No.: 125691

IN THE

SUPREME COURT OF ILLINOIS

RUSSELL ZANDER, Plaintiff/Appellant,	Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 1-18-1868
v.	There Heard on Appeal from the Circuit Court of the First Judicial Circuit, Cook County, Illinois, No. 2017 L 63098
ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER ORDER OF POLICE LABOR COUNCIL, Defendants/Appellees.	The Honorable Judge Martin S. Agran
	Petition for Leave to Appeal Allowed: March 25, 2020

APPELLANT'S BRIEF

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E-FILED
6/1/2020 3:31 PM
Carolyn Taft Grosboll
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POINTS AND AUTHORITIES

IV. CLAIMS AGAINST THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL WERE PROPERLY FILED IN STATE COURT (UNDER 2-619)

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INTRODUCTORY STATEMENT

This appeal seeks the reversal of the First District Appellate Court and the Trial Court of the First Judicial District of Cook County Circuit Court, Illinois decisions to affirm granting the Defendants-Appellees' Motion to Dismiss the Complaint with prejudice. The issue to be answered in this appeal is: 1) That the Appellate Court and Trial Court erred in granting Defendants-Appellees' Motion to Dismiss the Complaint with prejudice.

ISSUES PRESENTED FOR REVIEW

I. **IMMUNITY MUST NOT BE APPLIED TO ATTORNEYS WHEN THEY BREACH THE STANDARD OF CARE (UNDER 2-615)**

II. **IMMUNITY MUST NOT APPLY TO THE EXTENT OF AN ATTORNEY'S MALPRACTICE INSURANCE (UNDER 2-615)**

III. **UNION WORKERS MUST BE RECOGNIZED AS THIRD-PARTY BENEFICIARIES WITH RIGHTS TO SUE (UNDER 2-615)**

IV. **CLAIMS AGAINST THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL WERE PROPERLY FILED IN STATE COURT (UNDER 2-619)**

JURISDICTION

Illinois Supreme Court Rule 315 confers jurisdiction upon this Court. The Appellate Court issued its decision on November 21, 2019. A Petition for Rehearing was timely filed on December 12, 2019 and denied on December 18, 2019.

Plaintiff-Appellant's Petition for Leave to Appeal to the Supreme Court was allowed on March 25, 2020.

STATEMENT OF FACTS

RUSSELL ZANDER ("ZANDER") brought his legal malpractice against ROY CARLSON, ESQ., ("CARLSON") and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL ("FOP"). (C9-C20; A015-A026)

The underlying issue in the legal malpractice case was that ZANDER, a police officer, was going through termination proceedings brought by the Village of Fox Lake due to formal charges being filed against him. (C9-C20; A015-A026)

ZANDER and CARLSON entered into an attorney-client relationship wherein CARLSON would abide by the standard of care and represent ZANDER in the termination proceedings. (C11; A017) Rather than having ZANDER's formal charges be heard before the Fox Lake Police Commission, ZANDER maintained that CARLSON, as his attorney, advised and induced him to waive this right and agree to a binding arbitration before a single arbitrator. (C12-C13; A018-A019)

Prior to the arbitration, CARLSON took little or no depositions or other discovery from the witnesses that had been created by the Chief of Police to testify against ZANDER. (C14-15; A20-A21) CARLSON took no active role in attempting to minimize the incidents that the formal charges were based on, or to interview, interrogate, and/or depose the parties involved. (C14-C15; A20-A21) Ultimately ZANDER lost his employment as a police officer based on the ruling of the arbitrator and had no right to appeal the arbitration. (C15;A21)

In his legal malpractice Complaint ZANDER alleged that CARLSON breached the standard of care in the following ways:

a) Failed to recommend to ZANDER that he should seek review by the police commission of the Village of Fox Lake;

b) Failed to completely investigate and discover the extent and details of the charges brought against ZANDER;

c) Failed to advise ZANDER they had not done a thorough and complete investigation and evaluation of the charges being brought against ZANDER;

d) Because they had not completed a thorough, complete investigation and evaluation of all possible defenses as well as the prosecutions factual basis, the Defendants were unable to properly inform ZANDER as to what proceedings would be best for ZANDER and the methodology of those proceedings;

e) Failed to properly conduct discovery, including the interviews of all witnesses, and particularly the interviews of the students and faculty involved in the contrived charges created by the then Chief of Police to add "muscle" to the primary charge against ZANDER in order to obtain his termination;

f) Failed to retain experts, businesses, or individuals outside of the FOP for information or suggestions on how to better assist ZANDER with regard to the charges pending against him;

g) Failed to obtain competent, experienced counsel and representation to handle what was a very complicated and extensive arbitration hearing lasting two days, with a very experienced Village Prosecutor representing the Chief of Police and the Village of Fox Lake as the employer of ZANDER;

h) Failed to recognize that the treatment of ZANDER in the investigative stage through the use of a private detective agency and through other actions of the Chief of

Police may have violated the civil rights of ZANDER and to research and recommend the filing of litigation in Federal Court for redress of those wrongs;

i) Failed to properly prepare for testimony at the arbitration hearing, including a demand for the appearance of all persons executing various affidavits and other documents which were to be submitted into evidence as a hearsay exception in order to cross examine the drafters of those documents as opposed to allowing the documents to be admitted;

j) Failed to properly subpoena and present witnesses to testify on behalf of ZANDER at the proceeding;

k) Failed to properly prepare a closing brief with appropriate argument for the defense of ZANDER, instead submitted what could best be described as a last minute 11-page brief failing to discuss the evidence properly or the common law of the State of Illinois, which might have assisted in a fair resolution of the matter;

l) Failed to properly organize and argue that if ZANDER was guilty of any, of what could be construed as, minor offenses, that a period of probation or supervision was more appropriate than total termination; and

m) Routinely and regularly advised ZANDER not to accept offers of settlement made by the Chief of Police and the Village of Fox Lake which would have resulted with ZANDER, in a relatively short period of time, being able to return to work as a police officer in the Village of Fox Lake thereby causing a substantial loss to ZANDER. In truth and in fact, rather than advising ZANDER not to accept the offers Defendants' advice should have been directly opposite to that if in fact they felt ZANDER had any potential liability under the charges brought. (C15-C17; A021-A023)

That due to the wrongful actions and inactions as stated above by CARLSON, ZANDER lost his employment, which over a period of 20 years prior to retirement would have easily exceeded $1,000,000 together with a life-long pension and other employment benefits such as health insurance. (C18; A024) ZANDER's Complaint also stated a cause of action for vicarious liability and negligence against the FOP. (C19; A025)

On January 4, 2018, CARLSON and the FOP filed a Motion to Dismiss. (C77-C150; A027-A100) In the Motion to Dismiss, CARLSON and the FOP argued that CARLSON, as a union worker, has immunity from any liability and the Illinois Public Labor Relations Board, not the Trial Court, has exclusive jurisdiction over the claims filed against CARLSON and the FOP. (C77-C150; A027-A100)) Appellees argued that under Section 2-615, ZANDER's claims against CARLSON were barred as a matter of law based on the *Atkinson* Rule. (C77-C150; A027-A100)) Appellees also argued that under Section 2-619 (a)(1), the Illinois Labor Relations Board has exclusive jurisdiction and that the Trial Court lacked jurisdiction. (C77-C150 ; A027-A100)

ZANDER filed his Response on February 16, 2018. (C157-C191; A101-A135) In his Response, ZANDER disagreed that the *Atkinson* Rule applied to the case, disagreed that CARLSON was immune from liability and further distinguished CARLSON's case law. (C157-C191 A101-A135) ZANDER also argued that the Illinois Labor Relations Board did not have the exclusive jurisdiction to hear ZANDER's case and that the case was properly before the Trial Court. (C157-C191 A101-A135)

CARLSON and the FOP filed their Reply on March 8, 2018. (C192-C200; A136-A144) In their Reply, they argued that immunity applied to CARLSON and that the Illinois Labor Relations Board had proper jurisdiction. (C192-C200; A136-A144)

After oral argument, an Order was entered on March 30, 2018, the Court took the matter under advisement. (C210; A145) On April 30, 2018, the Trial Court granted the Motion to Dismiss with prejudice. (C211; A146)

ZANDER filed a Motion to Reconsider on May 29, 2018. (C217-C229; A147-A159) The basis of the Motion was the Court's error in applying the existing law as to CARLSON's immunity and the Court's jurisdiction. (C217-C229; A147-A159) ZANDER also argued that CARLSON should at least be liable to the extent of his malpractice insurance policy. (C220-C222; A147-A159)

Appellees filed their Response to the Motion to Reconsider on July 10, 2018, arguing that the Trial Court properly applied the law and that the dismissal with prejudice was proper. (C231-C237; A161-A167) ZANDER filed his Reply by July 25, 2018, which further supported his position to reconsider the Trial Court's dismissal of the Complaint with prejudice. (C238-C241; A168-A171) The Trial Court denied the Motion to Reconsider on July 31, 2018, finding that its application in law was not in error. (C242; A172) A Notice of Appeal was timely filed on August 27, 2018. (C243-C245; A173-A175)

ZANDER filed his Appeal on February 15, 2019, against both CARLSON and the FOP arguing that the Trial Court erred in determining that the *Atkinson* Rule applied to CARLSON, that at the very least, CARLSON should have been liable to the extent of his malpractice coverage, and that ZANDER had rights to sue CARLSON as a third-party beneficiary. Lastly in the Appeal, ZANDER argued that the Illinois Public Labor Relations Board does not have exclusive jurisdiction and ZANDER properly sued the FOP.

