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.

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

---

WILLIG, WILLIAMS & DAVIDSON
AMY L. ROSENBERGER, ESQUIRE
Attorney I.D. No. 76257
ALIDZ OSHAGAN, ESQUIRE
Attorney I.D. No. 321986
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
(215) 656-3600
Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes, Rules and Other Authorities

I. STATEMENT OF JURISDICTION

The Commonwealth Court has jurisdiction over appeals from an order granting a motion for preliminary injunction pursuant to 42 Pa. C.S. § 762, and Pa. R.A.P. 311(a)(4).

II. ORDER IN QUESTION[1]

ORDER

AND NOW, to-wit, this 19th day of March, 2019, upon consideration of the Plaintiffs' Motion for Preliminary Injunction, Plaintiffs' Renewed Motion for Preliminary Injunction and Requesting Emergency Relief, the Union Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction and the Supplemental Memorandum of Law in Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction; following evidentiary hearings held on February 26, 2019 and March 15, 2019; and upon notice the Board of Directors of Defendant, Erie Water Works has scheduled a vote to occur on Thursday, March 21, 2019 on whether to accept or reject an offer presented to and voted upon by AFSCME, Local 2206 membership on or about January 11, 2018; and upon good cause shown, it is hereby **ORDERED** as follows[1]:

1. Defendant Erie Water Works and its agents, assistants, successors, employees, attorneys and assigns, and all other persons acting in concert or

---

[1/] A Memorandum Opinion in Support of this Order shall follow forthwith.

---

[1] A copy of the trial court's March 19, 2019 Order is attached hereto as Appendix A. A copy of the trial court's July 18, 2019 Memorandum Opinion is attached hereto as Appendix B. A copy of the trial court's subsequent Opinion following submission of AFSCME's statement of errors complained of on appeal is attached hereto as Appendix C.

cooperation with them or at their direction or under their control, are hereby **PRELIMINARILY ENJOINED** from voting on any contract or agreement with Defendants AFSCME, Local 2206; AFSCME, District Council 85; and/or union officials Randy Procious and/or Shane Clark in their official capacities.

2. It is **FURTHER ORDERED** Plaintiffs shall post a nominal bond in the amount of $1.00 (one dollar and no cents).

BY THE COURT:

s/Daniel J. Brabender, Jr.
Daniel J. Brabender, Jr., Judge

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

An appellate court reviews a trial court's order granting a motion for preliminary injunction under an abuse of discretion standard. *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1286 (Pa. 1992). In doing so, the appellate court must determine whether the trial court had any "apparently reasonable grounds" for granting the motion for preliminary injunction. *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount., Inc.*, 828 A.2d 995, 1000 (Pa. 2003); *Mazzie v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981); *Reed v. Harrisburg City Council*, 927 A.2d 698, 702 (Pa. Cmwlth. 2007).

"Apparently reasonable grounds" for granting a motion for preliminary injunction exist when the record demonstrates that all of the following essential prerequisites for a preliminary injunction are satisfied: (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 the status quo ante; (4) the party seeking the injunction 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 injunction will not adversely affect the public interest. *Summit*

Towne Ctr., Inc., 828 A.2d at 1001; *Anglo-American Ins. Co. v. Molin*, 691 A.2d 929, 933 (Pa. 1997); *Reed*, 927 A.2d at 703.

The reviewing court will reverse or vacate the trial court's order if it determines that there are no apparently reasonable grounds to find that any one of the essential prerequisites for a preliminary injunction were satisfied or if "the rule of law relied upon [in granting the motion] was palpably erroneous or misapplied." *See Novak v. Commonwealth*, 523 A.2d 318, 319, 321 (Pa. 1987); *Sameric Corp. of Market Street v. Gross*, 295 A.2d 277, 280 (Pa. 1972); *Reed*, 927 A.2d at 706-07; *Gwynedd Properties v. Lower Gwynedd Twp.*, 615 A.2d 836, 839 (Pa. Cmwlth. 1992); *Keen v. Philadelphia*, 555 A.2d 962, 965 (Pa. Cmwlth. 1989). *See also Kozlosky v. Lakeland Sch. Dist.*, No. 1948 C.D. 2007, 2008 Pa. Commw. Unpub. LEXIS 819, at *8 (Pa. Cmwlth. April 18, 2008) (reviewing court may overturn trial court ruling on preliminary injunction where "it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied . . ..").

The scope of appellate review is plenary, in that the court conducts "a searching inquiry of the record." *Warehime v. Warehime*, 860 A.2d 41, 46 n.7 (Pa. 2004).

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Trial Court err in determining that the Appellee-Plaintiffs' right to relief was clear on the merits of their claim that AFSCME breached its duty of fair representation?

   (Suggested answer in the affirmative.)

2. Did the Trial Court err in holding that AFSCME was required by law or the AFSCME International Union Constitution to submit a contract proposal it had rejected ("Option 1") to a ratification vote of its members, and in failing to admit the AFSCME International Union Judicial Panel's interpretation of the Constitution into evidence and to defer to that interpretation?

   (Suggested answer in the affirmative.)

3. Did the Trial Court err in failing to hold that AFSCME acted consistent with its duty of fair representation by rejecting Option 1 and submitting to ratification only the proposal it had not rejected ("Option 2")?

   (Suggested answer in the affirmative.)

4. Did the Trial Court err in determining that an injunction was necessary to prevent immediate and irreparable harm where the harm asserted by Appellee-Plaintiffs was purely speculative and it is undisputed that the injunction will not repair any non-economic harm claimed to have been suffered by Appellee-Plaintiffs?

   (Suggested answer in the affirmative.)

5. Did the Trial Court err in determining that a preliminary injunction would preserve the status quo and that it was reasonably suited to abate the offending activity?

   (Suggested answer in the affirmative.)

6. Did the Trial Court err in determining that greater injury would result from refusing an injunction than from granting it, that issuance of the injunction would not substantially harm other interested parties, including other bargaining unit employees and the PLRB, and that an injunction would not adversely affect the public interest?

   (Suggested answer in the affirmative.)

V. STATEMENT OF THE CASE

A. Procedural History

On December 5, 2018, Mark Kiddo, Joan Hordusky, Mike Dzurko, Christine Arnone, Jennie Clay, Madelyn Groover, Melissa Guzowski, and Jeff Granger (collectively, "Appellee-Plaintiffs") filed a Complaint in the Erie County Court of Common Pleas against 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 ("Local 2206"); Shane Clark; and Randy Procious (District Council 85, Local 2206, Mr. Clark and Mr. Procious are referred to collectively here as "AFSCME" or "Appellants"). The Complaint was filed against Appellee Erie Water Works ("EWW"). R. 2a, 12a-23a.[2]

The Complaint asserts a duty of fair representation claim arising out of collective bargaining negotiations in late December 2017 and January 2018 for a successor collective bargaining agreement ("CBA") between District Council 85 and EWW. Appellee-Plaintiffs allege that AFSCME violated its duty of fair representation when Appellants presented only one of EWW's two final offer options to the membership for a ratification vote. R. 20a-22a. Appellee-Plaintiffs

[2] On January 24, 2019, AFSCME filed timely Preliminary Objections to the Complaint. Appellee-Plaintiffs responded to AFSCME's Preliminary Objections on February 13, 2019. The trial court has not yet ruled on the Preliminary Objections. (R. 3a-4a).

further allege that AFSCME violated its duty of fair representation because it violated the Constitution of AFSCME's parent union, AFSCME International. Specifically, they claim that AFSCME violated Section 7 of the Constitution's "Bill of Rights for Union Members." R. 13a.

On December 18, 2018, Appellee-Plaintiffs filed a Motion for Preliminary Injunction ("Motion"), to which AFSCME responded on January 7, 2019. R. 2a. Of relevance to this appeal, the Motion requested that the trial court enjoin EWW from entering into a CBA with AFSCME based upon the contract proposal that the AFSCME membership had ratified. Appendix B, at 2.[3] A hearing on the Motion began on the afternoon of February 26, 2019 before Judge Daniel J. Brabender of the Erie County Court of Common Pleas. R. 2a. At the end of the day, the trial court scheduled a second day of hearing for June 25, 2019.

