MARK KIDDO, JOAN HORDUSKY, MIKE DZURKO, CHRISTINE ARNONE, JENNIE CLAY, MADELYN GROOVER, MELISSA GUZOWSKI and JEFF GRANGER, Plaintiffs	:	IN THE COURT OF COMMON PLEAS
v.	:	OF ERIE COUNTY, PENNSYLVANIA
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2206; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 85; RANDY PROCIOUS in his official capacity; SHANE CLARK in his official capacity; and ERIE WATER WORKS, Defendants	:	CIVIL DIVISION
	:	NO. 13144-2018

MEMORANDUM OPINION

The matter came before the Court on the Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Renewed Motion for Preliminary Injunction and Requesting Emergency Relief. Plaintiffs allege the American Federation of State, County and Municipal Employees (AFSCME), Local 2206; AFSCME District Council 85; and union officials, Randy Procious and Shane Clark in their official capacities (collectively, union Defendants), breached a duty of fair representation to Plaintiffs, members of AFSCME Local 2206, by 1) concealing from them at the January 11, 2018 membership meeting and actively misleading them about the complete terms of the Erie Water Works' (EWW's) final offer for a new collective bargaining agreement (CBA) as presented by EWW to union leaders on December 22, 2017; 2) presenting to Plaintiffs on January 11, 2018, an altered final offer which differed from EWW's final offer in material respects; and 3) misleading members the January 11, 2018 membership meeting regarding

potential consequences in not approving the altered final offer. Plaintiffs allege they would not have approved Option #2 of the final offer on January 11, 2018, had they known the final offer as submitted by the employer, EWW, also included Option #1.

Plaintiffs requested injunctive relief 1) to prevent EWW from executing the proposed CBA which AFSCME local 2206 members had approved on January 11, 2018, and 2) to prevent AFSCME from imposing union discipline or pursing charges against union members for pursuing their rights.

Prior to the hearing initially scheduled for December 27, 2018, the parties informed the Court that union Defendants agreed not to initiate any internal union charges against Plaintiffs arising out of the events at issue "for the pendency of the litigation." The parties proposed February 26, 2019 as the rescheduled date of the hearing on the motion, and advised the Court that EWW agreed to refrain from holding a ratification vote until after that date. *Joint Motion to Modify Hearing Date, ¶¶ 4-6.* The Court rescheduled the hearing to occur February 26, 2019. A hearing was held on February 26, 2019, and was ultimately continued to March 19, 2019 for presentation of additional testimony.

On March 7, 2019, Plaintiffs filed a Renewed Motion for Preliminary Injunction and Requesting Emergency Relief.[1] The basis of the renewed motion was Plaintiffs had recently learned EWW scheduled a vote to occur on March 21, 2019 on whether to accept or reject Option #2 as voted upon on January 11, 2018. *Plaintiffs' Renewed Motion.* Plaintiffs advised the date of EWW's scheduled vote was well before the date which had been originally set for the continued hearing on the Motion for Preliminary Injunction. *Plaintiffs' Renewed Motion.*

[1] In the motion, Plaintiffs acknowledged that the union Defendants' agreement not to initiate charges against Plaintiffs (arising out of the events at issue) effectively vitiated the need for injunctive relief for the purpose of preventing AFSCME from imposing union discipline or pursuing charges against union members. *Plaintiffs' Renewed Motion for Preliminary Injunction and Requesting Emergency Relief (Plaintiffs' Renewed Motion).*

In the motion, Plaintiffs reasserted irreparable harm to them would occur if EWW ratified a new collective bargaining agreement containing Option #2. *Plaintiffs' Renewed Motion, ¶¶12-13.* Plaintiffs asserted a vote by EWW to approve Option #2 would permanently foreclose Plaintiffs from seeking equitable relief, including the opportunity to re-vote on the Final Offer which included both Option #1 and Option #2 as originally submitted by EWW. *Plaintiffs' Renewed Motion, ¶16.* Plaintiffs thus asserted the elements required for the Court to grant injunctive relief were met. Plaintiffs requested the Court to rule on the Motion for Preliminary Injunction prior to March 21, 2019. *Plaintiffs' Renewed Motion, ¶¶14-17.* The continued evidentiary hearing was rescheduled to and occurred on March 15, 2019.

Upon consideration of the motions, the parties' written submissions and the evidentiary record, on March 19, 2019, the Court preliminarily enjoined EWW from voting on any contract or agreement with union Defendants. This Memorandum Opinion is in support of the Order of March 19, 2019 granting preliminary injunctive relief to Plaintiffs.

BACKGROUND

All Plaintiffs, with the exception of Plaintiff Joan Hordusky, are current employees of Defendant EWW; they are members of Defendant American Federation of State, County and Municipal Employees, Local 2206 (AFSCME Local 2206), and each is a "public employe" for purposes of the Public Employe Relations Act (PERA).[2] Plaintiff Joan Hordusky was an employee of Defendant employer and an AFSCME Local 2206 member from January 11, 2018 through her retirement on October 30, 2018.

The Defendants are American Federation of State, County and Municipal Employees, District Council 85 (AFSCME District Council 85), the exclusive collective bargaining agent or

[2] The definition of "public employe" is at 43 P.S. §1101.301(2).

representative for a bargaining unit of professional and white-collar non-professional employees of EWW; AFSCME Local 2206, an affiliate of District Council 85 which includes the bargaining unit employees at EWW; AFSCME union officials, Randy Procious and Shane Clark, in their official capacities; and Erie Water Works (EWW). Defendant Procious is the President of AFSCME Local 2206. Defendant Clark is a staff representative for AFSCME District Council 85. Defendant Erie Water Works is a municipal authority of the City of Erie, Pennsylvania, with its principal place of business in Erie and a "public employer" for purposes of PERA.[3]

The Complaint

On December 5, 2018, Plaintiffs filed a Complaint against Defendants which provides context to the issues raised in Plaintiffs' requests for injunctive relief and Defendants' responses thereto, and shall therefore be summarized herein.[4]

Plaintiffs allege AFSCME (and all Defendants) breached a duty of fair representation to Plaintiffs by failures to act in good faith, in a reasonable manner and without fraud and violated Paragraph 7 of AFSCME's "Bill of Rights for Union Members".[5] Plaintiffs allege the breach of

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[3] The definition of "public employer" is at 43 P.S. §1101.301(1).

[4] No Answer to the Complaint has been filed. Preliminary Objections were filed after the Motion for Preliminary Injunction was filed.

[5] Paragraph 7 of AFSCME's "*Bill of Rights for Union Members*" provides:

> **Constitution of the American Federation of State, County and Municipal Employees, AFL-CIO**
>
> ...
>
> **Bill of Rights for Union Members**
>
> ...
>
> 7. 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. All members shall have an equal right to vote and each vote shall be of equal weight.

Stipulation of Exhibits and Facts dated February 26, 2019 (Stipulation), Exhibit A.

duty occurred when union officials presented to the members at a meeting on January 11, 2018 some, but not all, terms of the Defendant employer's "Final Offer" to resolve negotiations over a new collective bargaining agreement (CBA) between the Defendant employer, EWW, and AFSCME Local 2206 to replace the previous CBA which expired on December 31, 2017.

Plaintiffs assert that before or during negotiations over the new CBA, they notified AFSCME officials and/or members of AFSCME's negotiation team they wanted the new or successor CBA to include certain terms. These terms included provision for "post-employment subsidies" and/or certain other benefits. *Complaint, ¶¶23-24.* Plaintiffs allege that on December 22, 2017, Defendant employer presented to the AFSCME negotiation team a final offer in the form of a written document entitled "Final Offer".[6] The Final Offer contained two options with respect to, among other things, wages, health care, and retirement benefits. These options were labeled and described in the Final Offer as "Option #1" and Option #2". *Complaint, ¶¶25-27.*[7]

Plaintiffs allege AFSCME's negotiation team knew the employer's Final Offer included both Option #1 and Option #2. Plaintiffs allege that prior to the January 11, 2018 meeting during which a vote by the members on the employer's offer was to be had, the employer informed union negotiators the employer intended the entire Final Offer containing both options to be presented to the members at the January 11th meeting. Communications ensued between the employer and union leaders over whether this would occur or whether, instead, AFSCME's negotiation team would present to AFSCME local members an altered final offer which only included Option #2. *Complaint, ¶¶31-33.*

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[6] EWW's Final Offer was appended to the Complaint as Exhibit D.