CARLSON and the FOP filed a Response Brief on March 22, 2019. In their Brief they argued that the Court correctly dismissed the Complaint with prejudice where

ZANDER's claims were barred by the *Atkinson* Rule. CARLSON argued that ZANDER did not allege the existence of an attorney-client relationship between himself and CARLSON. CARLSON further argued that no Court has adopted Plaintiff's proposed third-party beneficiary theory of liability to defeat the *Atkinson* Rule. Lastly, CARLSON argued that ZANDER waived his argument as to CARLSON's malpractice insurance. Finally the FOP argued that the Court properly dismissed the claims against the FOP based on jurisdiction.

ZANDER filed his Reply Brief on April 4, 2019. In the Reply Brief, ZANDER further argued that the *Atkinson* Rule did not apply and did not bar ZANDER's claims. ZANDER also argued that an exception should be made for union members to be able to sue as third-party beneficiaries of the union and union attorney relationship. ZANDER argued that CARLSON, if not personally liable, should at least be liable to the extent of his malpractice insurance.

The Appellate Court heard oral argument on November 7, 2019 and subsequently issued its Opinion on November 21, 2019. (A001-A014

In its' Opinion, the Appellate Court affirmed the decision of the Trial Court, finding that CARLSON was immune from personal liability and that ZANDER's claims should have been brought before the Illinois Labor Relations Board, as it has exclusive jurisdiction over claims that a union has violated its duty to fairly represent its members.

On December 12, 2019 ZANDER filed a Petition for Rehearing which was denied on December 18, 2019. Thereafter, ZANDER filed a Petition for Leave to Appeal to the Illinois Supreme Court, which was allowed on March 25, 2020. ZANDER thereafter elected to file a Brief in support of his arguments. This Brief is being timely filed.

ARGUMENT

That on March 25, 2020 this Honorable Court allowed ZANDER's appeal against Appellees CARLSON and the FOP to proceed.

The Appellate Court affirmed the Trial Court's dismissal of the Complaint pursuant to Section 2-615 and 2-619, therefore the standard of review on the issues presented is *de novo*. "Our review of a dismissal under either section 2–615 or 2–619 is *de novo*." *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31 (Ill. 2012).

The issue that this Honorable Court is being asked to address is whether an attorney can hide behind a union's immunity when he carries malpractice insurance for his own actions. By allowing an attorney to maintain full immunity allows for the attorney to completely disregard the Rules of Professional Conduct and the standard of care in representing their clients. This further creates concerned and jaded union members knowing that their attorney can act in any way while representing them, without having any repercussions directly against the attorney. Simply because an attorney is employed by a certain group or agency, he cannot be held to a different standard than other attorneys practicing in the same state and be considered "immune" from any liability.

Union members must be allowed to at least recover to the extent of an attorney's malpractice insurance, otherwise, what would be the point in a union attorney having insurance if he is completely immune for liability?

In order to allow union members, like ZANDER, their day in court, this Honorable Court has the opportunity to carve out and extend the rights of third-party beneficiaries to sue the attorney. If the union chooses not to sue the attorney on behalf of the union member, the attorney cannot be shielded. The union member must be able to proceed when its union

fails to act on his behalf. Lastly, ZANDER is asking this Honorable Court to determine that the vicarious liability claims against the FOP were properly brought in State Court.

Based on the arguments set forth below, this Honorable Court should reverse the decision of the Appellate Court because the Appellate Court abused its discretion in determining that the Trial Court properly dismissed the Complaint with prejudice.

I. IMMUNITY MUST NOT BE APPLIED TO ATTORNEYS WHEN THEY BREACH THE STANDARD OF CARE.

Simply because an attorney has the benefit "immunity" based on the employment he or she possesses, does not mean that it can be or should be a total immunity. In ZANDER's case his former attorney, CARLSON, is claiming that because of the *Atkinson* Rule he cannot be held personally liable for any malpractice or negligence, as a union member.

This case is a matter of first impression before this Honorable Court, because there are no Illinois cases directly on point with the issue of whether a union attorney can be held liable for his negligent actions and inactions.

Although many other State Courts seem to reject arguments that union attorneys should be held on a different level as other union employees and agents, this Honorable Court should consider this issue practically and logically.

How can an attorney completely be allowed to avoid liability when sued by the person that the attorney represented, or have this immunity allow them to never be sued by the union member? This would mean that the attorney has free range to breach the standard of care. The Appellate Court erred in determining that the Trial Court was correct in finding that CARLSON was immune from any legal malpractice liability.

To support its Opinion affirming the Trial Court's ruling as to ZANDER's claims being barred, the Appellate Court cited *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) and *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985). (A001-A014)

The Appellate Court applied the *Atkinson* Rule by stating "a union's agents may not be held individually liable for actions taken on the union's behalf in the collective bargaining process." (A005)

The *Atkinson* Rule comes from the case *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). The facts in *Atkinson v. Sinclair Refining Co., supra*, are distinguishable from ZANDER's case, thus the Appellate Court erred in finding that the immunity applied to ZANDER's case.

The relevant facts in *Atkinson v. Sinclair Refining Co., supra*, are that employees participated in a strike and the company filed a lawsuit for damages against the union and the union members. The Complaint alleged that the collective bargaining agreement contained a promise by the union not to strike over any cause which could be the subject of a grievance under other provisions of the contract. The officers and agents of the union were charged with breach of the collective bargaining contract and tortious interference with contractual relations. *Atkinson v. Sinclair Refining Co., supra*, generally. The Supreme Court held that the national labor policy requires that when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages. *Atkinson v. Sinclair Refining Co., supra*, at 249.

First, the *Atkinson* Rule does not apply to ZANDER because ZANDER's case is a civil legal malpractice action against CARLSON directly. As an attorney, CARLSON should be required to abide by the Illinois Rules of Professional Conduct. Contrasting the

Atkinson case, ZANDER is not filing his claims as a violation of the collective bargaining agreement.

This Honorable Court must remove CARLSON's "identity" as a union agent or member and must determine the role that CARLSON played. In this case, CARLSON's role was to represent ZANDER as his attorney in the termination proceedings. As his attorney, CARLSON rendered ZANDER. "[T]he appropriate test for *Atkinson* immunity ought not to be the actor's identity, occupation, or formal position, but rather, the role that he played...It is not much in doubt that, ordinarily, an attorney is the client's 'agent' within the traditional legal import of that term." *Montplaisir v. Leighton*, 875 F.2d 1, 6 (1st Cir. 1989).

The Illinois Supreme Court has come up with the Rules of Professional Conduct which hold Illinois attorneys to a certain standard of care. When admitted to the Illinois Bar, CARLSON gave an oath to support the Constitution of the United States and the Constitution of the State of Illinois, and to faithfully discharge the duties of the office of attorney and counselor at law to the best of his ability. (705 ILCS 205/4)

Upholding the *Atkinson* Rule, allows an attorney to ignore the Rules of Professional Conduct, the standard of care, and the oath taken in this State. *Atkinson v. Sinclair Refining Co., supra*, is a Federal Case and each State should be allowed to apply its own laws to the people of its State and not be bound by this case, especially where a State law action is concerned. "Because federal law neither preempts the state malpractice claim nor provides an independent federal remedy in its place, the district court erred both in retaining jurisdiction over this state law claim and in dismissing it for failure to state a claim." *Aragon v. Federated Dep't Stores, Inc.,* 750 F.2d 1447, 1457 (9th Cir. 1985). In

ZANDER's case, the Appellate Court and the Trial Court both erred in applying a Federal Case to a State law legal malpractice action.

The Appellate Court in ZANDER's case also found that the Labor Relations Act supports the application of *Atkinson* immunity to agents and officers of public sector unions including union attorneys. (A007-A008) In support of this, the Appellate Court cited to *Peterson v. Kennedy*, 771 F.2d 1244, 1257 (9th Cir. 1985), "Allowing union members to file malpractice suits against union attorneys for actions taken in connection with the collective bargaining process would 'anomalous[ly]' hold 'certain agents or employees of the union *** to a far higher standard of care than the union itself'." *Peterson v. Kennedy*, 771 F.2d at 1259. (A007-A008)

Similar to *Atkinson*, the Appellate Court's review of *Peterson v. Kennedy*, *supra*, is respectfully misplaced. *Peterson v. Kennedy, supra*, is distinguishable from ZANDER's case because in *Peterson,* the Plaintiff signed a contract to play football for a certain amount of years. The Plaintiff was injured during one of the games and did not play. He was ultimately cut from the team and would not receive compensation under the injury protection clause of the contract. The Complaint, among other claims, included a professional malpractice claim against the union attorneys for erroneously advising Peterson to file an injury grievance. The Plaintiff argued that there must be an exception to the *Atkinson* Rule if the union employee is an attorney. The Court did not agree stating, if the attorney performs a function in the collective bargaining process that would otherwise be assumed by the union's business agents or representatives, the rationale behind the *Atkinson* rule is squarely applicable. *Peterson v. Kennedy*, *supra*, generally.

In *Peterson v. Kennedy*, *supra*, the Court determined that unions could employ

other union members to represent union workers in collective bargaining proceedings, and therefore an attorney should not be held to a higher level than another union worker. "[A different result is not warranted or permissible merely because a union chooses to employ an attorney rather than a business agent to perform collective bargaining functions." *Peterson v. Kennedy, supra,* at 1259.

The decision in *Peterson v. Kennedy, supra,* was due to the Court finding that there was no attorney-client relationship with the union member. However, in this case, ZANDER's Complaint clearly alleged an attorney-client relationship with CARLSON. (C11; A017) The Trial Court should have taken this allegation as true, and the Appellate Court should have reversed this issue. Further, the issues in *Peterson* included the attorney's representation during the collective bargaining process, ZANDER's case was relating to termination and receiving faulty advice to waive his rights and proceed to binding arbitration. Also, in ZANDER's case, it would be the function of an attorney, not another union member, to represent a client in an arbitration, thus the *Atkinson* Rule would not be "squarely applicable".

