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In the Commonwealth Court of Pennsylvania

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; and SHANE CLARK IN HIS OFFICIAL CAPACITY,

Appellants,

and

ERIE WATER WORKS,

Appellee.

APPELLEES' BRIEF

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

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COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

Appellate courts review a trial court order granting or refusing a preliminary injunction for an abuse of discretion, *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 501 (Pa. 2014) (citing *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1000 (Pa. 2003)); *see also Buffalo Twp. v. Jones*, 813 A.2d 659, 664 n.4 (Pa. 2002) (distinguishing *de novo* review for permanent or final injunctions), and its review is plenary. *Warehime v. Warehime*, 860 A.2d 41, 46 n.7 (Pa. 2004).

This is a "highly deferential" standard of review. *SEIU Healthcare*, 104 A.3d at 501. Reviewing courts will not "inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below." *Roberts v. Bd. of Dirs. of Scranton*, 341 A.2d 475, 469 (Pa. 1975). An order granting an injunction will not be reversed unless "it is plain that no grounds exist to support the decree or the rule of law relied upon was palpably erroneous or misapplied . . . ." *Id.* And there is no abuse of discretion where "some basis exists to satisfy all the prerequisites for a preliminary injunction." *Greater Nanticoke Area Educ. Ass'n v. Greater Nanticoke Area Sch. Dist.*, 938 A.2d 1177, 1185 (Pa. Cmwlth. 2007).

COUNTER-STATEMENT OF QUESTION INVOLVED

1. Did the trial court abuse its discretion in determining that Appellees met their burden of proof in establishing the right to preliminary injunctive relief?

   (Suggested answer in the negative.)

COUNTER-STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On December 5, 2018, eight public employees—Appellees Mark Kiddo, Joan Hordusky,[1] Mike Dzurko, Christine Arnone, Jennie Clay, Madelyn Groover, Melissa Guzowski, and Jeff Granger (collectively, "Employees")—filed a complaint in the Erie County Court of Common Pleas against American Federation of State, County and Municipal Employees, District Council 85 ("District Council 85") and Local 2206 ("Local 2206"), as well as union officers Randy Procious and Shane Clark.[2] Employees also named their employer, Erie Water Works ("EWW"), as a defendant.

Employees' single-count complaint alleged that AFSCME breached its duty of fair representation[3] ("DFR") in bargaining for a successor agreement defining Employees' terms and conditions of employment. R.20a–21a.[4] At the time Employees filed their complaint, AFSCME's membership had voted to ratify the collective bargaining agreement ("CBA") negotiated by AFSCME officials, but EWW had not yet scheduled its vote to approve the ratified CBA. R.439a–441a, 631a.

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[1] Ms. Hordusky retired after the initiation of this case.

[2] District Council 85, Local 2206, and Messrs. Procious and Clark are referred to, collectively, as "AFSCME."

[3] The duty of fair representation requires that labor unions "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

[4] All citations to the reproduced record appear as "R." followed by the specified page(s).

On December 18, 2018, Employees filed a motion for preliminary injunction requesting that the trial court enjoin EWW from executing any CBA with AFSCME until further ordered. R.276a.[5] AFSCME opposed Employees' preliminary injunction motion, but EWW took no position. R.2a.

On February 26, 2019, the trial court began the hearing on Employees' preliminary injunction motion. Br. of Appellants ("AFSCME's Br."), App. B at 2 ("Opinion"). Employees presented testimony or affidavits from all eight Employees and testimony from an EWW official. R.357a–461a. However, at AFSCME's request, the hearing was continued until June 25, 2019. R.5a.

Then, on March 7, 2019, after learning that EWW had scheduled a vote for March 21 to approve the terms negotiated by AFSCME, Employees renewed their preliminary injunction motion and requested emergency relief. R.341a–345a. The trial court re-scheduled the continued hearing for March 15, 2019. Op. at 3.

On March 15, 2019, the hearing resumed with AFSCME presenting evidence and testimony, R.469a–521a, followed by Employees' rebuttal testimony, R.524a–526a, and closing arguments, R.527a–573a. On March 19, 2019, the trial court issued an order preliminarily enjoining EWW "from voting on any contract or agreement with Defendants AFSCME, Local 2206; AFSCME, District Council 85; and/or union

[5] Employees also requested an order enjoining AFSCME from imposing union discipline or internal charges against Employees. R.287a–288a. However, AFSCME agreed that it would not take such action while Employees' case was pending. Br. of Appellants ("AFSCME's Br."), App. B at 2 n.1.

official Randy Procious and/or Shane Clark in their official capacities." AFSCME's Br., App. A ("Order"), at 1–2.

On or around April 18, 2019, AFSCME filed a Notice of Appeal as to the trial court's Order. R.6a.

On July 18, 2019, Judge Daniel J. Brabender issued his Opinion in support of the court's Order and ordered AFSCME to file a statement of errors. R.7a. On August 7, 2019, AFSCME filed a statement of errors as directed. R.7a. In response, on August 21, 2019, the trial court issued an opinion determining that no further opinion would be necessary. R.8a.

II. STATEMENT OF FACTS

A. AFSCME Misrepresents EWW's Final Offer to Employees

From January 1, 2013 to December 31, 2017, Employees worked under terms and conditions of employment set forth in a CBA between EWW and AFSCME. R.631a. However, since that CBA expired, AFSCME and EWW have been observing the *status quo* requirement.[6] *Id.*

Before expiration of the CBA, AFSCME and EWW began negotiations over a successor CBA. R.631a. At the last formal bargaining session on December 22, 2017,

[6] "Both this Court and our Supreme Court have recognized a duty in the parties to maintain the *status quo* when a CBA expires and no successor agreement is in place." *Phila. Fed'n of Teachers v. Sch. Dist. of Phila.*, 109 A.3d 298, 309 (Pa. Cmwlth. 2015).