[7] "Option #1" included a 3.00% wage increase beginning in 2018, a post-employment subsidy of $400.00 per month, and a 457(b) retirement plan for new hires. "Option #2" differed from "Option #1" in that "Option #2" included a lesser wage increase (2.50%) beginning in 2018, no post-employment subsidy, and a pension plan for new hires instead of the 457(b) retirement plan. *Complaint, ¶¶28-29.*

At the meeting on January 11, 2018, AFCME leaders presented to AFSCME members an altered final offer which only included Option #2. *Complaint, ¶¶35-38.* Plaintiffs allege heated discussion took place at the meeting concerning some or all of the terms of employment which Plaintiffs wanted in the new CBA but were absent from the altered offer presented to AFSCME Local 2206 members.

Plaintiffs assert that at the January 11, 2018 meeting, AFSCME leaders failed to inform them the Defendant employer's Final Offer, as originally conveyed by Defendant employer to the AFSCME negotiation team, included Option #1 which contained the terms desired by Plaintiffs. Plaintiffs allege AFSCME leaders failed to inform Plaintiffs the Defendant employer was willing to agree to a successor CBA which included the terms in Option #1. Plaintiffs assert AFSCME leaders actively misled them with regard to potential consequences that could befall them if AFSCME Local 2206 failed to approve the altered offer which only included Option #2. On January 11, 2018, Plaintiffs approved Option #2 without knowing the original Final Offer also included Option #1 which included the terms they desired. *Complaint, ¶¶38-45.*

Plaintiffs assert that on approximately February 8, 2018, they learned the Final Offer as originally communicated by the employer included both Option #1 and Option #2. Between February 14, 2018 and February 15, 2018, Plaintiffs requested of the union the opportunity for a re-vote and to formally decide between Option #1 and Option #2. Plaintiffs allege the union leaders denied the requests. *Complaint, ¶¶48-50.*

Plaintiffs allege union Defendants breached a duty of fair representation to Plaintiffs for reasons including, *inter alia,* 1) AFSCME removed Option #1 from EWW's Final Offer and on January 11, 2018, presented only Option #2 to AFSCME Local 2206 members and represented it as being the entirety of EWW's final offer, and 2) AFSCME denied members' requests for a)

cancellation of the voting held on January 11, 2018 and b) the opportunity to revote on the entirety of EWW's Final Offer which included both Option #1 and Option #2. *Complaint, ¶¶3-4; ¶¶37-52.*

The Complaint further alleges that in February, 2018, Plaintiff Kiddo, on behalf of himself and other AFSCME Local 2206 members, filed a grievance with the union regarding this matter. On June 4, 2018, a hearing on the grievance was held before AFSCME Judicial Chairperson Richard Abelson who dismissed the charges against Defendants Procious and Clark on July 20, 2018. On October 9, 2018, the AFSCME Judicial Panel sustained the decision. Plaintiffs' assert that, per AFSCME's Constitution, any appeal from the Judicial Panel cannot be reached until the next International Convention during the summer of 2020. *Complaint,* ¶¶ 52-58; *Complaint, Exhibits K (Official Grievance Form); L (Notice Letter) and M (Decision of Judicial Panel Chairperson R. Abelson, AFSCME, AFL-CIO, July 20, 2018).* Plaintiffs claim exhaustion of all internal available remedial measures reasonably required. *Complaint,¶51.*

AFSCME's charge with the Pennsylvania Labor Relations Board against EWW

On or about March 8, 2018, before the Complaint and the Motion for Preliminary Injunction were filed, AFSCME filed a charge with the Commonwealth of Pennsylvania Labor Relations Board (PLRB), alleging the Defendant employer violated the Public Employee Relations Act (PERA), 43 P.S. §§1101.101 *et seq.*, for various alleged infractions with regard to this matter. As the charge and outcome provide further context to the issues raised in Plaintiffs' requests for injunctive relief and Defendants' responses thereto, these matters shall also be summarized herein.

AFSCME alleged EWW committed unfair practices by, among other things, "reneging on the understanding reached at the bargaining table regarding submission of EWW's final offer to a vote of the Union membership, and attempting to negotiate directly with the employees." AFSCME sought an order from the PLRB directing EWW to ratify and implement the terms of employment in Option #2 which the members voted upon on January 11, 2018. *Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction (Defendant's Memorandum of Law), page 3.*

A hearing on AFSCME's charge was held on July 11, 2018 before a PLRB hearing officer. *Id.* On January 31, 2019, PLRB Hearing Examiner John Prozniak issued a Proposed Decision and Order, determining EWW engaged in unfair labor practices by refusing to hold a ratification vote on Option #2, and by requiring the union to take the choice of Option #1 or Option #2 to the members. *Defendants' Exhibit. 2, PLRB Proposed Decision and Order of January 31, 2019 (PLRB Proposed Decision and Order).* In the Proposed Order, Examiner Prozniak directed EWW to, *inter alia,* "[i]mmediately 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 the Authority's Board of Directors for ratification[.]" *Defendants' Exhibit. 2, PLRB Proposed Decision and Order, p. 11, ¶3(a).*

On or about February 20, 2019, EWW filed Exceptions to the Proposed Decision and Order of January 31, 2019. *Defendants' Exhibit 3; Defendants' Supplemental Memorandum of Law in Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction.*[8]

[8] At the hearing held on March 15, 2019 before the undersigned, the parties advised EWW's appeal/exceptions with the PLRB remained pending.

Union Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction

On January 7, 2019 (prior to issuance of the PLRB Proposed Decision and Order), union Defendants filed a Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction. Concurrently, union Defendants filed an Affidavit of Defendant Shane Clark. Defendants cited to the Affidavit of Defendant Shane Clark (Affidavit of Clark) in their Memorandum of Law. A significant portion of Defendants' Memorandum addresses communications among EWW, union officials and union membership *following* the January 11, 2018 membership meeting. Defendant's assertions are summarized herein.

1. Union Defendants characterize Plaintiff's Motion for Preliminary Injunction "as it pertains to EWW's execution of CBA, [as] plainly an improper attempt at an end-run around PLRB's exclusive jurisdiction to determine whether the Union's requested order is appropriate to remedy an unfair practice it may find." *Union Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction (Union Defendants' Memorandum), p. 3; Affidavit of Clark, ¶6.*

2. With regard to Plaintiffs' request for injunctive relief in the nature of an Order preventing AFSCME from imposing union discipline or pursing charges against Plaintiffs for pursuing their rights, union Defendants assert this claim of harm is speculative and "on December 20, 2018, Union Defendants confirmed ... [they] will not initiate any internal union charges against Plaintiffs arising out of the events at issue in the above-referenced litigation for the pendency of the litigation." *Union Defendants' Memorandum, pp.3-4.*

3. According to union Defendants, on December 22, 2017, EWW submitted a Final Offer with two options wherein EWW advised "the Union will select one of the following options to apply to all of its members." *Defendants' Memorandum, p.5, Affidavit of Clark, ¶6.* Essentially, union Defendants take the position it was not obligated to submit both elements of EWW's final offer to union membership at the January 11th membership meeting because:

    a) EWW did not state AFSCME was to submit both Option #1 and Option #2 to the bargaining unit employees for them to choose between the two options, *Union Defendants' Memorandum, p. 5, Affidavit of Clark, ¶7;*

    b) The union did not agree to submit both Option #1 and Option #2 to the union members, *Union Defendants' Memorandum, p. 5, Affidavit of Clark, ¶7;* and

c) Union Defendant Clark (staff representative for AFSCME District Council 85) advised the EWW negotiation team the union decided to present Option #2 to union members to vote upon; union Defendant Clark asked the Defendant employer to re-format the Final Offer to exclude Option #1 and merely show Option #2; the parties "shook hands" and the meeting ended. *Union Defendants' Memorandum, p. 5, Affidavit of Clark, ¶8.*

4. On January 4, 2018, Attorney Wassell emailed a cover letter and a reformatted Final Offer containing Option #1 and Option #2 to Defendant Clark. Wassell reiterated the Final Offer contained two options; advised EWW is allowing the bargaining unit which option to accept; and advised if either option was accepted by January 10, 2018, the CBA would be retroactive to January 1, 2018.[9] *Union Defendants' Memorandum, p. 6, Affidavit of Clark, ¶9.*

5. On January 5, 2018, Defendant Clark sent an email to Attorney Wassell, inquiring why the reformatted Final Offer still included both options. Clark advised the union negotiation team selected Option #2, and inquired why both options remained in the Final Offer. *Union Defendants' Memorandum, p. 6, Affidavit of Clark, ¶10.*

6. On January 8, 2018 there was an email exchange between Aaron Stankiewiz, human resources manager of EWW, and Defendant Clark, wherein Clark advised: he had not received a response to his email of January 5, 2018; the union negotiation team selected Option #2; and there seemed to be confusion on the part of Defendant EWW. *Union Defendants' Memorandum, p. 6, Affidavit of Clark, ¶11.*

