

Supreme Court of Pennsylvania

Court of Common Pleas Civil Cover Sheet

Cambria

County

For Prothonotary Use Only:

Docket No:

2021-1421

TIME STAMP

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

Commencement of Action:

- ☒ Complaint ☐ Writ of Summons ☐ Petition
☐ Transfer from Another Jurisdiction ☐ Declaration of Taking

Lead Plaintiff's Name:
Penny Gustafson

Lead Defendant's Name:
AFSCME, Council 13

Are money damages requested? ☒ Yes ☐ No

Dollar Amount Requested: ☒ within arbitration limits
(check one) ☐ outside arbitration limits

Is this a *Class Action Suit*? ☐ Yes ☒ No

Is this an *MDJ Appeal*? ☐ Yes ☒ No

Name of Plaintiff/Appellant's Attorney: Danielle R.A. Susanj, Curtis M. Schube, Nathan J. McGrath

☐ Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)

SECTION B

Nature of the Case: Place an "X" to the left of the **ONE** case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

TORT (do not include Mass Tort)

- ☐ Intentional
☐ Malicious Prosecution
☐ Motor Vehicle
☐ Nuisance
☐ Premises Liability
☐ Product Liability (does not include mass tort)
☐ Slander/Libel/ Defamation
☒ Other:
Duty of Fair Representation

MASS TORT

- ☐ Asbestos
☐ Tobacco
☐ Toxic Tort - DES
☐ Toxic Tort - Implant
☐ Toxic Waste
☐ Other:

PROFESSIONAL LIABILITY

- ☐ Dental
☐ Legal
☐ Medical
☐ Other Professional:

CONTRACT (do not include Judgments)

- ☐ Buyer Plaintiff
☐ Debt Collection: Credit Card
☐ Debt Collection: Other
☐ Employment Dispute:
Discrimination
☐ Employment Dispute: Other
☐ Other:

REAL PROPERTY

- ☐ Ejectment
☐ Eminent Domain/Condemnation
☐ Ground Rent
☐ Landlord/Tenant Dispute
☐ Mortgage Foreclosure: Residential
☐ Mortgage Foreclosure: Commercial
☐ Partition
☐ Quiet Title
☐ Other:

CIVIL APPEALS

- Administrative Agencies
☐ Board of Assessment
☐ Board of Elections
☐ Dept. of Transportation
☐ Statutory Appeal: Other
☐ Zoning Board
☐ Other:

MISCELLANEOUS

- ☐ Common Law/Statutory Arbitration
☐ Declaratory Judgment
☐ Mandamus
☐ Non-Domestic Relations
Restraining Order
☐ Quo Warranto
☐ Replevin
☐ Other:

**COURT OF COMMON PLEAS OF PENNSYLVANIA
CAMBRIA COUNTY**

PENNY GUSTAFSON,

Plaintiff,

v.

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, COUNCIL 13;
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, DISTRICT
COUNCIL 83; AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 2047; AND PENNSYLVANIA
DEPARTMENT OF HUMAN SERVICES,

Defendants.

Case No. _____

CIVIL ACTION

COMPLAINT—JURY TRIAL DEMANDED

COUNSEL FOR PLAINTIFF:

Danielle R.A. Susanj

Pa. Attorney I.D. No. 316208

Curtis M. Schube

Pa. Attorney I.D. No. 325479

Nathan J. McGrath

Pa. Attorney I.D. No. 308845

THE FAIRNESS CENTER

500 North Third Street, Suite 600B

Harrisburg, Pennsylvania 17101

Phone: 844.293.1001

Facsimile: 717.307.3424

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT
HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW.
THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A
LAWYER.**

**IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO
PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER
LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.**

Laurel Legal Services, Inc.
227 Franklin Street, Suite 400
Johnstown, PA 15901
Telephone: (814) 536-8917
Fax: (814) 535-3377

**COURT OF COMMON PLEAS OF PENNSYLVANIA
CAMBRIA COUNTY**

PENNY GUSTAFSON,

Plaintiff,

v.

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, COUNCIL 13;
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, DISTRICT
COUNCIL 83; AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 2047; AND PENNSYLVANIA
DEPARTMENT OF HUMAN SERVICES,

Defendants.

