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In the Commonwealth Court of Pennsylvania

150 M.D. 2016

STEVEN RAMOS; SCOTT ARMSTRONG; and JAMES WILLIAMS,
Petitioners,

v.

ALLENTOWN EDUCATION ASSOCIATION; PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM; and ALLENTOWN SCHOOL DISTRICT,
Respondents.

REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEFS IN SUPPORT OF PRELIMINARY OBJECTIONS

On Original Jurisdiction Petition for Review

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SUMMARY OF THE ARGUMENT

For over 25 years, the Allentown Education Association ("AEA") and the Allentown School District ("District") have unlawfully taken taxpayer dollars from Allentown schools to pay the salary and benefits of the AEA President, and the Public School Employees' Retirement System ("PSERS") has unconstitutionally provided pension credits and retirement dollars to private employees. Allentown taxpayers Steven Ramos ("Mr. Ramos") and Scott Armstrong ("Mr. Armstrong") clearly meet all the requirements for taxpayer standing, and their case is exactly the type for which taxpayer standing was created. PSERS member James Williams ("Mr. Williams") (together with Messrs. Ramos and Armstrong, "Petitioners"), has a direct, immediate interest in the solvency of PSERS and is owed a fiduciary duty by the PSERS Board.

As no other statutory or administrative remedy is available to Petitioners, they came to this Court seeking a declaration of constitutional and statutory rights. While PSERS' efforts to remedy the violation of the law are encouraging, no action by PSERS could make the constitutional determinations necessary to fully address the constitutional concerns created by full release time. Moreover, this Court should rule on the issues of this case to prevent duplicative lawsuits and competing rulings in multiple jurisdictions.

ARGUMENT IN REPLY

Petitioners ask for a declaration that the provision of full release time is invalid and an injunction requiring the AEA to return improperly disbursed funds. Ultimately, Respondents cannot sustain their burden to show the preliminary objections should be sustained. Instead, Petitioners' Application for Summary Relief should be granted as Petitioners' right to judgment is clear with no material facts in dispute.

When considering preliminary objections, the court must accept as true all relevant facts alleged in the complaint "and every inference fairly deducible from those facts." Willet v. Pennsylvania Med. Catastrophe Loss Fund, 702 A.2d 850, 853 (Pa. 1997). The moving party then bears the burden of supporting its preliminary objections. See Nutrition Mgmt. Servs. Co. v. Hinchcliff, 926 A.2d 531, 535 (Pa. Super. 2007); De Lage Landen Servs., Inc. v. Urban P'ship, LLC, 903 A.2d 586, 590 (Pa. Super. 2006); Alumbaugh v. Wallace Bus. Forms, Inc., 313 A.2d 281, 284 (Pa. Super. 1973).

I. TAXPAYER STANDING WAS CREATED SO CASES LIKE THIS WOULD RECEIVE JUDICIAL REVIEW

Petitioners challenge a practice, untouched for 25 years, in which the District and a private association are complicit in siphoning taxpayer dollars for private

benefit. In addition to Mr. Ramos and Mr. Armstrong meeting the five preconditions set by the court for taxpayer standing, the public policy considerations underlying this petition are exactly of the nature taxpayer standing was created to address.

Taxpayer standing is intended "to enable the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement." Pittsburgh Palisades Park, LLC v. Commonwealth, 888 A.2d 655, 661 (Pa. 2005). "Taxpayers' litigation . . . . allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts." In re Biester, 409 A.2d 848, 851 n.5 (Pa. 1979) (quoting Note, Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895, 904 (1960)).

Five requirements have emerged as preconditions to satisfy the Biester exception for taxpayer standing:

> (1) the governmental action would otherwise go unchallenged;
> (2) those directly and immediately affected by the complained of matter are beneficially affected and not inclined to challenge the action;
> (3) judicial relief is appropriate;
> (4) redress through other channels is unavailable; and

> (5) no other persons are better situated to assert the claim.

Pittsburgh Palisades Park, 888 A.2d at 662.

This Court has previously granted taxpayer standing in a case with very similar facts. In Rizzo v. City of Philadelphia, 582 A.2d 1128, 1130 (Pa. Cmwlth. 1990), this Court held 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[1] and Sprague,[2] Rizzo has standing to do so.

Here, as in Rizzo, the taxpayers conclusively meet every prong of the Beister test.

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1. Biester, 409 A.2d 848.
2. Sprague v. Casey, 550 A.2d 184 (Pa. 1988).