7. In response, on January 8, 2018, Stankiewiz sent an email to Clark, advising Stankiewiz understood that Clark/union officials selected Option #2; Wassell provided the final offer in writing with some minor clarifications which Stankiewiz and Clark had discussed; EWW can't control how this information is presented to union membership; and EWW provided the final offer in writing as it was presented "at our last meeting." Stankiewiz advised he was unsure what else Clark sought, and requested clarification from Clark. *Union Defendants' Memorandum, pp. 6-7, Affidavit of Clark, ¶12.*

8. Wassell responded to the exchange between Clark and Stankiewiz, advising the offer was the Final Offer which contained two options, and EWW expected the Final Offer comprised of both options to be presented to the members. *Union Defendants' Memorandum, p. 7, Affidavit of Clark, ¶13.*

9. Clark responded by email advising the union negotiation team selected Option #2; AFSCME would present Option #2 to the bargaining unit for a vote; and "we" would be doing their best to hold the vote by the end of the week. *Union Defendants' Memorandum, p. 7, Affidavit of Clark, ¶14.*

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[9] Union Defendants advised the retroactivity deadline was later extended to January 12, 2018. *Union Defendants' Memorandum, p. 6.*

10. On February 8, 2018, EWW wrote to the bargaining unit employees themselves, advising that EWW learned after-the-fact the union presented only Option #2 of the Final Offer to the members at the January 11, 2018 meeting. EWW attached to the letter documents labeled Option #1 and Option #2. In the letter, EWW advised it intended to submit the currently-approved version of Option 2 of the Final Offer for a ratification vote by EWW's Board of Directors on February 15, 2018. *Union Defendants' Memorandum, pp. 7-8, Affidavit of Clark, ¶¶18-19.*

11. On February 15, 2018, Plaintiff Kiddo wrote to representatives of the employer and to Defendants Clark and Procious, requesting on his behalf and on behalf of 13 union members the opportunity to re-vote on the employer's entire Final Offer before EWW's scheduled ratification vote later that day. The basis of the request was the union negotiation team did not inform voting members at the meeting on January 11, 2018 there were two options to the Final Offer, and the members did not know there were two options when they voted. *Union Defendants' Memorandum, p. 9, Affidavit of Clark, ¶20.*

12. In response, on February 15, 2018, EWW advised it would hold off in presenting the proposed CBA to EWW's Board of Directors, "to afford you time to work out your concerns." *Union Defendants' Memorandum, p. 9, Affidavit of Clark, ¶21.*

13. As of the filing of Defendants' Memorandum of Law, the Board of Directors of EWW had not voted on the proposed CBA. *Union Defendants' Memorandum, p. 9, Affidavit of Clark, ¶22.*

14. On March 8, 2018, the union filed a charge with the PLRB, alleging EWW violated various provisions of the PERA. A hearing on the charge was held before PLRB Hearing Examiner on July 11, 2018. As of the filing of Defendants' Memorandum of Law, the PLRB Hearing Examiner had not issued a decision. *Union Defendants' Memorandum, pp. 10-11, Affidavit of Clark, ¶¶22-26.*

15. Defendants assert Plaintiffs cannot meet the requirements for issuance of a preliminary injunction because:

    a. Defendants assert Plaintiffs cannot establish immediate, irreparable harm. Defendants assert since neither execution by EWW of the ratified CBA, nor the imposition of union discipline or charges by union Defendants is impending, the alleged harms are speculative and this element cannot be met. *Union Defendants' Memorandum, pp.12-17.*

    b. Defendants assert Plaintiffs failed to establish a clear right to relief with regard to either the internal union discipline issue or "the [e]mployer's [e]xecution of the CBA." With regard to the employer's potential ratification of the CBA approved in January, 2018, Defendants assert Plaintiffs' request for injunctive relief amounts to a request for an Order enjoining EWW from complying with any remedy ordered by a PLRB Hearing Examiner with regard to the union's unfair

practices claims against the employer. Defendants assert the PLRB has exclusive jurisdiction to decide unfair practice cases arising under PERA. *Union Defendants' Memorandum, pp.18-20.* Defendants also assert there is no evidence AFSCME's selection of Option #2 for presentation to union members for a ratification vote was in some way unlawful, because the union had no obligation under PERA to submit to a vote by members a proposal it is unwilling to accept. *Union Defendants' Memorandum, p. 20.*

c. Defendants also assert Plaintiffs cannot show greater injury from refusing the injunction than from granting it; an injunction is not needed to preserve the status quo; an injunction would not abate the offending activity; and injunctive relief would be contrary to the public interest. *Union Defendants' Memorandum, pp. 21-23.*

Union Defendants' Supplemental Memorandum of Law in Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction

On March 11, 2019, union Defendants filed a Supplemental Memorandum of Law in Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction. Defendants did not dispute that EWW scheduled a vote to occur on March 21, 2019 on the proposed CBA with Option #2. However, Defendant's asserted the alleged harm arising from an upcoming vote was 1) speculative in that the outcome of the vote was unknown until it occurred, and 2) economic in nature. For these reasons, Defendants asserted no threat of immediate, irreparable harm existed. *Defendants' Supplemental Memorandum of Law in Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction (Defendants' Supplemental Memorandum).*

FACTUAL FINDINGS

I. Hearing Held on February 26, 2019

At the February 26, 2019 hearing, the parties presented a Stipulation of Exhibits and Facts dated February 26, 2019 (Stipulation) which was admitted into the record. Plaintiffs presented the testimony of Plaintiffs Mark Kiddo, a customer service representative of EWW, and Jennie Clay, an operations clerk with EWW. Plaintiffs also presented testimony from Aaron

Stankiewiz, the human resources manager of EWW. Admitted into the record as Plaintiffs' Ex. 1 were Affidavits of Mark Kiddo, Christine Arnone, Jennie Clay, Joan Hordusky, Madelyn Groover, Melissa Guzowski, Mike Dzurko and Jeff Granger.

Admitted into the record as Union Defendants' Exhibits were the following: Union Defendants' Exhibit No. 1 was correspondence of February 8, 2018 from Paul D. Vojtek, CEO and CFO of the Defendant employer, EWW, to "Mark" with attached summaries of Options 1 and 2. Union Defendants' Exhibit No. 2 was the Proposed Decision and Order of January 31, 2019 of John Posniak, Hearing Examiner, PLRB. Union Defendants' Exhibit No. 3 was EWW's "Exceptions to Proposed Decision and Order Dated January 31, 2019."

A. Stipulation of Exhibits and Facts

On February 26, 2019, the parties stipulated to the following facts.

From January 1, 2013 to December 31, 2017, Plaintiffs worked under the terms and conditions of employment set forth in a CBA between EWW and District Council 85. The most recent CBA expired December 31, 2017.

Prior to the expiration of the CBA, District Council 85 and EWW began negotiations over a successor CBA. District Council 85's negotiating team included Defendant Shane Clark, a staff representative for AFSCME District Council 85 and the individual who served as "chief negotiator". District Council 85's negotiating team also included the following members of AFSCME Local 2206: Defendant Randy Procious, President of AFSCME Local 2206; Kim Range, Vice President of AFSCME Local 2206; and Tamura Squire and Brian Zilonka, employees of Defendant EWW.

Defendant EWW's negotiating team was comprised of three persons: Mark Wassell, Esq., EWW's chief negotiator; Aaron Stankiewiz, EWW's Human Resources Manager; and Ronald Constantini, EWW's Manager of Administration.

The last formal negotiation or bargaining session between EWW and union officials occurred on December 22, 2017, at which time Defendant EWW presented a "Final Offer" to the District Council 85 negotiating team. A photocopy of EWW's "Final Offer" was appended to the parties' Stipulation of Exhibits and Facts (Stipulation) as Exhibit B. EWW's "Final Offer" was clearly comprised of two components labeled or denoted as "Option #1" and "Option #2." *Stipulation of Exhibits and Facts dated February 26, 2019 (Stipulation), Exhibit B.*[10]

The Stipulation further provided that on January 11, 2018, District Council 85's negotiating team presented only "Option #2" of the Final Offer to AFSCME Local 2206 membership. The membership held a vote and approved "Option #2".

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[10] Exhibit B reflects EWW's "final offer" and was formatted as a four (4)-page document consisting of:

> Page 1 - a cover page, entitled "Erie Water Works and Local Union 2206 AFSCME, AFL-CIO, Final Offer, December 22, 2017";
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> Page 2 - a page with Item Nos. 1 through 4;
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> Page 3 - a page with Item No 5, Cellular Telephone Use Policy, and the following language: "In addition to the foregoing five items, the Union will select one of the following options to apply to all of its members: Option #1". Following this verbiage, under the heading "Option #1" the third page went on to list Item Nos. 6 through 9. Item No. 6 pertained to a five-year agreement; Item No. 7 concerned percentage increases in wages from 2018 through 2022. Item No. 8 concerned replacing the pension with a "457(b)" plan for certain employees and the employer's match of employees' contributions. Item No. 9 concerned a post-retirement subsidy of $400.00 per month.
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> Page 4 – a page which continued with the list of items as follows: Item No. 10 which concerned EWW's proposal for the monthly employee contribution to health care, and Item No. 11 which concerned the union's proposal for a wage premium for certain employees. Next, the heading, "OPTION #2" appeared. Beneath this heading, Item Nos. 6 and 7 were listed. Item No. 6 pertained to a four-year agreement. Item No. 7 concerned percentage increases in wages from 2018 through 2021. No further items were listed and the document ended half-way down on Page 4.

