Case No. 125691

IN THE
SUPREME COURT OF ILLINOIS

RUSSELL ZANDER, Plaintiff-Appellant, v. ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants-Appellees.	)	Appeal From The Appellate Court Of Illinois, First District, Case No. 1-18-1868 There Heard On Appeal From The Circuit Court Of The First Judicial Circuit, Cook County, Illinois Case No. 2017 L 63098 The Honorable Judge Martin S. Agran

THE ILLINOIS PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION'S BRIEF *AMICUS CURIAE*

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POINTS AND AUTHORITIES

Pursuant to Illinois Supreme Court Rule 345, the Illinois Public Employer Labor Relations Association ("IPELRA") provides this Honorable Court with its brief *amicus curiae* in support of Defendants-Appellees Roy Carlson, Esq. ("Carlson") and the Illinois Fraternal Order of Police Labor Council ("Union). IPELRA appreciates the opportunity to assist in the determination of these important issues.

STATEMENT OF INTEREST OF *AMICUS CURIAE* IPELRA

IPELRA is a professional, not-for-profit association comprised of approximately 300 Illinois public sector management representatives, who are responsible for formulating and executing the labor relations programs for their respective jurisdictions, impacting more than 100,000 Illinois public employees. IPELRA's members work for municipal, county, and state governments as well as school districts and state university systems.

IPELRA and its respective members have a specific interest in this matter because the holding in this case will affect public entities that are parties to collective bargaining agreements with various unions. These local public entities have an interest in ensuring that the Illinois Labor Relations Board retains exclusive jurisdiction over unfair labor practices claims. Any ruling that provides otherwise could negatively impact IPELRA's members (directly or indirectly) and lead to uncertainty in labor relations matters.

INTRODUCTION

In *Zander v. Carlson*, 2019 IL App (1st) 181868, 43 N.E.2d 1216 (1st Dist. 2019), the First District Appellate Court held, in pertinent part, that the Illinois Labor Relations Board has exclusive jurisdiction over unfair labor practice charges, including claims that a union has breached its duty of fair representation. As explained below, this holding is consistent with the Illinois Public Labor Relations Act's comprehensive statutory scheme,

as well as established case law interpreting the scope of the Act and its exclusivity provisions. IPELRA and its members have a unique interest in ensuring that the Illinois Labor Relations Board retains exclusive jurisdiction over such claims. From a policy standpoint, carving out an exception to this rule or otherwise failing to affirm the Appellate Court's decision in *Zander* would frustrate the Illinois legislature's intent to provide a uniform body of law in the area of labor relations, create uncertainty about the finality of arbitration decisions, unduly delay the resolution of labor relations matters, lead to inconsistent judgments in similar cases and forum shopping, open the door to claims against a public employer for breach of contract claims that are premised on an union's breach of the duty of fair representation, and further burden the circuit court system. In effect, accepting Plaintiff-Appellant's argument for an exception to the general rule that the Illinois Labor Relations Board has exclusive jurisdiction over such matters would eviscerate the reason for the rule altogether and lead to unintended consequences, delay, and inefficiencies.

ARGUMENT

I. The Illinois Labor Relations Board Has Exclusive Jurisdiction Over Plaintiff-Appellant's Claims.

The Illinois Public Labor Relations Act ("Act") and case law interpreting that Act establish that the Illinois Labor Relations Board ("Board") has exclusive jurisdiction over unfair labor practice charges, including whether a union has breached its duty of fair representation. *See* 5 ILCS 315/5; *Knox v. Chicago Transit Authority*, 2018 IL App (1st) 162265, ¶¶ 24-25, 105 N.E.3d 810, 817 (1st Dist. 2018); *Foley v. American Federation of State, County, and Municipal Employees*, 199 Ill. App. 3d 6, 12 (1st Dist. 1990); *Cessna v. City of Danville*, 296 Ill.App.3d 156, 163 (4th Dist. 1998). Consequently, claims of unfair

labor practices or breach of the duty of fair representation are subject to the comprehensive and exclusive scheme of remedies and administrative procedures set forth in the Act. *Knox,* 2018 IL App (1st) 162265, ¶¶ 24-25. Under that comprehensive and exclusive scheme, the Board has exclusive jurisdiction over such claims and Illinois appellate courts may only review the Board's final administrative decisions on administrative appeal. *Id.* Significantly, there are no provisions in the Act that authorize public employees to file suit directly in the circuit court alleging what amounts to a union's breach of the duty of fair representation. *See Foley*, 199 Ill. App. 3d at 10.