A. Without granting taxpayer standing, this governmental action would otherwise go unchallenged.

Chief among Biester's five prongs is the first: whether the governmental action would otherwise go unchallenged. See Biester, 409 A.2d at 852 ("[A]lthough many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts.") (quoting Faden v. Philadelphia Hous. Auth., 227 A.2d 619, 612 (Pa. 1967)). This Court will grant taxpayer standing when it is "likely" the actions would not otherwise be heard. League of Women Voters of Pennsylvania v. Commonwealth, 692 A.2d 263, 269 (Pa. Cmwlth. 1997). The lack of other legal actions is evidence in itself the governmental action would otherwise go unchallenged. Pennsylvania Fed'n of Dog Clubs v. Commonwealth, 105 A.3d 51, 58 (Pa. Cmwlth. 2014), aff'd, 115 A.3d 309 (Pa. 2015) ("Here, if Petitioners were not granted standing, the diversion would go unchallenged as evidenced by the fact that no other legal action has been filed.").

This was precisely the scenario that gave rise to taxpayer standing in Rizzo, 582 A.2d at 1130. In Rizzo, a taxpayer filed suit to enjoin the payment of pension benefits to a former police commissioner as a violation of city law. In granting taxpayer standing, this Court noted the former commissioner's application for

retirement benefits "was supported by the City and approved by the Pension Board" and that neither they nor the former commissioner were "aggrieved by the Pension Board's decision." Id. The Court granted standing to the taxpayer and ultimately ordered that the former commissioner was not entitled to pension benefits.

Here, the governmental action has been unchallenged for over 25 years. No other legal action has been filed in relation to these claims either now, or in the past, and these actions would have no airing before a Court absent the current proceeding. It is more than "likely" this action will otherwise go unheard. See League of Women Voters, 692 A.2d at 269.

In arguing the governmental action is challenged regularly through the election of school board members and the collective bargaining process, the AEA fails to understand the underlying purpose of taxpayer standing: to allow for scrutiny of governmental action by the courts. Whether or not voters elect individuals who continue the constitutional and statutory violations that are occurring is irrelevant to the Court's determination. Moreover, the collective bargaining process affords no relief when both sides at the bargaining table benefit from the release time arrangement and are complicit in pursuing the arrangement in violation of the law.

B. The District, the AEA, and PSERS are beneficially affected, have not challenged full release time in the past 25 years, and are not likely to do so

Relatedly, Biester's second prong asks whether "those directly and immediately affected by the complained of matter are beneficially affected and not inclined to challenge the action." Pittsburgh Palisades Park, 888 A.2d at 662. The Pennsylvania Supreme Court has found this to be the case where, for example, government officials instituted a self-serving election process in violation of the state constitution, Sprague v. Casey, 550 A.2d 184, 187 (Pa. 1988) ("[T]his election would otherwise go unchallenged because respondents are directly and beneficially affected."), and where members of the General Assembly enacted legislation conferring a benefit to themselves, see, e.g., Stilp v. Commonwealth, 905 A.2d 918, 950-51 (Pa. 2006) ("[T]he very individuals who enacted the legislation—i.e., the members of the General Assembly—were directly and beneficially affected by the legislation and thus would not be inclined to challenge its constitutionality."); Consumer Party of Pennsylvania v. Commonwealth, 507 A.2d 323, 329 (Pa. 1986), abrogated on other grounds, Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383 (Pa. 2005) ("[T]he very individuals who enacted the legislation are directly and beneficially affected and are thus not inclined to challenge the constitutionality of the legislation.").

Here, as with a legislative pay raise, the school board has no interest in challenging the validity of the practice it created and from which it benefits. The school board has repeatedly voted in support of full release time and receives the benefit of using full release time as a bargaining chip to secure other concessions in collective bargaining. The AEA is beneficially affected because it gets a full-time employee with salary and benefits without having to pay for them, and PSERS continues to receive contributions from the District and the full release time employees.[3]

The AEA's assertion that the District has not benefited from the current arrangement is both legally and factually inaccurate. By definition, in order for the collective bargaining agreement ("CBA") between the AEA and the District to be a valid contract, there must be mutual assent by the parties with both parties exchanging promises providing mutual benefit. See Restatement (Second) of Contracts § 17 (1981) ("The formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). "The term 'benefit' means the receiving as the exchange for a promise some