Stipulation, ¶¶ 18-23 and Exhibit B.

A photocopy of "Option #2" as presented to AFSCME Local 2206 membership on January 11, 2018, was appended to the Stipulation as Exhibit C.[11] Exhibit C does not include any of the terms of Option #1 of EWW's "Final Offer".

As of February 26, 2019, the date of the Stipulation of Exhibits and Facts, EWW had not yet approved or implemented "Option #2". EWW and District Council 85 have continued to operate under the terms of the most recent CBA which expired December 31, 2017.

Stipulation, ¶¶ 24-26 and Exhibit C.

The parties also stipulated AFSCME's International Constitution and Bill of Rights for Union Members applies to Defendants AFSCME District Council 85 and AFSCME Local 2206.

Stipulation, ¶17.

B. Testimony of Plaintiff Mark Kiddo, Local 2206 Member and Customer Service Representative of EWW

Mark Kiddo is a Customer Service Representative at EWW. He has been employed by EWW and a member of AFSCME Local 2206 for 17 years. AFSCME represents white collar employees of EWW and the City of Erie. Another union, the Teamsters, represents blue collar workers such as laborers and repair persons. *Transcript of Proceedings, February 26, 2019 (Tr. Day 1), pp. 16-18.* Approximately 18 to 21 employees of EWW are in the AFSCME bargaining unit. Defendant Randy Procious, current president of AFSCME Local 2206, is not an employee of EWW. Procious is employed by the City of Erie; he operates under a separate collective bargaining agreement for City of Erie employees; he is not bound by EWW's CBA with Local 2206; and he was on the AFSCME Local 2206 negotiation team for the most recent round of

[11] Exhibit C is a five (5)-page document captioned, "Option #2". It identifies and describes, sometimes in greater detail than EWW's "final offer", Item Nos. 1 through 5 of the "final offer". It also includes "Option #2" of the "final offer" which option contained only two items: Item Nos. 6 (a four-year agreement) and 7 (percentage increases in wages from 2018 through 2021). *Stipulation, Exhibit C.*

negotiations with EWW. AFSCME Local 2206 has been without a union steward for a number of years. *Tr. Day 1, pp. 18-20.*

The most recent CBA between EWW and AFSCME Local 2206 expired December 31, 2017. Kiddo was not part of the negotiation team for the expired CBA. The negotiation team for the expired CBA (the terms pursuant to which the parties continued to operate) had provided Kiddo with updates about negotiations and spoke with him about matters he wanted included in that CBA. During negotiations for the expired contract, the negation process was: members were provided options regarding the length of the contract; the business agent made a recommendation; and the membership selected the option they wanted. *Tr. Day 1, pp. 21-23.*

In contrast, during the most recent round of negotiations in late 2017 for a new CBA, the AFSCME Local 2206 negotiation team did not meet with Kiddo or other union members to discuss the status of negotiations over the new contract or provide union members with negotiation progress updates. Kiddo wanted the new contract to include a "post-employment subsidy", that is, a monthly payment of $300.00 to EWW retirees from date of retirement until eligibility or receipt of Medicare benefits. Kiddo believed it was fair to request this benefit because the administration at EWW and the Teamsters members had this benefit. Kiddo testified the post-employment subsidy would provide Kiddo with payments totaling from $25,000.00 to $28,000.00, assuming he retired in three years at age 59 and collected the subsidy until he become eligible for Medicare. In response to an inquiry, Kiddo notified the union by email he wanted a post-employment subsidy included in the new contract. He also spoke about it with Brian Zilonka, a negotiation team member. *Tr. Day 1, pp. 23-26.*

Kiddo was one of 18 AFSCME Local 2206 members who attended the membership meeting on January 11, 2018. The entire AFSCME Local 2206 negotiation team attended the meeting as well: Tammy Squire, Brian Zilonka, Shane Clark, Randy Procious and Kim Range. During the meeting, negotiation team members did most of the talking; they presented as the employer's final offer a document entitled Option 2. Kiddo did not recognize the title of the document until later due to all the strike-outs on the document. *Tr. Day 1, pp. 27-30.* Not seeing a post-employment subsidy as an option in the proposed contract, Kiddo inquired about it. Kiddo testified the meeting, which lasted from 1 to 1.5 hours, became "chaotic" and its tone contentious. One or more union leaders informed union members they could lose their pensions if they pushed the topic of a post-employment subsidy. Another leader, Kim Range, shouted out that Kiddo was selfish. Defendants Procious and Clark told union members that if Option 2 was rejected, union negotiators would have to go back to the bargaining table and union members might lose benefits or might have to work nights or weekends. *Tr. Day 1, pp. 30-34.*

At no time during the meeting of January 11, 2018, did union leadership inform Kiddo or union members that EWW's Final Offer included two options; that Option #1 included the post-employment subsidy Kiddo had inquired about; or that Option #1 included a larger raise than what was offered in Option #2. Kiddo testified this information would have affected his vote. The only offer presented to union members for discussion and a vote was the offer Kiddo testified to, Option #2, which did not include these features. The final vote tally was 15 in favor, three opposed. Kiddo was one of three who voted against the offer. Kiddo voted against the offer because he felt the union could have done better during negotiations, seeing that the administration and the Teamsters were both successful in negotiating a post-employment subsidy in their contracts. *Tr. Day 1, pp. 34-35.*

Approximately one week later, Kiddo and the other members received a letter from Mr. Voytek, CEO of EWW, advising the employer's Final Offer contained two options, including Option #1 which offered the post-employment subsidy, and a higher raise. Option #1 did not require members to work weekends or forfeit pensions. Had Kiddo been presented with Option #1 at the January 11th meeting, Kiddo testified he would have voted for it. After receiving the letter, Kiddo and 12 other AFSCME members employed by EWW who attended the January 11th meeting requested AFSCME, via email to Defendants Procious and Clark, to provide them an opportunity to re-vote on the complete Final Offer as originally submitted by EWW. Defendants Procious and Clark denied the request. A hearing was held on the matter before the AFSCME Judicial Panel, who also denied the request. Kiddo testified the harm to union members due to AFSME's concealment of Option #1 and AFSCME's denial of the request for a re-vote included the absence of a pay increase since expiration of the contract and the absence of a post-employment subsidy for retirees. *Tr. Day 1, pp. 35-42.*

During cross examination, Kiddo testified that at the meeting on January 11, 2018, Kim Range informed him that "Amber," a recent new hire, would lose her pension if there was a post-employment subsidy. *Tr. Day 1, p. 44.* By the time of the evidentiary hearing on February 26, 2019, Kiddo understood the retirement benefit under Option #1 was that any employee hired after January 1, 2018 would not have a defined pension plan, but instead would have a defined contribution plan. Kiddo understood the difference between the two benefit plans was, with the defined pension plan, both the employer and employee make a contribution, and after working a certain amount of time, upon retirement the retiree receives a set benefit for life. With a defined contribution plan, both the employer and employee make a contribution, and upon retirement the retiree has a set amount of funds to draw upon until the fund is depleted. Under Option #1,

employees hired after January 1, 2018 would be part of a defined contribution plan. *Tr. Day 1, pp. 53-56.*

Kiddo understands a different retirement benefit for employees hired after January 1, 2018 would result in different terms and conditions for people in the same bargaining unit. However, Kiddo testified the same thing occurred with Kiddo when he was hired with regard to the sick leave benefit. *Tr. Day 1, p. 66.* Kiddo testified he expected the union to present to union members the employer's complete Final Offer. *Tr. Day 1, p. 72.*

C. Testimony of Jennie Clay, Operations Clerk with EWW

Jennie Clay is an Operations Clerk for EWW. She has been employed by EWW and has been a member of AFSCME Local 2206 for 15 years. Clay wanted a post-employment subsidy benefit in the new union contract. She believed it was fair to request inclusion of this benefit in the new contract because it was a benefit the administration and the Teamsters' union had successfully negotiated for in their contract with EWW. During the negotiation process for a new contract, AFSCME did not update members about the status of negotiations. In fact, when Clay inquired with Tammy Squire about a post-employment subsidy, Squire informed Clay she could not discuss the matter. This was surprising to Clay. *Tr. Day 1, pp. 73-77.*

