

MARK KIDDO; JOAN HORDUSKY;  
MIKE DZURKO; CHRITINE ARNONE;  
JENNIE CLAY; MADELYN GROOVER,  
MELISSA GUZOWSKI; AND JEFF  
GRANGER, Plaintiffs

v.

AMERICAN FEDERATION OF STATE,  
LOCAL and MUNICIPAL EMPLOYEES.  
LOCAL 2206; AMERICAN  
FEDERATION OF STATE, COUNTY  
and MUNICIPAL EMPLOYEES,  
DISTRICT COUNCIL 85; and ERIE  
WATER WORKS, Defendants

: IN THE COURT OF COMMON PLEAS  
: OF ERIE COUNTY, PENNSYLVANIA

: CIVIL DIVISION  
: NO. 13144--2018

COMMON PLEAS COURT  
ERIE, PA  
2021 JAN 13 AM 11:30  
CLERK OF RECORDS  
PROTHONOTARY

Appearances: Fairness Center and Quinn Firm for the Plaintiffs  
Willig, Williams & Davidson for the Defendant AFSCME  
Knox Firm for Defendant Erie Water Works

**MEMORANDUM OPINION**

Brabender, J., January 13, 2021

The matter is before the Court on the Defendant-AFSCME’s Motion for Summary Judgment, as well as the Plaintiff-Employees’ Motion for Summary Judgment.

**PROCEDURAL BACKGROUND**

The Plaintiffs are eight employees of the Defendant Erie Water Works (EWW) and individual members of the Defendant union American Federation of State, County and Municipal Employees (AFSCME) Local 2206 and AFSCME District Council 85. Pursuant to a Civil Complaint filed on December 5, 2018, Plaintiff-Employees contend Union-Defendants, including negotiators Randy Procious and Shane Clark, in their official capacities, are trustees of the rights of the bargaining unit members, who are beneficiaries of the fiduciary obligations owed to them

by the union. As such, they bear a heavy duty of fair representation to those the union is bound to protect. The Plaintiffs allege that the Union-Defendants breached this duty of fair representation by misrepresenting, misleading and/or concealing what EWW's "Final Offer" was to the bargaining unit for consideration and ratification. This caused the Plaintiffs to ratify what they feel is a less favorable offer, resulting in them suffering, or in the future suffering, pecuniary losses of pay raises and loss of a post-employment subsidy.

On December 18, 2018, the Plaintiff-Employees filed a Motion for Preliminary Injunction, seeking to enjoin EWW from executing "Option 2," as ratified on January 11, 2018, by the bargaining unit. The Union-Defendants opposed the motion, arguing that the Plaintiffs could not meet the six requirements needed for obtaining a preliminary injunction. Evidentiary hearings were held on February 26, 2019 and March 15, 2019; and on March 19, 2019, the trial court granted the Motion for Preliminary Injunction and enjoined EWW from voting on and entering into any contract or agreements with Defendant-AFSCME until the Plaintiffs' Civil Complaint was resolved.

The Defendant-AFSCME filed a Notice of Appeal with the Commonwealth Court of Pennsylvania on April 18, 2019, arguing that the trial court abused its discretion in granting the Motion for Preliminary Injunction because the Plaintiffs did not meet the requirements for a preliminary injunction, and did not, in particular, establish that they would suffer immediate and irreparable harm that was not speculative or merely economic if the motion was denied. On August 3, 2020, the trial court's Order was reversed.

Earlier, on January 24, 2019, the Defendants filed Preliminary Objections to the Complaint, first, seeking to dismiss the duty of fair representation claims against Defendants Procious and Clark; and, second, seeking to strike Plaintiff-Employees' Jury Trial Demand. On February 21,

2020, the trial court sustained the Preliminary Objections, granting a demurrer and dismissing the actions against Prociuous and Clark individually, with prejudice; and striking the demand for a jury trial.

On May 27, 2020, the Defendant-AFSCME filed a Motion for Summary Judgment and a Brief in support of said Motion. AFSCME alleges that the Plaintiff-Employees have failed to adduce facts sufficient to establish that the Union's choice of "Option 2" over "Option 1" was arbitrary, discriminatory or in bad faith; that the Plaintiffs have failed to adduce facts sufficient to establish a breach of AFSCME's duty of fair representation in the ratification process; that the Plaintiffs have failed to demonstrate they are entitled to damages, attorneys' fees or costs; and that there are no genuine issues of material facts and the union is entitled to judgment as a matter of law. On June 12, 2020, the Plaintiffs filed a Response in Opposition to AFSCME's Motion for Summary Judgment. They argue that AFSCME is not entitled to a Summary Judgment because the Plaintiffs produced evidence that AFSCME breached its duty by misrepresenting its bargaining efforts in order to ratify a different offer, rather than the "Final Offer;" that AFSCME is not entitled to a Summary Judgment because it violated its own rules and therefore breached its duty; and that AFSCME is not entitled to a Summary Judgment as to damages and relief.