EWW presented a document entitled "Final Offer" to the AFSCME negotiating team. *Id.* The Final Offer contained two options, identified as "OPTION #1" and "OPTION #2." R.642a–643a. EWW intended for AFSCME to submit both options to its membership so that EWW employees could choose between them. R.191a.

Option 1 included higher pay raises and a new "post-employment subsidy" designed to help retiring employees pay for healthcare until Medicare benefits are available. Under Option 1, all new hires would be provided with a defined-contribution retirement plan instead of the existing, defined-benefit pension plan, while all current EWW employees could retain their defined-benefit pension plan. R.186a–187a.

Meanwhile, Option 2 included *lower* pay raises and *no* post-employment subsidy. However, under Option 2, new hires would continue to be placed into the defined-benefit pension plan. R.187a.

On January 4, 2018, EWW sent a letter to AFSCME reiterating the terms of EWW's Final Offer, specifically noting that the Final Offer contained two options. R.190a. Then, on January 8, 2018, EWW sent an email to its Director of Human Resources, with copies sent to AFSCME representatives, reiterating that the Final Offer contained two options and that EWW expected the entire Final Offer, comprised of both options, to be presented to the union members. R.191a.

Three days later, on the evening of January 11, 2018, AFSCME convened a general membership meeting at which members were told they could vote on EWW's

offer. But AFSCME did not present the Final Offer to membership. Instead, AFSCME officials presented a document ("Altered Offer") containing only Option 2 and omitting Option 1. R.631a, 645a–649a.

At the January 11 meeting, certain members of the bargaining unit expressed their frustration that the Altered Offer did not include some of the terms they were hoping would be included—the post-employment subsidy in particular. R.379a. However, AFSCME did not inform the bargaining unit that EWW actually offered increased wages and the post-employment subsidy in Option 1 of the Final Offer. R.379a. Instead, AFSCME led Employees and other union members to believe that the Altered Offer was EWW's only offer and that, if the bargaining unit rejected the offer, then subsequent offers may get worse. R.378a, 426a–427a. A vote was held on the Altered Offer and it passed by a margin of 15–3. R.494a.

B. Employees Petition AFSCME for a Revote

After the union members voted to approve the Altered Offer, EWW sent a letter to EWW employees informing them that EWW's Final Offer contained "two specific options for you and your fellow AFSCME members to consider." R.201a. Upon learning of the existence of Option 1, thirteen EWW employees, representing a clear majority of the bargaining unit,[7] requested that AFSCME allow for a revote on EWW's Final Offer. R.206a–217a, 250a–251a.

[7] Employees' bargaining unit is comprised of eighteen to twenty employees. R.364a.

AFSCME refused. R.385a.

On or around February 21, 2018, Employees, along with five additional union members, filed internal union charges with AFSCME's Judicial Panel ("AJP") alleging that AFSCME violated its Constitution by concealing the terms of Option 1 at the ratification meeting. R.250a–251a. Employees requested that the AJP nullify the January 11th ratification vote and allow a revote on the Final Offer. R.250a.

The specific provision at issue in Employees' internal union charges was Article 7 of the AFSCME International Constitution and Bill of Rights for Union Members, which is fully applicable to District Council 85 and Local 2206. R.250a, 631a. It states the following:

> 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 rejections of collective bargaining contracts, memoranda of understanding, or any other agreements affecting their wages, hours, or other terms and conditions of employment. All members shall have an equal right to vote and each vote cast shall be of equal weight.

R.638a.

On July 20, 2018, the AJP dismissed the charges. R.269a. Employees' timely appeal was later denied. R.20a.

C. The Trial Court Conducts a Two-Day Preliminary Injunction Hearing

After exhausting these internal union remedies, Employees filed their complaint and, shortly thereafter, their motion for preliminary injunction. R.12a–22a, 278a–288a. The trial court quickly scheduled a hearing, but Employees, AFSCME, and EWW moved to postpone the hearing after AFSCME and EWW agreed to maintain the *status quo* at least until a rescheduled hearing date. R.2a. At that time, AFSCME also represented to the trial court that it would not pursue internal union charges against Employees during the pendency of this litigation. Op. 2 n.1.

At the rescheduled hearing date on February 26, 2019, Employees presented testimony from Mark Kiddo, Jennie Clay, and EWW's human resources manager. R.361a–460a. Employees also submitted signed stipulations, 357a–358a, 628a–649a, and affidavits from all eight Employees,[8] R.461a, R.220a–247a.

Kiddo testified that, during or prior to AFSCME's negotiations over the successor CBA, he had informed members of AFSCME's bargaining team that he hoped EWW's offer would include a post-employment subsidy. R.370a–371a. But when AFSCME convened the ratification meeting on January 11, 2018, the Altered Offer was presented as the only offer from EWW and did not contain the post-employment subsidy. R.375a. When Kiddo asked AFSCME about the lack of post-

[8] *See* Pa. R. Civ. P. 1531(a) ("In determining whether a preliminary or special injunction should be granted . . . the court may . . . consider affidavits of parties or third persons or any other proof which the court may require.").

employment subsidy at the meeting, AFSCME told him that members could "lose [their] pensions" and did not disclose that EWW's Final Offer contained a second option with higher wages and the post-employment subsidy. R.376a, 379a. Kiddo testified that he felt threatened and intimidated at the meeting and was accused by a member of the negotiating team of being "selfish." R.377a.