Clay attended the membership meeting on January 11, 2018. Clay was provided with a packet at the meeting, which she later learned was "Option 2". The way things were presented, Clay believed it was the employer's final offer, and if the offer was rejected, a worse offer could be forthcoming. The meeting was uncomfortable for Clay because she felt pressured to vote. It was obvious to Clay that others at the meeting were frustrated. Clay testified Kiddo inquired

about the post-employment subsidy at the meeting. Clay was upset a post-employment subsidy benefit was not included in Option 2. *Tr. Day 1, pp. 77-81.*

Clay testified that at no point did AFSCME inform Clay that EWW's Final Offer included two options and the post-employment subsidy was included in the other option, Option #1. Option #1 was not presented at the meeting. Knowing about Option #1 would have affected Clay's vote. At no point did AFSCME inform Clay that Option 1 of EWW's final offer included a larger raise than what was offered in Option 2. Knowing this also would have affected Clay's vote. Clay voted against Option 2 because she wanted the union "to fight back." Clay testified she was distressed; she left the meeting early; and she cried on the way home because the post-employment benefit was important to her. *Tr. Day 1, pp. 81-83.*

Clay learned about Option #1 in a letter from Mr. Vojtek of EWW. She was surprised Option #1 was not presented at the meeting of January 11, 2018. Option #1 included the post-employment subsidy. It did not require union members to work on weekends or forego their pensions. Clay would have voted for Option #1 had it been presented at the January 11, 2018 meeting. Clay joined in Kiddo's request for the opportunity to re-vote on both options. AFSCME did not permit a re-vote. *Tr. Day 1, p. 84.* At the meeting, union representatives advised that in order to get a post-employment subsidy benefit from the employer, the employees would lose their pension. *Tr. Day 1, p. 87.*

At the meeting, Clark distributed a document which he said was "the proposal". *Tr. Day 1, p. 88.* Clark informed the union members "if the decision of the group was to reject the proposal ... the negotiating team would have to go back to the table and resume negotiations with the employer." *Tr. Day 1, p. 89.* Clark and all Plaintiffs want a re-vote. Clark understands a re-vote would include a vote of any union members hired since 2018. *Tr. Day 1, pp. 89-90.*

D. Testimony of Aaron Stankiewiz, Human Resources Manager of EWW

Aaron Stankiewiz has been the Human Resources Manager for EWW for 13.5 years. During his tenure, he has been involved in negotiations for 5 or 6 union contracts. Negotiations began in September, 2017, for the contract which expired on December 31, 2017. Two members of AFSCME's negotiation team, Randy Procious and Kim Range, are employees of the City of Erie which operates under a different union contract. *Tr. Day 1, pp. 91-93.*

EWW's Final Offer had two options. On January 11, 2018, AFSCME Local 2206 held a meeting at which only Option #2 was presented and voted upon. Subsequently, the Board of Directors of EWW met but Option #2 was not presented to the Board for ratification because EWW's management learned the original Final Offer containing both options was not presented in its entirety to union members for a vote. Had Option #2 been presented to and approved by EWW's Board of Directors, Option #2 would have been binding upon AFSCME's members and EWW. Approval or ratification by EWW's Board of Directors was a prerequisite. *Tr. Day 1, pp. 94-96.* Upon expiration of the contract on December 31, 2017, by mutual agreement between the union and EWW, EWW continued to abide by its terms. *Tr. Day 1, pp. 95-97.*

Stankiewiz is aware the CBA between AFSCME and the City of Erie contains a provision for a post-employment subsidy for retired employees. *Tr. Day 1, pp. 98.* That CBA governs the terms of employment of Defendant Procious and Kim Range. *Tr. Day 1, pp. 98.*

As a member of management of EWW, Stankiewiz would receive a post-employment subsidy if he retired tomorrow. *Tr. Day 1, p. 99.* EWW does not have a policy requiring newly hired managers to belong to a defined contribution plan. The CBA between EWW and the

Teamsters union currently being followed provides for a post-employment subsidy. *Tr. Day 1, pp. 99-100.*

Stankiewiz has been employed with EWW for 13 and one-half years and has engaged in negotiations with AFSCME over approximately three contracts. With regard to the contract which commenced in 2013, EWW presented a final offer which had two options: one was for a 4-year contract, the other was for a 5-year contract. The differences between those two options included the wage increase for the 5th year on the 5-year contract and a difference concerning short-term disability. The difference between the two options presented in the final offer for the 2013 contract were not as significant as the differences between Option #1 and Option #2 of the subject Final Offer. *Tr. Day 1, pp. 100-101.*

EWW has taken the position it will not present Option #2 to the Board of Directors of EWW for approval until the employees are presented with and permitted to choose between Option #1 and Option #2. *Tr. Day 1, p. 107.*

During negotiations with AFSCME in late 2017, there were proposals from the employer to have employees work nights or weekends. There was also a proposal that new hires would not have the option of joining the pension, but rather, would be placed in the 457(k) plan. Employees already in the defined benefit pension plan but not yet vested would have the option to move into the 457(k) plan. Other employees would not be affected. *Tr. Day 1, pp. 109-110.* The negotiation session held on December 22, 2017 was the first time the employer, in presenting Option #2, had made a proposal that would not involve a change to the pension. *Tr. Day 1, pp. 110-111.*

Stankiewiz testified that under a defined benefit plan, if an employee left employment before becoming fully vested, the employee would lose the retirement benefits built up during

the employee's period of service. Under a defined contribution plan, a 457(k) plan, if an employee left employment, the employee would receive the full amount built up during the employee's period of service. *Tr. Day 1, p. 112.* If Option #1 had been ratified, an employee hired after January 1, 2018 would not be "grandfathered", that is, permitted to belong or remain in the pension plan. *Tr. Day 1, pp. 113-114.* Under the current retirement plan, the defined benefit pension plan, it takes five (5) years to become fully vested. If the employee leaves employment before becoming fully vested, the employee is paid their contribution, plus three (3) percent. The 457 (k) plan (not in effect) would have involved immediate vesting. Stankiewiz agreed with the testimony of Mark Kiddo regarding the difference between a defined benefit pension plan and a 457(k) plan in terms of benefits paid. *Tr. Day 1, pp. 114-115.*

On February 26, 2019, at the conclusion of Stankiewiz's testimony the Plaintiffs rested their case with the introduction in evidence of Plaintiffs' Exhibits D through K, the affidavits of the eight Plaintiffs. *Tr. Day 1, p. 116.*

The hearing was rescheduled to occur on June 25, 2019. *Tr. Day 1, p. 116.*

II. Hearing Held on March 15, 2019

The Court rescheduled the continued hearing on Plaintiffs' motions to occur on March 15, 2019, prior to EWW's scheduled vote on March 21, 2019. At the March 15th hearing, union Defendants presented the testimony of Shane Clark, staff representative of AFSCME, District Council 85. *Transcript of Proceedings, March 15, 2019 (Tr. Day 2), pp. 5-57.* Plaintiffs presented additional testimony of Mark Kiddo. *Tr. Day 2, pp. 60-62.* Admitted into the record as Union Defendants' Exhibits were the following: Union Defendants' Ex. No. 4, cover letter of January 4, 2018, with attachments, via email from administrative assistant to Attorney Mark Wassell to Shane Clark, and Union Defendants' Ex. No. 5, cover letter of July 20 2018, from

AFSCME Judicial Panel Chairperson Richard Abelson with attached decision of Abelson dismissing the charges against Procious and Clark.[12]

A. Testimony of Shane Clark, Council Representative of AFSCME, District Council 85

Shane Clark has been employed by AFSCME since January of 2010. Clark has participated in negotiations for approximately 50 CBAs. A CBA is an agreement that outlines terms of employment and working conditions with a particular employer. The parties to a CBA are the employer and the union. Since AFSCME, District Council 85, is the sole bargaining agent for AFSCME, Local 2206,[13] any proposed changes in a CBA would be negotiated through Clark in his official capacity as the district council representative of AFSCME. *Tr. Day 2, pp. 6-8.*

Clark testified regarding the negotiation process for a CBA and his integral role in the process. *Tr. Day 2, pp. 8-14.* Clark testified the goal of the collective bargaining process is for the negotiation team and the employer to reach a tentative agreement. If a tentative agreement is reached, the next step is for the union negotiation team to present the tentative agreement to the union members for ratification, that is, a vote on whether or not to accept the tentative agreement. If the parties are unable to reach a tentative agreement, then the next step is for the union negotiation team to present the employer's final offer to the bargaining unit (the member

[12] The transcript of proceedings held March 15, 2019 references that Union Defendants' Ex. No. 6 was admitted in the record. *Transcript of Proceedings, March 15, 2019 (Tr. Day 2), pp. 53-54.* It appears either this exhibit was not provided to the Court for transmission with the record or is a duplicate of another exhibit admitted in the record..

