

COURT OF COMMON PLEAS OF PENNSYLVANIA  
ERIE COUNTY

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MARK KIDDO; JOAN HORDUSKY; MIKE DZURKO;  
CHRISTINE ARNONE; JENNIE CLAY; MADELYN  
GROOVER; MELISSA GUZOWSKI; and JEFF  
GRANGER,

Plaintiffs,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND  
MUNICIPAL EMPLOYEES, LOCAL 2206;  
AMERICAN FEDERATION OF STATE, COUNTY AND  
MUNICIPAL EMPLOYEES DISTRICT COUNCIL 85;  
RANDY PROCIOS IN HIS OFFICIAL CAPACITY;  
SHANE CLARK IN HIS OFFICIAL CAPACITY; and ERIE  
WATER WORKS,

Defendants.

Case No. 13144-18

Judge \_\_\_\_\_

**MOTION FOR PRELIMINARY  
INJUNCTION**

**INTRODUCTION**

AND NOW come Plaintiffs Mark Kiddo, Joan Hordusky, Mike Dzurko, Christine Arnone, Jennie Clay, Madelyn Groover, Melissa Guzowski, and Jeff Granger (collectively "Plaintiffs") by and through their undersigned counsel, and respectfully represent that:

1. In sum, this case is about whether an exclusive representative is permitted to, consistent with its "heavy duty of fair representation," misrepresent or conceal material terms of a final offer from a bargaining unit in order to induce membership to ratify a contract. *Falsetti v. Local Union No. 2026, United Mine Workers of Am.*, 161 A.2d 882, 895 (Pa. 1960).

2. Defendants American Federation of State, County and Municipal Employees, Local 2206, District Council 85, and union officials Randy Prociou ("Mr. Prociou") and Shane Clark ("Mr. Clark") (collectively "AFSCME") breached their duty of fair representation to Plaintiffs by

misrepresenting or concealing such material terms and by, among other failures, denying Plaintiffs a meaningful exercise of their rights as members to participate in the decision-making processes of their union as guaranteed by Paragraph 7 of AFSCME's "Bill of Rights for Union Members."

3. Plaintiffs' public employer, Defendant Eric Water Works ("EWW"), is in position to execute a collective bargaining agreement containing terms and conditions of employment that were ratified by AFSCME membership only on account of AFSCME's breach of its duty of fair representation.

4. Plaintiffs respectfully request that this Honorable Court enter an injunction:

- a) preliminarily enjoining EWW and its agents, assistants, successors, employees, attorneys, and all other persons acting in concert or cooperation with them or at their direction or under their control, from executing any contract or agreement with AFSCME during the pendency of this matter; and
- b) preliminarily enjoining AFSCME and its agents, assistants, successors, employees, attorneys, and all other persons acting in concert or cooperation with them or at their direction or under their control, from imposing union discipline or charges related or in response to the subject matter of this action.

### **STATEMENT OF FACTS**

5. On December 5, 2018, Plaintiffs filed a Complaint and Demand for Jury Trial ("Complaint") at the above docket number alleging a breach of the duty of fair representation.<sup>1</sup>

6. As alleged in the Complaint, on or around December 22, 2017, EWW conveyed a final offer ("Final Offer") to AFSCME with two options respectively titled Option #1 and Option #2. Compl. ¶¶ 25–27 & Ex. D.

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<sup>1</sup> Plaintiffs set forth the facts below in summary fashion and rely principally on the facts as set forth in their Complaint.

7. Option #1 and Option #2 differed from one another in other significant respects, in particular, wages and retirement benefits. *Id.* at ¶¶ 27–29 & Ex. D.

8. On or around January 11, 2018, AFSCME, including Mr. Clark and Mr. Prociou, removed or omitted Option #1 from the Final Offer, caused Option #1 to be omitted from the Final Offer, or modified the Final Offer so as to exclude Option #1 from the Final Offer, leaving a document that resembled the Final Offer but did not include Option #1 (“Altered Offer”). *Id.* at ¶ 36.

9. On or about January 11, 2018, AFSCME, including Mr. Clark and Mr. Prociou, presented the Altered Offer to Local 2206 membership for ratification. *Id.* at ¶¶ 35–38.

10. The members voted to ratify the Altered Offer, without ever being told about EWW’s Final Offer. *Id.* at ¶¶ 35–44.

11. But for AFSCME’s concealment of Option #1, Plaintiffs would not have voted to ratify the contract as it was presented. *Id.* at ¶ 45.

12. Had Plaintiffs known that EWW had made Option #1 equally available to them, Plaintiffs would not have voted to ratify a contract that included Option #2. *Id.* at ¶ 46.

13. Additionally, had Option #1 been presented to Plaintiffs, Plaintiffs would have selected Option #1 and voted to ratify a contract that included Option #1 instead of Option #2. *Id.* at ¶ 47.