Kiddo further testified that he learned—only after the ratification meeting—that EWW's Final Offer actually contained two options. R.380a–383a. Kiddo testified, as a result of AFSCME's conduct, Employees have worked without a new contract and raises, R.386a, and Kiddo has lost confidence in his union to fairly and honestly represent his interests. R.525a.

Clay also testified that she hoped the new contract would have the post-employment subsidy and that she informed members of AFSCME's negotiating team of that hope prior to or during negotiations. R.420a–421a. When AFSCME presented the Altered Offer at the ratification meeting, Clay felt intimidated and pressured into voting for the Altered Offer because she was led to believe that was the only contract offer that AFSCME presented and that they had to vote that day. R.425a. Nonetheless, Clay voted against the Altered Offer because it did not contain terms and benefits she was hoping would be included in the offer. R.428a. At no point did AFSCME inform the union members that EWW's Final Offer actually contained a post-employment subsidy and higher wages. R.426a–427a.

EWW's human resources manager testified that EWW's Final Offer contained two options, but he learned that AFSCME only presented Option 2 and did not tell the union members about Option 1. R.439a–440a. He testified that, after the 2013–2017 CBA expired on December 31, 2017, the terms of that CBA have carried forward to the present date in the absence of a new CBA. R.441a–442a. He also clarified that, when a new CBA is ratified, its terms will apply retroactively to January 1, 2018. R.458a–459a.

Following Employees' presentation of testimony on February 26, 2019, AFSCME requested that the hearing be continued. R.462a. The trial court granted the request. R.463a.

When the hearing resumed on March 15, 2019, AFSCME presented the testimony of union official and Appellant Shane Clark. R.469a–521a. On cross-examination, Clark testified that AFSCME owes the duty of fair representation to Employees. R.506a. He admitted that this means he must, as an AFSCME official, act in good faith toward the union members and that he cannot misrepresent the terms of an offer. R.504a. He further acknowledged that AFSCME's Constitution guarantees that union members have the right to pertinent information needed to participate in decisions concerning the acceptance or rejection of collective bargaining contracts and any other agreement affecting the terms and conditions of employment. R.508a.

Clark further admitted that Option 1 contained terms and conditions of employment affecting wages but that AFSCME did not present Option 1 to the

members at the ratification meeting. R.509a–510a. He also admitted that the terms contained in Option 1 would be relevant to the union members when deciding whether to accept or reject a contract. R.509a.

D. The Trial Count Issues a Preliminary Injunction

On March 19, 2019, the trial court granted Employees' motion and issued the preliminary injunction. Order 1–2. In the subsequent 40-page Opinion, the trial court detailed how each of the preliminary injunction prerequisites had been satisfied.

Among other findings, the trial court concluded that Employees had established a clear right to relief, in part, because "[a]ctive misrepresentation [wa]s apparent from the record." Op. 38. Specifically, the evidence demonstrated that AFSCME "concealed from union members . . . and actively misled them concerning the terms of EWW's [F]inal [O]ffer," that AFSCME instead presented "an altered final offer," and that AFSCME "misled members . . . regarding potential consequences in not approving the altered final offer." Op. 35–36. Moreover, the trial court determined that AFSCME's explanations for its conduct was "disingenuous," that Clark's explanation for not presenting Option 1 to Employees was "opaque," that AFSCME had "actively misrepresent[ed] to union members [that] the redacted version was the full extent of [EWW]'s willingness to negotiate," and that AFSCME "continued in this misrepresentation, even in the face of direct questioning by members." Op. 36–37.

As for the nature of the harm facing Employees, the trial court determined that a preliminary injunction was necessary to prevent immediate and irreparable harm, in part, because final approval of the Altered Offer would "undermine the collective bargaining process," "force [Employees] to labor under the terms and conditions of the [Altered Offer]," and "would permanently foreclose [Employees] from seeking relief, including the opportunity to revote on the Final Offer." Op. 38. The trial court rejected AFSCME's argument that harm was speculative, finding that the scheduled vote constituted a threat of immediate, irreparable harm regardless of any uncertainty as to the outcome of the vote. Op. 38. Additionally, the trial court found, EWW was facing pressure from AFSCME to approve the successor CBAs, "tipp[ing] the scales in favor of a vote by EWW to ratify." Op. 38–39.

E. AFSCME Files Unfair Labor Practice Charges with the Pennsylvania Labor Relations Board

As a separate matter, on March 8, 2018, AFSCME filed unfair labor practice charges against EWW pursuant to the Public Employe Relations Act ("PERA"), 43 P.S. § 1101.1201. R.575. AFSCME alleged, among other things, that EWW had improperly engaged in direct dealing with bargaining unit members and had refused to approve the offer ratified by AFSCME membership in bad faith. R.575

On January 31, 2019—over a month after the preliminary injunction motion was filed in this matter—a hearing examiner for the Pennsylvania Labor Relations Board ("PLRB") issued a Proposed Decision and Order ("PDO") recommending to

the PLRB a conclusion that EWW committed certain unfair labor practices involving interference in the collective bargaining process and refusing to bargain in good faith. R.584a–585a. The PDO also recommended that the PLRB order EWW to submit the Altered Offer to EWW's Board of Directors for possible ratification but recognized that the PLRB could not order the Board of Directors to vote in favor of ratification. R.584a–585a.