[13] AFSCME Local 2206 includes the City of Erie, EWW (there are approximately 20 employees at EWW in the AFSCME bargaining unit), and the Erie Housing Authority. Each of these employers has its own CBA with AFSCME.

of the local) for a ratification vote on whether or not to accept the final offer. Clark testified EWW is a public sector employer. *Tr. Day 2, pp. 9-12.*[14]

In the event union members voted down either the tentative agreement or the final offer, Clark would hold an open discussion session with them about their reason(s) for the vote. Clark would subsequently hold a meeting with management of the employer to explain reasons advanced by union members for rejecting either the tentative agreement or final offer. Hopefully, negotiations would continue. *Tr. Day 2, p. 12.* If and when union membership approved or ratified either a tentative agreement or final offer, the next step would be the submission of the document ratified by union members to the employer's Board of Directors for final ratification or approval. *Tr. Day 2, pp. 13, 30.*

Clark's role as chief spokesperson for AFSCME in negotiating the subject CBA is the same role he played in negotiating prior union contracts. *Tr. Day 2, p. 13.*

Clark's understanding of a "final offer," in the context of negotiating a CBA, is as follows:

> A final offer is generally when we've negotiated for quite some time and we are just locked up and can't move any further on anything and the employer has decided that they're going to come forward with their last, best or final offer during negotiations.

Tr. Day 2, p. 15.

EWW's "Final Offer" as set forth in Joint Exhibit B was presented to union negotiators by Mark Wassell, Esq., the employer's attorney and chief negotiator. *Tr. Day 2, pp. 16.* Option #1 of the Final Offer included a provision for a post-employment subsidy, a monthly stipend to be paid after retirement but before an employee became eligibile for Medicare. This benefit, the post-employment subsidy, was originally a union proposal. Under Option #1, the defined benefit

[14] During these proceedings, a meeting of dues-paying union members to approve or reject a tentative agreement or the employer's final offer was frequently referred to as a "ratification meeting."

plan would not apply to employees hired after January 1, 2018. Under Option #2, there was no post-employment subsidy and the defined benefit plan would remain intact and apply to new hires. *Tr. Day 2, pp. 17-18.*

Clark testified that, at the meeting during which EWW presented its Final Offer, the union negotiation team asked for a "caucus" during which the negotiation team stepped out of the meeting and decided amongst themselves to present only Option #2 to the union members for consideration. When the union negotiators returned to the room, they informed the employer the union negotiators "were prepared to take Option 2 back to the membership for ratification"; they requested EWW to reformat the document; the parties shook hands and the meeting concluded. *Tr. Day 2, pp. 18-19.* However, there was simply no discussion one way or another about the union negotiators' decision about only presenting a portion of the employer's Final Offer to union members for a vote. As Clark testified, "[i]n the December 22nd meeting, there was zero discussion about the decision from the Union team to take Option 2 back to the members." *Tr. Day 2, p. 21.* Clark asked EWW to reformat EWW's final offer because at the beginning of the document there were some tentative agreements and also, the union negotiators only wanted to present Option #2 to the union members. Clark testified the reason the negotiators only wanted to present Option #2 to union members is because the negotiators wanted to retain the defined benefit plan which would cover new hires after January 1, 2018. *Tr. Day 2, pp. 18-19.*

Clark testified he subsequently received from Attorney Wassell an email with a reformatted Final Offer with editing marks. The reformatted offer included both Option #1 and Option #2. Clark, somewhat confusingly, testified this is what he had requested. *Tr. Day 2, pp. 21-23.*

In particular, Clark testified concerning Defendants' Exhibit 4, an email of January 4, 2018 with attachments from Sharon Bruno, Wassell's administrative assistant.[15] The attachments consisted of correspondence from Wassell,[16] and a Final Offer document containing an "Option #1" and an "Option #2" with editing denoted in purple ink.[17] In the cover letter of January 4, 2018, Wassell advised he was transmitting a document reformatted "as ... requested", but substantively the same as communicated at the bargaining table. Wassell advised: "As was explained, the Final Offer of [EWW] includes two options. The Employer is allowing the bargaining unit to decide which option to accept." *Defendants' Exhibit 4.* The Final Offer document transmitted with Wassell's cover-letter was 13 pages long, including the title page for

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[15] The email of January 4, 2018 from Bruno to Clark reads,

> "Mr. Clark,
> Please see the attached documents from Attorney Mark Wassell. Hard copies will follow in the mail. Thank you.
> Sharon Bruno, Administrative Assistant."

Defendants' Ex. 4.

[16] Attorney Wassell's correspondence of January 4, 2018 to Clark reads,

> "Dear Shane:
> Enclosed please find the Final Offer that was presented to you and your bargaining committee on December 22, 2017. This is in a different format, as you had requested, but substantively is the same as was communicated at the bargaining table.
>
> As was explained, the Final Offer of the Erie Water Works includes two options. The Employer is allowing the bargaining unit to decide which option to accept. If either of the options is accepted by January 10, 2018, the Agreement will be retroactive to January 1st.
>
> Should you have any questions, please feel free to contact me.
>
> Very truly yours,
> ...
> Mark T. Wassell"

Defendants' Exhibit 4.

[17] The Final Offer document enclosed with Wassell's correspondence of January 4, 2018 was 13 pages in length, including the title page/cover sheet for each option. *Defendants' Exhibit 4.*

each option, and contained editing to the introductory paragraphs of the document and both options. The editing was denoted in purple ink. *Defendants' Exhibit 4.*

Clark testified union negotiators did not agree with the employer (at the December 22nd meeting or any time after) to present both options to union members. *Tr. Day 2, pp. 24-25.*

Clark brought to the January 11, 2018 union members' meeting a photocopy of reformatted Option #2 as depicted in Joint Exhibit C. *Tr. Day 2, pp. 26-27.* Eighteen members attended the meeting. Most, perhaps all, members of the union negotiation team were also present. Clark distributed to union members photocopies of reformatted Option #2 as set forth in Joint Exhibit C.[18] He testified that since no tentative agreement had been reached, he told the members he would stay at the meeting as long as they had questions and needed him there to feel comfortable voting. *Tr. Day 2, p. 27.* Clark denied making any recommendation to union members on how they should vote. *Tr. Day 2, pp. 27-28.*

When asked on direct examination whether there was any discussion at the ratification meeting about why the negotiating team rejected a "proposal" from the employer containing a post-employment subsidy, Clark testified: "There was some discussion, yes." *Tr. Day 2, p. 28.* Clark testified that Kiddo had asked where the post-retirement subsidy was, because it was not in the document. Kiddo asked several questions about this and was visually agitated because this provision was not included in the document distributed at the meeting. Clark testified other union members questioned this as well. *Tr. Day 2, p. 28.*

[18] Joint Exhibit C is different from the attachment to Wassell's correspondence of January 4, 2018 to Clark, in that Exhibit C does not include the cover page to Option #1, reformatted Option #1, or the cover page to Option #2. The five pages of Joint Exhibit C otherwise appear identical to the remaining five pages of Option #2 as attached to Wassell's correspondence, except the editing markings on the photocopy of the Joint Exhibit C appear in black rather than purple ink. *Joint Exhibit C; Defendants' Exhibit 4.*

Clark testified that at the meeting, he advised the post-retirement subsidy was not in the document because union negotiating team felt the price to bring back the post-employment subsidy was too great "because it would have done away with a defined benefit plan for new hires and would have put everybody [anyone in the AFSCME bargaining unit hired after January 1, 2018] into a defined contribution plan after January 1, 2018." *Tr. Day 2, p. 29.*

During Clark's testimony about his explanation to members for the absence of the post-retirement subsidy from the document union members were asked to vote upon, the record is devoid of evidence Clark informed union members the employer's final offer included Option #1; that Option #1 included the post-retirement subsidy; and the negotiation team removed Option #1 from the final offer.