Case No. _____

COMPLAINT—JURY TRIAL DEMANDED

AND NOW comes Plaintiff Penny Gustafson (“Plaintiff”), by and through her undersigned counsel, and states the following claim for relief against Defendants American Federation of State, County and Municipal Employees, Council 13 (“Council 13”); American Federation of State, County and Municipal Employees, District Council 83 (“District Council 83”); American Federation of State, County and Municipal Employees, Local 2047 (“Local 2047”)¹; and Pennsylvania Department of Human Services (“DHS”), and avers as follows:

SUMMARY OF THE CASE

1. Plaintiff brings this civil action to address AFSCME’s failure to fairly represent Plaintiff during a workplace investigation and subsequent grievance proceeding.
2. “[T]he Union bears a heavy duty of fair representation to all those within the shelter of its protection.” *Falsetti v. Loc. Union No. 2026, United Mine Workers of Am.*, 161 A.2d 882, 895 (Pa.

¹ Defendants Council 13, District Council 83, and Local 2047 will be referred to, collectively, as “AFSCME”.

1960). “If the Union, in processing an employee’s grievance, does not act in good faith, in a reasonable manner and without fraud, it becomes liable in damages for breach of duty.” *Id.*

3. After initially filing a grievance on Plaintiff’s behalf, AFSCME did not communicate with Plaintiff or pursue a satisfactory or fair result for Plaintiff. AFSCME accepted the unsatisfactory settlement on Plaintiff’s behalf without timely informing her, preventing Plaintiff from any appeal or challenge of the resolution.

4. AFSCME acted in bad faith or discriminatorily toward Plaintiff in connection with the investigation and grievance because Plaintiff is not a member of AFSCME, as stated by AFSCME officials on multiple occasions.

JURISDICTION AND VENUE

5. “[B]reach of the duty of fair representation . . . is within the exclusive jurisdiction of the courts of common pleas.” *Dailey v. PLRB*, 148 A.3d 920, 924 (Pa. Cmwlth. 2016).

6. Venue is proper in Cambria County, because Defendants regularly conduct business in Cambria County and the cause of action arose in Cambria County. *See* Pa. R. Civ. P. 2179(a)(2)–(4).

PARTIES

7. Plaintiff Penny Gustafson is an adult individual residing in Cambria County, Pennsylvania. Ms. Gustafson is an employee of DHS, at all relevant times hereto a nonmember of AFSCME within a bargaining unit represented by AFSCME, and a “public employe” for purposes of the Public Employe Relations Act (“PERA”), 43 P.S. § 1101.301(2).

8. Defendant Council 13 is a labor union with a principal place of business at 4031 Executive Park Drive, Harrisburg, Pennsylvania. Council 13 is an “employe organization” for purposes of PERA, 43 P.S. § 1101.301(3). Council 13 is also Plaintiff’s exclusive representative for purposes of PERA, 43 P.S. § 1101.606.

9. Defendant District Council 83 is a labor union with a principal place of business at 161 Patch Way Road, Duncansville, Pennsylvania. District Council 83 is an “employee organization” pursuant to 43 P.S. § 1101.301(3), and is an affiliate of Council 13.

10. Defendant Local 2047 is a labor union with a principal place of business at 4501 Admiral Peary Highway, Ebensburg, Pennsylvania. Local 2047 is an “employee organization” for purposes of PERA, 43 P.S. § 1101.301(3), and an affiliate of District Council 83.

11. Defendant DHS is an agency of the Commonwealth of Pennsylvania located at 625 Forster Street, Harrisburg, Pennsylvania. DHS is a “public employer” for purposes of PERA, 43 P.S. § 1101.301(1). DHS is sued solely for purposes of the alternative remedy sought in the relief.

FACTUAL ALLEGATIONS

Background

12. Plaintiff is, and was at all relevant times, employed by DHS as a Residential Services Aide at Ebensburg Center in Ebensburg, Pennsylvania, in a bargaining unit represented by AFSCME.

13. At all relevant times, Plaintiff was subject to the provisions of a collective bargaining agreement between Council 13 and the Commonwealth of Pennsylvania, which governs the terms and conditions of Plaintiff’s employment and provides for the processing of grievances.

14. Plaintiff was previously a member of AFSCME, but resigned her membership in June 2019.

15. At Plaintiff’s place of employment, when an investigation is being conducted, employees involved are taken “off the floor” or “out of complement,” which means that they are still considered to be working, but do not have any interactions with residents of Ebensburg Center.