The PDO stated that "in the absence of any exceptions filed with the Board . . . within twenty days of the date hereof, this decision and order shall be final." R.585a. On February 20, 2019, EWW filed timely exceptions to the PDO. R.587a–591a.

EWW's exceptions were still pending at the time the trial court issued an injunction in this matter; as such, the PDO was nonfinal at that time. Order 1–2. Shortly thereafter, EWW withdrew its exceptions.[9] AFSCME's Br. 21–22. As of the present date, the Altered Offer has not been ratified or implemented by EWW.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's order granting Employees' preliminary injunctive relief because the trial court's order is based on "apparently reasonable grounds" in support of each prerequisite for injunctive relief. *Roberts*, 341 A.2d at 469. The trial court did not abuse its discretion.

[9] Employees agree with counsel for AFSCME that the Commonwealth Court may take judicial notice of this fact. AFSCME's Br. 22.

Furthermore, contrary to AFSCME's contentions, the trial court did not abuse its discretion or otherwise lose its jurisdiction simply because a PLRB hearing officer issued a nonfinal PDO relating to EWW's unfair labor charge against EWW. The PLRB does not have jurisdiction over DFR claims, and the trial court did not otherwise err in issuing the injunction.

Finally, the trial court did not err in his consideration of the AJP's opinion. The AJP did not decide whether AFSCME breached its duty of fair representation. Moreover, Pennsylvania state courts are not required to defer to a union's interpretation of its own constitution. In any event, the court's deference was not required because the AJP's interpretation was patently unreasonable.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BECAUSE REASONABLE GROUNDS SUPPORT ITS ORDER

The trial court did not abuse its discretion in granting the injunction because every prerequisite required for a preliminary injunction is supported by reasonable grounds. *See Greater Nanticoke Area Educ. Ass'n*, 938 A.2d at 1185 ("Finally, we conclude that because some basis exists to satisfy all the prerequisites for a preliminary injunction, no abuse of discretion is apparent."). Therefore, the trial court should be affirmed. *See id.* at 1186 ("[W]e conclude the trial court had reasonable grounds upon which to preliminarily enjoin School Districts . . . Accordingly, we affirm."); *see also Summit Towne Ctr.*, 828 A.2d at 1004–05 (admonishing Superior Court

for not limiting its review of an injunction to "any apparently reasonable grounds" but instead, independently reviewing the record and making credibility determinations that were not accorded by the trial court).

The six essential prerequisites for a preliminary injunction are: (1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction than from granting it, and the issuance of the injunction will not substantially harm other interested parties in the proceedings; (3) the injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the activity to be restrained by the injunction is actionable, the right to relief is clear, and the wrong is manifest, or simply stated, the party seeking the injunction it is likely to prevail on the merits; (5) the injunction must be reasonably suited to abate the offending activity; and (6) the preliminary injunction must not adversely affect the public interest. *Summit Towne Ctr*, 828 A.2d at 1001; *Greater Nanticoke Area Educ. Ass'n*, 938 A.2d at 1183–84.

Potential loss of retirement benefits and undermining of the collective bargaining process represent threats of harm supporting entry of a preliminary injunction. *See Phila. v. Dist. Council 33, AFSCME*, 598 A.2d 256, 260 (Pa. 1991). In *District Council 33*, the Pennsylvania Supreme Court held that the trial court had "apparently reasonable grounds" for ordering an injunction to prevent Philadelphia from unilaterally altering public employees' retirement plans. *Id.* The union had

requested a preliminary injunction to prevent Philadelphia from enforcing a city ordinance which would alter the city's retirement benefit plan in violation of the CBA. *Id.* at 257. The trial court granted the injunction, and this Court affirmed the trial court's order. *Id.* Philadelphia appealed to the Pennsylvania Supreme Court, arguing that AFSCME failed to meet all the requirements for a preliminary injunction. *Id.* at 259.

In affirming this Court, the Supreme Court cited the testimony from the injunction hearing that, if the new plan went into effect, it would result in an "immediate diminution of benefits" to the union members. *Id.* at 260. The Supreme Court also held that the trial court had "apparently reasonable grounds" for finding that the union demonstrated a clear right to relief because any attempt to unilaterally alter provisions of the CBA "effectively render[ed] the process of collective bargaining a nullity." *Id.* at 259–60. Therefore, the trial court's order granting the injunction was affirmed. *Id.* at 261.

Here, as in *District Council 33*, the trial court's opinion provides reasonable grounds based on credible evidentiary support for each prerequisite, Op. 35–40, and should be affirmed.

A. The Injunction Prevented Immediate and Irreparable Harm

The party seeking a preliminary injunction must show that the "injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages." *Summit Towne Ctr.*, 828 A.2d at 1001. Immediate and

irreparable harm exists when an employer changes the terms of a CBA without union support, *District Council 33*, 598 A.2d at 260, or otherwise undermines the collective bargaining process, s*ee id.*; *see also Hoffman ex rel. NLRB v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 369 (2d Cir. 2001) (deciding existence of irreparable harm based on whether "employees' collective bargaining rights may be undermined" by an unfair labor practice).

Additionally, when the threatened harm is a vote procured through unlawful conduct, then an injunction is proper to prevent the vote from taking place. *See Pennsylvania Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255, 1258 (Pa. 2007); *Hempfield Sch. Dist. v. Election Bd. of Lancaster Cty.*, 574 A.2d 1190, 1193 (Pa. Cmwlth. 1990). In *Pennsylvania Gaming Control Board*, the Gaming Control Board approved two slot machine licenses in Philadelphia. 928 A.2d at 1257. In response, Philadelphia enacted an ordinance that would submit a ballot question to qualified voters asking whether the city's home rule charter should be amended to prohibit the location and license of any gaming facility within 1500 feet of residential and other specified districts. *Id.* at 1261. This prompted the Gaming Control Board to request injunctive relief to prevent the ordinance from appearing on the ballot of an upcoming election. *Id.* at 1262.