In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), the Supreme Court held that a union agent is immune from personal liability for actions taken on the union's behalf in the collective bargaining process. In this case, the Appellate Court properly determined that the *Atkinson* rule forecloses Plaintiff-Appellant's claims against Carlson as the Union's attorney. *Zander,* 2019 IL App (1st) 181868, ¶¶ 11-22. Other courts have similarly dismissed efforts to carve out an exception to the *Atkinson* rule for attorneys who represent the union. *See, e.g., Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 862 (10th Cir. 1996) (rejecting exception to *Atkinson* rule for attorneys retained by the union); *Carino v. Stefan*, 376 F.3d 156, 160 (3rd Cir. 2004) (similar); *Peterson v. Kennedy*, 771 F.2d 1244, 1257 (9th Cir. 1985) (similar).

In this case, despite Plaintiff-Appellant's "inventive" pleading, it is clear that his allegations boil down to a claim that the Union (through its attorney) breached its duty of fair representation to him during the grievance arbitration process. Apparently disappointed with the results of his grievance arbitration, Plaintiff-Appellant seeks to blame the Union's attorney, Carlson, for the outcome of the arbitration by claiming that

Attorney Carlson did not properly represent him. The mere fact that Plaintiff-Appellant styled his complaint as one for "legal malpractice" against Attorney Carlson does not alter the conclusion that the circuit court properly dismissed his claim for lack of subject matter jurisdiction. Indeed, that Plaintiff-Appellant's claim is based on his disappointment with the union's representation of him during the grievance arbitration process (whether that representation was conducted by the Union's attorney or non-attorney representative), simply confirms that this case is nothing more than a claim that the Union (and/or the attorney who represented the Union during the process) breached its duty to fairly represent Plaintiff-Appellant.

Of course, the Union had no obligation to appoint an attorney to represent Plaintiff-Appellant during the underlying grievance arbitration that gave rise to this matter, as non-attorneys often represent union members during grievance arbitration matters. Nonetheless, the Union chose to assign Attorney Carlson, one of its employees, to do so. It would be a curious and unwelcome outcome for labor relations matters if unions were held to a "higher" duty by assigning an attorney to represent its members. As a practical matter, the unintended consequence of creating such a higher duty would likely result in unions being *less* likely to assign attorneys to such matters, possibly to the union members' detriment.

As a legal matter, IPELRA contends that the circuit court and the Appellate Court properly determined that Plaintiff-Appellant's claims fall within the Board's exclusive jurisdiction and the circuit court lacked subject matter jurisdiction to consider such claims.

II. Policy Reasons Further Support The Appellate Court's Holding That The Board Has Exclusive Jurisdiction Over Plaintiff-Appellant's Claims.

The Court's ruling on this important legal issue will have significant ramifications for the labor relations process generally, and to IPELRA specifically, if the Court carves out an exception to the comprehensive and exclusive scheme that the Illinois legislature has constructed for labor relations matters. First, doing so would frustrate the legislature's intent to provide a uniform body of law in the area of labor relations. Public labor relations matters involving claims of unfair labor practices and a union's breach of the duty of fair representation have typically been left to the jurisdiction of the Board, whose years of experience focusing on such issues has led to efficiencies and expertise in this area. This scheme has served Illinois well for many years. As a result, public employers and unions rely on the Board's efficiencies and expertise to resolve disputes as they arise, and the Board's decisions provide a body of law upon which both IPELRA's members and unions reasonably depend on.[1] *See Collins v. Reynard*, 154 Ill. 2d 48, 50 (1992) ("Certainty in the law enables parties to understand their relative rights and duties and facilitates rationality and planning in matters of commerce and social intercourse. Uncertainty, on the other hand, introduces [dysfunction] and chaos.").

[1] Even in this case, which is styled as one for legal malpractice, the essence of Plaintiff-Appellant's claim would require an interpretation of the collective bargaining agreement – i.e., precisely the type of inquiry that the Board is well-equipped to resolve. Relevant questions would include what duties did the Union have to Plaintiff-Appellant under the terms of the collective bargaining agreement, an analysis of the collective bargaining agreement's grievance process, and an analysis of the collective bargaining agreement's arbitration processes and related discovery provisions. In this case, as Defendants-Appellees have explained, Attorney Carlson had no duty to Plaintiff-Appellant outside the auspices of the collective bargaining agreement and the Union's duty to provide fair representation to Plaintiff-Appellant in connection with the grievance process. Consequently, it is the Board – not the circuit courts – that is entrusted with analyzing and deciding Plaintiff-Appellant's claims.

Second, ruling in Plaintiff-Appellant's favor in this case will create uncertainty about the finality of arbitration decisions in other cases.[2] IPELRA members and unions understand that while the arbitration process is not always perfect, the process typically results in a final decision, which is only appealable if one of a narrow set of exceptions applies. Allowing a union member who is disappointed with the results of a grievance arbitration process to continue litigating the grievance in state court, under the guise of some separate contract or tort theory, undermines the purpose of arbitration altogether. It is quite likely that union members will seek to use such avenues for the proverbial "second bite at the apple." Indeed, that is precisely what Plaintiff-Appellant is doing in this case under the guise of his "legal malpractice" theory. IPELRA members should not have to face the prospect of devoting additional time, money, and/or other resources to grievance or litigation matters once the arbitration process has ended. Even if the union member's claim is not against the public employer directly, it is possible (if not likely) that the public employer would be pulled into the dispute via discovery or other means.

