, to issue the requested injunction against EWW would expose EWW to the possibility of

being subject to conflicting judgements of this Court and the Board (or, if the Board's decision were ultimately to be appealed, the Commonwealth or Supreme Court).

For the foregoing reasons, Plaintiffs have failed to sustain their heavy burden to establish with concrete evidence that greater injury will result from refusing the injunction than from granting it and that granting the injunction will not substantially harm other interested parties in the proceedings. Accordingly, the Court should deny the requested preliminary injunction.

D. **An Injunction is Not Needed to Preserve the Status Quo.**

Plaintiffs' assertions that an injunction is necessary to maintain the status quo (See Motion for Preliminary Injunction, ¶¶ 39-45) must be dismissed, because, as set forth above, there has been no change to the status quo -- it has been and continues to be the case that EWW refuses to execute Option 2. Mr. Vojtek testified that he will not submit Option 2 to a vote of EWW's board unless the Union submits both Options 1 and 2 to a vote of the membership. Clark Aff. ¶ 25. Thus, if EWW does execute Option 2 it will be because the PLRB Hearing Examiner, in his exclusive authority, ordered EWW to ratify and implement Option 2 in order to remedy EWW's unfair labor practices. Accordingly, the Court should deny the requested preliminary injunction.

E. **An Injunction Would Not Abate the Offending Activity.**

Plaintiffs' assertions that an injunction would abate the offending activity, and that without an injunction, EWW will be "forced to execute the contract" (See Motion for Preliminary Injunction, ¶¶ 49-51) must be dismissed. Again, EWW would only be "forced to execute the contract" if the PLRB Hearing Examiner, in his

exclusive authority, orders EWW to ratify and implement the agreement as part of its ruling on the Union's Charge and requested remedy. However, there is currently no "offending activity" that an injunction would abate -- EWW has not and is not executing Option 2 unless the PLRB Hearing Examiner requires that he do so. Accordingly, the Union Defendants request that the Court deny the requested preliminary injunction.

F. Entering an Injunction Would be Contrary to the Public Interest.

Plaintiffs assert that an injunction would promote the public interest by allowing "the fair representation claim to be fully litigated" thereby promoting the "fair treatment of members." See Motion for Preliminary Injunction, ¶¶ 52-54. Contrary to Plaintiffs' assertions, however, an injunction would not promote the public interest because it would in this case serve to improperly tie the hands of the PLRB Hearing Examiner in remedying EWW's unfair practices. Beyond the instant matter, the injunction would set a dangerous precedent for intruding upon the PLRB's exclusive jurisdiction to determine the appropriate remedy for an unfair labor practice charge. See Williamsport Area Sch. Dist., 406 A.2d at 331; Butler Bldg. Trades Council, AFL-CIO, 288 A.2d at 528.

VI. CONCLUSION

For all of the foregoing reasons, the Union Defendants respectfully request the Court to deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

WILLIG, WILLIAMS & DAVIDSON

By: _____

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Date: January 4, 2019

CERTIFICATE OF SERVICE

I, Alidz Oshagan, hereby certify that I have, on this 4th day of January, 2019, sent a copy of the foregoing Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction via First Class U.S. Mail, postage prepaid, upon the following:

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IN THE COURT OF COMMON PLEAS OF
ERIE COUNTY, PENNSYLVANIA

MARK KIDDO; JOAN HORDUSKY; MIKE DZURKO; CHRISTINE ARNONE; JENNIE CLAY; MADELYN GROOVER; MELISSA GUZOWSKI; AND JEFF GRANGER,	:	Case No. 13144-18 Judge Brabender
Plaintiffs,	:	
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; AND ERIE WATER WORKS,	:	
Defendants.	:	

PROPOSED ORDER

AND NOW, this ___ day of _____, 2019, upon consideration of Plaintiffs' Motion for Preliminary Injunction, the Union Defendants' response thereto, and the arguments made by the parties at the hearing on the Motion for Preliminary Injunction on February 26, 2019, it is hereby ORDERED that Plaintiffs' Motion is DENIED.

BY THE COURT:

_____
Judge Brabender