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3. See Travis Bayer, Note, Defined (Yet Uncertain) Benefit Pension Plans in America, 87 Chi.-Kent L. Rev. 201, 212 (2012) (states often have to rely on current workers to pay defined benefits of past workers).

performance or forbearance which the promisor was not previously entitled to receive. That the promisor desired it for its own advantage and had no previous right to it is enough to show it was beneficial." 3 Williston on Contracts § 7:4 (4th ed.). In fact, after spending an entire paragraph trying futilely to argue that the District is not beneficially affected by the arrangement, the AEA then concludes by agreeing with Mr. Ramos and Mr. Armstrong, admitting that "the District received something else in the collective bargain that the District believed to be of equal or greater value for the full-time release provision contained in the contract." Respondent AEA's Brief, pg. 10. Ergo, all parties agree, the District benefits from the arrangement.

C. Judicial relief is appropriate, especially given the constitutional questions involved in the case

It is well established that assessing the constitutionality of a statute is a judicial duty and therefore only the judiciary may provide relief when a constitutional determination must be made. See Robinson Twp. v. Commonwealth, 83 A.3d 901, 927 (Pa. 2013) ("[T]he Court has recognized that '[i]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts.' ") (quoting Council 13, Am. Federation of State, County and Mun. Employees, AFL-CIO ex rel.

Fillman v. Rendell, 986 A.2d 63, 75 (Pa. 2009). No surprise, therefore, that for purposes of Biester's second prong, Pennsylvania courts have found it entirely appropriate to grant taxpayers' constitutional challenges. See, e.g., Sprague, 550 A.2d 187; Fed'n of Dog Clubs, 105 A.3d at 58; Taxpayers of City of Carbondale v. City of Carbondale, 553 A.2d 119, 122 (Pa. Cmwlth. 1989).

Here, judicial relief is appropriate because Mr. Ramos and Mr. Armstrong have challenged the constitutionality and validity of release time. It cannot be seriously maintained that this Court is without the power to decide such questions.

D. Redress through other channels is unavailable

As for the prong requiring the unavailability of redress through other channels, taxpayers are under no obligation to rule out every possible forum for initiating a challenge, see Fed'n of Dog Clubs, 105 A.3d at 58 ("[T]he Commonwealth has presented no other reasonably available channels to challenge the fund transfer and none appear apparent, thus redress through other channels is unavailable."), only that the alternatives would be less than meaningful, see, e.g., Consumer Party, 507 A.2d at 329 ("There is no administrative agency which can provide relief and the legislators themselves are unlikely to provide a meaningful mechanism for redress."). Taxpayers are not required to wade through the administrative morass to litigate questions of law over which the courts are

properly suited to address. See Keith v. Commonwealth ex rel Pennsylvania Dep't of Agriculture, 116 A.3d 756, 760 (Pa. Cmwlth. 2015) (granting taxpayer standing in action challenging an agency's rule because administrative procedures would have been "futile"); Seeton v. Pennsylvania Game Comm'n, 937 A.2d 1028, 1033 (Pa. 2007) (granting taxpayer standing to litigate administrative agency's construction of its statute without requiring that she utilize administrative procedures).

Here, the alternative channels suggested by the AEA—namely, the filing of a complaint with PSERS—is hardly adequate to provide meaningful relief. There is no statutorily prescribed procedure for Mr. Ramos' and Mr. Armstrong's challenges, see 24 Pa.C.S. §§ 8101-8536, and PSERS would be without jurisdiction to address their challenges to the constitutionality or validity of full release time even if there were such procedures, Lehman v. Pennsylvania State Police, 839 A.2d 265, 275 (Pa. 2003) ("[A]gencies have authority to consider the validity of their regulations . . . but they must refuse to consider the validity of their organic statutes.").

Finally, the AEA is naïve—or disingenuous—to suggest that adequate redress is available at the school board. Mr. Armstrong tried to address this issue as part of his responsibilities as an Allentown School Board member, over the course of several years. Even when the School Board received a legal opinion stating the

practice was illegal, the board refused to take action. The ballot box does not give government officials license to act contrary to statutory and constitutional authority.