On May 28, 2020, the Plaintiff-Employees filed a Motion for Summary Judgment and a Brief in support of said motion. They argue that undisputed material facts demonstrate that Defendant-AFSCME breached its duty of fair representation, entitling the Plaintiffs to judgment as a matter of law. The Plaintiffs further argue that said duty applies to all union activity and the duty was breached when the union concealed and misrepresented the terms of AWW's "Final Offer," causing ratification of a different offer. On June 10, 2020, AFSCME filed a Reply Brief in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary

Judgment. AFSCME asserts that the Plaintiffs misstate the following: what their burden is to establish a breach of duty of fair representation; the law on their duty of fair representation as applied to the ratification process; and the law concerning any entitlement to damages in a duty of fair representation claim. In the alternative, AFSCME requests partial summary judgment as to the Plaintiffs' claims for attorneys' fees and costs.

### **FACTUAL BACKGROUND**

The material facts in this matter are undisputed. AFSCME is the exclusive representative for a bargaining unit of approximately 20 employees of EWW. AFSCME is a party to a Collective Bargaining Agreement with EWW that establishes the terms and conditions for all employees in the bargaining unit.

At a final negotiating session on December 22, 2017, EWW presented a "Final Offer" to the union, consisting of "Option 1" and "Option 2." Option 1 proposed a five-year agreement that eliminated a defined benefit pension plan for future hirees, further requiring those new employees to participate in a defined contribution retirement plan. Option 1 also called for a post-employment subsidy of \$400 until Medicare eligibility and a 3 percent increase in wages. Option 2 proposed a four-year agreement that retained the defined benefit pension plan for all employees, including future hirees. Option 2 also rejected the retirement subsidy and included a 2 ½ percent increase in wages.

The union negotiators selected Option 2 to apply to its members, subject to a vote at a ratification meeting on January 11, 2018, believing it was more important to keep the pension plan for all union employees, including new hirees, rather than to give up the pension plan for the retirement subsidy. Option 1 was never presented to the union members by the AFSCME

negotiators. It was explained to the members that if Option 2 were rejected, they would have to return to the negotiating table and could not guarantee a better offer. Following discussion, Option 2 was ratified by a vote of 15 to 3.

On February 8, 2018, EWW, through CEO Paul Vojtek, sent a letter to all employees noting that the EWW Board of Directors were scheduled to vote on Option 2 as opposed to Option 1. This was the first that the employees were aware there was an Option 1. On behalf of 13 employees, lead Plaintiff Mark Kiddo requested a re-vote on EWW's Final Offer. That request was denied by AFSCME. The trial court enjoined EWW from executing Option 2, but the same was reversed by the Commonwealth Court.

### **LEGAL STANDARDS**

The Pennsylvania Rules of Civil Procedure provide that “any party may move for summary judgment in whole or in part as a matter of law

- (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
- (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

*Pa.R.C.P. 1035.2.*

Summary judgment is appropriate only where the record clearly demonstrates the moving party is entitled to judgment as a matter of law. *Shedden v. Anadarko E. & P. Co., L.P.*, 136 A.3d 485, 489 (Pa. 2016). When considering a motion for summary judgment, the trial court must review the record the light most favorable to the non-moving party. *Jones v. Sec. Pa. Transp. Auth.*,

772 A.2d 435, 438 (Pa. 2001). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Id.* Summary judgment may be granted only when the right to judgment is clear and free of doubt. *Barnish v. KWI Bldg. Co.*, 980 A.2d 535, 543 (Pa. 2009).

Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of his cause of action. Thus, a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to the fact-finder.

*Yenchi v. Ameriprise Fin., Inc.*, 123 A.3d 1071, 1077 (Pa. Super. 2015), *re-argument denied* (Nov. 19, 2015), *appeal granted*, 134 A.3d 51 (Pa. 2016), citing *DeArmitt v. N.Y. Life Ins. Co.*, 73 A.3d 578, 585–586 (Pa.Super.2013) (internal citations and quotation marks omitted; some punctuation modified).

### **DISCUSSION**

The arguments of AFSCME are basically the same in their Motion for Summary Judgment and their defense of the Plaintiffs' Motion for Summary Judgment. Similarly, the arguments of the Plaintiffs are basically the same in their Motion for Summary Judgment and their defense of AFSCME's Motion for Summary Judgment.