16. When an employee is “off the floor,” that employee is not eligible to work overtime hours.

17. Overtime priority for employees at Ebensburg Center is determined by an “equalization” process where employees who more frequently accept overtime opportunities gain priority for overtime opportunities.

18. On information and belief, as a part of AFSCME’s established practice at Ebensburg Center, AFSCME assists and/or represents members when DHS investigates them for potential violations.

19. On information and belief, AFSCME’s policies state that under “the duty of fair representation,” AFSCME stewards have the responsibility to advocate for bargaining unit members throughout grievances, keep employees informed about the status of grievances, and notify the employee about the resolution of the grievance and how to appeal in writing.

Plaintiff’s Time “Off the Floor”

20. In October 2019, Plaintiff was taken “off the floor,” purportedly for an investigation, although Plaintiff was not informed of the reason for the investigation.

21. No investigator from Plaintiff’s employer came to speak with Plaintiff, and, on information and belief, no investigation was conducted.

22. AFSCME did not attempt to assist Plaintiff in connection with the purported investigation or to have her restored to her normal duties.

23. After three weeks, Plaintiff’s unit manager began to conduct a pre-disciplinary conference with Plaintiff, but then realized that no investigation had been performed.

24. At that time, the unit manager took Plaintiff’s statement and returned her to her normal duties.

25. While Plaintiff was “off the floor,” she was not eligible to work overtime.

26. While Plaintiff was “off the floor,” Plaintiff lost the opportunity to work overtime hours, which would have also counted toward her pension.

27. While Plaintiff was “off the floor,” she lost overtime priority, or “equalization,” because she was unable to accept overtime opportunities for three weeks.

28. Plaintiff would have accepted and worked significant overtime hours during the three weeks she was “off the floor,” had she not been “off the floor.”

29. On information and belief, AFSCME did not assist Plaintiff during her time “off the floor” because she is not a member of AFSCME, even though she is a member of a bargaining unit for which AFSCME is the exclusive representative.

30. On information and belief, AFSCME provides more assistance to members of AFSCME who are taken “off the floor” than it provided for Plaintiff, resulting in Plaintiff being “off the floor” longer than a member of AFSCME would have been.

Plaintiff's Grievance

31. On or about October 30, 2019, Plaintiff requested that AFSCME file a grievance related to her time “off the floor” and the lack of investigation, and an official of AFSCME, Local 2047 shop steward Doug Myers, filed a grievance related thereto on her behalf.

32. On November 4, 2019, Plaintiff's employer provided her a letter stating that the results of the “pre-disciplinary conference” were that “no disciplinary action will be taken.”

33. After the filing of the grievance, at least once per month thereafter, Plaintiff asked Myers for the status of her grievance, but he provided no information other than telling Plaintiff that the grievance would “take a while” and that the grievance process was delayed due to the coronavirus pandemic.

34. Plaintiff asked Myers about the status of her grievance in March 2020, April 2020, May 2020, and June 2020, but Myers told her that he had no information or updates on her grievance.

35. In or about June 2020, Plaintiff called District Council 83 to ask for the status of her

grievance.

36. Within a few days of the June 2020 call, Myers delivered to Plaintiff a grievance resolution letter dated March 3, 2020.

37. The grievance resolution letter stated that the “Department offers the following in final resolution of the above case: Grievant was equalized.” Ex. A.

38. The grievance resolution letter did not award Plaintiff the lost wages from the hours of overtime that she would have worked, been paid for, and would have had credited toward her pension while she was “off the floor.”

39. Additionally, the equalization credited to her was 72.5 hours, but Plaintiff should have received more credited hours in the calculation of the equalization.

40. The grievance resolution letter, dated March 3, 2020, stated that “the settlement will be effective upon return to this office of the enclosed copy, properly executed, within fifteen (15) days of the postmark date. Acceptance of this settlement will dispose of all issues encompassed in this grievance.” Ex. A.

41. The grievance resolution letter was signed by an AFSCME official on March 3, 2020.

42. AFSCME did not timely inform Plaintiff of the resolution letter and did not ask for her input in AFSCME’s decision to sign and accept the settlement.