14. After discovering that Option #1 was concealed from membership, a majority of the bargaining unit requested an opportunity to revote. *Id.* at ¶ 49 & Ex. 1.

15. Plaintiffs filed an internal union appeal with AFSCME requesting a revote, but AFSCME dismissed it, denying any opportunity to revote on the Final Offer. *Id.* at ¶¶ 51–57.

16. On information and belief, AFSCME has requested that EWW execute the Altered Offer, which has now been ratified by AFSCME membership.

17. Should EWW execute the contract, Plaintiffs will be immediately and irreparably harmed beyond that which can be adequately compensated by damages.

18. Because Plaintiffs are union members, they may be subjected to union discipline or charges should AFSCME believe Plaintiffs' exercise of their rights in this matter are contrary to AFSCME's interests, also causing immediate and irreparable harm.

### STANDARD FOR PRELIMINARY INJUNCTIONS

19. "Generally, preliminary injunctions are preventative in nature and are designed to maintain the status quo until the rights of the parties are finally determined." *Mazze v. Com.*, 432 A.2d 985, 988 (Pa. 1981).

20. A party seeking a preliminary injunction must show six elements: (1) 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., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

21. Whether an injunction prohibits an action or compels an action, in both cases the court is concerned with maintaining the status quo until determining the parties' rights. *See Shepherd v. Pittsburgh Glass Works*, 25 A.3d 1233, 1241 (Pa. Super. 2011) ("[P]reventative injunctions maintain the present status of the parties to the litigation by barring any action until the litigants' rights are adjudicated on the merits. Mandatory injunctions require the performance of a positive action to

preserve the status quo . . . .”) (Citations omitted).

## **PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION**

### **I. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE HARM THAT CANNOT BE ADEQUATELY COMPENSATED BY DAMAGES**

22. First, Plaintiffs will suffer from immediate and irreparable injury which cannot be adequately compensated through monetary damages.

23. EWW is currently considering for execution a set of terms and conditions of employment which were ratified by AFSCME membership only because AFSCME breached its duty of fair representation to the bargaining unit.

24. Accordingly, EWW’s execution of those terms and conditions of employment would impose terms and conditions of employment on Plaintiffs which should not have been ratified and would ultimately work irreparable harm on Plaintiffs.

25. It would irreparably harm Plaintiffs if EWW executed a contract with terms and conditions of employment ratified due to an employee organization’s breach of the duty of fair representation.

26. It would irreparably harm Plaintiffs if EWW executed a contract with an employee organization about which there is a good faith doubt of its majority status. *See Moore-Duncan ex rel. NLRB v. Horizon House Developmental Servs.*, 155 F. Supp. 2d 390, 394 (E.D. Pa. 2001) (“An employer may lawfully refuse to bargain with a certified bargaining agent if it has a good-faith doubt, based on a sufficiently objective basis, of continued support of the union by a majority of the bargaining unit.”).

27. Should EWW be permitted to execute such a contract, the status quo would be altered, labor peace would be disrupted, and collective bargaining would be undermined, and such damages cannot be adequately compensated. *See Cent. Dauphin Educ. Ass’n v. Cent. Dauphin Sch. Dist.*, 792 A.2d 691, 698 (Pa. Cmwlth. 2001) (“The District’s actions clearly altered the status quo and

disrupted labor peace. The common pleas court reasonably concluded that allowing an employer to unilaterally change the status quo, while the employees were at work and seeking to negotiate a new contract, seriously undermined the Association's bargaining power and constituted irreparable harm.").

28. Even those damages related to Plaintiffs' lost salaries and post-employment subsidies may be subject to fierce opposition from AFSCME as such damages are ongoing and compounding in nature. *See John G. Bryant Co., Inc. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164, 1167 (Pa. 1977) ("It is not the initial breach of a covenant which necessarily establishes the existence of irreparable harm but rather the threat of the unbridled continuation of the violation and the resultant incalculable damage . . . that constitutes the justification for equitable intervention.")

29. For instance, the Altered Offer represents a four-year collective bargaining agreement. If EWW executes the collective bargaining agreement, Plaintiffs will be forced to labor under the terms and conditions of the Altered Offer, which included only Option #2, and be denied the greater benefits that would have been afforded to Plaintiffs had Option #1 been selected.

30. The amount of damages suffered by Plaintiffs includes not only all benefits effectively denied by AFSCME through the end of the term of the new agreement but also the loss of *future* earnings and benefits that would have been built, in part, on the foundation of the new collective bargaining agreement. *See Helpin v. Trs. of the Univ. of Penn.*, 10 A.3d 267, 270 (Pa. 2010) ("[E]stimation of future earnings has been neither straightforward nor without controversy.").

