

No. 1-14-1223

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).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SALVATORE T. ZICCARELLI,)	
)	
Charging Party-Appellant,)	Appeal from
)	the Illinois
v.)	Labor Relations
)	Board, Local
ILLINOIS LABOR RELATIONS BOARD, LOCAL PANEL; and)	Panel
LOCAL NUMBER 700 of the INTERNATIONAL)	
BROTHERHOOD OF TEAMSTERS,)	L-CB-13-020
)	
Respondents-Appellees.)	

JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Decision of administrative agency summarily affirmed where arguments for reversal, not timely made during administrative proceedings, could not be considered by reviewing court.

¶ 2 Petitioner Salvatore T. Zicarelli, a correctional officer employed by the Sheriff of Cook County, filed a charge pursuant to section 10(b) of the Illinois Public Labor Relations Act (5 ILCS 315/10 (West 2000)) with the Illinois Labor Relations Board (ILRB or board) contending his labor union, respondent Local No. 700 of the International Brotherhood of Teamsters (labor union or union), failed to fairly represent him at an employment-related arbitration in 2012. The Board

dismissed Zicarelli's charge on grounds that he did not give the Board supporting evidence. When he subsequently appealed to the board, it upheld and affirmed the dismissal. In this direct appeal pursuant to the Illinois Administrative Review Act (735 ILCS 5/3-113 (West 1990)), Zicarelli contends the board never formally requested evidence to support his charge and that his compliance with the purported deadline would have been unreasonable or unnecessarily burdensome. The board and the labor union have responded to the merits of these arguments, but also contend these are new arguments—ones which Zicarelli is presenting for the first time on appeal—which results in waiver of those arguments. Accordingly, we first consider whether the arguments are new. The record and appeal lead us to conclude that the arguments are untimely raised and have been waived.

¶ 3 Between 2010 and 2012, Zicarelli filed at least 25 grievances against his employer. In addition, in 2011, he sued his employer in federal district court alleging violations of his civil rights on the basis of race, gender, and age and retaliation for his numerous grievances. Zicarelli is a white male and when he filed the federal suit he was 47 years old.

¶ 4 While the federal action was pending, Zicarelli and the Sheriff's Department reached an agreement about some of the grievances. Zicarelli, however, became dissatisfied with how his employer followed through on their agreement. Subsequently, an arbitration hearing was scheduled for May 22, 2012, in order to address the settled grievances as well as the contested grievances.

¶ 5 Zicarrelli thereafter filed a charge against his labor union concerning its representation at this arbitration. This is the charge now at issue. According to the charge, when the arbitration was

convened on May 22, 2012, the arbitrator, the assistant state's attorney (who was representing the public employer), and Zicarelli's union attorney conferred without Zicarelli present; and then the assistant state's attorney informed Zicarelli that the arbitration was being deferred pending the resolution of Zicarelli's federal lawsuit concerning the same issues. Zicarelli has taken the position that by agreeing to delay resolution of his grievances, the union failed in its duty to him to properly represent his interests. Based on these allegations, Zicarelli sought to proceed with the arbitration of his stayed grievances and to be awarded compensatory damages for financial loss, emotional suffering, and mental anguish.

¶ 6 "When investigating such a charge, the Board is analogous to a grand jury. [Citation.] Like a grand jury, the Board assesses the credibility of witnesses; draws inferences from the facts; and, in general, decides whether there is enough evidence to support the charge. [Citation.]" *Michels v. Illinois Labor Relations Board*, 2012 IL App (4th) 110612, ¶44, 969 N.E.2d 996. "If the Board finds an issue of law or fact sufficient to warrant a hearing, the Board will issue a complaint setting forth the issues that warrant a hearing." *Michels*, 2012 IL App (4th) 110612, ¶44, 969 N.E.2d 996 (citing 5 ILCS 315/11(a) (West 2008); 80 Ill. Admin. Code 1220.40(a)(3) (2012)). "However, the Board will dismiss the charge if the charge fails to state a claim on its face or the investigation reveals no issue of law or fact sufficient to warrant a hearing." 80 Ill. Admin. Code 1220.40(a)(4) (2012)." *Michels*, 2012 IL App (4th) 110612, ¶44, 969 N.E.2d 996.

