

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>JANE LADLEY AND CHRISTOPHER MEIER, Appellants, v. PENNSYLVANIA STATE EDUCATION ASSOCIATION, Appellee.</p>

158 CD 2019

**RESPONSE TO APPELLEE
PENNSYLVANIA STATE
EDUCATION ASSOCIATION’S
APPLICATION TO STRIKE
AND NEW MATTER**

Appellants Jane Ladley and Christopher Meier (“Teachers”), by and through undersigned counsel, hereby submit this Response to Appellee Pennsylvania State Education Association’s (“PSEA’s”) Application to Strike and New Matter:

INTRODUCTION

Before responding to PSEA’s specific allegations, Teachers note that the public records to which PSEA objects were supplied to this Court in the context of a request to take judicial notice pursuant to Pennsylvania Rule of Evidence 201(c)(2).¹ See Appellants’ Initial Br. 2 n.1. Although PSEA can certainly take issue with the ability of this Court to take judicial notice pursuant to Pennsylvania Rule of Evidence 201, Teachers should not be penalized in any way for requesting judicial notice of public records in accordance with the Rules of Evidence.

¹ Pennsylvania Rule of Evidence 201(c)(2) provides that a court “*must* take judicial notice if a party requests it and the court is supplied with the necessary information.” (Emphasis added).

In an effort to streamline adjudication, if necessary, of PSEA's instant application, Teachers' New Matter, *infra*, again requests that this Court take judicial notice of the fact that, even after the Supreme Court's June 2018 decision in *Janus v. AFSCME, Council 31*, 585 U.S. ___, 138 S. Ct. 2448 (2018), PSEA continues to negotiate for and execute fair share fee provisions relying specifically on title 71, section 575, of the Pennsylvania Statutes ("section 575"). Teachers supply the collective bargaining agreements ("CBAs") previously supplied but also supply, again pursuant to Pennsylvania Rule of Evidence 201(c)(2), *eight more* CBAs in which PSEA's affiliates executed fair share fee provisions after *Janus*.

ANSWER TO PSEA'S APPLICATION TO STRIKE

1. ADMITTED.
2. ADMITTED. By way of further answer, the emails included with each CBA were not necessary but included to further demonstrate, pursuant to Pennsylvania Rule of Evidence 201(b)(2), that the CBAs are "sources whose accuracy cannot reasonably be questioned."
3. ADMITTED.
4. ADMITTED. Again, the public records to which PSEA objects were supplied to this Court in the context of a request to take judicial notice pursuant to Pennsylvania Rule of Evidence 201(c)(2). *See* Appellants' Initial Br. 2 n.1.
5. DENIED as a conclusion of law. By way of further answer, the public records to which PSEA objects were supplied to this Court in the context of a request

to take judicial notice pursuant to Pennsylvania Rule of Evidence 201(c)(2). *See* Appellants’ Initial Br. 2 n.1. In contrast, the reply brief stricken in *Kuznick v. Department of Public Welfare*, 5 A.3d 832, 834 n.6 (Pa. Cmwlth. 2010), included no such request and relied on information over which the Court could not have taken judicial notice. *See* Reply Br. of Appellant, *Kuznick v. Dep’t of Pub. Welfare*, 5 A.3d 832 (Pa. Cmwlth. 2010) (No. 1991 CD 2009), 2010 WL 7137706.

6. DENIED as a conclusion of law. By way of further answer, the public records to which PSEA objects were supplied to this Court in the context of a request to take judicial notice pursuant to Pennsylvania Rule of Evidence 201(c)(2). *See* Appellants’ Initial Br. 2 n.1.

7. DENIED as a conclusion of law. Teachers question the timeliness of PSEA’s request; Teachers’ initial brief was submitted on March 27, 2019, but PSEA failed to make their request until May 6, 2019.