In its Opinion, following *Peterson v. Kennedy, supra,* the Appellate Court takes issue with allowing a union member to file malpractice suits because it would hold certain union agents to a higher standard of care than the union itself. (A008)

The Appellate Court in ZANDER's case completely ignores the fact that by disallowing a union member to sue his attorney for malpractice, holds each and every union attorney at a higher standard than all other Illinois attorneys and allows for the union attorneys to essentially be exempt for the Rules of Professional Conduct and to abide by a different standard of care, if any.

This Honorable Court should determine that the Appellate Court's reasoning is flawed because despite what *Peterson v. Kennedy, supra,* states an attorney is, or should be, held to a higher standard, i.e. the standard of care, than another union agent. Instead, what these cases are doing is lowering the standard for an attorney to be that of a "lay person". Presumably the reason why a union would retain an attorney in certain proceedings rather than using a union member is to have a higher level of representation and with that comes a higher standard.

The *Peterson* Court also discussed when a union agent may be able to sue. First the attorney's conduct must fall within the "arbitrary, discriminatory or bad faith" test. *Peterson v. Kennedy, supra,* at 1259. If the conduct falls within this test, then the union agent is allowed to sue the union for breach of the duty of fair representation. (emphasis added) *Id.* In fact, nothing allows for the union agent to sue the attorney directly.

The *Peterson* Court held that "mere negligent conduct on the part of a union does not constitute a breach of the union's duty of fair representation". *Peterson v. Kennedy, supra,* at 1253. Thus, under this case, a union attorney cannot be sued for negligence, which is typically the crux of a legal malpractice claim. Here, what the Court is saying is that union attorneys can be as negligent as they want in their representation as long as the conduct is not considered "arbitrary, discriminatory or bad faith" and even so, it is instead the union that gets sued for breach of the union's duty of fair representation, not the attorney for legal malpractice. This completely eliminates the ability to file for legal malpractice.

For example, a union member actions are arbitrary if: "it simply ignores a meritorious grievance or handles it in a perfunctory manner (*see Vaca v. Sipes,* 386 U.S. at 191, 87 S.Ct. at 917), if it is 'without rational basis', *see Gregg v. Chauffeurs, Teamsters*

and Helpers Union Local 150, 699 F.2d 1015, 1016 (9th Cir.1983), or is 'egregious, unfair and unrelated to legitimate union interests.' *See Johnson v. United States Postal Service,* 756 F.2d 1461, 1465 (9th Cir.1985)". *Peterson v. Kennedy, supra,* at 1254.

A union member would first need to conclude that the conduct fell within these actions. If so, then the union member would have to go forward with a suit against the union, not the union attorney. This again goes against the common law causes of action, where attorneys can be sued for legal malpractice.

The *Peterson* Court also held that it is actually the union that can sue the attorney directly, not the employee. "We also note that nothing we have said limits a union's right to sue its attorney for malpractice or for breach of contract, and to compensate a union member out of the recovery for any damages he may have suffered." *(emphasis added) Peterson v. Kennedy, supra,* at 1259. However, the issue is what if the union chooses not to sue the attorney, then how does the union employee recover damages caused by the attorney's conduct?

The other flawed reasoning by the *Peterson* Court was that "[h]olding that union attorneys are subject to malpractice suits by individual grievants for actions undertaken as the union's representative would give rise to an anomalous result: certain agents or employees of the union would be held to a far higher standard of care than the union itself." *Peterson v. Kennedy, supra,* at 1259.

There is nothing wrong with holding an attorney to a higher standard of care than an agent or employee. By failing to distinguish the different standards of care essentially puts a union agent or employee, for example that did not graduate high school on the same level as a union attorney, that has had extensive legal training and education. On the

contrary, this in fact is what creates an "anomalous result" not the fact that the two would be held to different standards.

Also, interestingly the Courts are so concerned about keeping union workers on a same standard, while completely ignoring the standard in which all attorneys of that State should be held to.

Another reason *Peterson v. Kennedy*, *supra*, held that a union attorney cannot be sued is because of the different statute of limitations to sue an attorney and a union. *Peterson v. Kennedy*, *supra*, 1259-1260.

One way to resolve this is to limit the time frame to sue a union attorney to the same statute of limitation expiration for a breach of duty of fair representation. This way at the very least allows the union member the opportunity to bring suit against the attorney who caused him damages, and there would be no concern of lawsuits being brought years later against an attorney.

The case of *Warren v. Williams,* 313 Ill.App.3d 450 (1st Dist., 2000) speaks to the issue, in that the attorney and union member entered into an attorney-client relationship which imposed a duty of reasonable care on behalf of the attorney and the member was able to sue the attorney. *Warren v. Williams, supra*, at 454. ZANDER alleged in the Complaint that an attorney-client relationship existed between ZANDER and CARLSON wherein CARLSON gave ZANDER advice and represented him. ZANDER also maintains that the representation by CARLSON was not in the area of collective bargaining proceedings thus the *Atkinson* Rule would be inapplicable.

In *Warren v. Williams, supra*, a police officer was allowed to bring a legal malpractice claim against his attorney. The police officer and the Village were sued. The

attorney filed an appearance on behalf of both the Village and the police officer. Ultimately a default judgement was entered against the officer. He then brought a claim for legal malpractice against the attorney. The attorney argued that he could not be liable for malpractice because he was never contracted to represent Plaintiff, nor did he speak to him about the case. The Circuit Court and the Appellate Court disagreed with the attorney and found that the attorney-client relationship between the Village and the attorney created duty of reasonable care on part of the attorney toward the officer. *Warren v. Williams, supra,* generally.

In *Warren v. Williams*, *supra*, the Defendant argued that there was no attorney-client relationship between the Plaintiff police officer and the Village attorney. The Court concluded that, "In our view, there was an attorney-client relationship between Williams and the Village in the instant case that resulted, in accordance with Rule 3.15 for the United States District Court for the Northern District of Illinois (N.D. Ill. Loc. Gen. R. 3.15 (eff. July 1, 1996)), when the attorney filed an appearance for plaintiff." *Warren v. Williams*, *supra*, at 453.

The Court also stated, "While there was no contract between Warren and Williams in the instant case, we think that a duty of reasonable care was nevertheless imposed. Rule 3.15 was the source of a legal duty upon Williams to provide professional care once he had appeared for Warren." *Warren v. Williams*, *supra*, at 454.

In this case, following *Warren v. Williams, supra*, even though there was no retainage contract directly between ZANDER and CARLSON, a duty of reasonable care was imposed on CARLSON in his representation of ZANDER in the termination proceedings.

The Court in *Niezbecki v. Eisner & Hubbard, P.C.,* 186 Misc.2d 191 (N.Y., Nov. 1, 1999) stated, "if the union attorney or another attorney agreed specifically to represent a union member directly as an individual client, not as a union member, the member could sue the attorney for malpractice or breach of contract. *Arnold v. Air Midwest, Inc.,* 100 F.3d at 862–63; *Peterson v. Kennedy,* 771 F.2d at 1259." *Niezbecki v. Eisner & Hubbard, P.C., supra,* at 198-199. Here, ZANDER's Complaint allegations should have been taken as true that ZANDER and CARLSON were in an attorney-client relationship, which would have given ZANDER the right to sue CARLSON.

In *Weitzel v. Oil Chem. & Atomic Workers Int'l Union, Local 1-5*, 667 F.2d 785 (9th Cir. 1982), the union employee brought a lawsuit for legal malpractice against the union law firm that represented him after he was fired by Shell Oil Company during a strike. The Court held that there was "a triable issue of fact whether an attorney-client relationship existed between the law firm and Weitzel" and held that the matter should be set for trial to determine these facts. *Weitzel v. Oil Chem. & Atomic Workers Int'l Union, Local 1-5., supra,* at 787. Specifically, the Court stated, "Weitzel was represented by the law firm in the unfair labor practice proceeding, and the evidence is sufficient to create a genuine issue of fact whether the law firm's conduct met professional standards and a genuine issue of fact on the causal connection question." *Weitzel v. Oil Chem. & Atomic Workers Int'l Union, Local 1-5., supra,* at 787. ZANDER's allegations of an attorney-client relationship should have been presented to a trier of fact and the Appellate Court and Trial Court both erred in dismissing the action.

Peterson v. Kennedy, supra, agreed with the logic in *Weitzel v. Oil Chemical & Atomic Workers, supra,* that an attorney-client relationship allows an attorney to be sued,

which stated, "if such a relationship had been formed, the firm would not have been acting primarily on behalf of the union or as the union's agent in the collective bargaining process. Rather, it would have been serving as private counsel to the individual grievant." (emphasis added) *Peterson v. Kennedy*, *supra*, at 1260.

This Honorable Court should determine that federal labor laws are not above state legal malpractice laws. *Aragon v. Federated Dep't Stores, Inc.*, 750 F.2d 1447 (9th Cir. 1985), held that a legal malpractice action is not part of a collective bargaining agreement and more importantly found that legal malpractice actions rise above labor laws. "The malpractice claim does not alter the economic relationship between employer and employee; it alters only the relationship between the former employee and a wholly separate entity, the union's counsel. The remedy is in tort, and it is based on the standard of care the attorney owes the client; it is not a contractual remedy under a collective bargaining agreement. It also furthers the state's interest in protecting the public from legal malpractice, **an interest that transcends labor law**." (emphasis added) *Aragon v. Federated Dep't Stores, Inc.,* 750 F.2d 1447, 1456–57 (9th Cir. 1985).