In its Motion for Summary Judgment, AFSCME argues that the Plaintiffs failed to adduce facts sufficient to establish that the union's choice of Option 2 over Option 1 was arbitrary, discriminatory, made in bad faith, or a breach of the duty of fair representation in the ratification process. Viewing the record in a light most favorable to the Plaintiffs as the non-moving party in the matter of Defendant-AFSCME's Motion for Summary Judgment, this court finds that the union negotiators concealed pertinent information concerning Option 1, even after discussion on the same, by not presenting the full Final Offer; that the union negotiators led the members to believe

that Option 2 was the only offer; and, therefore, deliberately misrepresented the terms of EWW's Final Offer. There is no evidence to support AFSCME's claim that the members understood the "trade-off" choice between a pension plan, small salary increase, no post-employment subsidy, or potentially something worse. The assertion that if the members rejected Option 2 they might get a worse offer is not supported by the record, particularly when Option 1 was available to the members at the time. Further, the union refused a request by a majority of its members for a simple re-vote. This limited the members from being able to fully participate and exercise their rights. All this amounted to a breach of AFSCME's duty to act in good faith and in a reasonable manner. Hence, summary judgment in favor of the Defendant-AFSCME must be DENIED.

In its Motion for Summary Judgment, the Plaintiffs argue that AFSCME, as its exclusive representative, "bears a heavy burden of fair representation to all those in the shelter of its protection" and must "act in good faith, in a reasonable manner and without fraud." *Falsetti v. Local Union No. 2026, United Mine Workers of Am.*, 161 A2d 882, 895 (Pa. 1960). Further, that a union "becomes liable in damages" when it breaches its duty of fair representation and its conduct directly causes damage to the group "to whom the duty is owed." See *Falsetti*, 161 A.2d at 895; *Deboles v. Trans World Airlines, Inc.*, 552 F2d 1005 1019 (3d Cir. 1977). The undisputed material facts of this case demonstrate that AFSCME breached its duty of fair representation to all union activity by concealing Option 1 from its members and misrepresenting the terms of EWW's Final Offer. As a result of this conduct, the Plaintiffs' collective bargaining rights were violated and they lost the opportunity to realize higher wages and additional benefits.

Defendant-AFSCME argues that the Plaintiffs misstate the law on their burden of proof and the union's duty of fair representation. The issue here is not the law, but the undisputed material facts. AFSCME fails in its same argument that the Plaintiffs failed to adduce facts

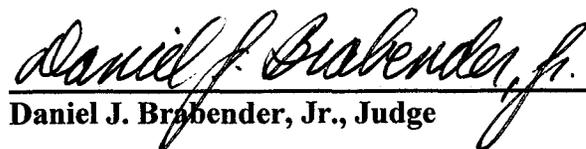
sufficient to establish that the union's choice of Option 2 over Option 1 was arbitrary, discriminatory, made in bad faith, or a breach of the duty of fair representation in the ratification process. Even viewing the record in a light most favorable to the Defendant-AFSCME as the non-moving party in the matter of the Plaintiffs' Motion for Summary Judgment, summary judgment must be GRANTED.

**CONCLUSION**

Defendant-AFSCME's Motion for Summary Judgment is **DENIED**. Plaintiffs' Motion for Summary Judgment is **GRANTED**. This court further reserves decision on the appropriate relief, including the calculations of damages and attorneys' fees and costs.

Appropriate ORDERS will follow.

**BY THE COURT:**

  
Daniel J. Brabender, Jr., Judge

cc: Fairness Center and Quinn Firm for the Plaintiffs  
Willig, Williams & Davidson for the Defendant AFSCME  
Knox Firm for Defendant Erie Water Works

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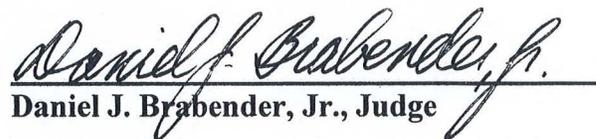
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**ORDER**

AND NOW, to-wit, this 13<sup>th</sup> day of January, 2021, upon consideration of Defendant-AFSCME's Motion for Summary Judgment, it is hereby **ORDERED** said motion is **DENIED**. Further, consideration of Plaintiffs' Motion for Summary Judgment, it is hereby **ORDERED** said motion is **GRANTED**. This court further reserves decision on the appropriate relief, including the calculations of damages and attorneys' fees and costs.

**BY THE COURT:**

  
Daniel J. Brabender, Jr., Judge

cc: Fairness Center and Quinn Firm for the Plaintiffs  
Willig, Williams & Davidson for the Defendant AFSCME  
Knox Firm for Defendant Erie Water Works

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