However, on March 7, 2019, Appellee-Plaintiffs filed a Renewed Motion for Preliminary Injunction ("Renewed Motion"), alleging that they had learned that, after the first day of hearing, EWW had scheduled a vote of its Board of Directors on the ratified contract proposal for March 21, 2019. R. 5a; Appendix B at 2. AFSCME responded on March 11, 2019. R. 5a. In the Renewed Motion,

[3] The Motion also sought an order preliminarily enjoining AFSCME from imposing union discipline or pursuing charges against Appellee-Plaintiffs taking such action. *Id.* Although neither the Complaint nor the Motion alleged any facts suggesting that union discipline or charges were contemplated, much less impending, Appellants agreed not to take such action, rendering a hearing on that portion of the Motion unnecessary. *Id.* at 2 and n.1.

Appellee-Plaintiffs requested that the trial court enjoin the scheduled vote of the EWW Board.

The second day of hearing was then rescheduled and held on March 15, 2019. R. 5a. At the close of the hearing, Appellee-Plaintiffs and Appellants presented oral closing argument to supplement their written submissions in support of and in opposition to the Motion and Renewed Motion. R. 527a-573a.

On March 19, 2019, Judge Brabender issued an Order granting the Motion and Renewed Motion. R. 6a; Appendix A. However, the Order goes beyond merely enjoining EWW from voting on the contract terms that were ratified by the AFSCME membership, or from entering into a CBA on those terms. Instead, the Order enjoins EWW from entering into any contract or agreement with AFSCME whatsoever. *See* Appendix A. As discussed at greater length below, the March 19, 2019 Order is also in direct conflict with the January 31, 2019 Proposed Decision and Order ("PDO") issued by a Pennsylvania Labor Relations Board ("PLRB") Hearing Examiner, directing EWW to vote on the CBA terms that the AFSCME membership ratified. R. 575a-585a.[4]

[4] Although not part of the record below, the Court may take judicial notice of the fact that EWW initially filed, but subsequently withdrew its exceptions to the PDO. *See Lycoming County v. PLRB*, 943 A.2d 333, 335 n.8 (Pa. Cmwlth. 2007); *Lozado v. Workers' Compl. Appeal Bd.*, 123 A.3d 365, 367 (Pa. Cmwlth. 2015). That ruling is therefore now final. *See* 34 Pa. Code § 95.98(b).

On April 18, 2019, AFSCME filed a Notice of Appeal to this Court as to the trial court's March 19, 2019 Order. R. 6a. On August 19, 2019, the trial court issued a Memorandum Opinion concerning the March 19, 2019 Order. Appendix B. After AFSCME submitted a statement of errors complained of on appeal, the trial court issued a supplemental Opinion on August 21, 2019. Appendix C.

B. Statement of Facts

1. During Contract Negotiations with EWW, AFSCME Agrees to Submit Option 2 to the Membership for a Ratification Vote.

District Council 85 is the exclusive collective bargaining agent for a bargaining unit of approximately twenty employees who work for EWW. R. 470a.[5, 6] As the exclusive representative, District Council 85 is party to a CBA with EWW that establishes the terms and conditions of employment for all employees in the bargaining unit. R. 291a.

The most recent CBA between District Council 85 and EWW expired on December 31, 2017. Before the CBA's expiration, the President of Local 2206,

[5] Appellant AFSCME Local 2206 is an affiliate of District Council 85. Local 2206 is an amalgamated local that also includes employees who work for the City of Erie and the Erie Housing Authority. District Council 85 negotiates separate CBAs with the City of Erie, the Erie Housing Authority, and EWW. R. 470a-471a.

[6] As of the hearings in this matter, District Council 85 represented all of the Appellee-Plaintiffs except for Joan Hordusky, who is no longer employed in a bargaining unit position. R. 290a.

Randy Procious, asked the bargaining unit members via email what they would like to see in the next CBA. R. 388a. Appellee-Plaintiffs Mark Kiddo and Jennie Clay responded that they wanted a healthcare subsidy for their retirement, because EWW had previously negotiated a contract with the union representing another bargaining unit, the Teamsters, that included a retirement subsidy for healthcare. R. 226a, 239a, 363a, 375a. *See* 178a.

In anticipation of the CBA's expiration, District Council 85 and EWW began negotiations for a successor CBA. District Council 85's negotiating team consisted of individuals who were either elected by the Local 2206 membership or were appointed to be on the negotiating team. R. 615a. The chief negotiator was District Council 85 Staff Representative Shane Clark, who had experience in negotiating over fifty CBAs for various AFSCME bargaining units across Northwestern Pennsylvania. The team also included Mr. Procious; Kim Range, the Vice President of Local 2206; and two EWW bargaining unit employees, Brian Zilonka and Tamura Squire. R. 631a. EWW's negotiating team consisted of its outside counsel and chief negotiator, Mark Wassell, Esquire; EWW's Human Resources Manager, Aaron Stankiewiz; and EWW's Manager of Administration, Ronald Constantini. R. 291a, 481a, 631a.

District Council 85 and EWW conducted approximately seven or eight bargaining sessions that culminated in a final session on December 22, 2017.

R. 631a. Throughout the negotiation sessions, EWW and District Council 85 made proposals that were either accepted or rejected by the other side's negotiating team. For example, the District Council 85 negotiating team rejected an EWW proposal that would have required employees to work on weekends. The District Council 85 negotiating team also rejected an EWW proposal to place current employees who were not yet vested in the defined benefit pension plan into a defined contribution retirement plan. R. 454a-455a. The District Council 85 negotiating team proposed the retirement subsidy sought by Mr. Kiddo and Ms. Clay, but without any changes being made to the employees' pension, which EWW rejected. R.481a.

At the final negotiation session, Attorney Wassell presented a proposal characterized as EWW's final offer.[7] The final offer consisted of two options: "Option 1" and "Option 2." R. 291a, 302a-303a, 480a. During his presentation of Options 1 and 2, Attorney Wassell never stated or otherwise indicated that EWW intended for District Council 85 to submit *both* Options 1 and 2 to the bargaining unit members in order for them to choose between the options. R. 291a. On the contrary, the final offer stated that District Council 85 was to select either Option 1 or Option 2 to present to its membership for ratification:

[7] The trial court's Memorandum Opinion incorrectly states that Mr. Wassell was not present at the meeting on December 22, 2017. *See* Appendix B at 32. In fact, Mr. Wassell was present at the December 22 meeting and presented EWW's final offer. *See* R. 480a.

> **In addition to the foregoing five items,[8] the Union will select one of the following options to apply to all of its members:**
>
> **OPTION #1**
>
> ***
>
> **OPTION #2**

R. 302a (emphasis in original).

The contract terms proposed in Options 1 and 2 were largely similar, but had the following major difference: Option 1 proposed to eliminate the defined benefit pension plan for all bargaining unit employees hired on or after January 1, 2018 and permit those employees to participate only in a defined contribution retirement plan. In exchange for removing the defined benefit pension plan for new hires, Option 1 proposed to institute a retirement subsidy of $400 per month, until Medicare eligibility.[9] Option 2 proposed to keep the defined benefit pension plan as is, including for employees hired after January 1, 2018, but Option 2 did not include a retirement subsidy. R. 184a-187a. Option 2 was the first EWW proposal throughout the negotiation sessions that proposed to keep the pension

[8] The "foregoing five items" were agreed-upon terms that were to apply to Options 1 and 2.

[9] There were certain other differences between Option 1 and 2. Option 1 provided a slightly higher wage increase in year one of the CBA, with the following raises: 3.00% (2018), 2.25% (2019), 2.50% (2020), 2.75% (2021), and 2.75% (2022); Option 2 proposed the following raises: 2.50% (2018), 2.25% (2019), 2.50% (2020), and 2.75% (2021). Option 1 proposed that the CBA have a 5-year duration; Option 2 proposed a 4-year duration. Option 1 proposed a premium for duties requiring a fall harness; Option 2 did not. R. 187a.

plan intact for all employees, including for employees who would be hired into the bargaining unit during the term of the contract. R. 455a-456a.

After Mr. Wassell presented Options 1 and 2, the District Council 85 negotiating team took a caucus and unanimously agreed to take Option 2 back to the membership for a ratification vote. The negotiating team chose Option 2 because they wanted to maintain the defined benefit pension plan for all employees, including those hired on or after January 1, 2018. Additionally, Option 1 was a worse proposal compared to what EWW agreed upon with the Teamsters: in that contract, EWW had agreed to provide the post-employment subsidy without requiring any changes to employee pension benefits. R. 174a-175a, 178a, 445a, 483a-484a.