¶ 7 The Board issued a notice of Zicarelli's unfair labor practice charge to the union and sent copies of the notice to Zicarelli and his attorney. The notice indicated Zicarelli would be given about two weeks to submit information supporting his charge and that the Board's case manager

would be willing to extend the submission deadline by one to three days only for good cause. The notice included "a list of suggestions that may prove helpful to parties that practice before the agency," including the suggestion that "If the Board's request for information of the charge is not clear, or suggests a misunderstanding of the issues in the case, [the charging party should] contact the Board agent IMMEDIATELY."

¶ 8 The union responded to the Board that as the charging party, Zicarelli bore the burden of establishing that the union took intentional action because of and in retaliation for his past actions or because of his race, gender, or origin or animosity between him and the union's representatives. The union argued that Zicarelli had not presented any evidence in support of his charge and that it was actually clear that the procedural decision not to proceed with the arbitration while Zicarelli's federal suit was pending was because testimony or other evidence presented at the arbitration could prejudice the outcome of his federal suit. Also, the union did not tell Zicarelli that it was abandoning the pursuit of his grievances, but even if the union were to subsequently determine that the grievances lacked merit and should not be pursued, this would be a permissible exercise of its discretion consistent with its duty to fairly represent its union member. The union pointed out that it also acted in Zicarelli's best interests at the arbitration by advocating that the arbitrator should proceed to address the settled grievances and find that the settlement terms were enforceable. In fact, the arbitrator did reach this conclusion and ordered the Sheriff's Department to comply with its agreement. In support of this position statement, the union attached copies of grievances it had filed on Zicarelli's behalf and its memorandum seeking arbitration of specific grievances. The union also tendered a copy of the arbitrator's agenda for May 22, 2012, showing Zicarelli's

numerous grievances. The union marked about half of the listed grievances with the notation "highlighted grievances were heard by the arbitrator" and also tendered the arbitrator's orders in Zicarelli's favor. In addition to arguing the charge lacked merit, the union contended the charge should be dismissed as untimely filed.

¶ 9 The Board then dismissed the charge based on the limitations period defense, but subsequently reinstated it when Zicarelli argued the filing deadline had been automatically extended by four days due to a State holiday and weekend.

¶ 10 The union then refiled its position statement on August 5, 2013, arguing that Zicarelli had failed to meet his burden.

¶ 11 On August 6, 2013, the federal court concluded Zicarelli's lawsuit by granting summary judgment to the Sheriff's Department, based on findings that Zicarelli failed to make out a *prima facie* case for discrimination by his employer, failed to show a materially adverse action as opposed to trivial harm supporting a claim of retaliation by his employer, and failed to show he was entitled to indemnification from his employer.

¶ 12 On August 30, 2013, a Board employee sent an email to Zicarelli's attorney with regard to the reinstated charge against the union. In this email, the board's employee said, "If there is any additional information with regard to this case, please forward it to me by September 6, 2013." Later that same morning, Zicarelli's attorney responded by email stating, "Thank you, I will." Zicarelli, however, did not submit any further information.

¶ 13 On September 17, 2013, the board's executive director dismissed the charge on grounds that it "fails to raise an issue of law or fact sufficient to warrant a hearing." The order states,

"Charging Party has failed to comply with the Board agent's request to provide information to support the charge, and without such evidence, a complaint for hearing cannot be issued."

Continuing, the order states, "Section 1220.40(b)(1) of the Rules and Regulations of the [board] require[s] that a charging party shall submit to the Board or its agent all evidence relevant to or in support of the charge. This rule has been interpreted to allow the Executive Director to dismiss cases where the charging party has not complied with a request for evidence in support of the charge, or has not responded to a request for a written withdrawal. [Citations.]" The executive director concluded, "Accordingly, the instant charge is hereby dismissed."

¶ 14 On September 27, 2013, Zicarelli filed an administrative appeal to the board. Here, Zicarelli indicated his "attorney was unable to respond timely to the ILRB agent's request [for evidentiary support] because [counsel] was [busy writing petitions and briefs in other pending litigation]." Zicarelli then listed the other cases that had consumed his attorney's available time. Zicarelli cited no authority, but indicated that his attorney "will be able to furnish the requested information to the ILRB agent if the Charge is reinstated and an extension of time to furnish the information is granted until October 4, 2013." He also indicated that he intended to appeal the judgment of the federal district court judge.

