

IN THE COURT OF COMMON PLEAS OF
ERIE COUNTY, PENNSYLVANIA

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 PROCIOSUS IN HIS OFFICIAL CAPACITY;
SHANE CLARK IN HIS OFFICIAL CAPACITY;
AND ERIE WATER WORKS,

Defendants.

Case No. 13144-18
Judge Brabender

COMMON PLEAS COURT
ERIE COUNTY
CLERK OF RECORDS
PROTHONOTARY
2019 FEB 9 10:11 AM
19-11

**MEMORANDUM OF LAW IN SUPPORT OF
UNION DEFENDANTS' PRELIMINARY OBJECTIONS TO THE COMPLAINT**

Pursuant to Pennsylvania Rule of Civil Procedure 1028 and Erie Local Rule 1028(c), Defendant AFSCME Local 2206, Defendant AFSCME District Council 85, Defendant Randy Prociuous, and Defendant Shane Clark (collectively, "Union Defendants"), by and through their counsel, Willig, Williams & Davidson, submit this Memorandum of Law in Support of their Preliminary Objections to Plaintiffs' Complaint. The Preliminary Objections were filed on January 24, 2019.

I. BACKGROUND

On December 5, 2018, Mark Kiddo, Joan Hordusky, Mike Dzurko, Christine Arnone, Jennie Clay, Madelyn Groover, Melissa Guzowski, and Jeff Granger (collectively, "Plaintiffs") filed a Complaint with this Court against the Union Defendants

and Defendant Erie Water Works ("EWW"). A true and correct copy of the Complaint is attached as Exhibit A to the Preliminary Objections.

The Complaint arises out of collective bargaining negotiations between AFSCME District Council 85 and EWW for a successor collective bargaining agreement and Union Defendants' conduct of a ratification meeting and vote by the AFSCME Local 2206 membership in January 2018. (Comp. ¶¶ 69-76).

Count I of the Complaint asserts a Duty of Fair Representation claim against the Union Defendants (and EWW as a necessary party) for violating the duty of fair representation. (Compl. ¶¶ 59-79). Plaintiffs allege that the Union Defendants violated the duty of fair representation when they chose to submit for ratification by the Local 2206 membership only one contract proposal, and did not submit to ratification a second proposal that the employer had made.

Union Defendants were served with the Complaint on or about December 10, 2018. On December 13, 2018, Plaintiffs and Union Defendants agreed, pursuant to Pa. R.C.P. 248 and 1003, that the Union Defendants' response to the Complaint would be filed on or before January 25, 2019. A true and correct copy of the correspondence showing the parties' agreement is attached as Exhibit B to the Preliminary Objections.

Union Defendants filed Preliminary Objections because (1) suing Defendant Clark and Defendant Prociuous individually in connection with a duty of fair representation claim is *improper under Pennsylvania law* and (2) the jury demand is improper under Pennsylvania law and the Pennsylvania Rules of Civil Procedure.

II. STANDARD OF REVIEW

Pennsylvania Rule of Civil Procedure 1028 provides that preliminary objections may be filed for failure of a pleading to conform to law or rule of court (Pa.R.C.P. 1028(a)(2)) or where the pleading is legally insufficient (a demurrer) (Pa.R.C.P. 1028(a)(4)). "The question presented by a demurrer is whether, in the facts averred, the law says with certainty that no recovery is possible." Wei Chem v. Horn, 725 A.2d 226, 228 (Pa. Cmwlth. 1999). "However, legal conclusions, unjustified inferences, argumentative allegations, and expressions of opinions are not deemed admitted." Runski v. AFSCME, 142 Pa. Cmwlth. 662, 598 A.2d 347, 349 (Pa. Cmwlth. 1991).

III. ARGUMENT

A. The Claims Against Defendants Clark and Procius Should Be Dismissed for Legal Insufficiency.

Pennsylvania courts have long held that duty of fair representation claims may not be pursued against individual union officials. See Falsetti v. Local 2026, United Mine Workers of America, 400 Pa. 145, 161 A.2d 882, 896 (1960) ("Officials of the Union, acting in their authorized capacities, cannot be held individually liable in damages to a member-employee for failure to process a grievance since they are but agents responsible only to the Union itself. It is the Union that is the proper target of appellant's complaint."); Narcotics Agents Reg'l Comm. v. AFSCME, 780 A.2d 863, 867 (Pa. Cmwlth. 2001) ("a public employee's remedy for a union's refusal to submit a grievance to arbitration is an action against the union for breach of its duty of fair representation") citing Ziccardi v. Commonwealth, 500 Pa. 326, 456 A.2d 979 (1982)

(emphasis added); Plouffe v. Gambone, 2012 U.S. Dist. LEXIS 85405, *28 (E.D. Pa. June 20, 2012) (dismissing plaintiff's duty of fair representation claims against individual union officials with prejudice because "defendants are correct that the fiduciary duty owed to the member-employee is by the union, not by its individual representatives."); Jusiti v. City of Chester, 2018 U.S. Dist. LEXIS 180520, **21-22 (E.D. Pa. October 22, 2018) (dismissing plaintiff's duty of fair representation claim against the local union president because "as an individual union officer, [the local union president] may not be held liable for any breach of the duty of fair representation.").