Following the caucus, Mr. Clark informed EWW's negotiating team that they had decided to take Option 2, not Option 1, back to the membership for a ratification vote. Because they had selected Option 2, Mr. Clark asked EWW's negotiating team to re-format the document so that it would show only Option 2. The negotiating teams shook hands and the negotiating session ended. R. 292a.

Contrary to the agreement at the conclusion of the December 22, 2017 negotiations, on January 4, 2018, Attorney Wassell sent a reformatted proposal to Mr. Clark that included *both* Options 1 and 2, and stated, for the first time, that

EWW "is allowing the *bargaining unit* to decide which option to accept." R. 292a (emphasis added).[10]

Mr. Clark responded 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.

R. 292a.

In a January 8, 2018 email exchange between Mr. Stankiewiz and Mr. Clark, Mr. Clark noted 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." R. 292a-293a. When EWW reiterated its position in subsequent correspondence, Mr. Clark sent EWW a final response, to which EWW did not reply, as follows:

> 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. R. 293a.

Mr. Clark explained this exchange at the March 15, 2019 hearing as follows:

[10] The trial court erroneously states that Mr. Clark knew on December 22, 2017 that EWW expected both options to be presented to the membership. *See* Appendix B at 31. However, the testimony cited in support of this statement merely confirms that Mr. Clark knew what the final offer was on December 22, not that EWW expected both options to be presented to the membership. See R. 512a.

> There was correspondences after that [December 22, 2017] meeting where [EWW] had indicated that the final offer had both options at which point I told them that I was prepared to do exactly what I told them I was going to do at the negotiating table, in front of the State mediator, which was taken Option 2 back to for ratification to the membership.

R. 510a.

2. AFSCME's Membership Ratifies Option 2.

The ratification meeting and vote was held on January 11, 2018. At the meeting, the District Council 85 negotiating team distributed Option 2 to the membership. Mr. Clark reviewed the terms and conditions contained within Option 2 and explained the implications of ratifying Option 2 or voting it down. R. 492a. Mr. Clark explained that if the members did not wish to accept Option 2, the negotiating team would return to the bargaining table with EWW, and that if they did return to the bargaining table, he could not assure that the negotiating team could secure a better CBA than Option 2. R. 395a.

Mr. Clark then opened up the meeting for the members to ask the negotiating team questions about Option 2. R. 392a. During the discussion, Mr. Kiddo asked the negotiating team why the retirement subsidy was not included in Option 2. Mr. Clark responded to Mr. Kiddo as follows:

> [B]ecause the negotiating team for the Local had an option and picked Option 2, because the price to bring back the postretirement subsidy was too great in the eyes of the negotiating team, **because it would have done away with the**

> **defined benefit plan for new hires** and it would have put [new hires] into a defined contribution plan after January 1, 2018.

R. 493a (emphasis added).[11]

Following the discussion, the membership overwhelmingly voted to ratify Option 2, with fifteen members voting to ratify, and three members voting not to ratify. R. 494a. Appellee-Plaintiffs Mr. Kiddo, Ms. Clay, and Christine Arnone voted against Option 2. Two of the Appellee-Plaintiffs, Mike Dzurko and Jeff Granger, did not attend the ratification meeting and did not vote on whether to ratify Option 2. R. 222a, 246a, 402a, 410a, 430a. The ratification vote lasted approximately one and one-half hours. R. 379a.

3. EWW Refuses to Submit Option 2 to a Vote of its Board and Instead Engages in Unlawful Direct Dealing with the Employees.

After Mr. Clark notified EWW of the results of the ratification vote, EWW Chief Executive Officer Paul Vojtek distributed a letter to each bargaining unit employee on February 8, 2018, stating in pertinent part, that:

> [T]he AFSCME negotiating team did not present both options of the Final Offer to all of its members, but instead only presented Option number 2.

[11] Between January 1, 2018 and the hearings in this matter, four new employees (Amber Corritore, Christine Pelusio, Jennifer Maya, and Wendy Husbicky) were hired into the EWW bargaining unit. R. 401a.

> 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.

R. 201a.[12]

Although Mr. Vojtek's letter claimed that he attached "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 on December 22. Instead, Mr. Vojtek attached summaries of Options 1 and 2 that the negotiating team had never seen before and that were different in substance from the actual options presented to AFSCME's negotiating team on December 22. In particular, the 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. R. 202a-203a.

[12] In the Memorandum Opinion, the trial court erroneously states that the February 8, 2018 correspondence was admitted into the record as Union Defendants' Ex. No. 1 (*see* Appendix B, at 13). Union Defendants' Exhibit 1 was only marked for identification to refresh Mr. Kiddo's recollection. *See* R. 405a.

The EWW Board was scheduled to vote on Option 2 as ratified by the members on February 18, 2018. However, without consulting District Council 85, the Board canceled the vote at the request of Mr. Kiddo and Appellee-Plaintiffs' former attorney. Mr. Kiddo and other bargaining unit members asked District Council 85 to conduct a re-vote of the membership on Option 1 and Option 2, which District Council 85 declined.[13,14] R. 295a-296a, 329a, 405a-406a, 612a.

From that point until after the first day of hearing on the Motion, EWW took the position that it would not present Option 2 to its Board for a vote until the bargaining unit members were permitted to choose between Options 1 and 2. R. 296a, 452a.

4. A PLRB Hearing Examiner Finds that EWW's Conduct Constitutes an Unfair Labor Practice and Orders EWW to Submit Option 2 to a Vote of its Board.

On March 8, 2018, District Council 85 filed an Unfair Labor Practice Charge with the PLRB, alleging that EWW violated Sections 1201(a)(1) and (5) of the Public Employe Relations Act ("PERA"), and further engaged in independent

[13] The trial court's Memorandum Opinion incorrectly states that District Council 85 Staff Representative Shane Clark wanted a re-vote. *See* Appendix B, at 20. Only Mr. Kiddo and certain other bargaining unit members wanted a re-vote. R. 295a-296a, 329a, 405a-406a, 612a.

[14] As set forth in further detail in Section VII.A.2., *infra*, had District Council 85 conducted a revote, it would have constituted an unfair labor practice under PERA. *See Larksville Borough*, 48 PPER ¶ 82, 2017 WL 2178520 (Final Order, 2017), at pp. 345-46, citing *PSSU, Local 668, SEIU*, 35 PPER ¶ 102, 2004 WL 6017596 (Proposed Decision and Order, 2004).

violations of Section 1201(a)(1) of PERA, by reneging on the understanding reached at the bargaining table regarding submission of EWW's final offer to a vote of the membership, instead demanding that District Council 85 permit it to negotiate directly with the employees; by engaging in direct dealing in an effort to overturn the ratification vote after the fact; and by refusing to ratify its own final offer. R 332a-336a.

After a hearing on the Charge, on January 31, 2019, a PLRB Hearing Examiner issued a PDO.[15] The Hearing Examiner held that EWW violated PERA by refusing to hold a vote on Option 2 and by providing its employees with false information about the negotiations, including the content of EWW's final offer. The Order required EWW, among other things, to:

> Immediately bargain in good faith and submit the terms of the CBA as it existed in Option 2 on December 22, 2017, **without the inclusion of Option 1 or any other unaccepted proposal,** to [EWW's] Board of Directors for ratification.

R. 585a (emphasis added).

On around February 20, 2019, EWW filed exceptions to the PDO with the PLRB. R. 355a. However, after the trial court issued the March 19, 2019 Order granting the Motion and Renewed Motion, EWW withdrew its exceptions

[15] The Order was admitted into evidence before the trial court as Union Exhibit 2. *See* R. 449a-450a.

on April 8, 2019,[16] which made the PLRB Hearing Examiner's January 31, 2019 Order final and binding upon EWW and District Council 85. *See* 34 Pa. Code §95.98(b).

Notwithstanding that fact, to date, the EWW Board has not voted on Option 2. R. 296a. As a result, the EWW bargaining unit employees have been living under the same terms and conditions that existed when the most recent CBA expired on December 31, 2017. Accordingly, the employees have been subject to a wage freeze since the expiration of the prior CBA. R. 453a.