Before the Pennsylvania Supreme Court,[10] Philadelphia argued that, since the vote had not yet taken place, an injunction "would be merely advisory because it would be rendered before the process is complete" and asked the court to wait until the voters approved the measure before taking up the legal challenge. *Id.* at 1265. The Pennsylvania Supreme Court disagreed, holding that the vote itself was as much a concern to the Gaming Control Board as the outcome of the vote because the vote itself was unlawfully predicated. *Id.* Therefore, the Supreme Court granted the injunction and enjoined Philadelphia from placing the question on the ballot. *Id.* at 1270.

Likewise, in *Hempfield School District*, 574 A.2d at 1190–91, a local election board authorized the placement of a nonbinding referendum on a ballot asking whether the electors favored the school board's plan to build a new high school. The school board filed for an injunction preventing the referendum's placement on a ballot, but the trial court denied the injunction. *Id.* at 1191. On appeal, however, this Court reversed the trial court, holding that, because the election board's action was unlawful, it constituted a threat of immediate and irreparable harm, and there were no reasonable grounds to deny the injunction. *Id.* at 1193.

[10] The Pennsylvania Supreme Court concluded that it had original jurisdiction over the Pennsylvania Gaming Board's petition. *Pennsylvania Gaming Control Bd.*, 928 A.2d at 1264 n.6.

Here, as in *District Council 33*, an injunction was necessary to prevent irreparable harm. AFSCME undermined the collective bargaining process by only presenting the Altered Offer, R.490a–491a, 508a–509a, despite knowing that the Final Offer contained two options, R.510a. As the trial court noted, this caused Employees to lose confidence in their union and to upset the "peaceful labor of union members," harm not compensable by damages. Op. 39. *See District Council 33*, 598 A.2d at 259–60; *see also Hoffman*, 247 F.3d at 369. And regardless of whether EWW's Board voted to approve or reject the Altered Offer, the vote would foreclose Employees' ability to revote on EWW's Final Offer and forever alter the parties' posture, including Employees' terms and benefits of employment, in future contract negotiations. Op. 38.

Moreover, as in *Pennsylvania Gaming Control Board* and *Hempfield School District*, the conduct enjoined—an impending vote brought about by unlawful conduct—was sufficiently immediate for purposes of a preliminary injunction. At the time the injunction was issued on March 19, 2019, EWW would be voting on the Altered Offer at its next meeting scheduled for March 21, 2019. R.468a, R 556a, 558a. This vote was only procured by AFSCME's misrepresentations and breach of the duty of fair representation and, as the trial court determined, was more likely than not to result in approval of the successor CBA. Op. 38–39. Therefore, the trial court's conclusion that the injunction would prevent immediate and irreparable harm not

compensated by monetary damages was supported by the evidence and not an abuse of discretion.

B. Greater Harm Would Have Resulted from Refusing the Injunction

Similarly, here, the trial court did not abuse its discretion in determining that greater harm would follow from refusing the injunction than from granting it. *See Summit Towne Ctr.*, 828 A.2d at 1001 ("[T]he party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings."). If the trial court denied the injunction, then EWW would have voted on the Altered Offer and Employees would be forever prevented from revoting on EWW's Final Offer. Op. 38. But by granting the injunction, AFSCME and EWW suffer no harm; the injunction merely maintains the terms and conditions of employment that have been in effect since the expiration of the CBA on December 31, 2017. *See* R.441a–442a. Neither AFSCME's interests nor EWW's interests are substantially harmed by preserving the same terms and conditions of employment until Employees' claims can be ultimately decided on the merits. And other EWW employees' interests are not harmed because, when a new CBA is ratified, its terms will apply retroactively to January 1, 2018, and such employees will be entitled to every salary increase and benefit included in the new CBA. R.458a–459a.[11]

[11] AFSCME argues that the PLRB's interest is harmed because the injunction "effectively overruled" the PLRB's exclusive jurisdiction. AFSCME's Br. 53. But the

C. The Injunction Preserved the *Status Quo*

A preliminary injunction serves to "put and keep matters in the position in which they were before the improper conduct of the defendant commenced." *In re Appeal of Little Britain*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994). Thus, an injunction "preserves the *status quo* as it existed before the acts complained of, while the Court decides on the merits of permanent injunctive relief." *The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co., Inc.*, 893 A.2d 196, 204 (Pa. Cmwlth. 2006).

There is an important distinction, though, between prohibitory injunctions which enjoin an action that would otherwise change the *status quo*, *Mazzie v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981), and mandatory injunctions which order a positive act "to restore the *status quo* to the 'last actual, peaceable (and) noncontested status which preceded the pending controversy,'" *Shanaman v. Yellow Cab Co. of Phila.*, 421 A.2d 664, 666 (Pa. 1980) (quoting *Commonwealth v. Coward*, 414 A.2d 91, 99 (Pa.

PLRB is not an "interested party" in this case because it has no jurisdiction to adjudicate Employees' DFR claim, *Case v. Hazelton Area Educ. Support Pers. Ass'n*, 928 A.2d 1154, 1161 (Pa. Cmwlth. 2007), no stake in which terms and conditions of employment are imposed on Employees, and no basis to intervene. For the same reasons, granting the injunction did not substantially harm the PLRB even if it were an interested party.