Here, Plaintiffs purport to assert a duty of fair representation claim against Defendant Clark and Defendant Prociuous individually, *in their official capacities*. Because Defendant Clark is a Staff Representative of Defendant AFSCME District Council 85 and because Defendant Prociuous is the Local President of Defendant AFSCME Local 2206, they are but individual agents of the Union and are not subject to suit for breach of the duty of fair representation.

Accordingly, Plaintiffs' duty of fair representation claim against Defendant Clark and Defendant Prociuous is improper under Pennsylvania law, and so must be dismissed for legal insufficiency.

B. The Jury Demand Should Be Stricken for Failure to Conform to Law or Rule of Court and/or for Legal Insufficiency.

Pennsylvania Rule of Civil Procedure 1007.1 provides that a jury demand is proper only where there is a right to a jury trial. The Pennsylvania Supreme Court has made clear that a plaintiff asserting a cause of action arising from a statute has a right to a jury trial only if (1) the statute which creates the plaintiff's asserted cause of action expressly recognizes a right to a jury trial, or (2) Article I, Section 6 of the

Pennsylvania Constitution—at the time it was drafted in 1790—recognized a right to a jury trial for plaintiff's asserted cause of action. See Wertz v. Chapman Township, 559 Pa. 630, 741 A.2d 1272, 1277 (1999); Murphy v. Cartex Corp., 377 Pa. Super. 181, 546 A.2d 1217, 1223 (1988) (“It has long been recognized that the Pennsylvania Constitution only preserves the right to trial by jury in those cases where it existed at the time the constitution was adopted.”).

Here, Plaintiffs' duty of fair representation claim arises under the Public Employee Relations Act (Act of July 23, 1970, P.L. 563, No. 195, 43 Pa.C.S. § 1101.101, et seq.) (“PERA”). PERA created the statutory right for public sector employees to form or join a union and to collectively bargain through a union representative. Id. at § 1101.401. When a unit of employees selects a union as their exclusive bargaining agent, the union assumes a duty to fairly represent all of the employees in the unit. Falsetti, 161 A.2d at 985 & n.21; Cohen v. Temple Univ., 299 Pa. Super. 144, 445 A.2d 179, 184-185 (1982). Thus, the duty of fair representation that AFSCME District Council 85 and AFSCME Local 2206 owe to Plaintiffs comes from PERA, the statute which established the right of employees of EWW to select AFSCME as their bargaining agent.

The fact that the duty of fair representation claim arises under PERA is further evidenced by our Supreme Court's limitation of the remedies available to a PERA duty of fair representation plaintiff. In Martino v. Transport Workers' Union of Philadelphia, 505 Pa. 391, 480 A.2d 242, 245 (1984), the Pennsylvania Supreme Court recognized that a public sector employee may sue its union representative under PERA for a breach of duty of fair representation, but held that the relief available in a duty of

fair representation claim under PERA is more limited than that available under the federal Labor Management Relations Act, which applies to private sector employees. Under PERA, the Court held, a duty of fair representation plaintiff's remedy is ordinarily limited to an order compelling arbitration of the underlying grievance. *Id.*, 480 A.2d at 245, 249-252. See also Waklet-Riker v. Sayre Area Educ. Ass'n, 440 Pa. Super. 494, 656 A.2d 128, 141 (1995) ("A public employee's sole remedy in the courts, under PERA is an action in equity to compel arbitration, when the union has breached its duty of fair representation by acting in bad faith."); Runski v. AFSCME, 142 Pa. Cmwlth. 662, 598 A.2d 347, 350 (Pa. Cmwlth. 1991) ("Under PERA, an action in equity seeking an order to compel arbitration of the underlying grievance is the employee's sole remedy in the courts for the union's breach of its duty of fair representation").

PERA does not recognize the right to a jury trial for PERA violations. Indeed, the word "jury" does not appear anywhere in the statute. Pursuant to Wertz, because PERA does not recognize the right to a jury trial, Plaintiffs would be entitled to a jury trial on the duty of fair representation claim only if such a right were recognized by Pennsylvania's Constitution at the time it was drafted in 1790. However, Pennsylvania's Constitution does not provide the right to a jury trial for a violation of the duty of fair representation under PERA because neither PERA nor the notion of a union's duty of fair representation were in existence in 1790.

Because neither PERA nor Pennsylvania's Constitution provide Plaintiffs with the right to a jury trial for the duty of fair representation claim against Union Defendants, the jury demand must be stricken for failure to conform to law or rule of court and/or for legal insufficiency, pursuant to Pa. R.Civ. P. 1028(a)(2) and (4).

IV. CONCLUSION

For the foregoing reasons, Union Defendants respectfully request that the Court dismiss the Complaint as to Defendant Clark and Defendant Precious and strike the jury demand, with prejudice.

Respectfully submitted,

WILLIG, WILLIAMS & DAVIDSON

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Dated: February 15, 2019

CERTIFICATE OF SERVICE

I, Alidz Oshagan, hereby certify that I have, on this 15th day of February, 2019, sent a copy of the foregoing Memorandum of Law in Support of Union Defendants' Preliminary Objections via First Class U.S. Mail, postage prepaid, upon the following:

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Alidz Oshagan

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