For example, in Arizona, *Canez v. Hinkle*, 210 F.3d 381 (9th Cir. 2000), although an unpublished Opinion, the Court found that the union attorney was not immune from legal malpractice claims because he was not representing the Plaintiff in the collective bargaining process. *Canez v. Hinkle, supra.* In this case, ZANDER argued that CARLSON was not representing him in the collective bargaining process. During his representation, CARLSON gave ZANDER negligent advice which resulted in ZANDER being ultimately terminated from his employment as a police officer.

For these reasons, this Honorable Court must reverse the finding in the lower Courts

and reverse the prior findings and ultimately maintain that each Illinois attorney should be on the same level playing field and accordingly find that an exception must be carved out to allow a union member to directly sue the union attorney that caused him damages.

II. IMMUNITY MUST NOT APPLY TO THE EXTENT OF AN ATTORNEY'S MALPRACTICE INSURANCE.

This case is also a matter of first impression, because there are no cases that address whether a union attorney, otherwise immune, can be held liable to the extent of his or her malpractice insurance.

In the alternative, if his Honorable Court does not reverse the Appellate and Trial Courts based on the immunity, then this Honorable Court should reverse as to the extent of the damages that would be recoverable by ZANDER.

In this case, ZANDER is asking this Honorable Court to carve out an exception to the *Atkinson* Rule wherein attorneys, who maintain a malpractice insurance policy and claim "immunity" may still be liable, not personally, but to the extent of their malpractice insurance policy limit.

This way the *Atkinson* Rule would still remain intact, where a union member cannot be held *personally* liable, however the union plaintiff will still be able to recover some damages, depending on the attorney's malpractice insurance policy.

Throughout these proceedings, CARLSON had and continues to have legal malpractice insurance, as reported on the Illinois Attorney Registration and Disciplinary Commission website.

If CARLSON believes to be totally immune from any liability, then what is the purpose of CARLSON having and paying for malpractice insurance?

Complete and total immunity essentially results in the attorney not needing to worry

about following the Rule of Professional Conduct because there are no repercussions that can be filed against the attorney.

There is a lack of case law which allows for this type of remedy, thus it is imperative that this Honorable Court carves out an extension to the immunity rule to allow for plaintiffs to recover at least some of their damages from the negligent attorney.

In the case of *Bagley v. Blagojevich*, 685 F. Supp. 2d 904, 910 (C.D. Ill. 2010), *aff'd,* 646 F.3d 378 (7th Cir. 2011), the Court held that the *Atkinson* Rule did not apply to the officials for two reasons. "First, the United States Court of Appeals for the Seventh Circuit has not adopted the broad interpretation of *Atkinson* that the AFSCME Officials have propounded. Second, the Plaintiffs' allegations are broader than any possible *Atkinson* immunity." *Bagley v. Blagojevich, supra.*

In this case the *Atkinson* Rule should not apply to ZANDER because the argument here is that although the *Atkinson* Rule bars claims against union agents from being personally liable, because CARLSON maintains malpractice insurance, he would not be held liable personally.

For example, in a bankruptcy proceeding in *Green v. Welsh*, 956 F.2d 30 (US Ct. App., 1992), the Court allowed the Plaintiff's claim for negligence against the Defendants to proceed. The Plaintiff was able to recover against the Defendants, not personally but to the extent of the liability insurance coverage. (emphasis added) *Green v. Welsh, supra,* generally.

In other bankruptcy cases, Courts agreed that to avoid personal liability, one can still be liable to the extent of the insurance policy. "*In re Greenway,* 126 B.R. 253, 255 (Bankr.E.D.Tex.1991) (discharge order does not bar continuation of state court action to

determine liability of debtor solely as a prerequisite to recovery from debtor's insurance carrier); *In re Peterson,* 118 B.R. 801, 804 (Bankr.D.N.M.1990) (injunction provided by § 524 does not bar FDIC from establishing the liability of the debtor so as to proceed against bank employee insurer); *In re Traylor,* 94 B.R. 292, 293 (Bankr.E.D.N.Y.1989) (discharge does not release debtor's insurer from liability); *In re Lembke,* 93 B.R. 701, 702-03 (Bankr.D.N.D.1988) (section 524 injunction permits suit to recover from debtor's insurer); *In re White,* 73 B.R. 983, 984-86 (Bankr.D.D.C.1987) (injunction issued pursuant to debtor's discharge does not bar a lawsuit against the debtor that will affect only the assets of the debtor's insurer); *In re Mann,* 58 B.R. 953, 959 (Bankr.W.D.Va.1986) (section 524 does not prohibit tort claimant from maintaining a pending suit against discharged debtor to effectuate recovery under claimant's uninsured motorist coverage)." *Green v. Welsh, supra,* at 33–34.

Following the bankruptcy cases, this Honorable Court should find that in order to avoid personal liability against an otherwise immune attorney, ZANDER should be able to maintain a cause of action against CARLSON to the extent of his malpractice policy limits.

Another example where plaintiffs are able to recover damages from insurance policy is the governmental immunity act. In the case, *Beach v. City of Springfield,* 32 Ill.App.2d 256 (1961) Plaintiff, the Estate of Robert Dooley, brought suit for negligence against the City of Springfield and employees of the City when Robert Dooley died in a lake. The City of Springfield filed a Motion to Dismiss arguing that it is immune from liability for its acts and the acts of the agents based on governmental immunity. The Trial Court granted the dismissal. The Appellate Court reversed and remanded finding that the City carried public liability insurance for injury to persons in the amount of $100,000 for

each person and $500 deductible, which meant that Plaintiff, if successful, should be able to collect only the amount of her judgment over and above the $500 deductible provisions of the policy. *Beach v. City of Springfield, supra*, at 264, generally.

In *Porter v. City of Urbana*, 88 Ill. App. 3d 443, 445 (1980) the Court held that a "municipality waives the statutory immunity by securing insurance coverage against a particular form of liability (Ill.Rev.Stat.1979, ch. 85, par. 9-103(b)." *Id.* This example further supports ZANDER's position that if the Court finds CARLSON immune, his immunity should be waived by the malpractice insurance and ZANDER should be able to recover.

Here, if this Honorable Court does not reverse the lower Courts based on the *Atkinson* Rule immunity, then this Honorable Court should create an extension to the *Atkinson* Rule, wherein union members can recover damages against their union attorneys, to the extent of the malpractice policy limits.

ZANDER would then be afforded to have his day in court and be able to prove his case but be only allowed to recover damages to the extent of CARLSON's insurance policy, leaving CARLSON not personally liable. The integrity of the *Atkinson* Rule would remain intact against personal liability against a Defendant, however still allow a Plaintiff to recover to a certain extent based on the malpractice insurance. Thus, this Honorable Court should reverse and remand this issue.

III. UNION WORKERS MUST BE RECOGNIZED AS THIRD-PARTY BENEFICIARIES WITH RIGHTS TO SUE.

The current case law that states that only a union can sue the union attorney, not the union employee, is flawed because it does not give the member who is actually being represented by the attorney, any remedies. As argued, ZANDER maintains that an attorney-

client relationship was formed between ZANDER and CARLSON, and CARLSON was to abide by the standard of care. Under this relationship ZANDER has the right to sue CARLSON as his attorney.

In this case, the Appellate Court found that there was no exception to a third-party's right to suing a union attorney. (A010-A011) If this Honorable Court finds that ZANDER was not in a direct attorney-client relationship with CARLSON and finds that ZANDER cannot directly sue CARLSON, then in the alternative, this Honorable Court should at least find ZANDER to be a third-party beneficiary, giving him the ability to sue CARLSON.

The Appellate Court cited to *Peterson v. Kennedy*, 771 F.2d at 1259, stating that the "union itself retains the right 'to sue its attorney for malpractice or for breach of contract, and to compensate a union member out of the recovery for any damages he may have suffered.' *Peterson v. Kennedy*, 771 F.2d at 1259. And nothing in our decision should be read to suggest that union attorneys may not face discipline for violating rules of professional conduct. See *id.* at 1258" (A011)

However, the concern with relying on this as a conclusion to ZANDER's case, is what if the union itself fails to sue the attorney? Then, as it appears, ZANDER has no other way to recover or obtain a remedy.

It must be undisputed that ZANDER was a third-party beneficiary of the union and the union agent because the attorney was working directly with ZANDER, regarding ZANDER's employment.

The Court in *Pelham v. Griesheimer*, 92 Ill. 2d 13, 21-23 (1982) when determining whether a party would be considered a third-party beneficiary, applied the "intent to

directly benefit" test, considering whether the attorney is acting at the direction of or on behalf of the client to benefit or influence the third party.

The *Pelham* Court concluded, "for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party. Under such proof, recovery may be allowed, provided that the other elements of a negligence cause of action can be proved." *Pelham v. Griesheimer, supra,* at 21.

The primary purpose of the attorney-client relationship is to represent and protect the union members, i.e. ZANDER. CARLSON was directly representing ZANDER in the proceedings.