Meanwhile, the PLRB's amicus brief claims the injunction is contrary to the express purpose of PERA. PLRB's Br. 9. But, again, DFR claims are not unfair labor practices under PERA, and the PLRB's jurisdiction does not extend to DFR claims. *Case*, 928 A.2d at 1161.

1980)). Appellate review of prohibitory injunctions involves less scrutiny than review of mandatory injunctions. *Mazzie*, 432 A.2d at 988.

Here, the trial court did not abuse its discretion in issuing a prohibitory injunction and concluding that a preliminary injunction would "properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct." Op. 39. Below, the parties stipulated that the last date of the 2013–2017 CBA was December 31, 2017, and that, in the absence of a successor CBA, AFSCME and EWW were operating pursuant to the terms and conditions of employment set forth in the expired CBA. R.631a; *see* R.437a, 441a–442a. Therefore, just prior to AFSCME's improper conduct, all parties were operating under the expired CBA, precisely the situation that exists under the trial court's injunction. The trial court properly preserved the *status quo* as it proceeds to consideration on the merits.

D. Employees Demonstrated a Clear Right to Relief

"To establish a clear right to relief, the party seeking an injunction need not prove the merits of the underlying claim, but only demonstrate that substantial legal questions must be resolved to determine the rights of the parties." *SEIU Healthcare*, 104 A.3d at 506; *see also Fischer v. Dep't of Pub. Welfare*, 439 A.2d 1172, 1174 (Pa. 1982) ("[S]ince a preliminary injunction is designed to preserve the *status quo* pending final resolution of the underlying issues, it is obvious that the 'clear right' requirement is not intended to mandate that one seeking a preliminary injunction establish his or her claim absolutely."). Where "the other elements of a preliminary injunction are present,

and the underlying claim raises important legal questions, the plaintiff's right to relief is clear." *T.W. Phillips Gas & Oil Co. v. Peoples Nat. Gas Co.*, 492 A.2d 776, 781 (Pa. Cmwlth. 1985).

Here, the trial court did not abuse its discretion in determining that Employees established a clear right to relief because Employees demonstrated the other prerequisite elements for a preliminary injunction and that their DFR claim raised important legal questions affecting the rights of the parties. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (specifying that the duty of fair representation requires that labor unions "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."). Instead, the trial court correctly found that the "evidence strongly suggests" AFSCME concealed from, and misled union members concerning the terms of EWW's Final Offer, and that AFSCME's position to the contrary was "disingenuous." Op. 36.

Indeed, the evidence supported Employees' DFR claim. An AFSCME official testified that AFSCME owes the duty of fair representation to the employees. R.506a. He testified that this means he must act in good faith toward the union members and cannot misrepresent the terms of an offer. R.504a. He further acknowledged that the AFSCME Constitution guarantees that union members have the right to participate, through discussion and vote, in the decision-making process of the union, that union members have the right to pertinent information needed for their participation, and

that they are guaranteed the right to participate in decisions concerning the acceptance or rejection of collective bargaining contracts and any other agreement affecting the terms and conditions of employment. R.507a–508a.

The same AFSCME official admitted that, on December 22, 2017, he received the Final Offer from the EWW negotiating team. R.480a. By stipulation, the parties agreed that the Final Offer contained two options. R.357a–358a, 480a, 629a, 631a, 639a–643a. He admitted that Option 1 contained terms and conditions of employment affecting wages and that, even though Option 1 contained terms and conditions of employment affecting wages, he did not present Option 1 to the members at the ratification meeting. R.509a–510a. Instead, he only presented the Altered Offer. R.490a, 508a–509a. At no point in time did AFSCME present Option 1 or even tell the union members that there was a second option contained within EWW's Final Offer. R.509a–510a.

Conversely, the trial court had grounds to conclude that testimony presented by AFSCME was "disingenuous" and "opaque." Op. 36. AFSCME was not confused about the terms of EWW's Final Offer, nor was its failure to present the Final Offer, including both Option 1 and Option 2, to union members mere negligence. The union official admitted that he received two letters from EWW's lead negotiator reiterating that the Final Offer contained two options, and both letters were admitted as evidence below. R.486a–487a, 503a, 510a–513a, 592a–593a, 627a.

E. The Injunction Was Reasonably Suited to Abate the Offending Activity

The trial court did not abuse its discretion in concluding that the injunction was reasonably suited to abate the offending activity. *See SEIU Healthcare*, 104 A.3d at 509. As the trial court noted, the injunction prevents EWW from holding a vote on the Altered Offer. Order 1–2. Without the injunction, EWW would have voted on the Altered Offer, thereby cementing the harm caused by AFSCME's breach of its duty of fair representation. The only way to prevent that from occurring was to prevent EWW from voting on the Altered Offer. That is precisely what the injunction does. And as the court noted, the injunction provides Employees with the opportunity to fully litigate their claims. Op. 40.

F. Entry of the Injunction Did Not Adversely Affect the Public Interest

Finally, the injunction did not adversely affect the public interest. *SEIU Healthcare*, 104 A.3d at 509. In fact, as the trial court noted, "[t]he record is "devoid of any adverse impact to the public interest." Op. 40. To the contrary, the public interest is served by requiring labor unions to provide for the fair treatment of individual members. *See Falsetti v. Local Union No. 2026, United Mine Workers of Am.*, 161 A.2d 882, 888 (Pa. 1960) ("There is as well as an over-riding *public* interest in promoting well-managed autonomous associations which . . . provide internally for the fair treatment of individual members . . . .").