5. The AFSCME International Judicial Panel Finds that District Council 85 Acted in Accordance with the AFSCME International Union Constitution.

While the unfair labor practice charge was pending, on March 30, 2018, Appellee-Plaintiffs and several other bargaining unit employees filed an internal union charge against Mr. Clark and Mr. Procious with the AFSCME International Judicial Panel. The AFSCME International Judicial Panel exists to resolve internal union charges by interpreting the AFSCME International Union's Constitution, including the Bill of Rights for Union Members. R. 94a-98a.

The internal union charge alleged that Mr. Clark and Mr. Procious violated the Bill of Rights for Union Members by presenting only Option 2 and not

[16] The Court may take judicial notice of these facts. *See Lycoming County*, 943 A.2d at 335 n.8; *Lozado*, 123 A.3d at 367.

Option 1 to the bargaining unit membership for a ratification vote. R. 607a-609a, 614a. The Bill of Rights for Union Members states:

> Members shall have the right to full participation, through discussion and vote, in the decision-making processes of the union, and to pertinent information needed for the exercise of this right. This right shall specifically include decisions concerning the acceptance or rejection of collective bargaining contracts, memoranda of understanding, or any other agreements affecting their wages, hours or other terms and conditions of employment.

R. 612a.

Following a hearing, at which all parties were represented by counsel and submitted testimony and evidence, the Chair of the Judicial Panel, Richard Abelson, dismissed the charges on July 20, 2018. Chairperson Abelson found that Mr. Clark and Mr. Procious did not violate the Bill of Rights for Union Members, concluding as follows:[17]

> The charging parties assert that the bargaining team had an affirmative obligation to bring forward the entire employer final offer, including that portion of the final offer which was expressly rejected by the union's negotiating team, to the membership for ratification.
>
> The testimony was clear that the union's bargaining team was selected, either by election or automatic participation, in the case of the president and the staff representative, and sent to the bargaining table to negotiate the terms and conditions for a successor collective bargaining agreement. **It is also clear that the bargaining team was vested with the authority to use its**

[17] As set forth further in the Argument section of this Brief, the trial court erroneously admitted the AFSCME Judicial Panel's decision for limited purposes only, and not for its rationale and ruling. *See* Appendix B, at 38-39.

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. On December 22, 2017, the employer presented a final offer which contained two different options. The union bargaining team caucused and in very short fashion concluded that the terms and conditions contained in Option 1 were potentially harmful to the members of the bargaining unit and should be rejected out of hand. In making this decision they relied on the dialogue which they had across the bargaining table with the employer, as well as the content of the offer. **Alternatively, they 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.**

At the bargaining session of December 22, 2017, the employer did not state at any time that it expected the final offer in its entirety (both Options 1 and 2) be brought back to the membership for vote. It presented its final offer with two equal alternatives. The Local 2206 bargaining team immediately informed the employer representatives that it was accepting Option 2 and rejecting Option 1. Further, the Local 2206 bargaining team clearly informed them that they would only be taking the final offer with Option 2 back to the membership for ratification. Absolutely no objection was raised by the employer representatives at that time.[18]

Brothers Procious and Clark are found not guilty of the charge that they violated the Bill of Rights for Union Members contained in the International Constitution when they did not

[18] [In original] This case has arisen completely due to the employer's actions. If the employer did not intend to present equally acceptable "options" to the union on December 22, 2017, it should have structured the Final Offer in a different fashion. Further, if the employer's representative did not want the union's bargaining team to take back only the Final Offer with Option 2, it should have responded accordingly when the union informed them of its opposition on December 22, 2017.

> bring back the employer's final offer with both options to the membership. The union's bargaining team rejected Option 1, accepted only Option 2, and properly informed the employer of its decision. After the bargaining session for December 22, 2017, the employer changed its position and have since refused to vote to ratify its own final offer.
>
> Brothers Procious and Clark, and the other uncharged members of the bargaining team, properly discharged their duty to the members of the Local 2206. Even Brother Kiddo stated in his testimony in the present case that the union's bargaining team does not have to bring trivial issues back to the membership for their vote. He states that in the present case, the issues involved create a bright line that the bargaining team crossed by not bringing the full final offer back to the membership. The undersigned disagrees. **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 (emphasis added).

The charging parties appealed Chairperson Abelson's decision to the full AFSCME Judicial Panel. The full AFSCME Judicial Panel affirmed the ruling. R. 547a.

VI. SUMMARY OF ARGUMENT

At the root of the controversy in this case is EWW's unlawful insistence that it be permitted to negotiate directly with bargaining unit employees, rather than their excusive representative, by demanding that AFSCME put the choice between Option 1 and Option 2 directly to the bargaining unit. The Appellee-Plaintiffs in this action seek to compel AFSCME to permit the employer to deal directly with them, in a manner that the PLRB Hearing Examiner held to be unlawful. The trial court's March 19, 2019 preliminary injunction Order prohibits EWW from complying with the Hearing Examiner's now final PDO, thereby perpetuating EWW's unlawful conduct, and puts a halt to all collective bargaining between the parties.

This Court's "searching inquiry of the record" (*Warehime*, 860 A.2d at 46 n.7) will reveal no reasonable grounds to support the trial court's conclusions that Appellee-Plaintiffs established the necessary elements to justify preliminary injunctive relief. On the contrary, both the record and prevailing law reveal that AFSCME had no obligation, under PERA or the AFSCME International Union Constitution, to present Option 1 to a ratification vote. The trial court improperly failed to admit into evidence the substance of the AFSCME International Union Judicial Panel's decision interpreting the Constitution on this point, and to defer to that interpretation. It simply assumed, without any basis in the record or the law,

that AFSCME was obliged to submit both Options 1 and 2 for a vote of the membership. Further, there are no reasonable grounds to conclude that AFSCME rejected Option 1 in favor of Option 2 out of arbitrariness, discrimination or bad faith, a prerequisite to a finding that AFSCME breached its duty of fair representation.

The record likewise reveals no reasonable grounds to indicate that the injunction was necessary to prevent immediate irreparable harm, because the asserted harm is purely speculative, and the only purported harm that the preliminary injunction prevents is economic, and therefore not irreparable. Moreover, the injunction does not preserve the status quo, which is the last actual, peaceable and lawful, noncontested status. Instead, it preserves and prolongs EWW's unlawful conduct. Nor is the injunction reasonably suited to abate the offending activity, because it goes beyond prohibiting EWW from voting on Option 2, and effectively prohibits all collective bargaining between EWW and AFSCME.

There are also no reasonable grounds to conclude that there would be greater injury from denying the injunction than has resulted from granting it, where the injunction is effectively allowing a minority of the bargaining unit (Appellee-Plaintiffs) to deprive the majority of their right to a resolution to the ongoing contract dispute, preventing enforcement of the PLRB's remedy for EWW's unfair

labor practices, and subjecting EWW to conflicting binding orders from the court and the PLRB. Denying the injunction, on the other hand, would have resulted in a vote of EWW's Board to enter into a contract under which all bargaining unit employees would have received pay raises and other benefits, or to reject Option 2 and resume the bargaining process. Furthermore, the injunction is adverse to the public interest in that it undermines the public policy underlying PERA, of avoiding unresolved disputes between public employers and their employees.

Accordingly, the trial court's ruling should be reversed, and the preliminary injunction vacated.

VII. ARGUMENT

As the party seeking the preliminary injunction, Appellee-Plaintiffs had a "heavy burden of persuasion" in proving all of 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 the injunction 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 injunction will not adversely affect the public interest. *Warehime*, 860 A.2d at 46-47; *Singzon v. Commonwealth*, 436 A.2d 125, 126 (Pa. 1981).

A preliminary injunction is "an extraordinary remedy," which courts 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). If the party seeking the injunction fails to prove any one of the essential 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).

This Court reviews a trial court's order granting a motion for preliminary injunction under an abuse of discretion standard. *Maritrans GP, Inc.*, 602 A.2d at 1286. In doing so, the appellate court must determine whether the trial court had any "apparently reasonable grounds" for granting the motion for preliminary injunction. *Summit Towne Ctr., Inc.*, 828 A.2d at 1000; *Mazzie*, 432 A.2d at 988; *Reed*, 927 A.2d at 702.