E. No other persons are better situated to assert the claim

In examining whether other persons are better situated to assert the claim raised by the taxpayer, courts look to whether there is a possible plaintiff—aside from those beneficially affected—who can assert a substantial, direct and immediate interest. Consumer Party, 507 A.2d at 329 ("[T]here are no other persons better situated to assert the claim because all those who are directly and immediately affected by the Compensation Law are beneficially affected and have not brought, and will not bring a cause of action."). Additionally, the Supreme Court has suggested it is the responsibility of the party challenging taxpayer standing to identify who would be better situated to challenge the governmental action in question. Seeton, 937 A.2d at 1033 (Pa. 2007) ("Thus, [the Commission] failed to respond to [the taxpayer's] assertions by identifying who would be better situated to challenge the Commission's inaction . . . .").

The only parties with substantial, direct, and immediate interests, and indeed the only parties better situated to assert the claims made by Mr. Ramos and Mr. Armstrong, are the AEA and the District. Neither party to the contract has any

interest in addressing the illegality of the practice of full release time, and the real injury is to taxpayers forced to pay the salary and benefits of an individual working for a private organization. Moreover, while the AEA has said that Mr. Ramos and Mr. Armstrong fail to meet "any of the 'taxpayer standing' requirements," the AEA has not identified a party who would be better situated to bring these claims. Brief of Respondent AEA, pg. 8.

In sum, taxpayer standing is necessary to provide judicial scrutiny over the statutory and constitutional violations at issue. The history of this practice has already shown that but for Petitioners' lawsuit, Allentown taxpayers would continue to pay an Allentown teacher not to teach, and PSERS would be continuing to pay the retirement benefits of current and past AEA Presidents in violation of the law. Petitioners have conclusively met all the elements for taxpayer standing. Accordingly, this Court should reject the AEA's preliminary objection challenging Mr. Ramos' and Mr. Armstrong's standing as taxpayers.

II. MR. WILLIAMS HAS A DIRECT AND IMMEDIATE INTEREST IN THE SOLVENCY OF PSERS AND PSERS OWES A FIDUCIARY DUTY TO MR. WILLIAMS

As a PSERS member, Mr. Williams has a direct and immediate interest in the proper functioning and solvency of PSERS, which is jeopardized by the provision of

pension credit and benefits to employees not permitted by law to receive them. Accordingly, he too has standing to challenge the practice of full release time.

PSERS' board owes a fiduciary duty to the members of the system and is obligated to "invest and manage the fund for the exclusive benefit of the members of the system." 24 Pa.C.S. § 8521. Black's Law Dictionary (10th ed. 2014) defines "fiduciary duty" as "a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person." As a function of this relationship, PSERS also has the duty to correct errors made by public school employers and make actuarial adjustments to an individual member's benefit payments. 24 Pa.C.S. § 8534; Baillie v. Pub. Sch. Employees' Ret. Bd., 993 A.2d 944, 950 (Pa. Cmwlth. 2010) ("Section 8534(b) of the Retirement Code requires PSERS to correct all intentional or unintentional errors in members' accounts.").

The AEA cites no legal authority—because there is none—for the contention that Mr. Williams was required to contact PSERS directly with his concern. PSERS' statutes, the statutes of other retirement boards, and case law interpreting both does not contain a requirement that a retirement system member who believes the Board has violated its fiduciary duty to manage the fund for the "exclusive benefit of the members of the system" is obligated to provide the Board with a "notice of a concern."

Accordingly, Mr. Williams too has standing to challenge full release time.

III. THERE IS NO STATUTORY OR ADMINISTRATIVE REMEDY FOR PETITIONERS

Contrary to the AEA's and PSERS' contentions, there are no statutory or administrative remedies available to Petitioners. A preliminary objection based on a failure to exercise or exhaust a statutory remedy, Pa.R.C.P. 1028(a)(7), necessarily presupposes the existence of an applicable statutory remedy. Here, the AEA has failed to identify an applicable statute because, quite simply, none exists. Likewise, the judge-made rule of exhaustion of administrative remedies also presupposes the existence of applicable administrative remedies—which again, do not exist.

A. No possible statutory remedy exists for Petitioners

The failure to exercise or exhaust a statutory remedy is "a challenge to the power of the court to hear the action because neither [the law nor equity] side of the court can entertain the action where there is an exclusive statutory remedy provided." Lashe v. N. York County Sch. Dist., 417 A.2d 260, 262 (Pa. Cmwlth. 1980). There is no requirement to pursue agency action when the statutory language empowering the agency "does not provide any remedy or appeal process to resolve such issues." Shenango Valley Osteopathic Hosp. v. Dep't of Health, 451 A.2d 434, 438 (Pa. 1982); see Ohio Cas. Group of Ins. Companies v. Argonaut Ins. Co., 525 A.2d 1195, 1198 (Pa. 1987) (finding that, to be applicable, a statutory remedy

should be directed to resolving the claims at issue, providing the requested remedy, and brought by the individuals the act intended it to).