31. That is, the terms and conditions of one collective bargaining agreement inherently affect the terms and conditions of successor agreements because the parties do not come to the bargaining table without reference to prior agreements. Plaintiffs' damages are not simply limited to the monetary difference between Option #1 and Option #2 but involve the potential loss of future earnings based on a different starting point for future contract negotiations.

32. If Plaintiffs are prevented from accepting Option #1, they will be prevented from establishing a course of conduct under the terms and conditions of Option #1 which may be useful when interpreting future contracts with provisions similar to Option #1. *See Pa. State Sys. of Higher Educ. v. Ass'n of Pa. State College & Univ. Facs.*, 98 A.3d 5, n.8 (Pa. Cmwlth. 2014) (providing examples of when an arbitrator may use evidence of past practice to determine intent of the parties).

33. Likewise, should AFSCME impose union discipline or charges on Plaintiffs as a result of Plaintiffs exercising their rights, such union discipline or charges would immediately and irreparably interfere with the instant matter and, in effect, immediately and irreparably deprive Plaintiffs of their rights to fair representation.

34. Accordingly, without an injunction, Plaintiffs will suffer irreparable harm which cannot be adequately compensated by monetary damages.

## **II. GREATER HARM WOULD FOLLOW FROM REFUSING THE INJUNCTION**

35. Second, greater injury will result from denying the injunction because, without an injunction, EWW will be permitted or forced to execute a collective bargaining agreement that reflects inadequate representation and has been ratified only due to AFSCME's breach of its duty of fair representation.

36. If EWW executes the contract, Plaintiffs will be forced to work under a smaller benefits package than what EWW offered in Option #1.

37. Should AFSCME impose union discipline or charges on Plaintiffs as a result of Plaintiffs exercising their rights, such union discipline or charges would immediately and irreparably interfere with the instant matter and, in effect, immediately and irreparably deprive Plaintiffs of their rights to fair representation.

38. Conversely, granting the injunction will cause no injury to AFSCME or EWW because the parties' respective positions will remain unchanged. *See SEIU Healthcare Pennsylvania v.*

*Commonwealth*, 104 A.3d 495, 509 (Pa. 2014) (finding standard met when plaintiff establishes irreparable harm and injunction maintains status quo).

### III. AN INJUNCTION WOULD PRESERVE THE STATUS QUO

39. Third, the injunction will maintain the status quo because the parties have been operating under the same terms and conditions of employment since 2013.

40. “The purpose of a preliminary injunction is to preserve the status quo as it exists *or previously existed before the acts complained of*, thereby preventing irreparable injury or gross injustice.” *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1286 (Pa. 1992) (citing *Slott v. Plastic Fabricators, Inc.*, 167 A.2d 306 (Pa. 1961)).

41. The most recent collective bargaining agreement expired on December 31, 2017. *See* Compl. ¶ 20 & Ex. B.

42. Thereafter, the parties continued operating under the terms and conditions of the expired collective bargaining agreement until a new collective bargaining agreement could be executed. *Id.*

43. AFSCME breached its duty of fair representation on January 11, 2018, when it misrepresented or failed to disclose the terms of the Final Offer in order to induce ratification.

44. If EWW is permitted to ratify the contract the terms and conditions of employment will be altered thereby upsetting the status quo. On the other hand, the injunction will prevent ratification and maintain the status quo until the resolution of Plaintiffs’ lawsuit.

45. Should AFSCME impose union discipline or charges on Plaintiffs as a result of Plaintiffs exercising their rights, such union discipline or charges would immediately and irreparably interfere with the instant matter and, in effect, immediately and irreparably deprive Plaintiffs of their rights to fair representation.



#### **IV. PLAINTIFFS HAVE A CLEAR RIGHT TO RELIEF**

46. Fourth, Plaintiffs have a clear right to relief because, as alleged in the Complaint, AFSCME violated its constitution when it misrepresented or failed to disclose the existence of and/or all pertinent information concerning the Final Offer.

47. The clear right to relief element is established if the other five elements are established and the “moving party [can] demonstrate that substantial legal questions must be resolved to determine the rights of the parties.” *Notarianni v. O’Malley*, No. 733 C.D. 2016, 2017 WL 1337564, at \*4 (Pa. Cmwlth. Apr. 12, 2017).

48. The other five elements for a preliminary injunction are met, and the factual allegations raise the substantial legal question of whether AFSCME breached its duty of fair representation or violated its constitution when it misrepresented or concealed the existence of and/or pertinent information concerning the Final Offer. Plaintiffs have demonstrated that this question must be resolved to determine the rights of the parties to this matter.