Here, Appellee-Plaintiffs failed to establish any of the six elements, much less all of them. Accordingly, there were no reasonable grounds to grant the preliminary injunction, and doing so was in error. The trial court's March 19, 2019 Order should be reversed, and the preliminary injunction vacated.

A. There are No Reasonable Grounds to Conclude that Appellee-Plaintiffs' Right to Relief Was Clear.

This Court has noted that "a preliminary injunction may not issue if the right to relief is not clear, and reviewing courts may not ignore this very fundamental principle." *See Reed*, 927 A.2d at 706. A clear right to relief can only be demonstrated with "concrete evidence" and must be more than a merely viable or plausible claim. *Greenmoor, Inc. v. Burchick Const.*, 908 A.2d 310, 314 (Pa. Super. 2006); *Ambrogi v. Reber*, 932 A.2d 969, 980 (Pa. Super. 2007). Here, there were no reasonable grounds to find that Appellee-Plaintiffs have a right to relief, much less a clear right to relief.

Appellee-Plaintiffs contend that AFSCME breached its duty of fair representation to them by failing to present both Option 1 and Option 2 for ratification by the membership, and by rejecting Option 1 in the first place. They and the trial court both characterize AFSCME's conduct in presenting only Option 2 as improper alteration of EWW's final offer, and concealment of Option 1. However, as discussed below, because the District Council 85 negotiations team had rejected Option 1 in favor of Option 2, their only obligation was to present Option 2 for ratification. There exists no obligation under PERA or the AFSCME International Union Constitution to present for ratification a proposal that the negotiators have rejected. Thus, they did not improperly alter the final offer or conceal Option 1; they simply presented to the membership the only option they were prepared to accept – Option 2. Furthermore, AFSCME's rejection of Option 1 was entirely consistent with its duty of fair representation, because it made that decision in good faith, considering the impact of Option 1 on all employees who would be covered by the contract's terms.

1. Neither PERA, nor the AFSCME International Union Constitution, as Interpreted by the AFSCME International Union Judicial Panel, Required AFSCME to Present Option 1 to a Ratification Vote.

As this Court long ago explained, ratification of agreements negotiated by a union's representatives is purely a matter of internal union governance. *PLRB v. Eastern Lancaster Cty. Educ. Ass'n*, 427 A.2d 305, 308 (Pa.

Cmwlth. 1981). PERA does not require that the union, as exclusive bargaining agent, obtain approval, consent, or ratification of a CBA from the bargaining unit membership. As set forth in Section 902 of PERA, ratification of a CBA by members is required only if the union's constitution or bylaws require it:

> Section 902. If the provisions of the constitution or bylaws of an employe organization requires ratification of a collective bargaining agreement by its membership, only those members who belong to the bargaining unit involved shall be entitled to vote on such ratification notwithstanding such provisions.

43 P.S. § 1101.902.

Furthermore, nothing in PERA requires that a union whose constitution has a ratification requirement must present to the members a proposal that its representatives have rejected. Section 701 of PERA permits bargaining representatives to reject any proposal, by providing that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." 43 P.S. § 1101.701. More to the point, the PLRB has explicitly held that a public employee union has no obligation to submit to a ratification vote any employer proposal to which it has not agreed – even if that proposal is a final offer. *See Int'l Bhd. of Painters and Allied Trades, Local 1968*, 38 PPER ¶ 128, 2007 WL 7563573 (Final Order, 2007); *Williamsport Area Support Personnel Ass'n v. Williamsport Area Sch. Dist.*, 41 PPER ¶ 15 (Proposed Decision and Order, 2010) ("an employee organization does not have the obligation to submit

proposed agreements to which it has not assented to its membership for ratification or rejection."). This is consistent with Section 902 of PERA, which refers only to ratification of "collective bargaining agreements," not proposals or final offers. *See* 43 P.S. § 1101.902. Thus, the negotiating team did not violate PERA by declining to submit Option 1, which it had rejected, to a ratification vote.

Appellee-Plaintiffs' entitlement, if any, to hold a ratification vote on Option 1 is entirely a matter of internal union governance. The provision of the AFSCME International Union Constitution upon which Appellee-Plaintiffs rely in this case is Paragraph 7 of the Bill of Rights for Union Members.[19] Appellee-Plaintiffs contend that Paragraph 7 required AFSCME to submit both Option 1 and Option 2 to the membership for ratification.

Significantly, Appellee-Plaintiffs concede that AFSCME was entitled to transmit proposals to EWW without membership knowledge or approval, and they concede that AFSCME was entitled to accept or reject EWW proposals without membership knowledge or approval. Appellee-Plaintiffs' Complaint is limited to AFSCME's failure to allow them to vote on both Option 1 and Option 2, on grounds that a final offer has some special status that the other proposals that AFSCME rejected or accepted throughout the negotiations lack. However, there is

[19] The text of Paragraph 7 is set forth in full at p. 23, *supra*.

.

no legal support for this proposition. *See Int'l Bhd. of Painters and Allied Trades, Local 1968*, 38 PPER ¶ 128, at 374.

Furthermore, this is precisely the question that was decided by the AFSCME International Judicial Panel, upon consideration of the internal union charges filed by Appellee-Plaintiffs against Appellants Clark and Procious. Chairperson Abelson interpreted Paragraph 7 to find that AFSCME's presentation of only Option 2 to the membership for a ratification vote and its general conduct at the ratification meeting did not violate the Constitution. On appeal, the full AFSCME Judicial Panel affirmed his decision. Chairperson Abelson explained his determination as follows:

> **It is [ ] clear that the bargaining team was vested with the authority to use its 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.** On December 22, 2017, the employer presented a final offer which contained two different options. The union bargaining team caucused and in very short fashion concluded that the terms and conditions contained in Option 1 were potentially harmful to the members of the bargaining unit and should be rejected out of hand. In making this decision they relied on the dialogue which they had across the bargaining table with the employer, as well as the content of the offer. **Alternatively, they 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.**

> Brothers Procious and Clark, and the other uncharged members of the bargaining team, properly discharged their duty to the members of the Local 2206. Even Brother Kiddo stated in his testimony in the present case that the union's bargaining team does not have to bring trivial issues back to the membership for their vote. He states that in the present case, the issues involved create a bright line that the bargaining team crossed by not bringing the full final offer back to the membership. The undersigned disagrees. **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 (emphasis added).

Appellee-Plaintiffs seek to overturn that ruling in the instant matter. As this Court has held, however, unions have a "well established right" to govern their internal affairs generally, and matters relating to ratification in particular, "without judicial interference." *Eastern Lancaster Cty. Educ. Ass'n*, 427 A.2d at 308. The authority cited by this Court in support of that principle was federal case law involving unions representing non-governmental employees. *Id*.

During closing argument at the end of the hearing on the Motion and Renewed Motion in this matter, counsel for AFSCME urged the trial court of defer to the Judicial Panel's interpretation of the AFSCME International Union Constitution, consistent with the instruction of the federal courts. R. 550a-553a. Specifically, the U.S. Court of Appeals for the Third Circuit, in *Exec. Bd., Local 234 v. Transp. Workers Union of Am.*, 338 F.3d 166 (3d Cir. 2003) ("*Transp.*

Workers Union of Am."), held that courts must defer to a union's interpretation of its own constitution unless that interpretation is patently unreasonable. *Id.* at 171, 175. *See also United Ass'n Of Journeymen & Apprentices v. United Ass'n. Of Journeymen & Apprentices*, 669 F.2d 129, 131 (3d Cir. 1982) (deference to union's interpretation of its constitution is a fundamental principle of law). The Third Circuit has prohibited courts from determining the "ultimately correct" interpretation of the constitution; rather, the courts are limited to determining whether the union's interpretation was patently unreasonable. *See United Ass'n Of Journeymen & Apprentices*, 669 F.2d at 131.[20]

The trial court failed to defer to the Judicial Panel's interpretation of Paragraph 7. Instead, the trial court admitted the Judicial Panel's decision into evidence only for "limited purposes," but not for its ruling or rationale, on grounds that the Judicial Panel "was not addressing the claims before this Court." R. 500a-501a; Appendix B, at 37. Then, the trial court quoted the Judicial Panel decision to distinguish the issues that the trial court believed were not before the Judicial Panel, but were before the trial court:

> The undersigned will not be addressing the content of the offer(s) submitted by the management, ***nor will the undersigned be addressing the merits of those offers or the correctness of the***

[20] Judicial deference to a union's interpretation of its constitution is widely acknowledged as a fundamental principle of federal law. *See Sim v. New York Mailers' Union No. 6*, 166 F.3d 465, 470 (2d Cir. 1998); *Newell v. Int'l Bhd. of Elec. Workers*, 789 F.2d 1186, 1189 (5th Cir. 1986); *Stelling v. IBEW*, 587 F.2d 1379, 1389 (9th Cir. 1978).