43. AFSCME did not ask Plaintiff whether the equalization calculation was correct.

44. AFSCME’s delay in informing Plaintiff caused her to be unable to appeal or otherwise challenge the resolution of the grievance.

45. The resolution of the grievance did not restore or repay her lost overtime hours or properly calculate her equalization.

46. On information and belief, other employees with similar grievances, who are members of AFSCME, have received better outcomes, including payment of lost overtime.

47. On information and belief, officials of DHS have stated that Plaintiff should have been paid for the lost overtime she was unable to work during her time “off the floor” in October 2019.

48. Plaintiff asked Myers to explain the resolution of the grievance and the reason for the delay in delivering it to her. She asked Myers, “How can this be?” In response, Myers grinned and said, “You’re right, it can’t be,” and walked away.

49. On information and belief, Myers purposely delayed delivering Plaintiff the grievance resolution letter.

50. On or about July 7, 2020, Plaintiff called to discuss the handling of her grievance with Dominic Sgro, Director of District Council 83.

51. Sgro told Plaintiff that he was not familiar with her situation because he “deals with hundreds of people,” but stated that he would look into it.

52. On the July 7, 2020 phone call, Sgro called Plaintiff a “free rider” when he learned that she was not a member of AFSCME.

53. Over three months later, on or about October 15, 2020, Plaintiff finally reached Sgro again by phone via conference call, within hearing of witnesses.

54. In the October 15, 2020 phone call, Sgro told Plaintiff that she is “sponging” off the union and its members and that he “knows what happened” and that Plaintiff got “minimal” or “limited” representation because she is a “freeloader.”

55. AFSCME violated its duty to Plaintiff by failing to fairly represent her during the investigation and processing of her grievance, including by failing to communicate with her regarding the grievance and its outcome, by failing to protect or represent her interests and rights, and by preventing her from appealing or otherwise challenging the grievance resolution.

56. AFSCME violated its duty of fair representation to Plaintiff because it acted out of

bad faith, arbitrarily, or with discrimination, because Plaintiff is a nonmember of AFSCME.

57. Under state law and federal constitutional law, Plaintiff has the right to refrain from membership in AFSCME or not to be a member of AFSCME.

58. Plaintiff chose not to be a member of AFSCME, and accordingly resigned her membership, just months before she was taken “off the floor” in October 2019 and asked AFSCME to file a grievance on her behalf.

59. AFSCME, by and through its agents or officials, as alleged above, discriminated against, punished, or otherwise retaliated against Plaintiff because of her decision to be or status as a nonmember of AFSCME.

60. AFSCME, by and through its agents or officials, acted with conduct, as alleged above, that was outrageous, because of evil motive, or with reckless indifference to the rights of Plaintiff.

CAUSE OF ACTION
Breach of Duty of Fair Representation

61. The foregoing paragraphs are incorporated by reference as if set forth fully herein.

62. Because the “[u]nion has assumed the role of trustee for the rights of its members and other employees in the bargaining unit” and employees are “beneficiaries of fiduciary obligations owed by the [u]nion[,] . . . the [u]nion bears a heavy duty of fair representation to all those within the shelter of its protection.” *Falsetti*, 161 A.2d at 895. Accordingly, unions must “act in good faith, in a reasonable manner and without fraud.” *Id.*

63. Additionally, “[t]he union must not have declined to press the grievance out of laziness or prejudice, or out of unwillingness to expend money on behalf of non-members.” *Falsetti*, 161 A.2d at 895 n.21 (quoting Hanslowe, *Individual Rights in Collective Labor Relations*, 45 Corn. L.Q. 25, 46–47 (1959)).

64. AFSCME has the duty of fair representation to Plaintiff, because she is a member of a bargaining unit represented exclusively by AFSCME for purposes of collective bargaining.

65. AFSCME breached its duty of fair representation by failing to try to help Plaintiff or otherwise represent her in connection with the workplace investigation.

66. AFSCME breached its duty of fair representation by failing to adequately pursue or protect her interests in the processing or resolution of her grievance.

67. AFSCME breached its duty of fair representation by failing to communicate with Plaintiff regarding the grievance or to consult with or otherwise inform her of its status and on its resolution.

68. AFSCME breached its duty of fair representation by preventing Plaintiff from appealing or otherwise challenging the grievance resolution.