In Keystone Funeral Directors Ass'n v. Calvary Cemetery Ass'n, 632 A.2d 909, 910 (Pa. Super. 1993), the Keystone Funeral Directors Association sought injunctive relief from the courts based on an unrelated individual's violation of the Funeral Directors Law. Initially, the trial court granted a preliminary objection based on a failure to pursue administrative findings against the alleged violator, via the State Board of Funeral Directors. However, the Superior Court vacated that order and remanded the case because, "the text of the Act ha[d] no express provisions for a third party to seek relief against an alleged violator." Id. at 912. The Court also reasoned that numerous other statutes[4] provide a specific complaint process for third parties to register some form of complaint against an alleged violator and prompt investigation but that no such process was outlined in the Funeral Directors Law. Id. at 911.

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4. See Keystone Funeral Directors, 632 A.2d at 911 (After listing the statutes allowing a third party to initiate a complaint or investigation for pharmacists, sellers of motor vehicles, nursing home administrators, real estate appraisers, veterinarians, and physical therapists, the court noted the Funeral Directors law was silent as to this point and the absence of such a provision "clearly handicap[ped] appellees' argument that there existed administrative avenues open to appellant.").

Here, there is no statutorily prescribed procedure for Petitioners' challenges. See 24 Pa.C.S. §§ 8101-8536. The statutes contain guidelines for appeals for benefit adjustments limiting those who may bring the appeal to the "affected member, beneficiary, or survivor annuitant." 24 Pa.C.S. § 8303.1. As in Keystone Funeral Directors, there is no mention in the statutes of a procedure by which a third party could challenge a benefit determination of an unrelated member of PSERS. Petitioners have no statutory avenue by which to challenge the benefit determination of an unrelated member of PSERS, and therefore a preliminary objection based on failure to exercise or exhaust a statutory remedy, Pa.R.C.P. 1028(a)(7), cannot apply.

B. No possible administrative remedy exists for Petitioners[5]

Under the judge-made rule of exhaustion of administrative remedies, "a

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5. Respondent AEA appears to have conflated a preliminary objection based on failure to exhaust administrative remedies—a judge-made rule raised through Rule 1028(a)(1)—with a preliminary objection based on there being a full, complete and adequate non-statutory remedy at law under Rule 1028(a)(8). A preliminary objection under Rule 1028(a)(8) objects to a remedy being sought in equity when an adequate remedy at law is available. Beattie v. Allegheny County, 907 A.2d 519 n.5 (Pa. 2006). The objection is to "the form of action and not the power of the court to hear the matter," and the remedy is to transfer the case to the law side of the court. Lashe, 417 A.2d at 262. Petitioners have not sought equitable remedies available through the law side of the Court.

party must pursue the administrative remedies he has against an agency before challenging its action in court." Delaware Valley Convalescent Ctr., Inc. v. Beal, 412 A.2d 514, 515 (Pa. 1980). But "exhaustion is not an absolute doctrine. Whether a court ought to apply the exhaustion doctrine in a given set of circumstances is itself a matter of the exercise of judgment and sound discretion." Frye Const., Inc. v. City of Monongahela, 584 A.2d 946, 948-49 (Pa. 1991) (quoting Feingold v. Bell of Pennsylvania, 383 A.2d 791 (Pa. 1977).

While it should go without saying, there is no requirement to exhaust administrative remedies when no administrative remedies exist. See County of Berks ex rel. Baldwin v. Pennsylvania Labor Relations Bd., 678 A.2d 355, 361 (Pa. 1996) ("Thus, the question here does not even rise to the level of determining whether [Petitioner]'s administrative remedies are 'adequate' for he has no administrative remedies."). In other words,

> [u]nder the doctrine of exhaustion[,] before a litigant can be denied access to the courts there must be a forum available in which he or she can participate. Nebulous claims of informal procedures or implied administrative powers are unavailing since it is clear that without a concrete procedural remedy the litigant could in no way achieve a resolution of his claim except by the grace of the party against whom he is proceeding.