To be considered a third-party beneficiary ZANDER needs to prove that CARLSON was acting at the direction of or on behalf of the union to benefit or influence ZANDER. "A third-party may have an enforceable right against an actual party to a contract if the third-party is a beneficiary of the contract. *Fleet Mortgage Corp. v. Schuster,* 112 N.M. 48, 49, 811 P.2d 81, 82 (1991). A third-party is a beneficiary if the actual parties to the contract intended to benefit the third-party. *Id.* at 49–50, 811 P.2d at 82–83; *Leyba v. Whitley,* 120 N.M. 768, 773, 907 P.2d 172, 177 (1995). The intent to benefit the third-party 'must appear either from the contract itself or from some evidence that the person claiming to be a third party beneficiary is an intended beneficiary.' *Fleet Mortgage,* 112 N.M. at 50, 811 P.2d at 83 (*quoting Valdez v. Cillessen & Son, Inc.,* 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987))." *Callahan v. New Mexico Fed'n of Teachers-TVI,* 2006-NMSC-010, ¶ 20, 139 N.M. 201, 208, see also *Schechter v. Blank,* 254 Ill.App.3d 560, 564 (1st Dist., 1993).

If the union and the union attorney are considered to be in an attorney-client relationship, then when the attorney is assigned to represent the union members, it is obvious that the attorney-client relationship is for the purpose of benefiting and representing that specific union member. The intent of the union retaining a union attorney was to have the attorney represent the union members directly, for example in arbitration proceedings. The evidence is clear ZANDER was an intended beneficiary because CARLSON acted as ZANDER's attorney, writing briefs, giving ZANDER advice, and otherwise representing ZANDER.

In *McLane v. Russell*, 131 Ill. 2d 509 (Ill., 1989), this Honorable Court held that the beneficiaries of a Will were able to sue the attorney for legal malpractice because they were considered intended third-party beneficiaries of the contract for professional services between the defendant-attorney and his client. *McLane v. Russell, supra*, at 520.

Here, ZANDER, the person actually receiving the "benefit" of CARLSON's counsel, must be afforded the right to be able to directly sue CARLSON, especially in situations if the union chooses not to file any lawsuits against the attorney, as a third-party beneficiary.

This Honorable Court should expand the third-party beneficiary rights to union members like ZANDER, who personally and directly received counsel and advice from the union attorney and were harmed as a result of that advice.

The Appellate Court stated that allowing the third-party beneficiary to sue would "upset the Labor Relations Act's statutory scheme governing a union's duty of fair representation by replacing the statute's intentional misconduct standard". (A011)

This poses an issue because if the union fails to sue for malpractice, then the union member would be out of luck. "The lawyer-client relationship required is not necessarily a relationship between the lawyer and the plaintiff, since non-clients may be third party beneficiaries entitled to sue for malpractice. D. Dobbs, The Law of Torts 1386 n. 16 (2000)." *Warren v. Williams*, *supra*, at 453.

The facts in ZANDER's case would support ZANDER being the intended third-party beneficiary of CARLSON and the union, and thus as a third-party ZANDER must be given his right to be able to sue, especially if the union chooses not to.

Therefore, this Honorable Court should allow union members to be able to sue the union attorneys as third-party beneficiaries for malpractice and accordingly should reverse the Appellate Court's and Trial Court's decisions.

IV. CLAIMS AGAINST THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL WERE PROPERLY FILED IN STATE COURT.

Lastly, ZANDER is requesting this Honorable Court to reverse the Appellate Court's and Trial Court's findings and find that ZANDER's claims against the ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL ("FOP") were properly filed in State Court.

The claims against the FOP were for vicarious liability based on CARLSON's actions and inactions, i.e. legal malpractice under a breach of contract theory. Vicarious liability, like legal malpractice, is a state law claim and was properly brought in State Court.

Despite what the FOP argues, exclusive jurisdiction does not solely lie with the Illinois Public Labor Relations Board to bring common law claims of vicarious liability,

nor legal malpractice claims brought by a client against his attorney and the employer, or alternatively as a third-party beneficiary.

ZANDER maintains that the underlying facts do not stem for the collective bargaining act and therefore would not be limited to being heard only by the Illinois Public Labor Relations Board, per the statute, "It is the purpose of this Act to regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements." See 5 ILCS 315/2, in pertinent part.

The Appellate Court stated in its Opinion that the "Labor Relations Act vests the Board with exclusive jurisdiction over unfair labor practice charges, including claims that a union has breached its duty of fair representation". (A012) Here, ZANDER did not sue the FOP for breach of duty of fair representation, therefore the analysis, respectfully, is inapplicable.

"In *American National Bank & Trust Co. v. Columbus–Cuneo–Cabrini Medical Center* (1992), 154 Ill.2d 347, 181 Ill.Dec. 917, 609 N.E.2d 285, we determined that common law implied indemnity, stemming from vicarious liability, was not abolished by the Contribution Act. Thus, a claim against an attorney for recovery of a settlement may be based upon implied indemnity." *Faier v. Ambrose & Cushing, P.C.,* 154 Ill. 2d 384, 387 (1993). The Appellate Court described ZANDER's pleadings as "creative" (A013) to try to avoid the statute, however the facts in this case are that the claims against the FOP were brought under a vicarious liability theory, and therefore recoverable under state law.

The issues of vicarious liability on behalf of the FOP stemmed from the negligent actions of CARLSON, as a union member. "A principal is vicariously liable for the conduct of its agent but not for the conduct of an independent contractor. *Petrovich v. Share Health Plan of Illinois, Inc.,* 188 Ill.2d 17, 241 Ill.Dec. 627, 719 N.E.2d 756 (1999). The difference is defined by the level of control over the manner of work performance. *Horwitz v. Holabird & Root,* 212 Ill.2d 1, 287 Ill.Dec. 510, 816 N.E.2d 272 (2004). An agency is a consensual relationship in which a principal has the right to control an agent's conduct and an agent has the power to affect a principal's legal relations. *Resolution Trust Corp. v. Hardisty,* 269 Ill.App.3d 613, 207 Ill.Dec. 62, 646 N.E.2d 628 (1995). An independent contractor relationship is one in which an independent contractor undertakes to produce a given result but, in the actual execution of the work, is not under the order or control of the person for whom he does the work. *Horwitz,* 212 Ill.2d at 13, 287 Ill.Dec. 510, 816 N.E.2d 272." *Sperl v. C.H. Robinson Worldwide, Inc.*, 408 Ill. App. 3d 1051, 1057 (2011). In this case, CARLSON is not an independent contractor, he is employed by the FOP, as evidenced by the Illinois Attorney Registration and Disciplinary Commission website.

As argued, ZANDER did not sue the FOP for a breach of the duty of fair representation. Similarly, the claims were not relating to the collective bargaining agreement. Thus, State Court is the appropriate venue for ZANDER's claims.

Therefore, this Honorable Court should reverse the decision of the Appellate Court and Trial Court and find that the claim against the FOP was properly filed in State Court.

CONCLUSION

Based on the arguments set forth above, this Honorable Court should reverse the findings of the Appellate Court and Trial Court and take this opportunity to carve out exceptions to the current case law that is being used in Illinois.

First, this Honorable Court should find that immunity is not applicable for an attorney and create an exception to the *Atkinson* Rule. As an attorney CARLSON must be held to a higher standard than just any union member, thus giving ZANDER the ability to file a legal malpractice claim against CARLSON.

If this Honorable Court determines that the *Atkinson* Rule does apply to attorneys, then the attorneys should be liable, not personally, but to the extent of their legal malpractice policy. Therefore, because CARLSON has malpractice insurance, ZANDER should be allowed to recover at least up to the policy limits.

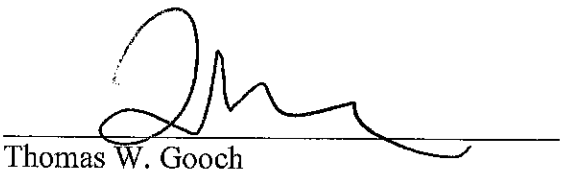
In the alternative, this Honorable Court should find that ZANDER was an intended third-party beneficiary of the union and CARLSON, giving him rights to sue the attorney, CARLSON.

Finally, this Honorable Court should determine that the vicarious liability claims against the FOP were properly filed in State Court as the claims are common law causes of action.

Pursuant to Supreme Court Rule, 352(a), Appellant RUSSELL ZANDER requests an oral argument.

WHEREFORE, your Appellant RUSSELL ZANDER, prays this Honorable Court reverses the decisions of the Appellate Court and the Trial Court and remands the matter for further proceedings, and any other relief deemed equitable and just.

Respectfully submitted
THE GOOCH FIRM, On behalf of,
Appellant, RUSSELL ZANDER,



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CERTIFICATE OF COMPLIANCE

Pursuant to Illinois Supreme Court Rule 341(c), I certify that this Appellant's Brief conforms with the requirements of Rules 341(a) and Rule 315(d) and that the length of this Petition, excluding the appendix is **30** pages.

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IN THE

SUPREME COURT OF ILLINOIS

RUSSELL ZANDER, Plaintiff/Appellant,	)	Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 1-18-1868
v.	)	There Heard on Appeal from the Circuit Court of the First Judicial Circuit, Cook County, Illinois, No. 2017 L 63098
ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER ORDER OF POLICE LABOR COUNCIL, Defendants/Appellees.	)	The Honorable Judge Martin S. Agran
	)	Petition for Leave to Appeal Allowed: March 25, 2020

APPENDIX

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ORAL ARGUMENT REQUESTED

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Opinion filed November 21, 2019
Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

RUSSELL ZANDER, Plaintiff-Appellant, v. ROY CARLSON and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 17 L 63098 Honorable Martin S. Agran, Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Presiding Justice Gordon and Justice Burke concurred in the judgment and opinion.