69. AFSCME acted in bad faith, arbitrarily, or with prejudice or discrimination toward Plaintiff in its representation of her during the investigation and the grievance because she is not a member of AFSCME.

70. AFSCME also failed to fairly represent or continue pursuing Plaintiff's grievance out of a desire not to expend money on behalf of bargaining unit employees who are not members of AFSCME.

71. AFSCME's bad faith, prejudice, discrimination, or arbitrary action is evidenced by AFSCME's delay in communicating with Plaintiff regarding the resolution of the grievance, as well as comments made by Myers and Sgro.

72. AFSCME's bad faith, prejudice, discrimination, or arbitrary action is evidenced by AFSCME's representation of, and better results attained for, members of AFSCME as compared to Plaintiff, a nonmember.

73. As a result of AFSCME's conduct, Plaintiff was injured by being "off the floor" for a

longer time than she otherwise would have been, resulting in more lost overtime opportunities and equalization hours.

74. As a result of AFSCME's conduct, Plaintiff was injured by the inadequate settlement and/or resolution of her grievance, which did not restore the pay for overtime hours she would have worked or the proper amount of equalization.

75. As a result of AFSCME's conduct, Plaintiff was injured because she was prevented from appealing or otherwise challenging the grievance resolution.

76. AFSCME's actions demonstrated an unwillingness to expend money on behalf of Plaintiff, a nonmember. AFSCME did not represent Plaintiff during her time "off the floor" or in pursuing her grievance, while preventing her from challenging or appealing the outcome, or otherwise pursuing the grievance further.

77. AFSCME's conduct caused harm to Plaintiff in the form of lost overtime wages, lost equalization and opportunity for overtime, and lost overtime hours to apply toward her pension.

78. AFSCME's conduct was outrageous or done with an evil motive or reckless indifference to the rights of Plaintiff, entitling Plaintiff to punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests this Honorable Court to:

- a) Enter judgment against AFSCME;
- b) As to AFSCME, award compensatory damages and punitive damages;
- c) Alternatively to (b), order Defendants to continue the grievance process *nunc pro tunc*;
- d) Award costs and fees, including reasonable attorneys' fees; and
- e) Award such other relief as the Court deems appropriate.

JURY DEMAND

Plaintiff demands a trial by jury pursuant to Pennsylvania Rule of Civil Procedure 1007.1.

Dated: May 18, 2021



Danielle R.A. Susanj

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THE FAIRNESS CENTER

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Harrisburg, Pennsylvania 17101

Phone: 844.293.1001

Facsimile: 717.307.3424

Attorneys for Plaintiff

VERIFICATION

I, Penny Gustafson, hereby verify that I am a plaintiff in this action and subject to the penalties of 18 Pa.C.S.A. § 4904, relating to unsworn falsification to authorities, hereby state that the facts set forth in Plaintiff's complaint are true and correct to the best of my knowledge, information and belief.

Date: 5/16/21

By: Penny Gustafson

EXHIBIT A

Grievance Resolution Letter



pennsylvania
DEPARTMENT OF HUMAN SERVICES

Nicole Ferrebee-Phillips
Facility Director

4501 Admiral Peary Hwy.
Ebensburg, Pa. 15931
Phone: 814-472-0200
FAX: 814-472-0542
TDD 814-472-0544

Date: 3-3-2020

Kim George
AFSCME Council 83
160 Patchway Road
Duncansville, PA 16835-8431

Grievant: Penny Gustafson
Grievance No: 0877-2019-429

Dear Ms. George:

The Department offers the following in final resolution in the above case:

1. Grievant was requalified.
2. The settlement will be effective upon return to this office of the enclosed copy, properly executed, within fifteen (15) calendar days of the postmark date. Acceptance of this settlement will dispose of all issues encompassed in this grievance.
3. It is distinctly understood and agreed to between the parties that this settlement is without prejudice to the contractual rights of either party and shall set no precedent for any future grievances.
4. This settlement will become void if it is discovered that the grievant(s) has an active appeal before the State Civil Service Commission. The action giving rise to the settlement shall be reinstituted, and the grievance procedure shall cease.

Sincerely,

Cynthia McGinnis LRC
Ebensburg Center Title

3-3-2020
Date

Timothy George JRP
Union Title

3-3-2020
Date

Cc: M. Fenton, File, Labor Relations