> ***union's bargaining team in rejecting one of the options and agreeing to recommend the other option to the membership for ratification.*** The Judicial Panel will not insert itself into the collective bargaining process.

Appendix B, at 37-38 (emphasis in original).

The trial court has misread the Judicial Panel's decision and the import of this quote. In the quoted portion of the decision, the Chairperson Abelson is noting that the determination is that AFSCME did not violate Paragraph 7 by presenting only presenting Option 2 to the membership was not based upon the merits of whether having a retirement subsidy is a "better" than having a defined benefit pension plan for all bargaining unit employees. However, Appellee-Plaintiffs' complained-of actions before the trial court are precisely the same as those complained of to the Judicial Panel. Accordingly, the trial court erred in failing to consider the Judicial Panel's interpretation of Paragraph 7 in connection with Appellee-Plaintiffs' ability to demonstrate a clear right to relief.[21] Appendix B, at 36-37. Further, because the trial court did not determine that the Judicial Panel's ruling was patently unreasonable, and because there are no

[21] Not only did the trial court fail to defer to the Panel's interpretation of the Constitution, at the March 15, 2019 hearing, the court openly expressed doubt as to the objectivity of the Panel itself, saying "I mean, obviously [the Judicial Panel] ruled for the negotiating team. I mean, it's taken for granted, right?" R. 500a. There is no evidentiary support whatsoever for the trial court's apparent assumption that the Judicial Panel was somehow biased in favor of Appellants Clark and Procious.

reasonable grounds in the record to do so, it should have deferred to the Panel's interpretation.

2. There are No Reasonable Grounds to Conclude That AFSCME's Rejection of Option 1 Breached its Duty of Fair Representation.

The duty of fair representation that a union owes to the bargaining unit arises from the union's status as sole collective bargaining agent of those employees under PERA. *Martino v. Transport Workers' Union, Local 234*, 480 A.2d 242, 250-252 (Pa. 1984); *see also Falsetti v. United Mine Workers*, 161 A.2d 882, 895 (Pa. 1960). The duty of fair representation prohibits unions from acting discriminatorily, arbitrarily, or in bad faith. *Id*. This Court has previously noted that "a union will be liable for breach of a duty of fair representation *only* when bad faith on the part of the union is shown." *Hughes v. Council 13, Am. Fed. of State, County & Mun. Employees*, AFL-CIO, 629 A.2d 194, 195 (Pa. Cmwlth. 1993) (emphasis added). *Black's Law Dictionary* defines "bad faith" as:

> [G]enerally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.

Black's Law Dictionary, 6th ed. (1990).

Here, there are no reasonable grounds to find that AFSCME's selection of Option 2 to present to the bargaining unit membership for a ratification

vote was discriminatory, arbitrary, or in bad faith. As an initial matter, the contents of the final offer itself, stating that "the Union will select one of the following options to apply to all of its members" (R. 302a), placed the choice of whether to bring back Option 1 or Option 2 in the hands of the negotiating team. And at that December 22 meeting, no one from the EWW negotiating team ever suggested that it intended the choice to be made by anyone other than the District Council 85 negotiating team. While EWW attempted to renege on that agreement later, there is no question that at the negotiating table, EWW put a choice to District Council 85, and they chose Option 2, without any objection from EWW.

The record is similarly devoid of evidence that AFSCME selected Option 2 instead of Option 1 in bad faith. It is undisputed that AFSCME chose Option 2 to maintain the defined benefit pension plan for all employees who would be covered by the agreement. Had AFSCME accepted Option 1, it would have obtained the retirement subsidy that Appellee-Plaintiffs wanted, but it would have paid a heavy price: the elimination of a defined benefit pension plan for new hires. The negotiating team unanimously decided that keeping the defined benefit pension plan was more important.

While certain members might disagree with the negotiating team's choice because they would have preferred having a retirement subsidy, that disagreement is not evidence of bad faith. This Court has previously noted that

unions' representation of the entire bargaining unit may result in the dissatisfaction of certain members, but such dissatisfaction does not equate to a violation of the duty of fair representation:

> Labor unions, as exclusive bargaining representatives for their members, have broad discretion in the execution of their duties. The United States Supreme Court has explained that discretion as follows:
>
> > The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Connelly v. Steel Valley Educ. Ass'n, 119 A.3d 1127, 1134 (Pa. Cmwlth. 2015) citing *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). Indeed, even Appellee-Plaintiff Jenny Clay acknowledged at the March 15, 2019 hearing that the District Council 85 negotiating team, in considering Options 1 and 2, needed to consider the interests of the entire bargaining unit, including those who would be hired during the contract's duration, and not just her and Mr. Kiddo's personal interest in the retirement subsidy. R. 431a.

There are also no reasonable grounds to find that AFSCME acted in bad faith at the ratification meeting. Appellee-Plaintiffs, and the trial court, characterize AFSCME's presentation of only Option 2 to the bargaining unit membership as intentionally hiding the existence of a retirement subsidy offer from EWW. Appendix B, at 36. However, it is undisputed that the members who

attended the ratification meeting were informed of the existence of an offer that included the subsidy, and the reason for the negotiation team's rejection of that offer. Specifically, the negotiating team told the members that EWW would have provided the retirement subsidy only if AFSCME agreed to eliminate the defined benefit pension plan for all employees hired after January 1, 2018. Mr. Clark explained to the members that the negotiating team decided not to make that trade-off, and selected the option that kept the defined benefit pension plan instead. [22]

Mr. Kiddo's and Ms. Clay's testimony reveals that there was substantial discussion of the retirement subsidy at the ratification meeting (which, according to Mr. Kiddo, lasted an hour to an hour and a half). Indeed, according to Mr. Kiddo, the debate on this very issue was so robust that it caused the meeting to get "chaotic." R. 378a. The members were further made aware at the ratification meeting that if they voted down Option 2, AFSCME would go back to the bargaining table for further negotiations. If any member wished to make that trade-off, they were free to vote against ratification of Option 2. In fact, Mr. Kiddo, Ms. Clay and a third Appellee-Plaintiff did exactly that.

[22] To the extent there was any confusion regarding which employees would lose their pension if the negotiating team agreed to the retirement subsidy, the record is clear that by the end of the discussion about the retirement subsidy and before the vote occurred, the negotiating team had made clear that only employees hired on or after January 1, 2018 would have lost the defined benefit pension plan. R. 394a-395a.

Finally, there are no reasonable grounds to find that AFSCME violated the duty of fair representation by not acquiescing to the re-vote desired by Mr. Kiddo and certain other bargaining unit employees. Far from being arbitrary or in bad faith, such a revote would be unlawful under PERA, as the PLRB has repeatedly held that a ratification vote is binding and cannot be rescinded based upon purported irregularities in the ratification process. R. 565a[23]; *Larksville Borough*, 48 PPER ¶ 82, 2017 WL 2178520 (Final Order, 2017), at pp. 345-46, citing *PSSU, Local 668, SEIU*, 35 PPER ¶ 102, 2004 WL 6017596 (Proposed Decision and Order, 2004). There is no evidence in the record to indicate that Appellants' failure to hold a re-vote was motivated out of anything other than a desire to comply with the law in this respect.

Accordingly, AFSCME acted in accordance with its obligations under PERA, the AFSCME International Constitution, and its duty of fair representation. There are no reasonable grounds for the trial court to have found otherwise, and so its conclusion that the Appellee-Plaintiffs have a clear right to relief should be reversed, and the preliminary injunction vacated.