OPINION

¶ 1 When the Village of Fox Lake (Village) sought to terminate Russell Zander's employment as a police officer, Zander waived his right to a hearing before the local police board and opted instead to challenge his dismissal through the arbitration process outlined in the collective bargaining agreement between the Village and his union, the Illinois Fraternal Order of Police Labor Council (FOP). He pursued this course on the advice of Roy Carlson, an FOP staff attorney who later represented him at the arbitration hearing. After the arbitrator ruled against him, Zander sued Carlson and the FOP for legal malpractice. In dismissing the

complaint, the circuit court held that Carlson was immune from personal liability for actions taken on behalf of a union in the collective bargaining process and that Zander's claim against the FOP must be brought before the Illinois Labor Relations Board, which has exclusive jurisdiction over claims that a union has violated its duty to fairly represent its members. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 We draw the following facts from Zander's complaint. In December 2014, the Village's police chief placed Zander on administrative leave based on allegations of misconduct. Sometime thereafter, the police chief filed formal charges recommending Zander's termination. In response to Zander's request for legal representation, the FOP assigned Carlson to represent him. Carlson is a licensed attorney and FOP employee who represents FOP members in grievance and termination proceedings. Zander did not pay Carlson (other than indirectly through his union dues), and the two did not sign a retainer agreement. According to Zander, the FOP forced him to accept Carlson's representation and gave him no input in the selection. Zander alleges that he formed an attorney-client relationship with Carlson through acquiescence.

¶ 4 Under the Illinois Municipal Code, a police officer facing discharge is entitled to a hearing before the local Board of Fire and Police Commissioners (police board), unless a collective bargaining agreement between the municipality and the officer's union provides for arbitration of such disputes. See 65 ILCS 5/10-2.1-17 (West 2018). The collective bargaining agreement between the Village and the FOP provides that an officer may elect to challenge his discharge either before the police board or through the agreement's ordinary grievance-

arbitration procedure. On Carlson's advice, Zander elected to proceed via arbitration. After a two-day hearing, the arbitrator upheld the decision to terminate Zander's employment.

¶ 5 Zander then filed a two-count complaint against Carlson and the FOP. Count I alleged that Carlson owed Zander a duty of care arising from their attorney-client relationship and that Carlson breached that duty by negligently advising Zander to waive his right to a hearing before the police board and by inadequately representing him at the arbitration hearing. Count II alleged that the FOP assumed its own duty of care to Zander by providing him with legal representation and that it breached that duty by assigning him an inexperienced and incompetent lawyer. Alternatively, count II alleged that the FOP was vicariously liable for Carlson's negligence.

¶ 6 Carlson and the FOP moved to dismiss the complaint. Citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), they argued that Zander's claim against Carlson should be dismissed pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2018)) because a union agent is immune from personal liability for actions taken on the union's behalf in the collective bargaining process. And they argued that Zander's claim against the FOP should be dismissed under section 2-619(a)(1) of the Code (735 ILCS 5/2-619(a)(1) (West 2018)) because the Illinois Labor Relations Board (Board) has exclusive jurisdiction over claims that a union violated its duty to fairly represent its members.

¶ 7 In response, Zander argued that Carlson was not entitled to immunity under *Atkinson* because the arbitration proceeding challenging his termination was unrelated to the collective bargaining process and because Carlson acted on his (rather than the union's) behalf due to their attorney-client relationship. Zander argued, alternatively, that he should be able to sue Carlson for malpractice as a third-party beneficiary of the FOP's attorney-client relationship with

Carlson. Finally, Zander argued that his claim against the FOP did not fall within the Board's exclusive jurisdiction because it was not based on the duty of fair representation but instead sought to hold the FOP vicariously liable for Carlson's malpractice.

¶ 8 The circuit court dismissed the complaint, holding that Carlson was immune from suit under *Atkinson* and that Zander's claim against the FOP fell within the Board's exclusive jurisdiction. In a motion to reconsider, Zander argued that Carlson should be subject to liability to the extent of his malpractice insurance coverage. The circuit court denied the motion, finding that Zander's new argument was forfeited. Zander then filed a timely notice of appeal.

¶ 9 II. ANALYSIS

¶ 10 We review the dismissal of a complaint under sections 2-615 and 2-619 of the Code *de novo*. *Bogenberger v. Pi Kappa Alpha Corp.*, 2018 IL 120951, ¶ 23; *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, ¶ 41. A motion to dismiss under section 2-615 challenges the legal sufficiency of a complaint. *Bogenberger*, 2018 IL 120951, ¶ 23. The question is whether the complaint's allegations, if proved, would entitle the plaintiff to relief. *Id.* In making this determination, we must accept the complaint's well-pleaded allegations as true. *Id.* "The critical inquiry is whether the allegations of the complaint, when construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Id.* A motion to dismiss under section 2-619, on the other hand, "admits the legal sufficiency of the plaintiff's complaint but asserts a defense defeating the claim." *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2015 IL 117443, ¶ 14. Under section 2-619(a)(1), a complaint should be dismissed if "the court does not have jurisdiction of the subject matter of the action." 735 ILCS 5/2-619(a)(1) (West 2018). When considering a motion to dismiss under

section 2-619, we again must accept the complaint's well-pleaded allegations as true and view them in the light most favorable to the plaintiff. *American Family Mutual Insurance Co. v. Krop*, 2018 IL 122556, ¶ 13; *Shirley v. Harmon*, 405 Ill. App. 3d 86, 90 (2010).

¶ 11 With those standards in mind, we turn to Zander's legal malpractice claim against Carlson. In *Atkinson*, the United States Supreme Court held that, under the Taft-Hartley Act (29 U.S.C. § 185), which amended the National Labor Relations Act (NLRA) (29 U.S.C. § 151 *et seq.*), a union's agents may not be held individually liable for actions taken on the union's behalf in the collective bargaining process. 370 U.S. at 245-49. That rule rests on the "view that only the union [should] be made to respond for union wrongs, and that the union members were not to be subject to levy." *Id.* at 247-48. "This policy cannot be evaded or truncated by the simple device of suing union agents or members, whether in contract or tort, *** for violation of a collective bargaining contract for which *** the union itself is liable." *Id.* at 249. Rather, "national labor policy" demands that "when a union is liable for damages for violation of [a collective bargaining agreement], its officers and members are not liable for these damages." *Id.* Following *Atkinson*, courts have repeatedly "cited *Atkinson* to foreclose state-law claims, however inventively cloaked, against individuals acting as union representatives within the ambit of the collective bargaining process." *Montplaisir v. Leighton*, 875 F.2d 1, 4 (1st Cir. 1989). "This principle has become so embedded in [NLRA] jurisprudence that it brooks no serious challenge." *Id.*

¶ 12 As noted above, *Atkinson* interpreted the NLRA, which governs labor relations in the private sector. The first question we must address is whether *Atkinson* immunity applies under the Illinois Public Labor Relations Act (Labor Relations Act), which "regulates labor relations

between public employers and employees." 5 ILCS 315/2 (West 2018). We hold that it does. "[T]he legislative history of the [Labor Relations Act] indicates a close parallel between the Illinois act and the National Labor Relations Act ***." *Rockford Township Highway Department v. Illinois State Labor Relations Board*, 153 Ill. App. 3d 863, 874-75 (1987). For that reason, Illinois courts regularly look to federal precedent interpreting the NLRA for guidance in construing the Labor Relations Act. See *Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board*, 178 Ill. 2d 333, 339 (1997); *Illinois Fraternal Order of Police Labor Council v. Illinois Local Labor Relations Board*, 319 Ill. App. 3d 729, 737 (2001). Courts in other jurisdictions, moreover, have construed both federal and state public labor relations laws to provide *Atkinson* immunity. See *Montplaisir*, 875 F.2d at 4-5; *Weiner v. Beatty*, 116 P.3d 829, 832-33 (Nev. 2005); *Brown v. Maine State Employees Ass'n*, 690 A.2d 956, 958 n.1 (Me. 1997); *Best v. Rome*, 858 F. Supp. 271, 275 (D. Mass. 1994).

¶ 13 We find that the structure of the Labor Relations Act supports the application of *Atkinson* immunity to agents and officers of public sector unions. Under the Labor Relations Act, a union owes its members a "duty of fair representation" arising from the union's "statutory role as exclusive bargaining agent" for its members. *Cessna v. City of Danville*, 296 Ill. App. 3d 156, 163 (1998). The Labor Relations Act vests the Board with exclusive jurisdiction over claims that a union has violated its duty of fair representation. *Id.*; see also *Foley v. American Federation of State, County & Municipal Employees*, 199 Ill. App. 3d 6, 8-10 (1990). And it requires a union member to establish "intentional misconduct" by the union to prevail on such a claim. 5 ILCS 315/10(b)(1) (West 2018); see *Knox v. Chicago Transit Authority*, 2018 IL 162265, ¶ 32 ("A union violates its duty of fair representation only where it commits intentional misconduct in

representing an employee."). This "comprehensive scheme of remedies and administrative procedures" (*Foley*, 199 Ill. App. 3d at 10) would be undermined by a rule that allowed union members to circumvent the Board's exclusive jurisdiction and avoid the Labor Relations Act's intentional misconduct standard by relabeling duty of fair representation claims as negligence actions against a union's agents or officers. Thus, "[t]o preserve the integrity of [the Labor Relations Act's] statutory scheme, the *Atkinson* rule must fully apply in the public sector." *Montplaisir*, 875 F.2d at 5.