Third, and for similar reasons, accepting Plaintiff-Appellant's argument in this case will unduly delay the resolution of labor relations matters. Under the Act, unfair labor practice charges must be filed within six months after the conduct giving rise to the alleged violation occurs. 5 ILCS 315/11(a). This relatively short limitations period reflects an intention on the part of the Illinois legislature to encourage the quick resolution of labor relations disputes and avoid stale claims. Allowing persons such as Plaintiff-Appellant to

[2] Notably, the Act requires collective bargaining agreements to have a grievance procedure providing for "final and binding arbitration." 5 ILCS 315/8. By virtue of this provision, the legislature acknowledged a policy favoring the certainty of arbitration decisions.

circumvent this limitations period by artfully pleading a claim with a longer limitations period thwarts the legislature's intent that such claims be resolved quickly.[3]

Fourth, carving out an exception to the exclusivity provisions will increase the likelihood of inconsistent judgments in similar cases, as the court acknowledged in *Knox. See Knox*, 2018 IL App (1st) 162265, ¶¶ 26-29 (summarizing policy reasons for the Board's exclusive jurisdiction). If both the circuit courts and the Board have jurisdiction over the same issues, a party will inevitably choose whatever forum appears most favorable based on the circumstances of its case. Such forum-shopping will result in further confusion and inconsistencies. *See, e.g., Cessna v. City of Danville*, 296 Ill. App. 3d 156, 168 (4th Dist. 1998) (acknowledging policy concerns and holding that the Board had exclusive jurisdiction over: (1) the employee's claims against the union for constructive fraud and breach of the duty of fair representation, and (2) the employee's claims against the City for breach of contract).

Fifth, IPELRA's members are concerned that if the Court allows union members to bring claims against unions outside the jurisdiction of the Board, and beyond the six-month limitations period set forth in the Act, that decision will open the door to union members bringing similar court claims against the union members' current or former public employers. In other words, if a union member is no longer required to bring his or her unfair labor practice claims to the Board, what prevents the union member from raising similar or related claims against the employer at the same time? In *Knox*, the First District

[3] Notably, in this case, Plaintiff-Appellant failed to meet the six-month deadline for filing his unfair labor practice charge and, therefore, restyled his complaint as one for negligence and legal malpractice, which has a statute of limitations in Illinois of two years. *See* 735 ILCS 5/13-214.3. This Court should not countenance Plaintiff-Appellant's efforts to extend the applicable statute of limitations in this manner.

Appellate Court rejected a union member's efforts to do just that. *See Knox*, 2018 IL App (1st) 162265, ¶¶ 34-35 (affirming dismissal of union employee's complaint against employer for lack of subject matter jurisdiction). If this Court were to permit court jurisdiction over a union member's claims against the *union* for the breach of the duty of fair representation, it is entirely possible that the union member would also attempt to bring claims against his or her public employer for breach of contract claims that are premised on the union's breach. At a minimum, IPELRA requests that to the extent this Court agrees with any of Plaintiff-Appellant's arguments, the Court clarify that such a decision does not permit union members to revisit claims against their employers that were lost in the grievance arbitration process.

Finally, IPELRA urges this Court to affirm the Appellate Court's decision because holding otherwise will further burden an already busy circuit court system. The Board has successfully and efficiently addressed unfair labor practice charges, including claims that a union has breached its duty of fair representation, for years. The Board has expertise in reaching its decisions. As a practical matter, it defies logic to ask the Illinois circuit courts to wade into this additional area when it is neither necessary nor prudent for them to do so.

CONCLUSION

Accepting Plaintiff-Appellant's argument for an exception to the general rule that the Illinois Labor Relations Board has exclusive jurisdiction over the claims he brought in his complaint would eviscerate the reason for the rule altogether and lead to unintended consequences, delay, and inefficiencies. Such harms would befall not only the Union, but also IPELRA's members. Therefore, in light of the arguments and authority above,

IPELRA respectfully requests that this Court affirm the Appellate Court's decision in *Zander v. Carlson*.

Dated: August 12, 2020

Respectfully submitted,

ILLINOIS PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 9 pages.

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NOTICE OF FILING and PROOF OF SERVICE

The undersigned attorney hereby certifies that on August 12, 2020, she electronically filed with the Clerk of the Supreme Court **Brief *Amicus Curiae* of the Illinois Public Employer Labor Relations Association** and to be served on the following individuals via U.S. Priority Mail with postage paid at 1520 Artaius Pkwy, Libertyville, IL 60048 on August 12, 2020:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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