Clark acknowledged he raised his voice during the membership meeting "to get the meeting back on track". *Tr. Day 2, p. 30.* He denied making threats at the meeting. The outcome of the vote was 15 members voted "yes" to approve Option #2 and three voted against approving it. EWW was notified of the result of the vote. As of the hearing, EWW has not taken "the document that was ratified" by union members back to its Board for ratification by the Board. *Tr. Day 2, p. 30.* As of the hearing, EWW's Board was scheduled to vote on March 21, 2019, on whether to ratify or approve Option #2. Clark is unaware how the Board of Directors of EWW will vote. *Tr. Day 2, p. 31.*

Clark testified AFSCME's International Constitution Bill of Rights is a set of guidelines and bylaws which provide direction to the internal workings of AFSCME. For example, it contains information about the election of local union leaders, procedure for the resolution of internal union disputes. *Tr. Day 2, p. 31.*

Clark's understanding or interpretation of the AFSCME Constitution Bill of Rights is that it does not require the negotiation team to bring back to union members during negotiations "proposals" the negotiation team deems unacceptable. *Tr. Day 2, pp. 33-35.*

For limited purposes, the Court admitted into the record Defendants' Exhibit 5, a decision of Richard Abelson, AFSCME AFL-CIO Judicial Panel Chairperson, of July 20, 2018, in response to the charges union members filed against Defendants Procious and Clark arising from the union membership meeting and vote of January 11, 2018.[19] *Tr. Day 2, p. 39.*

During cross-examination, Clark testified as follows. As a union official, he is obligated to treat the bargaining unit with good faith and fairness and to be honest with union members. He may not defraud union members or misrepresent offers, and is not permitted to hide relevant, important information from union members when they gather to vote on a contract. *Tr. Day 2, p. 40.*

Clark agreed union members have the opportunity to vote on whatever is brought before them by the team, yes." *Tr. Day 2, p. 40.* He admitted it would be inappropriate for union negotiators to present to union members a proposal, "tentative agreement", or "final offer" that had not been put on the table by the employer, and it would be inappropriate to just "present whatever you want to present" to union membership. Clark further admitted whatever is

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[19] Judicial Panel Chairperson Abelson dismissed the charges against Procious and Clark. Chairperson Abelson addressed the sole issue whether Procious and Clark violated the Bill of Rights for Union Members contained in AFSCME's International Constitution. *Defendants' Exhibit 5, pp. 4, n. 1; 6.* In the decision of July 20, 2018, Chairperson Abelson specifically stated:

> 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 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. The sole issue before the undersigned is whether the accused parties violated the International Constitution when it failed to bring the entire final offer (Option 1 and Option 2) to the membership for their vote.

Defendants' Exhibit 5, p. 4, n. 1 (emphasis added).

presented to union members must "be something pursuant to an offer that you've received from the employer." *Tr. Day 2, p. 42.* Clark admitted that as the exclusive representative for AFSCME Local 2206 he owed a duty of fair representation to the bargaining unit members. *Tr. Day 2, pp. 42-43.*

Clark testified concerning the terms of article/paragraph 7 of the AFSCME Constitution Bill of Rights, Joint Exhibit A. Paragraph 7 concerns the members' right to full participation including the right to discuss and vote and to "pertinent information" needed to exercise this right. Paragraph 7 defines "pertinent information" to include the acceptance or rejection of contracts and any other agreement affecting terms and conditions of employment.

At the meeting held on January 11, 2018, Clark presented only Option #2 to union members, and did not present the information in Option #1 to them. Option #1 contained terms and conditions of employment, such as wages. Clark admitted the information in Option #1 was relevant to the union members' decision on whether to approve or reject the offer presented to them. *Tr. Day 2, pp. 45-46.* Clark essentially admitted Option #1 was part of the employer's final offer, as opposed to a mere proposal. *Tr. Day 2, p. 46.*

By the time of Wassell's e-mailed correspondence of January 8, 2018, three days before the ratification meeting of January 11, 2018, Clark testified he understood it was EWW's intent for the Final Offer to include two options, and that EWW expected the Final Offer with two options to be presented to the membership. *Tr. Day 2, p. 47-48.*

Clark admitted he knew on December 22, 2017, that EWW expected the Final Offer with both options to be presented to the union members. *Tr. Day 2, p. 48.* Yet Clark testified there was never any confusion on his part about what was going to be communicated to union members. Clark testified the only confusion about this was on the part of employer's counsel,

Attorney Wassell, who Clark testified was not present at the meeting on December 22, 2017 when, Clark testified, he made it clear the negotiation team did not intend to present Option #1 to union members. *Tr. Day 2, pp. 48-49.* Admitted into the record was Plaintiffs' "Cross 1", a photocopy of email from Attorney Wassell of January 8, 2018, sent via Wassell's iPhone to Stankiewiz and "cc'd" *inter alia* to Clark, advising: "The Final Offer contained two options. That was the offer. We would expect the Final Offer (which is comprised of two options) to be presented to the membership." *Tr. Day 2, p. 49; Plaintiff's Ex. Cross 1.*

After the January 11, 2018, Clark received a request from union members for the opportunity to re-vote on the final offer. *Tr. Day 2, p. 51.* Wages have been frozen since the former CBA expired on December 31, 2017. If a new contract goes into effect, he hopes increases in wages will be retroactive to that date. *Tr. Day 2, p. 51.*

On redirect examination, Clark admitted the union owes a duty of fair representation to all members covered by the CBA, regardless whether they pay union dues. This includes persons hired after January 1, 2018. *Tr. Day 2, pp. 52-53.* There is no guarantee a post-employment subsidy, if included in the contract being negotiated, would be included in subsequent CBAs, because a new contract is negotiated every time a contract expires. *Tr. Day 2, p. 53.* Thus, for employees hired after January 1, 2018, there is no guarantee a post-employment subsidy provision would remain in effect when they retired. *Tr. Day 2, p. 53.*

B. Testimony of Mark Kiddo

Union members' trust and confidence in the union was eroded due to union officials' failure to present the entirety of EWW's Final Offer. Union members' trust and confidence in the union to adequately protect their interests in matters arising in the future has been compromised as well. *Tr. Day 2, pp. 60-61.*

CONTROLLING LEGAL PRINCIPLES

In the instant matter, the Court issued a preventive injunctive order, preliminarily enjoining EWW from voting on any contract or agreement with union Defendants.

Plaintiffs' motions for injunctive relief arose from their claims union Defendants 1) concealed from them at the January 11, 2018 membership meeting and actively misled them concerning the terms of EWW's final offer for a new CBA as presented by EWW to union leaders on December 22, 2017; 2) presented to Plaintiffs on January 11, 2018, an altered final offer which differed from EWW's final offer in material respects; and 3) misled union members at the January 11, 2018 meeting regarding potential consequences in not approving the altered final offer.

Plaintiffs' allege the above actions and Union Defendants' denial of union members' requests for a) cancellation of the voting held on January 11, 2018 and b) the opportunity to revote on the entirety of EWW's Final Offer (which included both Option #1 and Option #2) constituted breaches of union Defendants' duty of fair representation to Plaintiffs.

A public employee may sue his union for breach of its duty of fair representation. *See Garzella v. Borough of Dunmore*, 62 A.3d 486, 494 (Pa. Commw. Ct. 2013). [20]

> A union is a trustee for the rights of its members and owes its members a duty of fair representation. *Case v. Haz[el]ton Area Educ. Support Pers. Ass'n (PSEA/NEA)*, 928 A.2d 1154, 1158 (Pa. Cmwlth. 2007). That duty is breached when the union 'acts in bad faith toward its members, and violates the fiduciary trust created from the principal-agent relationship.' *Id.* Jurisdiction over a cause of action alleging breach of duty lies with the appropriate court of common pleas, not the [Pennsylvania Labor Relations] Board. *Id.* at 1160–61.

Dailey v. Pa. Labor Relations Bd., 148 A.3d 920, 924 n. 4 (Pa. Commw. Ct. 2016). [21]

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[20] In this Opinion, the Court is addressing only the request for the preventive preliminary injunction against Union Defendants.

[21] Further, as explained in *Case v. Hazelton* and as relevant to Union Defendants' argument no clear right to relief exists because "Plaintiffs' request that the Court enjoin EWW from executing Option 2 is effectively a request that

With regard to the collective bargaining agreement process,

> the Union has assumed the role of trustee for the rights of its members and other employees in the bargaining unit. The employees, on the other hand, have become beneficiaries of fiduciary obligations owed by the Union. As a result, the Union bears a heavy duty of fair representation to all those within the shelter of its protection.

Falsetti v. Local &Union No. 2026, United Mine Workers of Am., 161 A.2d 882, 895 (Pa. 1960).

There are six prerequisites a party must establish prior to obtaining preliminary injunctive relief:

1. that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;

2. 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;

3. that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;

4. that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits;

5. that the injunction it seeks is reasonably suited to abate the offending activity; and

6. that a preliminary injunction will not adversely affect the public interest.

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the Court enjoin the PLRB from exercising its exclusive statutory authority to determine whether EWW violated PERA ..." (*See Memorandum of Law In Opposition To Plaintiffs' Motion For Preliminary Injunction*, p. 19):

> [i]ndividual 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 v. Hazelton Area Educ. Support Pers. Ass'n (PSEA/NEA), 928 A.2d 1154, 1161 (Pa. Commw. Ct. 2007).