¶ 14 Zander appears to accept that *Atkinson* immunity applies under the Labor Relations Act, but he argues that such immunity should not extend to a union's lawyers. We disagree. In *Peterson v. Kennedy*, 771 F.2d 1244, 1257 (9th Cir. 1985), the Ninth Circuit refused to create "an exception to the *Atkinson* rule *** for union employees who happen to be attorneys." The court recognized that "[l]abor grievances and arbitrations frequently are handled by union employees or representatives who have not received any professional legal training at all." *Id.* at 1258. When a union instead hires an attorney "to act for it in the collective bargaining process"—including in an "arbitration proceeding" where "the underlying grievance belongs to a particular union member"—the union itself continues to "represent[,] and is ultimately responsible to[,] the member." *Id.* In those circumstances, the court held, "the rationale behind the *Atkinson* rule is squarely applicable." *Id.*

¶ 15 As *Peterson* explained, sound policy reasons support the extension of *Atkinson* immunity to attorneys who act on behalf of a union in matters arising under a collective bargaining agreement or that otherwise relate to the collective bargaining process. As we noted above, a union may be held liable to a member for breaching its duty of fair representation "only where it

commits intentional misconduct in representing an employee." *Knox*, 2018 IL 162265, ¶ 32. In a legal malpractice action, by contrast, an attorney may be held liable for merely negligent conduct. *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 25. Allowing union members to file malpractice suits against union attorneys for actions taken in connection with the collective bargaining process would "anomalous[ly]" hold "certain agents or employees of the union *** to a far higher standard of care than the union itself." *Peterson*, 771 F.2d at 1259. Worse yet, because duty of fair representation claims are subject to a six-month statute of limitations (see 5 ILCS 315/11(a) (West 2008)), while legal malpractice actions are subject to a lengthier two-year statute of limitations (see 735 ILCS 5/13-214.3(b) (West 2018)), failing to extend *Atkinson* immunity to union attorneys would subject them to personal liability for actions taken on behalf of a union well after the limitations period for a claim against the union itself had expired. See *Peterson*, 771 F.2d at 1259 (observing that, under such a rule, "the union attorney would often be the only defendant against whom a disappointed [union member] could proceed").

¶ 16 For these reasons, courts have consistently followed *Peterson* in "reject[ing] efforts to distinguish lawyers from other union agents for purposes of *Atkinson* immunity" (*Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 862 (10th Cir. 1996)) and "have uniformly concluded that *Atkinson* prohibits claims made by a union member against attorneys employed by or retained by the union to represent the member in a labor dispute." *Carino v. Stefan*, 376 F.3d 156, 160 (3d Cir. 2004).

¶ 17 Zander argues that *Atkinson* and *Peterson* do not support the dismissal of his malpractice claim under section 2-615 because his complaint alleged a direct attorney-client relationship between him and Carlson. While we must accept the well-pleaded allegations of Zander's

complaint as true when assessing its legal sufficiency, we are not required to accept "mere conclusions of law or fact unsupported by specific factual allegations." *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996). Zander's complaint alleged that Carlson was an FOP employee who regularly represented police officers in labor disputes, grievances, and termination proceedings. He alleged that, by acquiescing in Carlson's representation of him, he formed an attorney-client relationship with Carlson. But he conceded that he and Carlson did not sign a retainer agreement; that he had no input into the FOP's decision to assign Carlson to represent him; and that he did not pay for Carlson's services, other than indirectly through his union dues. Zander's contention that his mere acceptance of Carlson's representation created an attorney-client relationship is foreclosed by *Peterson*, which rejected the notion that "an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an 'attorney-client' relationship in the ordinary sense with the particular union member who is asserting the underlying grievance." 771 F.2d at 1258.

¶ 18 *Peterson* recognized that "union members who have themselves retained counsel to process grievances on their behalf" are not prohibited from bringing malpractice suits against their retained attorneys, even if the attorney otherwise "serves as the union's regular outside counsel and is employed at the union's suggestion." *Id.* at 1259. But to invoke this exception, the union member must show that the attorney "specifically agreed *** to provide direct representation to [the union member] as an individual client" and was not merely "acting pursuant to [his] obligation to provide representation for or on behalf of the union." *Id.* at 1261. Notably, Zander's complaint did not allege any specific agreement by Carlson to directly represent Zander as an individual client. To the contrary, Zander alleged that Carlson was an

FOP employee whose duties included regularly representing union members in grievance and termination proceedings and whose services were provided to Zander (and other union members) as a benefit of union membership. Even viewing the allegations in Zander's complaint in the light most favorable to him, he failed to sufficiently allege an attorney-client relationship between him and Carlson. See *Arnold*, 100 F.3d at 862-83 (rejecting union member's attempt to "recharacterize" his relationship with union attorney where the attorney was "retained by the union," the attorney's services were "provided to [the union member] as a benefit of [his] union membership," and the attorney "also provided services on behalf of [the union] to *** other [union members] threatened with termination").

¶ 19 Zander makes several other attempts to avoid the application of *Atkinson* immunity, but none is persuasive. He contends that the arbitration proceeding challenging his termination was not related to the collective bargaining process. But Zander's right to challenge his termination through arbitration was created and governed by the collective bargaining agreement. Under the agreement, Zander had the option to waive his right to a hearing before the police board and instead challenge his termination through the arbitration procedures applicable to other types of grievances. Whether it related to an ordinary grievance or a termination decision, the arbitration proceeding clearly was "part of the collective bargaining process." *Breda v. Scott*, 1 F.3d 908, 909 (9th Cir. 1993) (applying *Atkinson* immunity to outside counsel hired by union to represent member at arbitration hearing challenging his discharge).

¶ 20 Zander also argues that, even in the absence of a direct attorney-client relationship, he should be permitted to sue Carlson for malpractice as a third-party beneficiary of the FOP's attorney-client relationship with Carlson. It is true that an attorney may owe a duty of care to a

nonclient who "is an intended third-party beneficiary of the relationship between the client and the attorney," where the attorney acts "at the direction of or on behalf of the client to benefit or influence [the] third party." *In re Estate of Powell*, 2014 IL 115997, ¶ 14. But applying the third-party beneficiary doctrine to overcome a union attorney's *Atkinson* immunity would undermine the policy reasons that support such immunity in the first place. Contrary to the basic principle underlying *Atkinson* immunity, employing the third-party beneficiary doctrine in this manner would shift liability arising from a union's representation of its members from the union itself to the union's agents. And, as discussed above, it would upset the Labor Relations Act's statutory scheme governing a union's duty of fair representation by replacing the statute's intentional misconduct standard (and six-month statute of limitations) with the general negligence standard (and two-year statute of limitations) applicable to malpractice actions. For these reasons, the third-party beneficiary doctrine cannot be used to "remove the *Atkinson* bar." *Carino*, 376 F.3d at 162.

¶ 21 Zander contends that extending *Atkinson* immunity to union attorneys will insulate such attorneys from the harm that their misconduct might cause to union members and free them from complying with the rules of professional conduct. This concern is unfounded. The union itself retains the right "to sue its attorney for malpractice or for breach of contract, and to compensate a union member out of the recovery for any damages he may have suffered." *Peterson*, 771 F.2d at 1259. And nothing in our decision should be read to suggest that union attorneys may not face discipline for violating rules of professional conduct. See *id.* at 1258 (recognizing that a union attorney may have "certain ethical obligations" to a union member whom he represents in a grievance proceeding, even if "his principal client is the union").

¶ 22 Zander argues that he should be permitted to recover damages from Carlson up to the limits of any malpractice insurance coverage that Carlson may have. But Zander forfeited this argument by raising it for the first time in his motion to reconsider. See *Caywood v. Gossett*, 382 Ill. App. 3d 124, 133 (2008) ("arguments raised for the first time in a motion for reconsideration in the circuit court are waived on appeal"). In any event, the argument is merely another effort to shift liability for an alleged breach of a union's duty of fair representation away from the union itself and thus cannot be squared with the Labor Relations Act's comprehensive statutory scheme governing such claims or with the basic principle that "the union as an entity *** should *** be the sole source of recovery for injury inflicted by it." *Atkinson*, 370 U.S. at 249. Neither the Labor Relations Act nor *Atkinson* can "be evaded or truncated by the simple device of suing union agents" personally, whether or not the union agent is an attorney who carries malpractice insurance. *Id.* For all of these reasons, the circuit court correctly dismissed Zander's legal practice claim against Carlson.

¶ 23 That brings us to Zander's claim against the FOP. As discussed above, the Labor Relations Act imposes on public sector unions a duty to fairly represent their members and makes the breach of that duty an unfair labor practice. See *Foley*, 199 Ill. App. 3d at 8-10. The Labor Relations Act vests the Board with exclusive jurisdiction over unfair labor practice charges, including claims that a union has breached its duty of fair representation. *Id.* at 10-12. In addition, the Labor Relations Act creates a six-month statute of limitations for unfair labor practice charges (see 5 ILCS 315/11(a) (West 2018)) and expressly provides that "a labor organization or its agents shall commit an unfair labor practice *** in duty of fair representation

cases only by intentional misconduct in representing employees" (5 ILCS 315/10(b)(1)(ii) (West 2018)).

¶ 24 Zander contends that his claim against the FOP is not subject to the Board's exclusive jurisdiction—or, presumably, to the Labor Relations Act's six-month statute of limitations and intentional misconduct standard—because he has not alleged that the FOP breached its duty of fair representation. But Zander cannot avoid the Labor Relations Act's comprehensive statutory scheme through creative pleading. See *Montplaisir*, 875 F.2d at 4 (rejecting union members' effort to avoid "labor-law preemption" by choosing "not to couch their complaint as an unfair labor practice"). At bottom, Zander's attempt to hold the FOP liable for Carlson's performance at the arbitration proceeding challenging Zander's termination rests on the FOP's duty to fairly represent Zander in matters related to the collective bargaining process. Because the Labor Relations Act "creates and defines" the FOP's duty of fair representation, Zander "must look to the provisions of that Act for his remedy." *Brown*, 690 A.2d at 959. Zander's claim thus falls within the Board's exclusive jurisdiction, and the circuit court correctly dismissed it for lack of subject matter jurisdiction.