Ohio Cas. Group, 525 A.2d at 1198 (Pa. 1987) (emphasis added). It follows that one raising a preliminary objection based on failure to exhaust administrative remedies must "clearly state[] what the supposed administrative remedies, that should be exhausted prior to allowing access to the court, are." Keystone Funeral Directors, 632 A.2d at 912; Unified Sportsmen of Pennsylvania v. Pennsylvania Game Comm'n, 950 A.2d 1120, 1135 (Pa. Cmwlth. 2008) ("Despite asserting Sportsmen did not exhaust an available administrative remedy, the Game Commission does not identify a specific remedy Sportsmen may pursue to challenge . . . . Absent such a prescribed remedy, the Game Commission's argument fails.").

Here, no administrative remedy exists by which Petitioners could have challenged this action. PSERS' rules and regulations do not contemplate a situation where, as here, an individual not directly related in some form or fashion to a PSERS member seeks to bring an action for benefit adjustment. The Administrative Code governing the Public School Employes' Retirement Board only allows for appeals to be taken when a benefit letter is received, 22 Pa. Code § 201.3a(b), and, after appeal, upon receiving a denial letter from the Executive Staff Review Committee. None of Petitioners have, or could have, satisfied these requirements to allow them to appeal the benefits of AEA Presidents. As no concrete procedural remedy is available to Petitioners, and they are not required to invent an administrative

remedy, the judge-made rule of exhaustion of administrative remedies is not applicable.

Moreover, this Court's adoption of a rule requiring litigants to lodge informal complaints as a precondition to filing suit in this Court's original jurisdiction would unnecessarily delay legal disputes, be contrary to the Declaratory Judgments Act,[6] and have the result for taxpayers that "the standing of taxpayers to challenge governmental action recognized in Biester and Sprague, and the important policy concerns underlying such standing, would be completely undermined." Rizzo, 582 A.2d at 1131.

C. Even if there were an applicable statutory or administrative remedy, the constitutional questions involved would still require the Court's intervention

Finally, even if there were an administrative remedy available to Petitioners, it would not provide the relief requested from this court. Accordingly, the AEA's and PSERS' preliminary objections must be rejected.

The exhaustion of administrative remedies is a judge-made rule that restrains the court from undermining a process designed to draw first upon agency

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6. "[T]he existence of an alternative remedy shall not be a ground for the refusal to proceed." 42 Pa.C.S. § 7537.

expertise. Baker v. Commonwealth, Pennsylvania Human Relations Comm'n, 462 A.2d 881, 884 (Pa. Cmwlth. 1983), aff'd as modified, 489 A.2d 1354 (Pa. 1985) holding modified by Fiore v. Com., Dep't of Envtl. Res., 510 A.2d 880 (Pa. Cmwlth. 1986). It is appropriate "to defer judicial review when the question presented is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the desired result. However, a distinctly different situation is presented where the remedy afforded through the administrative process is inadequate." Shenango, 451 A.2d at 438.

Moreover, "an administrative agency cannot determine the constitutionality of its own enabling legislation." Myers v. Commonwealth, Dep't of Revenue, 423 A.2d 1101, 1104 (Pa. Cmwlth. 1980). As the Pennsylvania Supreme Court has explained,

> [t]he more clearly it appears that the question raised goes directly to the validity of the statute the less need exists for the agency involved to throw light on the issue through exercise of its specialized fact-finding function or application of its administrative expertise. Further, the less need there is for compliance with an agency's procedures as a prerequisite to informed constitutional decision making, then correspondingly greater is the embarrassment caused to litigants by requiring conformity with the statutorily-prescribed remedy.

Borough of Green Tree v. Bd. of Property Assessment, 328 A.2d 819, 825 (Pa. 1974). In fact,

> [t]o postpone the determination of such serious questions of the statute's constitutionality serves no purpose. We are not here faced with a premature interruption of the administrative process but rather a determination of the constitutional validity of the statute which provides the sine qua non for the validity of the entire process. The evils of piecemeal judicial intervention in the administrative process are not raised where judicial relief is limited to resolving questions concerning the constitutionality of an enabling act.

Shenango, 451 A.2d at 439.

In this case, there is no reason to defer to agency expertise and no prospect of consideration of the constitutional questions. No facts are in dispute, and there is no factual record that would shed light on this case. The only remaining questions as it pertains to PSERS are questions of law that go directly to the heart of the constitutionality of PSERS' statutes. Any remedy afforded by PSERS through an administrative process would be inadequate to address Petitioners' concerns, and, as stated in Shenango, to postpone the determination of questions regarding the Constitutionality of PSERS' statutes serves no purpose.