8. DENIED as a conclusion of law.² By way of further answer, Pennsylvania Rule of Evidence 201(b)(2) permits a court to take notice of a fact that “can be accurately and readily determined from sources whose accuracy cannot

² To the extent PSEA alleges such public records were available but not presented to the trial court at the time it was considering PSEA’s summary judgment motion, PSEA’s allegation is DENIED. The trial court issued its opinion and order dismissing this matter on October 29, 2018, and notice of appeal was filed November 28, 2018. Aside from the CBA governing Appellant Christopher Meier’s employment—which was presented to the trial court (R. 1378a–1379a)—the CBAs to which PSEA objects were all executed at various times in *December 2018* and were not available to Teachers for a time thereafter.

reasonably be questioned,” and Rule 201(c)(2) provides that a court “*must* take judicial notice if a party requests it and the court is supplied with the necessary information.” (Emphasis added).

9. DENIED as a conclusion of law. By way of further answer, each of the CBAs are public records and constitute “sources whose accuracy cannot reasonably be questioned.” Pa.R.E. 201(b)(2). As for PSEA’s contention that the emails included with each CBA cannot be relied on to further document the source of the information, such emails were not necessary to establish the source of the CBAs, which speak for themselves. In any event, *Teachers’ New Matter*, *infra*, includes, where available, certified copies of CBAs and/or official internet addresses where CBAs have been posted. *See In re Dawkins*, 98 A.3d 755, 759 (Pa. Cmwlth. 2014) (“This Court takes judicial notice that the Department’s website substantiates Dawkins’ testimony.”); *Hill v. Dep’t of Corrs.*, 64 A.3d 1159, 1165 n.3 (Pa. Cmwlth. 2013) (“We take judicial notice of DOC’s policies and handbooks, which appear on DOC’s official website at: http://www.cor.state.pa.us/portal/server.pt/community/department_of_corrections/4604.”).

10. DENIED. Teachers requested that this Court take judicial notice of PSEA’s conduct because the issue in this appeal is whether PSEA’s alleged voluntary cessation mooted the case. Generally, “voluntary cessation of allegedly unlawful conduct does not moot a case because such a situation would allow the party acting wrongly to revert, upon dismissal of the proceedings, to the offensive pattern of

conduct.” *Salvatore v. Dallastown Area Sch. Dist.*, No. 995 C.D. 2014, 2015 WL 5162153, at *6 (Pa. Cmwlth. Feb. 20, 2015). In determining whether to reject that general rule, Pennsylvania courts place the burden of demonstrating mootness on the party claiming mootness and consider, among other potential factors, “(1) the good faith of [their] announced intention to discontinue the challenged activity, (2) the effectiveness of the discontinuance, and (3) the character of the past violation.” *See Highway Auto. Serv. v. Commonwealth*, 439 A.2d 238, 240 (Pa. Cmwlth. 1982). PSEA’s announced intention to discontinue fair share fees is controverted by the fact that it continues to negotiate for and execute fair share fee provisions relying specifically on section 575, even after the United States Supreme Court’s decision in *Janus* in June 2018. In short, PSEA is either unwilling or unable to end fair share fees.

11. DENIED. Again, the public records to which PSEA objects were supplied to this Court in the context of a request to take judicial notice pursuant to Pennsylvania Rule of Evidence 201(c)(2). *See* Appellants’ Initial Br. 2 n.1.

12. DENIED as a conclusion of law. By way of further answer, the public records to which PSEA objects were supplied to this Court in the context of a request to take judicial notice pursuant to Pennsylvania Rule of Evidence 201(c)(2). *See* Appellants’ Initial Br. 2 n.1.