II. THE TRIAL COURT'S JURISDICTION AND CONCOMITANT POWER TO ORDER THE INJUNCTION IN A DUTY OF FAIR REPRESENTATION CASE IS UNAFFECTED BY A NONFINAL PDO IN A SEPARATE UNFAIR LABOR PRACTICE PROCEEDING

The trial court had jurisdiction to hear Employees' DFR claim and granted injunctive relief in accordance with its jurisdiction. The court did not lose jurisdictional authority simply because a PLRB hearing examiner issued a PDO in a separate unfair labor proceeding—particularly when the PDO did not become final until after the injunction was already ordered.

A. The Trial Court Has Jurisdiction Over Employees' DFR Claim

The Pennsylvania Constitution grants the courts of common pleas with "unlimited original jurisdiction in all cases except as may otherwise be provided by law." PA. CONST. ART. 5, § 5(b); *Martino v. Transp. Workers Union of Phila. Local 234*, 447 A.2d 292, 299 (Pa. Super. 1982). By contrast, the PLRB's jurisdiction is limited under PERA. *See* 43 P.S. § 1101.1301; *Ass'n of Pennsylvania State Coll. & Univ. Faculties v. Bd. of Governors of the State Sys. of Higher Educ.*, 744 A.2d 387, 388–89 (Pa. Cmwlth. 2000).

This Court has clarified that the PLRB is without jurisdiction to resolve DFR claims:

> Individual claims by employees against the union that allege a breach of the duty of fair representation do not qualify as unfair labor practices in violation of PERA. The PLRB's expertise lies in resolving disputes involving alleged violations of the provisions of PERA, not in remedying an individual injustice to an employee by an employee's representative union. Moreover, the duty to bargain in good faith, as required by Section 1201(b)(3) of PERA, 43 P.S. § 1101.1201(b)(3), is owed by the union to the employer ("refusing *to bargain* collectively *in good faith with a public*

> *employer*"), not the individual employee members. (Emphasis added).

Case, 928 A.2d at 1161. Even where a labor dispute may arguably relate to an unfair labor practice, the civil courts do not lose jurisdiction over the legal claims. *See Hollinger v. Dep't of Pub. Welfare*, 365 A.2d 1245, 1249 n.10 (Pa. 1976) ("This rule does not, of course, divest a court of jurisdiction to entertain suits for *breach of contract* merely because the alleged breach may arguably be an unfair labor practice.").

Here, the trial court clearly had jurisdiction to address Employees' DFR claim, and the PLRB clearly did not. The PLRB's jurisdiction to address unfair labor practices under PERA could not, by its very nature, limit the trial court's ability to address an issue squarely within its jurisdiction. And AFSCME never raised any objection to the trial court's initial exercise of that jurisdiction.

Even if there is some practical conflict between the preliminary injunction and the hearing examiner's PDO, the preliminary injunction should prevail. As AFSCME admits,[12] the PDO was issued by a hearing examiner—not the PLRB—and did not become final until *after* the court ordered the injunction. Further, at the time the trial court entered its order, the trial court would have expected EWW's exceptions to continue the administrative proceeding and could not have known that EWW would

[12] *See* AFSCME's Br. 21–22 ("[A]fter the trial court issued the March 19, 2019 Order granting the Motion and Renewed Motion, EWW withdrew its exceptions on April 8, 2019, which made the PLRB Hearing Examiner's January 31, 2019 Order final and binding upon EWW and District Council 85.").

eventually withdraw its exceptions. The trial court also could not anticipate whether EWW or AFSCME would appeal a decision on the exceptions, further prolonging the PDO from becoming a final order. All the trial court knew at the time was that an injunction was necessary to prevent EWW from voting on the Altered Offer as a protection against immediate, irreparable harm, and before the PDO became a final order.

Certainly, AFSCME cannot be arguing that any court, whether it be a court of common pleas or the Commonwealth Court hearing a case in its original jurisdiction, is prohibited from granting injunctive relief on grounds that, at some point in the future, the PLRB, or any other state agency, may issue an order in a tangentially related matter which may create additional obligations on one of the parties concerning a course of conduct. Yet, that is the import of AFSCME's contention when they argue that the trial court erred in granting the injunction because the injunction exposed EWW to conflicting orders. AFSCME's Br. 52. If EWW was exposed to conflicting orders, the conflict only arose after EWW was already enjoined by the trial court from voting on the Altered Offer.

B. Granting the Injunction Was a Proper Exercise of the Trial Court's Jurisdiction

The court of common pleas has the power to grant legal and equitable remedies by its jurisdictional authority. *Sch. Dist. of W. Homestead v. Allegheny Cty. Bd. of Sch. Dirs.*, 269 A.2d 904, 906 (Pa. 1970); *see also District Council 33*, 598 A.2d at 261

(affirming trial court's order granting injunctive relief for labor union in labor dispute with public employer). In a DFR claim seeking equitable relief, the employer must be joined as an indispensable party because the court needs jurisdiction over the employer to effectuate the remedy. *See Martino v. Transp. Workers Union of Phila., Local 234*, 480 A.2d 242, 245 (Pa. 1984).

Here, Employees' sued AFSCME for its breach of its duty of fair representation and are seeking damages as well as equitable relief in the form of a revote on the Final Offer. R.20a–22a. As a party to the CBA, EWW was sued as an indispensable party giving the court jurisdiction over EWW so that the court can grant equitable relief involving both AFSCME and EWW. The trial court's order granting the injunction was a proper use of its authority based on its subject matter and personal jurisdiction over AFSCME and EWW.