[23] As counsel for AFSCME explained during closing argument: "the Labor Board says you don't have to have a ratification vote to begin with, but if you have one, you get your chance, you make your decision, and there's no . . .going back on what that vote is until the employer [votes]. . .because at some point. . .when does that end? If the membership change their mind, they hold another vote. Well, what if they change their mind again? When do we know that we have a contract? R. 565a-566a.

B. There are No Reasonable Grounds to Conclude that the Injunction was Necessary to Prevent Immediate and Irreparable Harm.

It is well-settled law that, in order to establish immediate and irreparable harm, Appellee-Plaintiffs were required to demonstrate with "concrete evidence" that they would suffer immediate and irreparable harm without the injunction. *Summit Towne Ctr., 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). Appellee-Plaintiffs were further required to demonstrate that the asserted harm was not speculative. *See Novak*, 523 A.2d at 320 ("It is established, however, that speculative considerations cannot form the basis for issuing a preliminary injunction"); *Summit Towne Ctr., Inc.*, 828 A.2d at 1000 (preliminary injunction denied in part on grounds that the harm was speculative). Here, the evidence demonstrates that there were no reasonable grounds to find that the asserted harm was immediate or irreparable, and so the trial court should not have issued the preliminary injunction.

The mere fact that the EWW Board had scheduled a vote on Option 2 for March 21, 2019 is insufficient to merit the extraordinary remedy of a preliminary injunction, because the harm was purely speculative. It is undisputed that neither Appellee-Plaintiffs nor AFSCME knew whether the EWW Board would vote to accept and execute Option 2 or reject Option 2. R. 402a, R. 495a.

Indeed, in their Renewed Motion, Appellee-Plaintiffs' alleged only that the Board of Directors "*may"* have voted to approve Option 2 on March 21, 2019. R. 344a (emphasis added). Mr. Kiddo testified that had "no idea" how the EWW Board would vote on Option 2. R. 402a. Of course, it is entirely possible that, if Option 2 were put to a vote, that the Board would vote to reject Option 2. Accordingly, the undisputed evidence revealed that an injunction was not necessary to prevent immediate harm. *See Novak,* 523 A.2d at 320 ("It is established, however, that speculative considerations cannot form the basis for issuing a preliminary injunction"); *See Summit Towne Ctr., Inc.*, 828 A.2d at 1001.

On this issue, the trial court cited to no part of the record in support of its conclusion. *Reed*, 927 A.2d at 706 (reversing preliminary injunction in part because trial court cited no statutory or case law authority to support its reasoning). Instead, the trial court found irreparable and immediate harm based upon an entirely speculative consideration that has no support in the record, and which unfairly faults AFSCME for seeking to avail itself of PERA's protections:

> Further, the Court believes the likelihood is great, given recent events, the Union would pursue any and all remedies against EWW through PERA in the event EWW refused to ratify Option #2. Undoubtedly this state of affairs would have exerted subtle or other pressures upon EWW and tipped the scales in favor of a vote by EWW to ratify.

Nowhere in the record before the trial court is there evidence demonstrating that EWW felt pressure to vote to approve Option 2 due to

AFSCME's position. Far from feeling "pressures," EWW's Human Resources Director testified at the first day of hearing that EWW would not submit Option 2 to a vote of its Board of Directors until the bargaining unit members have a revote. R. 452a. Moreover, although AFSCME originally sought as a remedy for EWW's unfair labor practices an order directing EWW to approve Option 2, that remedy was not granted (R.584a), and AFSCME did not file exceptions to that ruling. Under these circumstances, if EWW's Board were to vote to reject Option 2, the only "remedy" available to AFSCME under PERA would be to resume negotiations, and attempt to reach an agreement with EWW on terms that can ultimately be ratified by both the union membership and the EWW Board.

The record also lacked any evidence that Appellee-Plaintiffs would have suffered irreparable harm before a decision on the merits could be rendered. *Reed*, 927 A.2d at 704-705. Appellee-Plaintiffs failed to demonstrate, and the trial court's opinion is devoid of any explanation, as to why delaying potential relief after the EWW Board's vote would fail to permit Appellee-Plaintiffs to obtain a re-vote, if they were ultimately to prevail on the merits of their claim. Appendix B at 38.

In *Smith v. Bowers*, 337 F.Supp. 2d 576, 592 (S.D.N.Y. 2004), a federal trial court refused to issue a preliminary injunction which plaintiffs sought to prevent the union and employer from entering into a collective bargaining

agreement due to alleged improprieties in the contract ratification process, because "Plaintiffs . . . have failed to demonstrate why delaying a re-vote or other injunctive relief that the Court might award after trial would itself cause irreparable harm." The court acknowledged that while an after-the-fact remedy may be more complex, there was no harm to the plaintiffs in allowing the contract to be implemented:

> Furthermore, the Court notes that, while the Master Contract about to take effect may not be to the liking of Plaintiffs, it is difficult to see how its imposition during the pendency of this action could be considered harmful to them. Though the Master Contract does contain some lessening of medical benefits for union members who work less than 1300 hours per year . . ., it does provide significant raises and other benefits as compared to the current agreement for Union members. Plaintiffs have failed to introduce any evidence suggesting that they will be economically injured by imposition of the agreement. While not dispositive, Plaintiffs' failure to allege any economic harm resulting from denial of a preliminary injunction further strengthens the Court's conclusion that Plaintiffs have not demonstrated that they will be irreparably harmed if injunctive relief is not granted during the pendency of this action.

Id.

At the February 26, 2019 hearing, Mr. Kiddo testified that the "harm" he suffered was purely financial, in the form of lost raises and the inability to get the retirement subsidy. R. 386a-387a; 406a-407a. Mr. Kiddo testified:

> Q. [Y]ou mentioned the harm that you're experiencing here. And I think I heard you talk about if Option 1 had been ratified, you're missing an additional raise, right?

A. Correct.

Q. And the potential for getting a post-employment healthcare subsidy?

A. Yes.

Q: And anything else?

A. Harm wise?

Q. Yes.

A. Not that I can think of. No. Not that I can think of.

R. 406a-407a.

As an initial matter, such harms are entirely speculative, as they are based upon the assumption that Option 1 would have been ratified, had it been presented for a vote (or would now be ratified by the membership if it were presented for a re-vote).[24] The trial court's conclusion that the preliminary injunction was necessary to prevent irreparable harm was based upon the same unfounded assumption. *See* Appendix B at 38 ("EWW's ratification of the altered final offer would also force Plaintiffs to . . . be denied the greater benefits that would have been afforded to them had they been presented with Option #1.")

[24] Even if every Appellee-Plaintiff had voted in favor of Option 1, they do not constitute a majority of the membership, or even of those who attended the January 11 ratification meeting. Two of the Appellee-Plaintiffs, Mike Dzurko and Jeff Granger, did not attend the ratification meeting, and so they did not vote at all. R. 246a, 410a. The remaining Appellee-Plaintiffs constitute only one-third of the 18 members at the ratification meeting.

Moreover, such monetary harms are not grounds for equitable relief in the form of a preliminary injunction. *See Novak*, 523 A.2d at 320 (economic harms are speculative in nature and cannot form a basis for a preliminary injunction). *See also Warehime*, 860 A.2d at 46-47; *The York Group, Inc. v. Yorktowne Caskets, et al*. 924 A.2d 1234, 1242 (Pa. Super. 2007) (in order to constitute irreparable harm, the asserted harm cannot be adequately compensated in money damages.); *Berkowitz v. Wilbar*, 206 A.2d 280, 282 (1965) (preliminary injunction against dismissal from employment denied).

At the March 15, 2019 hearing, in an effort to cure this obvious problem, Mr. Kiddo testified on direct examination:

> Q: And, Mr. Kiddo, the last time you were here you testified as to certain damages or harm that you were experiencing as a result of the Union Defendant's actions. And then on Mr. Clark's testimony on Direct he testified to, again, financial harm that individuals were suffering as a result of the issue that we're here today. Are there any other harm [sic], other than the financial harm that you testified to that you're experiencing and suffering currently?
>
> A: I believe that there is. Prior to the ratification vote, there was trust and confidence in the Union. Okay. Since everything has happened, the confidence in my Union is -- it's in disrepair. I don't know how I can get that trust back.
>
> Q: Let me ask you: If another contract comes up, do you have the same confidence in your union to be fair and honest?
>
> A: After what happened this time, I don't have that confidence right now.