13. ADMITTED.

14. DENIED as a conclusion of law. In any event, Teachers requested that this Court take judicial notice of PSEA’s conduct because the issue in this appeal is

whether PSEA’s alleged voluntary cessation mooted the case. Generally, “voluntary cessation of allegedly unlawful conduct does not moot a case because such a situation would allow the party acting wrongly to revert, upon dismissal of the proceedings, to the offensive pattern of conduct.” *Salvatore*, 2015 WL 5162153, at *6. In determining whether to reject that general rule, Pennsylvania courts place the burden of demonstrating mootness on the party claiming mootness and consider, among other potential factors, “(1) the good faith of [their] announced intention to discontinue the challenged activity, (2) the effectiveness of the discontinuance, and (3) the character of the past violation.” *See Highway Auto. Serv.*, 439 A.2d at 240. PSEA’s announced intention to discontinue fair share fees is controverted by the fact that it continues to negotiate for and execute fair share fee provisions relying specifically on section 575, even after the United States Supreme Court’s decision in *Janus* in June 2018. In short, PSEA is either unwilling or unable to end fair share fees.

WHEREFORE, Teachers request that this Court deny PSEA’s application to strike in its entirety. In the alternative, and should this Court determine that PSEA made a “timely request” for purposes of Pennsylvania Rule of Evidence 201(e), this Court should grant PSEA an opportunity “to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.”

NEW MATTER

15. Pennsylvania Rule of Evidence 201(b)(2) allows this Court to take judicial notice of facts not subject to reasonable dispute when such facts “can be

accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”

16. Pennsylvania Rule of Evidence 201(c)(2) provides that a court “*must* take judicial notice if a party requests it and the court is supplied with the necessary information.” (Emphasis added).

17. Pennsylvania Rule of Evidence 201(d) makes clear that “[t]he court may take judicial notice at any stage of the proceeding,” including on appeal. *See In re D.A.G.*, No. 153 MDA 2018, 2018 WL 3433864, at *4 n.2 (Pa. Super. July 17, 2018).

18. This Court has judicially noticed facts contained in public records posted on official government websites. *See, e.g., Dawkins*, 98 A.3d at 759 (“This Court takes judicial notice that the Department’s website substantiates Dawkins’ testimony.”); *Hill*, 64 A.3d at 1165 n.3 (“We take judicial notice of DOC’s policies and handbooks, which appear on DOC’s official website at: http://www.cor.state.pa.us/portal/server.pt/community/departments_of_corrections/4604.”).

19. For purposes of demonstrating that this matter is not moot on account of PSEA’s alleged voluntary cessation, Teachers requested that this Court take judicial notice of the fact that, even after the Supreme Court’s decision in *Janus* in June 2018, PSEA continues to negotiate for and execute fair share fee provisions relying specifically on section 575. The sources for this fact are various public records, more specifically, certain CBAs containing fair share fee provisions.

20. Notice of such fact will assist this Court as it determines whether to reject the general rule that “voluntary cessation of allegedly unlawful conduct does not moot a case because such a situation would allow the party acting wrongly to revert, upon dismissal of the proceedings, to the offensive pattern of conduct.” *Salvatore*, 2015 WL 5162153, at *6. In making its determination, this Court considers, among other factors, “(1) the good faith of [PSEA]’s announced intention to discontinue the challenged activity, (2) the effectiveness of the discontinuance, and (3) the character of the past violation.” *Highway Auto. Serv.*, 439 A.2d at 240.

21. Additionally, to the extent that this Court adopts the voluntary cessation analysis from cases cited by PSEA in its Appellee’s Brief, notice of such fact will assist this Court as it considers whether, “since the policy’s implementation[,] the [PSEA]’s officials have not engaged in conduct similar to that challenged by the plaintiff,” *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014), and whether PSEA “ha[s] completely and irrevocably eradicated the effects of the alleged violation.” *Campbell v. Greisberger*, 80 F.3d 703, 706 (2d Cir. 1996).

22. Since Teachers filed their initial brief in this matter, it has received several more CBAs demonstrating that, even after the Supreme Court’s decision in *Janus* in June 2018, PSEA continues to negotiate for and execute fair share fee provisions relying specifically on section 575.