III. THE TRIAL COURT WAS NOT REQUIRED TO DEFER TO THE AJP

The trial court was not required to defer to the AJP when determining whether Employees had a clear right to relief because that issue was not decided by the AJP. Furthermore, no state court in Pennsylvania has ever held that courts must defer to a union's interpretation of its own constitution. But even if this Court were to adopt the federal practice of deference, the trial court was not required to defer to the AJP's interpretation because the AJP's interpretation was patently unreasonable.

A. The AJP Did Not Decide Whether AFSCME Breached its Duty of Fair Representation

AFSCME argues that the trial court erred by not giving deference to the AJP's determination on the internal union charges. AFSCME's Br. 36. However, the trial court was correct in stating that the issue before the trial court, specifically, whether AFSCME breached its duty of fair representation, was not the issue before the AJP. Op. 37. The specific issue before the AJP was whether AFSCME representatives violated Article 7 of AFSCME's Bill of Rights. Op. 30 n.19; R.612a n.1. In other words, the trial court's job was to decide whether Employees demonstrated a clear right to relief regarding AFSCME's breach of its duty of fair representation; an entirely separate issue is whether certain union officials violated AFSCME's Constitution. Indeed, it is not clear from the Opinion that the trial court did *not* give deference to the AJP's interpretation.

Even if the trial court did defer to AFSCME's interpretation of Article 7, AFSCME's interpretation that union officials did not violate Article 7 would not absolve the union of its duty to fairly represent Employees. As the trial court noted, "[a]ctive misrepresentation by union leaders is apparent from the record," regardless of whether AFSCME's Constitution was violated. Op. 38. The DFR claim was rooted not just in whether AFSCME violated its Constitution but also in whether it intentionally concealed information from Employees and misrepresented material information concerning their terms and conditions of employment.

B. No State Court in Pennsylvania Has Ever Adopted the Federal Practice of Deference When Interpreting Union Constitutions

AFSCME cannot point to a single Pennsylvania case requiring trial courts to defer to a union's interpretation of its own constitution. Accordingly, it could not have been an abuse of discretion below to have refused to accept AFSCME's invitation, *see Martino*, 480 A.2d at 249 (explaining that federal caselaw arising under federal labor law is instructive but not authoritative on state courts deciding issues of state law), particularly where AFSCME's self-serving interpretation of its Constitution protected its own officials..

C. The AJP's Interpretation of AFSCME's Constitution Was Not Binding on the Trial Court Because its Interpretation Was Patently Unreasonable

Even if this Court were to adopt the federal practice of deferring to union interpretations of their own constitutions—and it should not—the trial court was not required to defer to the AJP when deciding whether AFSCME violated its own constitution because the AJP's interpretation was patently unreasonable. Simply, this is not a case in which it would make sense to defer to AFSCME's interpretation.

Here, the record before the trial court is clear: Article 7 guarantees that members have the right to all "pertinent information . . . concerning the acceptance or rejection of collective bargaining contracts . . . or other agreements affecting their wages, hours, or other terms and conditions of employment."[13] R.37a. AFSCME stipulated that Article 7 applies to Local 2206 and District Council 85, R.631a, and the testifying union official admitted that is what Article 7 requires, R.507a–508a.

[13] The full text of Article 7 is set forth at p. 7, *supra*.

Option 1 was included in EWW's Final Offer and contained provisions affecting wages, hours, and other terms and conditions of employment. R.642a–643a. AFSCME admitted as much. R.509a. But AFSCME chose not to present Option 1 to Employees even though Article 7 guarantees union members the right to information concerning agreements affecting wages, hours, or other terms and conditions of employment. R.509a–510a.

Yet the AJP concluded that AFSCME did not violate Article 7 "when they did not bring back the employer's final offer with both options to the membership." R.616a. This conclusion is contrary to the "stark and unambiguous language" of Article 7 because concealing the terms of a final offer during a ratification meeting is exactly the type of conduct Article 7 prohibits. *Noble v. Sombrotto*, 525 F.3d 1230, 1235 n.1 (D.C. Cir. 2008) (quoting *Loretangeli v. Critelli*, 853 F.2d 186, 194 (3d Cir. 1988)).

In accordance with the trial court's obligation, it considered AFSCME's argument regarding the AJP and concluded that any contention that trial court could not find a "clear right to relief" was "baseless and belied by the record." Op. 37. In other words, when AFSCME misrepresented the terms of EWW's Final Offer and chose to conceal Option 1—an option containing terms and conditions of employment—AFSCME violated the "stark and unambiguous" language of Article 7. *Noble*, 525 F.3d at 1235 n.1. Therefore, even under the federal practice, the trial court was not required to defer to the AJP when concluding that Employees' demonstrated a clear right to relief.

CONCLUSION

The trial court correctly concluded that Employees satisfied their burden for preliminary injunctive relief because each prerequisite was supported by the evidence and testimony. Therefore, the court's order was not an abuse of discretion, nor did the court rely on an erroneous or misapplied principle of law. Furthermore, the trial court did not lose jurisdiction to grant Employees' injunctive relief due to a subsequent final order issued by the PLRB in a separate matter or otherwise err with respect to consideration of the AJP's interpretation of AFSCME's Constitution. Thus, the Commonwealth Court should affirm the trial court's order granting Employees' injunctive relief and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the word count limits of Pennsylvania Rule of Appellate Procedure 2135(a)(1). This brief contains 8,003 words, according to the word count feature of the word processing program used to prepare this brief.

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