

NOTICE
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2016 IL App (5th) 150074-U

NO. 5-15-0074

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

JOHN BLOMENKAMP and STEVEN BURROWS,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	St. Clair County.
)	
v.)	No. 14-MR-6
)	
VILLAGE OF FREEBURG; MAYOR RAY)	
DANFORD; BOARD OF TRUSTEES OF THE)	
VILLAGE OF FREEBURG; RITA BAKER; SETH)	
SPEISER; CHARLIE MATTERN; MIKE BLAIES,)	
Individually and as Trustee of the Board of Trustees;)	
POLICEMEN'S BENEVOLENT LABOR)	
COMMITTEE; and CHIEF MELVIN E.)	
WOODRUFF, JR.,)	Honorable
)	Stephen P. McGlynn,
Defendants-Appellees.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Schwarm and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* An individual member of a union representing police officers did not have standing to challenge an arbitration award absent a determination that his union breached its duty of fair representation. The Illinois Labor Relations Board had exclusive jurisdiction to make that determination; therefore, the plaintiff could not raise the issue of fair representation in the trial court. The employer and other defendants did not forfeit their objection to the plaintiff's lack of standing.

¶ 2 This appeal involves the principle that because a union, rather than its individual members, is a party to a collective bargaining agreement, individual members do not have standing to challenge arbitration awards entered pursuant to the collective bargaining agreement unless the union has breached its duty of fair representation. The plaintiffs, John Blomenkamp and Steven Burrows, were terminated from their positions as police officers on the basis of misconduct. Their union filed grievances on their behalf, but before the matter came for arbitration, the plaintiffs retained private counsel to represent them. An attorney representing the union indicated that he remained willing to continue to represent the plaintiffs, but that he could not agree to dual representation. An arbitrator found in favor of their employer. The plaintiffs filed a petition in court seeking administrative review of the arbitrator's decision. The court granted the defendants' motion to dismiss, finding that the plaintiffs did not have standing to challenge the arbitration award. Both plaintiffs appealed; however, Blomenkamp subsequently reached a settlement. Burrows argues in this appeal that (1) he has standing to seek review of the arbitration award because the union breached its duty of fair representation by refusing to act as co-counsel; and (2) the defendants forfeited their objection to the standing question by failing to object during arbitration. We affirm.

¶ 3 The plaintiffs in this matter, as previously mentioned, are former police officers. They worked in a small police department serving the Village of Freeburg. The defendants are the Board of Trustees of the Village of Freeburg, the Mayor of the Village of Freeburg, the Chief of Police, individual members of the Board of Trustees, and the union that represented the plaintiffs, the Policemen's Benevolent Labor Association.

¶ 4 On May 4, 2012, Chief of Police Melvin E. Woodruff, Jr., informed the plaintiffs, Burrows and Blomenkamp, that they were the subject of an internal investigation. On July 23, Chief Woodruff provided them with the reports and conclusions of the investigation. The investigation of Burrows revealed numerous acts of misconduct, including (1) damaging the permanent evidence locker while attempting to break into it; (2) failure to report the damage to the evidence locker; (3) vandalism of the lockers of three other officers; (4) vandalism of the personal property belonging to the three officers; (5) harassment directed at the three officers; (6) pouring water on the sidewalk outside the back door to the police department, causing ice to form; (7) spraying pepper spray on the handle to the door of a squad car; and (8) opening mail addressed to another officer. The investigation of Blomenkamp revealed that he (1) observed Burrows' misconduct and failed to report it; (2) accessed the evidence locker without permission; (3) accessed the files of Officer Unverferth without permission; and (4) removed documents, gloves, and business cards from the files of Officer Cappello. These acts of misconduct occurred between April 2011 and March 2012. Many were captured on video.

¶ 5 On August 2, 2012, a disciplinary hearing was held before Mayor Ray Danford. Pursuant to the advice of Shane Voyles, the attorney representing the union, the plaintiffs declined to attend that hearing. They argued that they were entitled to a disciplinary hearing before the entire Board of Trustees. Mayor Danford recommended terminating Burrows and Blomenkamp. The Board of Trustees considered this recommendation at its regular meeting on September 4. Burrows and Blomenkamp were each given 10 minutes

to address the Board; however, they were not allowed to present additional evidence. The Board voted to terminate both officers.

¶ 6 On September 11, 2012, the union filed grievances on behalf of both officers. In the grievances, the union argued that Chief Woodruff failed to discipline them in a "progressive and corrective manner" before terminating them, as required in the collective bargaining agreement. More specifically, it alleged that the officers were terminated due to an accumulation of minor acts of misconduct; that Chief Woodruff was aware of the conduct at least as early as April 2011; and that he could have worked with the officers to remedy their conduct but did not do so.