Accordingly, there are no statutory or administrative remedies, and even if there were, they would not be adequate to address Petitioners' concerns.

IV. THE ONLY AUTHORITY VAGUELY REFERENCED BY THE AEA IN SUPPORT OF FULL RELEASE TIME ACTUALLY SUPPORTS PETITIONERS' POSITION

Full release time—and negotiation over the terms and conditions of non-public employees doing non-public work—is contrary to the law and to public policy. The AEA's preliminary objections to the contrary should be rejected, and this Court should invalidate the practice on the merits.

The AEA puzzlingly cites to Pennsylvania Labor Relations Bd. v. State College Area School District, 337 A.2d 262 (Pa. 1971), for its authority to negotiate for full release time when the Court's decision in State College actually supports Petitioners' position. In State College, the union filed an unfair labor practice with the Pennsylvania Labor Relations Board, arguing the employer illegally refused to bargain over 23 terms and conditions of public employment. But, as footnote 11 of the Court's opinion demonstrates, those terms and conditions of employment all dealt directly and specifically with employment concerns of in-classroom teachers.[7] In fact, the Supreme Court underscored the importance of spending public funds for a public purpose:

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7. A representative sampling of the issues discussed in Footnote 11 include: adequacy and handling of classroom supplies, required teacher work and leisure spaces, clarification of nonteaching duties, time for teacher preparation, class sizes, and school schedules.

> [W]e are mindful of the distinctions that necessarily must exist between legislation primarily directed to the private sector and that for public employes. . . . [P]ublic employers are custodians of public funds and mandated to perform governmental functions as economically and effectively as possible. . . . [T]he public employer must adhere to the statutory enactments which control the operation of the enterprise.

State College, 337 A.2d at 264.

The AEA simply fails to recognize the distinction made so clear by the Court in State College: there is a fundamental difference when negotiating in the private sector vis-à-vis the public sector. The private sector has broad discretion to negotiate in collective bargaining, while the public sector may only negotiate based on the statutory authority granted by the legislature. As the District is a public employer utilizing public funds, the District is mandated to use those funds to perform governmental functions and to adhere to the statutory enactments of its authorizing language—none of which authorize full release time.

In sum, Petitioners have not only stated a claim—they bring to this Court an important legal question concerning the abuse of public funds and the collective bargaining process. Petitioners are entitled to a declaration with respect to their rights.

V. PSERS ACTIONS TO REMOVE THE AEA PRESIDENTS' PENSION CREDIT DO NOT MAKE PETITIONERS' CLAIMS MOOT

This Court should reject PSERS' contention that, should it successfully reverse the award of pension credit to AEA's presidents, Petitioners' claims become moot. Accordingly, this Court should reject PSERS' preliminary objection averring mootness.

As stated in PSERS' brief, the claim of mootness "stands on the predicate that a subsequent change in circumstances has eliminated the controversy so that the court lacks the ability to issue a meaningful order, that is, an order that can have any practical effect." Burke v. Independence Blue Cross, 103 A.3d 1267, 1271 (Pa. 2014). Here, no such change in circumstances exist.

A. Regardless of PSERS' actions, an order by this Court will have real and practical effect

An issue is not moot if the court may enter an order that has legal force or effect. In re D.A., 801 A.2d 614 (Pa. Super. 2002). In order for the Court to dismiss a case on account of mootness, the record must establish with certainty the matter is moot. Sturgis v. Doe, 963 A.2d 1291 (Pa. 2009).

No record exists, or could exist, that would make this case moot. Even if PSERS successfully removes the credit and recoups the improperly given pension dollars from all past AEA Presidents, Petitioners are challenging the

constitutionality of the full release time practice, which is codified in one form within section 8102 of the Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. § 8102. The Court's decision on the constitutionality of the practice will continue to have legal effect regardless of PSERS actions.

Additionally, PSERS has not established with certainty they have fully rectified the violations of its statutes. PSERS' brief suggests they have begun the process of removing pension credit from past AEA Presidents, but those efforts are far from completed. The practice of full release time has been in place in the District since 1990, but Petitioners are without knowledge as to how long the practice may have extended in full or partial form prior to that. Moreover, the decision to adjust the retirement credit of AEA Presidents is not yet final.