¶ 15 The board denied Zicarelli's request for additional time and, citing the same authority cited by the executive director, the board affirmed the executive director's dismissal. The order states, "Faced with a deadline to respond to the Board agent's request for such evidence, we would expect a charging party represented by counsel either to comply or to seek an extension of time in advance of the deadline, not wait until three weeks after that deadline to seek additional time, and

then to do so only after the consequence of dismissal for noncompliance is evident." Continuing, the board stated that it would not have been "unreasonable or unnecessarily burdensome" to Zicarelli to either comply with the request for more information or make a timely request for an extension of time, and that under the circumstances, the Board would not suspend its rules or grant a variance.

¶ 16 This direct appeal followed. Zicarelli's arguments for reversal are two fold. His main contention is, "The ILRB Local Panel erred in entering an Order of Dismissal where no formal request for evidence had been sent to Charging Party." He contends the request for information was "precatory," "tepid," "oblique," and "equivocal," should have included citation to a specific rule, and should have alerted him that if the "documents sought" were not produced, the investigator would recommend that the board dismiss the charge. Zicarelli also contends the board's dismissal order includes an erroneous citation, in that the board likely meant to cite subsection (a)(1) of 80 Illinois Administrative Code §1220.40, but instead cited subsection (b)(1). 80 Ill. Admin. Code §1220.40 (2003).

¶ 17 Section 1220.40 of the Illinois Administrative Code provides in relevant:

"a) The Board or its agent shall investigate the charge. The investigation may include an investigatory conference with the parties.

1) The charging party shall submit to the Board or its agent all evidence relevant to or in support of the charge. The evidence may include documents and affidavits. If the charging party does not comply with the agent's requests for information and documents, the agent may recommend dismissal of the charge.

2) Upon request by the Board or its agent, the respondent may submit a complete account of the facts, a statement of its position in respect to the allegations set forth in the charge and all relevant evidence in support of its position. The evidence may include documents and affidavits.

3) If the investigation reveals that the charge involves an issue of law or fact sufficient to warrant a hearing, the Board or the Executive Director shall issue a complaint for hearing. The complaint shall state the issues that warrant a hearing and shall be served on the respondent and the charging party.

4) If the charge does not state a claim on its face or if the investigation reveals that there is no issue of law or fact sufficient to warrant a hearing, the Executive Director shall dismiss the charge. The charging party may appeal the dismissal in accordance with 80 Ill. Admin. Code §1200.135.

b) Whenever the Executive Director issues a complaint for hearing, the respondent shall file an answer within 15 days after service of the complaint and deliver a copy to the charging party by ordinary mail to the address set forth in the complaint.

Answers shall be filed with the Board with attention to the designated

Administrative Law Judge." (Emphasis added.) 80 Ill. Admin. Code §1220.40 (2003).

¶ 18 Although Zicarelli primarily argues that the request for information in support of his charge was not a sufficiently "formal request" which included citation and warning of the consequences of his noncompliance, the board and union have correctly noted that Zicarelli did

not make this argument during the administrative proceedings. In his appeal to the board, Zicarelli did not criticize the content or the tenor of the board's request for evidence. In his appeal to the board, he asked the agency to excuse his failure to respond with substantive information and he attributed this failure to his attorney's obligations to other clients. He indicated he would comply with the agency's request if he was given more time. Although he now emphasizes that the board cited to the wrong subparagraph of section 1220.40 of the administrative rules, he did not cite or discuss any rule or other authority in his administrative appeal of that order. (Moreover, he did not argue that the typo or miscitation misled him or confused him about his obligation to support his charge.)

¶ 19 Any argument or objection which was not raised during the pendency of the administrative proceeding is deemed waived and cannot be asserted on judicial review of the administrative agency's decision. *Department of Central Management Services v. Illinois State Labor Relations Board*, 278 Ill. App. 3d 79, 82, 662 N.E.2d 131, 133 (1996) (finding that failure to raise certain arguments during administrative stage of proceedings resulted in waiver of argument on appeal); *Moore v. Illinois State Labor Relations Board*, 206 Ill. App. 3d 327, 338-39, 564 N.E.2d 213, 220 (1990) (same). Zicarelli has forfeited any argument regarding 80 Illinois Administrative Code §1220.40 or the sufficiency of the agency's request for information.

¶ 20 He next contends, "The ILRB erred in finding that requiring compliance with its Investigator's purported request for evidence to be produced within four business days following a holiday weekend was *** unreasonable or unnecessarily burdensome." This is another argument that appears for the first time on appeal to this court. Accordingly, we find it has been waived.

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¶ 21 Having considered and concluded that the appellate arguments are waived, we affirm the decision of the board.

¶ 22 Affirmed.