¶ 7 Pursuant to a provision of the collective bargaining agreement, the matter was submitted to arbitration. In November 2012, before the parties had selected an arbitrator, the plaintiffs retained attorney William L. Berry to represent them in the arbitration proceedings. Voyles sent a letter to Berry. Voyles thanked Berry for entering his appearance, but then stated, "You should know, however, that the parties to the proceedings are the Union and the Employer." Voyles noted that there was no contractual relationship between the union and Berry. Voyles stated that he remained "ready, willing, and able" to represent the plaintiffs, but stated that dual representation was contrary to labor law. In addition, Voyles stated that he would not "risk committing an unfair labor practice" by refusing to allow Burrows and Blomenkamp to proceed with the attorney of their choice. In a second letter, Voyles reiterated his unwillingness to act as co-counsel, apparently in response to a letter requesting that he do so.

¶ 8 Arbitrator Gerard A. Fowler held a hearing in this matter in June 2013. On December 6, 2013, he issued his opinion and award denying the grievances. On January 9, 2014, the plaintiffs filed a complaint seeking administrative review of Fowler's decision. On February 3, while their petition was pending, they filed charges with the Illinois Labor Relations Board (ILRB) alleging that the union's failure to continue to represent them in the arbitration proceedings constituted an unfair labor practice (a breach of its duty of fair representation). The ILRB dismissed the charges on the grounds that they were not timely filed.

¶ 9 On October 14, 2014, the plaintiffs filed a motion for leave to file an amended complaint, which the court granted on November 5. The amended complaint added an allegation that the union refused to continue to represent the plaintiffs once they retained private counsel. On December 5, the defendants filed a motion to dismiss the amended complaint, arguing that the plaintiffs lacked standing to challenge the arbitration award because they were not parties to the collective bargaining agreement. On January 27, 2015, the court granted the motion to dismiss. This appeal followed.

¶ 10 As stated previously, the only parties to a collective bargaining agreement are the union and the employer. *Stahulak v. City of Chicago*, 184 Ill. 2d 176, 184 (1998). As such, individual employees ordinarily lack standing to seek judicial review of arbitration awards. *Id.* at 180-81. There is, however, an exception to this rule. If the individual employee can show that the union breached its duty of fair representation, the individual employee has standing to challenge the arbitration award in court. *Id.* at 184. To do so, the employee must show "that the union's conduct in processing the grievance was

arbitrary, discriminatory, or in bad faith." *Id.* at 181. Burrows argues that this exception is applicable in this case. As such, he contends, the court erred in dismissing his petition. Burrows further contends that the defendants forfeited their objection to his lack of standing by failing to object during the arbitration proceedings. We reject both contentions.

¶ 11 We first consider Burrows' contention that the court erred in finding that he lacked standing to bring an action challenging the arbitrator's award. He reminds us that this matter comes to us after a ruling on a motion to dismiss. He correctly notes that an action should not be dismissed at the pleading stage unless there is no set of facts the plaintiff could possibly prove that would entitle him to relief. See *Geick v. Kay*, 236 Ill. App. 3d 868, 874 (1992). He argues that this standard is not met in this case. He points to the letters union attorney Shane Voyles sent to his private counsel informing him that the union could not continue to represent the plaintiffs as co-counsel. He asserts that these letters are evidence that the union refused "to fulfill its contractual obligation to provide fair representation to the union employees" without advising Burrows and Blomenkamp that they lacked standing to proceed as individuals. We are not persuaded.

¶ 12 The problem with this contention is that the ILRB has exclusive jurisdiction to determine whether the union breached its duty of fair representation. In *Foley v. American Federation of State, County & Municipal Employees, Council 31, Local No. 2258*, 199 Ill. App. 3d 6 (1990), the First District explained that, under the Illinois Public Labor Relations Act, unions have the duty to fairly represent the interests of all of their members. *Id.* at 8-9. The court further explained that a breach of this duty constitutes an

unfair labor practice under the Public Labor Relations Act. *Id.* at 9-10. As such, claims involving breach of the duty of fair representation are "subject to the Act's comprehensive scheme of remedies and administrative procedures." *Id.* at 10. The Public Labor Relations Act gives the ILRB exclusive jurisdiction to resolve such claims. *Id.*

¶ 13 Burrows, however, calls our attention to *Casanova v. City of Chicago*, 342 Ill. App. 3d 80 (2003). The appeals court in *Casanova* upheld a trial court's dismissal of a petition to vacate an arbitration award based on lack of standing. Burrows argues that the differences between *Casanova* and the instant case warrant a different result here.

¶ 14 There, the plaintiff was a Chicago firefighter. The fire department brought a disciplinary action against him after he was arrested for possession of cocaine. *Id.* at 82. Instead of terminating his employment, the fire department required him to sign a "last chance agreement." *Id.* at 82-83. Among other things, the last chance agreement mandated random drug and alcohol tests. After testing positive for alcohol use, the plaintiff was terminated from his employment. *Id.* at 83. His union filed a grievance on his behalf and submitted the matter to arbitration. *Id.* at 83. The arbitrator denied the grievance, and the union did not challenge this decision within the required time period for doing so. *Id.* at 84-85.