As PSERS' Brief in Support of Preliminary Objections suggests, AEA Presidents whose retirement contributions have been adjusted have the opportunity to appeal to the Executive Staff Review Committee. If the Committee denies the appeal, the member then has a right to appeal to the PSERS Board under the General Rules of Administrative Practice and Procedure, 1 Pa. Code §§ 31.1-35.251, and would be afforded a formal evidentiary hearing, 22 Pa. Code §§ 201.2a., 201.4(a). The member may then appeal to the Commonwealth Court. See 42 Pa.C.S. § 763.

The standard for waiver allows PSERS to waive an adjustment if, in the opinion of PSERS:

> (1) The adjustment or portion of the adjustment will cause undue hardship to the member, beneficiary or survivor annuitant;
> (2) The adjustment was not the result of erroneous information supplied by the member, beneficiary or survivor annuitant
> (3) The member had no knowledge or notice of the error before adjustment was made, and the member, beneficiary or survivor annuitant took action with respect to their benefits based on erroneous information provided by the system; and
> (4) The member, beneficiary or survivor annuitant had no reasonable grounds to believe erroneous information was incorrect before the adjustment was made.

24 Pa.C.S. § 8303.1. In other words, the unconstitutional award of pension credit to nonpublic employees is entirely likely to be resurrected, and Petitioners would once again have to file an action in this Court to have their rights vindicated.

Additionally, PSERS suggests the District could achieve compliance with the Retirement Code, thereby entitling AEA Presidents to pension credit for their nonpublic work. In fact, PSERS states that all the District would have to do is vote to put the current AEA President on "leave for service with a collective bargaining

organization." In that likely scenario, Petitioners' constitutional claims will once again be before this Court.

B. Even if the case were moot, the case is capable of repetition—and in fact is currently being repeated across the state—but evading review

Even if a case is technically moot, the court may choose to hear a case if "the issue is one that is capable of repetition, yet likely to evade review." Pub. Defender's Office of Venango Cnty. v. Venago Cnty. Ct. of Common Pleas, 893 A.2d 1275, 1280 (Pa. 2006). In evaluating whether a question is capable of repetition but likely to evade review, the Court will consider "whether there is a reasonable expectation that the same complaining party will be subject to the same action again." Consol Pennsylvania Coal Co., LLC v. Dep't of Envtl. Prot., 129 A.3d 28, 42 (Pa. Cmwlth. 2015).

In addition to the situations discussed in the prior section that show the various ways the same complaining party could be forced to bring the same action again, presently, there are numerous other school districts across the state with similar release time arrangements. The practice of release time has evolved and taken many forms. Practices range from full release time as it exists in Allentown, to release time with partial reimbursement, to "leave with a collective bargaining

association" as it is contemplated in PSERS' statutes. This situation is currently happening widely across the state, but evading review.

VI. THIS COURT HAS AN INTEREST IN AVOIDING DUPLICATIVE LAWSUITS

Finally, this Court should address the merits of Petitioners' claims to avoid duplicative lawsuits and possible conflicting rulings. More specifically, this Court should rule that full release time is invalid, making clear to public employers across the Commonwealth that they are not permitted to devote public resources to private purposes.

The Supreme Court has recognized "the avoidance of numerous, duplicative lawsuits supports the propriety of pursuing judicial . . . remedies." Pennsylvania State Educ. Ass'n ex rel. Wilson v. Commonwealth, Dep't of Cmty. & Econ. Dev., 50 A.3d 1263, 1276 (Pa. 2012). "[D]eclaratory relief is appropriate in the Commonwealth Court's original jurisdiction to avert the potential 'multiplicity of duplicative lawsuits' with regard to the same issue." Commonwealth, Office of Governor v. Donahue, 98 A.3d 1223, 1235 (Pa. 2014).

Many other school districts also are operating in violation of the law. Some school districts are paying union employees with taxpayer dollars, and other school districts have union employees on "leave with a collective bargaining organization"

per PSERS regulations. A ruling in this case would prevent courts from dealing with these issues piecemeal and bring clarity to all parties.

CONCLUSION

For the reasons articulated above, Petitioners request that this Court render a judgment in their favor and against Respondents, granting all relief requested in the Petition.

Respectfully submitted,

THE FAIRNESS CENTER

Date: June 20, 2016

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limits of Pennsylvania Rule of Appellate Procedure 2135(1). This brief contains 6,616 words, according to the word count feature of the word processing program used to prepare the brief.

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