#### **V. AN INJUNCTION WOULD ABATE THE OFFENDING ACTIVITY**

49. Fifth, enjoining EWW from executing the contract will abate the harm because EWW will be prevented from executing the contract and implementing unwanted terms and conditions of employment until the parties fully litigate the claims raised in this matter.

50. Without an injunction, EWW will be free or forced to execute the contract, requiring Plaintiffs to accept the new conditions of employment despite AFSCME’s violation.

51. Likewise, should AFSCME impose union discipline or charges on Plaintiffs as a result of Plaintiffs exercising their rights, such union discipline or charges would immediately and irreparably interfere with the instant matter and, in effect, immediately and irreparably deprive Plaintiffs of their rights to fair representation.

## VI. ENTERING AN INJUNCTION WOULD NOT BE CONTRARY TO THE PUBLIC INTEREST

52. Sixth, an injunction will not adversely affect the public interest but will actually promote the public interest by allowing Plaintiffs, a group of public employees, to resolve their claims against AFSCME and EWW, a public employer, consistent with their rights as public employees and, specifically, their right to fair representation.

53. “There is . . . an over-riding public interest in promoting well-managed autonomous associations which are able to perform their functions effectively and still provide internally for the fair treatment of individual members . . . .” *Falsetti*, 161 A.2d at 888.

54. Enjoining EWW from ratifying the proposed contract will not adversely affect the public interest because the parties will continue to operate under the same conditions that have existed since 2013. Furthermore, the injunction will allow the fair representation claim to be fully litigated which will promote the fair treatment of members, thereby serving the public interest.

55. Finally, should AFSCME impose union discipline or charges on Plaintiffs as a result of Plaintiffs exercising their rights, such union discipline or charges would immediately and irreparably interfere with the instant matter and, in effect, immediately and irreparably deprive Plaintiffs of their rights to fair representation.

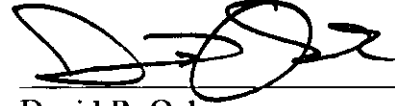
**WHEREFORE**, Plaintiffs respectfully requests that this Court issue an order:

- a) preliminarily enjoining EWW and its agents, assistants, successors, employees, attorneys, and all other persons acting in concert or cooperation with them or at their direction or under their control, from executing a contract or agreement containing the substance of the Altered Offer; and
- b) preliminarily enjoining AFSCME and its agents, assistants, successors, employees, attorneys, and all other persons acting in concert or cooperation with them or at their direction or under their control, from imposing union discipline or charges

related or in response to the subject matter of this action.

Respectfully submitted,

THE FAIRNESS CENTER



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*Counsel for Plaintiffs*

Dated: December 17, 2018

**CERTIFICATE OF SERVICE**

The foregoing Motion for Preliminary Injunction and Proposed Order were served this day via first-class mail on the Defendants as follows<sup>2</sup>:

AFSCME Local 2206  
626 State Street  
Erie, PA 16501

AFSCME District Council 85  
1276 Liberty Street  
Franklin, PA 16323

Randy Procius  
626 State Street  
Erie, PA 16501-1146

Shane Clark  
5296 Autumnwood Drive,  
Cochranton, PA 16314

Erie Water Works  
340 West Bayfront Parkway  
Erie, PA 16507-2004

Dated: December 18, 2018



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*Counsel for Plaintiffs*

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<sup>2</sup> At this time, counsel for Defendants, if any, have yet to file an appearance.

COURT OF COMMON PLEAS OF PENNSYLVANIA  
ERIE COUNTY

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Defendants.

Case No. 13144-18

Judge \_\_\_\_\_

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION**

AND NOW, this \_\_\_ day of \_\_\_\_\_, 2018, upon consideration of the Motion for Preliminary Injunction filed by Plaintiffs, and finding that good cause exists, said Motion is **GRANTED**, and **IT IS FURTHER ORDERED** as follows:

1. Defendant Erie Water Works ("EWW") and its agents, assistants, successors, employees, attorneys, and all other persons acting in concert or cooperation with them or at their direction or under their control, are hereby **PRELIMINARILY ENJOINED** from executing any contract or agreement with Defendants American Federation of State, County and Municipal Employees, Local 2206, District Council 85, and union officials Randy Procios ("Mr. Procios") and Shane Clark ("Mr. Clark") (collectively "AFSCME") until further order of this Court; and
2. AFSCME and its agents, assistants, successors, employees, attorneys, and all other persons acting in concert or cooperation with them or at their direction or under their control, are

hereby **PRELIMINARILY ENJOINED** from imposing union discipline or charges related or in response to the subject matter of this action until further order of this Court.

Because the interests of justice so require, Plaintiffs shall not be required to post a bond.

**IT IS SO ORDERED** this \_\_\_\_ day of \_\_\_\_\_, 2018.

BY THE COURT:

\_\_\_\_\_  
, J.