¶ 15 The employee retained private counsel and filed a petition in court to vacate the arbitration award. *Id.* at 85. The City of Chicago filed a motion to dismiss on the basis of standing. Meanwhile, the employee filed an unfair labor practice charge with the ILRB, arguing that the union's failure to timely file a petition to vacate the award constituted a breach of its duty of fair representation. *Id.* The court held a hearing on the

City's motion to dismiss while the unfair labor practice charge was still pending. *Id.* at 85-86. Counsel for the employee notified the court that the charge had been filed and was still pending. The City argued that the ILRB had exclusive jurisdiction to consider the employee's allegation that the union breached its duty of fair representation. *Id.* at 86. The court denied the city's motion to dismiss, but reserved ruling on the standing issue until after the ILRB issued its decision. *Id.* Subsequently, the ILRB dismissed the unfair labor practice charge. The circuit court then dismissed the petition to vacate the arbitration award. *Id.*

¶ 16 On appeal, the employee's primary argument was that he had standing to challenge the arbitration award because he was a party to the last chance agreement, which, he argued, was separate from the collective bargaining agreement. *Id.* at 87. The appeals court rejected this claim, finding that the last chance agreement was "technically a supplement to the collective bargaining agreement." *Id.* at 88. The court then explained that "the only way that Casanova would have standing to contest the arbitral award would be if he were a party to the collective bargaining agreement or he was able to show that the Union breached its duty of fair representation." *Id.* at 88-89. The court found that he could not make this showing for two reasons. First, the court noted that the petition did not specifically allege that the union breached its duty of fair representation. *Id.* at 90. Second, the court explained, "this issue was decided adversely to Casanova" by the ILRB. *Id.* The court then went on to determine that because the issue was already decided adversely to him by the ILRB, the doctrine of collateral estoppel precluded him from relitigating the issue in the trial court. *Id.*

¶ 17 Burrows argues that the case before us is distinguishable from *Casanova* because here (1) the plaintiffs did allege in their petition that the union breached its duty of fair representation; and (2) the ILRB dismissed their unfair labor practice charges on the grounds of untimeliness, not on the merits. We acknowledge that the procedural posture of the instant case is different from that of *Casanova*. There, as discussed, the ILRB disposed of the employee's breach of duty of fair representation claim on the merits, and the appellate court found that principles of collateral estoppel precluded relitigation of that claim. We further acknowledge that in this case, the plaintiffs alleged facts that could at least provide some support for their claim that the union breached its duty to them. However, as we have already explained, resolution of that claim lies within the exclusive jurisdiction of the ILRB. *Foley*, 199 Ill. App. 3d at 12. As such, the trial court did not have jurisdiction to make that determination.

¶ 18 It is worth noting that there is an important policy consideration underlying this rule. The Illinois Public Labor Relations Act provides a comprehensive set of remedies and procedures for resolving labor disputes involving public employees, the unions that represent them, and the agencies that employ them. *Foley*, 199 Ill. App. 3d at 10. One reason the Act confers on the ILRB exclusive jurisdiction to resolve charges involving unfair labor practices—including breach of a union's duty of fair representation—is that allowing trial courts to decide such questions would inevitably lead to "inconsistent judgments and forum shopping." *Id.* at 11. To allow Burrows to challenge the union's compliance with the requirement of fair representation in court merely because he failed to file a timely charge with the ILRB would fly in the face of this principle. We conclude

that the trial court lacked jurisdiction to consider Burrows' claim that the union breached its duty of fair representation. Absent such a determination by the ILRB, he does not have standing to challenge the award in court.

¶ 19 We next consider Burrows' forfeiture argument. He argues that the defendants forfeited any objection they might have to his standing to bring an action challenging the arbitrator's award by participating in the arbitration proceedings without objection despite being aware that the union was no longer participating. We disagree.

¶ 20 Burrows correctly points out that lack of standing is generally a matter in the nature of an affirmative defense. As such, if a party does not timely raise its objections to standing, the issue is forfeited. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-63 (2010). He argues that the defendants failed to object during arbitration and, thus, they may not do so now. He asserts that it should have been obvious to the defendants that the union had ceased to represent him and Blomenkamp during the arbitration proceedings when private counsel Berry entered his appearance on their behalf after union attorney Voyles initially filed the grievances. We find this argument unavailing.

¶ 21 As the defendants point out, there was no reason for the defendants to know that the union was not participating in the arbitration proceedings. The only evidence that Berry was not retained by the union or acting with its consent is found in letters from Voyles to Berry. Voyles indicated in those letters that he did not believe dual representation was permissible. The defendants could not have been aware of the contents of these letters. Thus, they could not reasonably be expected to have notice that

the plaintiffs were proceeding as individuals after the union filed the grievances on their behalf.

¶ 22 It is also worth reiterating that whether the union breached its duty of fair representation is a crucial factor in determining whether Burrows had standing to challenge the arbitration award in court. As we have discussed at length, the ILRB has exclusive jurisdiction to determine whether the union breached its duty of fair representation. To hold that the defendants must challenge Burrows' standing before he filed a charge with the ILRB would defy logic. Under these circumstances, we conclude that the defendants did not forfeit their right to challenge Burrows' standing by not raising the question during the arbitration proceedings.

¶ 23 For the foregoing reasons, we affirm the order of the trial court dismissing Burrows' petition.

¶ 24 Affirmed.