R. 524a-525a. However, moments later, on cross examination, he admitted that the requested injunction would not relieve that alleged harm:

> Q: So, Mr. Kiddo, what about the injunction that is being sought here that will restore your trust in the union?
>
> A: **I don't know that that's going to restore my trust.** How do you -- I guess I look at it this way: How do I go back and say that something that happened didn't happen, you know. The confidence that I had coming into that ratification vote was that the best possible offer was going to be put in front of you, the final offer. Okay. **After everything that's happened, I don't have that confidence.**

R. 524a-526a (emphasis added).

Pennsylvania courts have long recognized that "the purpose to be achieved by the issuance of a preliminary injunction is the avoidance of immediate and irreparable injury." *All-Pack, Inc. v. Johnston*, 694 A.2d 347, 350 (Pa. Super. Ct. 1997). Because the only non-economic harm asserted by Appellee-Plaintiffs – Mr. Kiddo's loss of confidence in AFSCME – admittedly cannot be cured by a preliminary injunction, there were no reasonable grounds for the trial court to conclude that the injunction was necessary to prevent irreparable harm.

Accordingly, the trial court erred in granting the preliminary injunction because the record lacks any evidence whatsoever that Appellee-Plaintiffs would suffer immediate and irreparable harm without it. Therefore, the trial court ruling should be reversed, and the preliminary injunction vacated.

C. There are No Reasonable Grounds to Find that the Preliminary Injunction Preserves the Parties to the Status Quo and is Reasonably Suited to Abate the Offending Activity.

As the Pennsylvania Supreme Court has explained, "[t]he status quo to be maintained by a preliminary injunction is the last actual, peaceable **and lawful noncontested** status which preceded the pending controversy." *Valley Forge Hist. Soc'y v. Washington Memorial Chapel*, 426 A.2d 1123, 1129 (Pa. 1981) (emphasis added), citing *Commonwealth v. Coward*, 489 Pa. 327, 341, 414 A.2d 91, 99 (1980). Here, the status being preserved is one which the PLRB Hearing Examiner, in a PDO that is now final (*see* note 4, *supra*), has held to be unlawful. Specifically, the Hearing Examiner held that EWW's insistence that AFSCME take both Option 1 and Option 2 to the membership for a vote amounted to unlawful insistence upon dealing directly with the employees, rather than with their exclusive collective bargaining agent, through its designated representatives. *See* R. 582a-583a. The Hearing Examiner also held that EWW's agreement with Mr. Kiddo and Appellee-Plaintiffs' former counsel to postpone EWW's vote, and its refusal to submit Option 2 to a vote of its Board of Directors unless or until the membership was allowed to vote on both Option 1 and Option 2 violated PERA. *See* R. 583a. The effect of the trial court's Order is to prevent EWW from complying with the remedy for its unlawful conduct, and in fact to prolong that

conduct. It is not surprising, then, that EWW did not offer any opposition to the Motion or Renewed Motion.

Thus, the preliminary injunction at issue here does not preserve "the last actual, peaceable and lawful noncontested status." Rather, it preserves the employer's multiple violations of PERA, notwithstanding the existence of a now final order from the PLRB directing it to cease and desist from such conduct.

Furthermore, the trial court's preliminary injunction order goes well beyond what was required to abate the alleged offending activity. The conduct complained of here is the Union's selection of Option 2 and submission of that Option only to a ratification vote. The trial court's Order does not only prohibit EWW from voting on Option 2; it also effectively prohibits all further collective bargaining between AFSCME and EWW during the pendency of the case, by enjoining EWW "from voting on any contract or agreement" with AFSCME. *See* Appendix A, at 1-2. As a result, the Order not only prolongs EWW's unlawful conduct, it prohibits both EWW and AFSCME from carrying out their bargaining obligations under PERA, and deprives them, as well as the employees in the AFSCME bargaining unit, of the rights afforded them under PERA.

For these reasons, there are no reasonable grounds to find that the trial court's Order preserves the status quo or is reasonably suited to abate the alleged

offending activity. Accordingly, the trial court ruling should be reversed, and the preliminary injunction vacated.

D. There are No Reasonable Grounds to Find that there is Greater Injury from Refusing the Injunction than from Granting it or that it Will Not Adversely Affect Other Interested Parties or the Public Interest.

The trial court caused more injury to parties interested in this proceeding by issuing the injunction than it would have by not granting it; further, the injunction is adverse to the public interest. The trial court utterly ignored the fact that issuing the injunction harmed AFSCME by foreclosing its right to the remedy ordered by the PLRB Hearing Examiner directing EWW to submit Option 2 to a vote of its governing Board. Further, the injunction has exposed EWW to conflicting orders: the preliminary injunction from the trial court and one from the PLRB that is now final.

Not only has the preliminary injunction prevented the bargaining unit from benefitting from a CBA that was approved by the overwhelming majority of the membership, but as noted above it has prohibited collective bargaining entirely. By issuing the injunction, the trial court impermissibly intruded into the collective bargaining process between EWW and AFSCME. *See Novak*, 523 A.3d at 321 (reversing injunction because it intruded into the collective bargaining process

between the union and the employer – in that case by effectively modifying the CBA).

The injunction also necessarily harms the entire bargaining unit, including Appellee-Plaintiffs. Because the EWW Board has not voted, the EWW bargaining unit employees – the majority of whom are not parties to this case – have been living under the same terms and conditions that existed when the most recent CBA between the Parties expired on December 22, 2017. Accordingly, the employees have been subject to a wage freeze since the expiration of the prior CBA, in addition to being deprived of their right to a resolution to the contract dispute. R. 453a.

Another non-party to this case is also impacted by the trial court's Order. The PLRB, the administrative agency charged with administering PERA, and vested with exclusive jurisdiction to remedy unfair practices that it finds (see 43 P.S. § 1101.1301), has been effectively overruled by the granting of the preliminary injunction in this case.

On the other hand, there is no harm to any party in allowing Option 2 to be voted on by the EWW Board of Directors, and permitting the collective bargaining process to proceed. Additionally, doing so would honor the statutory role of the PLRB. Until the preliminary injunction Order was issued, EWW's Board was scheduled to vote on Option 2 on March 21. It would have voted either

to ratify or to reject Option 2. If it had voted to ratify that proposal, those terms would have been implemented, and bargaining unit employees would receive the raises provided for in Option 2, among other benefits. If it had voted to reject Option 2, then negotiations between EWW and AFSCME would resume, and continue until mutually agreeable contract terms could be reached and ratified in accordance with PERA's requirements. If the ultimate conclusion of this action were an order directing that some other terms should have been implemented (for example, Option 1), as Appellee-Plaintiffs desire, there is nothing in the record to suggest that those terms could not be implemented retroactively. *See Smith*, 337 F.Supp. 2d at 592 and discussion, *supra*, at pp. 45-46.

By requiring AFSCME and EWW to suspend all collective bargaining until the conclusion of this case, the preliminary injunction Order adversely affects the public interest in that it directly undermines the public policy announced PERA. The General Assembly has declared that it is the public policy of this Commonwealth and the purpose of PERA to avoid: "Unresolved disputes between the public employer and its employes. . . ." 43 P.S. § 1101.101. Indeed, Article VIII of PERA is entirely dedicated to resolving collective bargaining impasses, based upon the idea that employers, employees, and the unions that represent them in bargaining with employer, require finality to the collective bargaining process. *See* 43 P.S. 1101.801, *et seq*.

Thus, there are no reasonable grounds to find that there would have been greater injury from refusing the injunction than from granting it, or that it would not adversely affect the public interest. Accordingly, the trial court ruling should be reversed, and the preliminary injunction vacated.

VIII. CONCLUSION

For all of the foregoing reasons, AFSCME respectfully requests that this Court reverse the trial court's March 19, 2019 Order and vacate the preliminary injunction in its entirety.

Respectfully submitted,

WILLIG, WILLIAMS & DAVIDSON

s/Amy L. Rosenberger
AMY L. ROSENBERGER, ESQ.
Pa. Attorney I.D. No. 76257
ALIDZ OSHAGAN, ESQ.
Pa. Attorney I.D. No. 321986
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
(215) 656-3600
arosenberger@wwdlaw.com
aoshagan@wwdlaw.com

Counsel for Appellants

Dated: October 7, 2019