Warehime v. Warehime, 860 A.2d 41, 46-47 (Pa. 2004). *See also SEIU Healthcare Pennsylvania v. Commonwealth*, 104 A.3d 495, 501-502 (Pa. 2014). The burden of proof is on the party who requested preliminary injunctive relief. *Warehime v. Warehime*, 860 A.2d at 47.

CONCLUSIONS OF LAW

Based upon the testimony of record and exhibits of the parties, the Court concludes Plaintiffs met their burden of proof in establishing the right to preventive preliminary injunctive relief.

I. Clear Right to Relief

The parties' focus in the presentation of testimony, and in written memoranda and oral argument, was whether Plaintiffs had a clear right to relief and were likely to prevail on the merits of the underlying action. Plaintiffs satisfactorily established this element. "To establish a clear right to relief, the party seeking an injunction need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties." *SEIU Healthcare Pa. v. Commonwealth,* 104 A.3d 495, 506 (Pa. 2014).

In this case, there is significant likelihood Plaintiffs would prevail on the merits of their claim the union, through actions of union officials, breached its duty of fair representation owed to Plaintiffs. The evidence strongly suggests union Defendants 1) concealed from union members at the January 11, 2018 membership meeting and actively misled them concerning the terms of EWW's final offer for a new CBA as presented by EWW to union leaders on December 22, 2017; 2) presented to Plaintiff employees on January 11, 2018, an altered final offer which

differed from EWW's final offer in that the altered final offer did not include Option #1; and 3) misled members at the January 11, 2018 meeting regarding potential consequences in not approving the altered final offer. Numerous opportunities were presented during the question-answer session at the membership meeting on January 11, 2018 for the union to disclose EWW's final offer included, within Option #1, the post-retirement subsidy, a matter of great importance to members, and the higher pay increase. It is undisputed union Defendants denied Plaintiffs' subsequent requests for cancellation of the voting held on January 11, 2018 and the opportunity to revote on EWW's Final Offer.

The union's position no breach of the duty occurred because 1) the union did not agree at the negotiation table with EWW on December 22, 2017 to submit EWW's entire offer to union membership, and 2) a representative of EWW "shook hands" with one or more union representatives at the conclusion of the meeting, is disingenuous and begs the question whether a breach of duty to union members occurred. Days before the January 11, 2018, membership ratification meeting, EWW clarified in writing any confusion about the content of its final offer. (See the exhibits referenced at footnote nos. 15 through 18 herein.) The union's position, as advanced through testimony of Shane Clark, the union is not required to relay "proposals" to members during contract negotiations is opaque. The evidence, including Shane's testimony, established contract negotiations had concluded and the employer presented a two-component "Final Offer" as it had during negotiations for a prior CBA in approximately 2013. The union recognized the employer's "Final Offer" as such at the meeting held in December of 2017. Nonetheless, the union opted to redact the Final Offer and actively misrepresent to union members the redacted version was the full extent of the employer's willingness to negotiate and the entirety of EWW's final offer. The union continued in this misrepresentation, even in the

face of direct questioning by members throughout the course of the January 2018 membership meeting. The members' questions presented the platform or opportunity for full and fair disclosure of all terms of the Final Offer, which terms included the much sought-after post-employment subsidy and a higher pay increase.

The union's assertions regarding this Court's lack of jurisdiction are unavailing. The pendency of a collateral action before the PLRB[22] does not divest this Court of jurisdiction.[23]

> 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 v. Hazelton Area Educ. Support Pers. Ass'n (PSEA/NEA), 928 A.2d 1154, 1161 (Pa. Commw. Ct. 2007).

The union also claims no clear right to relief exists and/or the Court lacks jurisdiction because Richard Abelson, AFSCME AFL-CIO Judicial Panel Chairperson, dismissed union grievances against Defendants Procious and Clark which arose from the union membership meeting and vote of January 11, 2018. The assertion is baseless and belied by the record. As discussed at footnote 19 herein, in the decision of July 20, 2018, Abelson expressly stated he was not addressing the claims before this Court. In the decision, Abelson stated:

> 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 union's bargaining***

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[22] (i.e., the employer's exceptions to the Proposed Decision and Order of January 31, 2019 of PLRB Hearing Examiner Prozniak (concerning the union's charge EWW committed unfair practices in this matter))

[23] "Plaintiffs' request that the Court enjoin EWW from executing Option 2 is effectively a request that the Court enjoin the PLRB from exercising its exclusive statutory authority to determine whether EWW violated PERA ..." *See Memorandum of Law In Opposition To Plaintiffs' Motion For Preliminary Injunction, p. 19.*

> ***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.

Defendants' Exhibit 5, p. 4, n. 1 (emphasis added). Active misrepresentation by union leaders is apparent from the record. Plaintiffs satisfactorily established the clear right to relief element.

II. Immediate and Irreparable Harm

Plaintiffs satisfactorily established a preliminary injunction was necessary to prevent immediate and irreparable harm that could not be adequately compensated by damages. EWW's ratification of the altered final offer would, in effect, undermine the collective bargaining process, given the apparent breach of the duty of fair representation which led to the vote by union members in favor of Option #2. EWW's ratification of the altered final offer would also force Plaintiffs to labor under the terms and conditions of the altered final offer, which included only Option #2, and be denied the greater benefits that would have been afforded to them had they been presented with Option #1, including the post-employment subsidy benefit and the higher pay increase Plaintiffs clearly preferred. Further, a vote by EWW would permanently foreclose Plaintiffs from seeking relief, including the opportunity to revote on the Final Offer.

Defendants asserted the alleged harm arising from the EWW ratification vote scheduled to occur just days after the second evidentiary hearing was speculative because the outcome of the vote was unknown until it occurred. The Court disagrees. Uncertainty about how EWW would vote did not reduce or eliminate the threat of immediate, irreparable harm. 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. Defendants' assertion the threat of harm was merely economic is unpersuasive. The undermining of the collective bargaining process, and the erosion of union members' faith and confidence in the union to fairly represent union members' interests are examples of non-economic threats of harm to day-to-day operations of the union, the collective bargaining process, and the peaceful labor of union members.

III. Greater Harm from Refusing Injunction

The Court concludes greater harm would result from refusing the injunction than from granting it, and, concomitantly, issuance of an injunction will not substantially harm other interested parties in the proceedings. Absent an injunction, EWW would be permitted to ratify or forced to execute a CBA which reflects inadequate representation. Further, to deny the request for preliminary injunctive relief would eliminate the opportunity for full and fair discussion between union members and union representatives of the employer's Final Offer and for a meaningful vote on the entirety of EWW's Final Offer. Maintaining the status quo will not substantially harm other interested parties in the proceedings.

IV. Restoration of *Status Quo*

A preliminary injunction will prevent EWW from ratifying or being forced to ratify the partial final offer which union officials submitted to union members for approval. It will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. The parties will continue to work under the terms of an expired CBA which the parties have honored as controlling the terms of employment.

V. Reasonably Suited to Abate Offending Activity

The injunction is reasonably suited to abate the offending activity. The preliminary injunction will prevent submission of Option #2, voted upon by union members, to EWW for a ratification vote. The injunction allows the parties to fully litigate their claims. The injunction allows Plaintiffs to pursue their right to fair representation and allows Plaintiffs the opportunity for redress of the violation of that right.

VI. Not Contrary to Public Interest

A preliminary injunction will not adversely affect the public interest. A preliminary injunction will promote the public interest by allowing Plaintiffs to resolve their claims against AFSCME and EWW, consistent with their right to fair representation. The record is devoid of any adverse impact to the public interest.

For the reasons stated herein, it was proper to grant the request for a preliminary injunction.

BY THE COURT:

7/18/2019
Date

Daniel J. Brabender, Jr.
Daniel J. Brabender, Jr., Judge

cc: Counsel for Plaintiffs:
David R. Osborne, Esq., 500 North Third Street, Floor 2, Harrisburg, PA 17101
Justin T. Miller, Esq., 500 North Third Street, Floor 2, Harrisburg, PA 17101
Nathan J. McGrath, Esq., 500 North Third Street, Floor 2, Harrisburg, PA 17101
Joshua M. Montagnini, Esq., 500 North Third Street, Floor 2, Harrisburg, PA 17101
Arthur Martinucci, Esq., 222 West Grandview Boulevard, Erie, PA 16506

Counsel for union Defendants:
Amy L. Rosenberger, Esq., 1845 Walnut Street, 24th Floor, Philadelphia, PA 19103
Alidz Oshagan, Esq., 1845 Walnut Street, 24th Floor, Philadelphia, PA 19103

Counsel for employer Defendant
Mark T. Wassell, Esq., 120 West Tenth Street, Erie, PA 16501-1461
Robert D. Zaruta, Esq., 120 West Tenth Street, Erie, PA 16501-1461