23. In an effort to streamline adjudication, if necessary, of PSEA’s instant application, Teachers request that this Court take judicial notice of the following

CBA, listed in reverse chronological order of execution and including those previously provided to this Court. Where available, Teachers have included certified copies of CBAs and/or official internet addresses where CBAs have been posted:

- a. CBA between Upper Darby School District & Upper Darby Education Association (executed Feb. 12, 2019), [https://www.boarddocs.com/pa/udar/Board.nsf/files/B9BUXQ625CB4/\\$file/UDEA%20Contract%20-%20Updated%20Jan%2030%2C%202019.pdf](https://www.boarddocs.com/pa/udar/Board.nsf/files/B9BUXQ625CB4/$file/UDEA%20Contract%20-%20Updated%20Jan%2030%2C%202019.pdf), and school board meeting minutes approving the CBA, copies of which are attached as composite Exhibit A.
- b. CBA between East Stroudsburg Board of Education & East Stroudsburg Education Association (executed Dec. 17, 2018), [https://www.esasd.net/cms/lib/PA01001915/Centricity/Domain/986/ESASD Professional Staff Agreement 2016 to 2021.pdf](https://www.esasd.net/cms/lib/PA01001915/Centricity/Domain/986/ESASD%20Professional%20Staff%20Agreement%202016%20to%202021.pdf) (last visited May 9, 2019), a certified copy of which is attached as Exhibit B.
- c. CBA between Steel Valley Board of School Directors & Steel Valley Education Association (executed Dec. 12, 2018), a copy of which is attached as Exhibit C.
- d. CBA between Southern Fulton School District & Southern Fulton Education Association (executed Dec. 3 & 5, 2018) and

subsequent Memorandum of Understanding (executed April 12, 2019) removing the fair share fee provision, copies of which are attached as composite Exhibit D.

- e. CBA between Penn Hills School District & Penn Hills Education Association (executed Nov. 27, 2018), a certified copy of which is attached as Exhibit E.
- f. CBA between Jefferson-Morgan School District & Jefferson-Morgan Education Association (executed Nov. 5, 2018), a certified copy of which is attached as Exhibit F.
- g. CBA between Oxford Area Board of School Directors & Oxford Area Education Association (executed Oct. 16, 2018), a certified copy of which is attached as Exhibit G.
- h. CBA between New Kensington-Arnold School District & New Kensington-Arnold Education Support Professionals/PSEA/NEA (executed Sept. 28, 2018), <https://4.files.edl.io/89c3/09/28/18/195919-799832b7-8510-4857-b6f3-9803a1eea8eb.pdf> (last visited May 9, 2019), a certified copy of which is attached as Exhibit H.
- i. CBA between Hanover Area School District & Hanover Area Education Association (executed Sept. 1, 2018), a copy of which is attached as Exhibit I.

- j. CBA between Tuscarora School District & Tuscarora Education Association (executed Aug. 20, 2018), <https://4.files.edl.io/66f5/02/28/19/135840-f27b8703-e188-450b-a989-46f808f21b79.pdf> (last visited May 9, 2019), a certified copy of which is attached as Exhibit J.
- k. CBA between New Hope-Solebury School District & New-Hope Solebury Education Association (executed June 28, 2018), <https://www.nhsd.org/cms/lib/PA01001961/Centricity/Domain/67/NHSEA%202018-2021.pdf> (last visited May 9, 2019), a certified copy of which is attached as Exhibit K.
- l. CBA between Penn Manor School District & Penn Manor Education Association (executed April 3, 2017), <https://www.pennmanor.net/employment/negotiated-agreement-2017-2021-4-3-17-1-2/> (last visited May 9, 2019), a copy of which is attached as Exhibit L.

WHEREFORE, Teachers request, pursuant to Pennsylvania Rule of Evidence 201(c)(2), that this Court take judicial notice of the fact that PSEA and its affiliates continue to negotiate for and execute fair share fee provisions relying specifically on section 575, even after the United States Supreme Court's decision in *Janus*.

Respectfully submitted,

Dated: May 10, 2019



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CERTIFICATE OF SERVICE

I certify that the foregoing response and new matter and related exhibits have been served on all counsel of record electronically via the Unified Judicial System of Pennsylvania's PACFile system.

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Dated: May 10, 2019



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