¶ 25 III. CONCLUSION

¶ 26 For the foregoing reasons, we affirm the circuit court's judgment dismissing Zander's complaint.

¶ 27 Affirmed.

No. 1-18-1868

Cite as:	*Zander v. Carlson*, 2019 IL App (1st) 181868
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 17-L-63098; the Hon. Martin S. Agran, Judge, presiding.
Attorneys for Appellant:	Thomas W. Gooch III and Sabina D. Walczyk, of The Gooch Firm, of Wauconda, for appellant.
Attorneys for Appellee:	Brendan J. Nelligan and Matthew J. Egan, of Pretzel & Stouffer, Chtrd., of Chicago, for appellees.

IN THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
3RD DISTRICT LAW DIVISION – ROLLING MEADOWS

RUSSELL ZANDER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. _____
	)	
ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL,	)	Plaintiff hereby demands a trial by jury of twelve (12) persons
	)	
Defendants.	)	

COMPLAINT AT LAW

COUNT I
(Legal Malpractice)

NOW COMES, your Plaintiff, RUSSELL ZANDER, (herein also referred to as "ZANDER"), by and through his attorneys, THE GOOCH FIRM, and as and for his Complaint against ROY CARLSON, ESQ., (hereinafter also referred to as "CARLSON") and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL (hereinafter also referred to as "FOP") states the following:

1. That your Plaintiff, RUSSELL ZANDER is a resident of Lake County, Illinois and was such a resident at all times relevant to this Complaint. ZANDER was a police officer employed by the Village of Fox Lake Illinois as a patrol officer for many years, until at some point during 2014 when he was placed on administrative leave, and his employment thereafter terminated in 2016 following an arbitration hearing.

2. Defendant ROY CARLSON, ESQ., is an attorney licensed to practice law in the State of Illinois. CARLSON was admitted to the practice of law on November 6, 2014 and at the time of the actions complained of herein had been practicing law for less than two (2) years.

3. The ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL ("FOP") is a labor union, organized primarily to provide job security and other union benefits to law enforcement agents and employees of various villages, cities, and other various governmental units in and around the State of Illinois. The FOP transacts its business in all of the collar counties around Chicago and in Cook County, Illinois. Its principle place of business is located in Western Springs, Cook County, Illinois and is also the place of business of Defendant CARLSON.

4. Venue is therefore claimed proper in Cook County, Illinois, pursuant to statute.

5. At all relevant times herein, CARLSON was an employee of FOP. However, FOP is not a law firm and is not registered to practice law in the State of Illinois.

6. Nevertheless, CARLSON has been held out to the members of the FOP as the FOP's attorney who would represent all members in labor disputes or grievances with the various employers of the police officers who were members of the FOP.

7. That on or about December 5, 2014 your Plaintiff, ZANDER had contact with an arrestee in the Fox Lake Police Station at a time when ZANDER was functioning as the officer in charge of the patrol shift. The arrestee had been arrested for public intoxication and was disruptive and disorderly in his behavior at the time.

8. After various interrogations, the Village of Fox Lake brought formal charges against ZANDER for his alleged behavior during the arrest of the aforesaid arrestee, and then went back in time imagining other wrongful conduct of ZANDER and dredged four different incidences from assignments of ZANDER which suddenly became disciplinary complaints.

9. ZANDER, after being notified of the proceedings, immediately notified FOP seeking legal representation.

10. ZANDER, although being initially assigned an experienced attorney, was subsequently assigned Defendant CARLSON to represent him. At the time, ZANDER was informed by more than one employee of FOP that Defendant CARLSON handled all grievances and termination proceedings on behalf of its members, and was a highly competent attorney. The aforesaid representations were false and materially false. In fact, as aforesaid, CARLSON had practiced law for less than two years, and was hardly experienced in the various procedures available to a police officer facing charges by his or her employer, and facing potential termination.

11. ZANDER was given no input into the selection of an attorney to represent him but rather was assigned CARLSON, who was an employee of FOP, as his attorney.

12. Nevertheless, the somewhat unusual method of requiring a person to utilize a particular attorney without allowing any input, an attorney client relationship was formed between ZANDER and CARLSON, which gives rise to this Complaint. There was no formal retainer agreement executed between ZANDER and CARLSON, rather, what happened was in fact a "cramdown" by FOP informing ZANDER if he wanted an attorney (which his union dues guaranteed him such an attorney) he would use CARLSON, and based on his acquiescence, forced or otherwise, ZANDER and CARLSON created an attorney-client relationship.

13. That by virtue of that attorney-client relationship, CARLSON and the FOP owed ZANDER certain duties, commonly referred to as the standard of care, which required CARLSON to comport his behavior to the acts and actions of a reasonably well qualified attorney practicing law in the same geographical area as CARLSON.

14. FOP, by injecting itself into the practice of law, should be held to the same standard of conduct as CARLSON, and certainly as alleged in a separate count, is vicariously liable for the actions of CARLSON.

15. In accepting the representation of ZANDER in this matter, neither CARLSON nor FOP restricted the scope of his or its representation of ZANDER, agreeing to handle the entire grievance and termination proceedings on behalf of ZANDER with the Village of Fox Lake. As aforesaid, during the initial contacts and interviews with Fox Lake, ZANDER was represented by a well experienced attorney whose last name was Mahoney. Mahoney was accompanied by CARLSON at that initial interview. Thereafter, ZANDER was informed that Mahoney was no longer involved in the matter and Defendant ROY CARLSON, who was well qualified, would be handling the balance of the proceedings.

16. That at the time of the filing of formal charges against ZANDER, ZANDER was entitled to a formal hearing before the Fox Lake Police Commission, which had authority to discipline ZANDER in any number of ways. Routinely police officers are involved in the operation of the local police commission, and routinely the police commission is made up of a number of local residents, who by oath agree to be fair and impartial in their decision-making process.

17. On information and belief, over the years many police officers have passed through the Fox Lake Police Commission (which is a civil service type of commission) with varying results and varying discipline, including absolute acquittals.

18. Under the law, following a police commission decision, a Respondent appearing before it has the rights of appeal to a Circuit Court through the Administrative Review Act, and can bring various causes of action allowed by law in both State and Federal Court based on the behavior of the police commission.

19. Additionally, upon a review of the police commission action by the village board, and a legislative action by that village board terminating the employment of a police officer, the

terminated officer has further legal rights in the Circuit Court of Lake County Illinois, as well as the Appellate and Supreme Courts of the state.

20. Plaintiff maintains and alleges on information and belief, that at this stage of the proceeding, Defendant CARLSON had never conducted a full hearing before the Fox Lake police commission or before any other police commission, as the primary attorney responsible for the hearing without assistance of another more experienced attorney.

21. In spite of the obvious benefits to proceeding before the civil service police commission of Fox Lake, CARLSON induced ZANDER to waive that right and agree to an arbitration in front of a single arbitrator, which would be binding on ZANDER, thereby cutting off any rights of review or appeal by the Circuit Court or the courts of review of the State of Illinois.

22. The behavior of ZANDER was of a minor nature. The entire disciplinary matter which was started by the Chief of Police of Fox Lake was based on his failure to report the misconduct of another police officer to his superiors in the administration of the police department. After creating that charge, the Police Chief then began looking for other charges that had never been filed against ZANDER, involving conduct that had never risen to the form of a complaint by any member of the public, and created additional charges against ZANDER based on his behavior while assigned to a local high school as a "school resource officer." The Police Chief then, having created those charges, began the disciplinary proceeding.

23. As aforesaid, CARLSON had induced ZANDER to agree to a sole arbitrator and a binding arbitration, which from the outset was predetermined to result in ZANDER's termination of employment. In fact, the arbitrator, in his 72-page arbitration award, found that it is improper in the circumstance of a police officer to allow an arbitrator to substitute his judgment on behalf of a Chief of Police, and made that specific finding in his aforesaid findings and Order.

24. At no time had CARLSON, if he even knew of the case law, advised ZANDER that there was common law in the State of Illinois indicating that an arbitrator was justified in stating that he would not overrule the decision of a Police Chief due to the nature of police work, during an arbitration hearing in the State of Illinois. Had ZANDER been advised of and known that fact, together with other facts learned subsequently, ZANDER never would have agreed to substitute and arbitration for a hearing before the local police commission.

25. Nevertheless, the matter proceeded through the arbitration process. CARLSON took little or no depositions or other discovery from numerous witnesses that had been created by the Chief of Police to testify against ZANDER, involving not only the primary incident, which was the arrest by other police officers of a person for public intoxication and difficulties they had with that person in the city jail. As aforesaid that arbitration expanded to then include four created incidents that had never been disciplinary matters or incidents complained of between ZANDER and students and faculty at the Gregg Community High school in 2014.

26. Incredible amounts of time were spent creating these four additional incidents to bolster the charge against ZANDER of failing to report an incident to his superiors. CARLSON took no active role in attempting to minimize those incidents or to interview, interrogate, and/or depose the parties involved.

27. Noteworthy is the fact that prior to the December 5, 2014 encounter, ZANDER had never been the subject of any disciplinary proceeding. Nevertheless, the Police Chief determined that the only suitable punishment by the time of the arbitration hearing would be the termination of ZANDER's employment.

28. At this chronological time, the Village of Fox Lake and the Fox Lake Police Department were under severe public scrutiny and criticism. This was due to the staged shooting of a Fox

Lake Police Department Lieutenant who had apparently been stealing from the various funds of the Fox Lake Police Department, and when confronted, attempted to stage his shooting which did result in his death, although the matter was found to be a suicide and not an attack by others as the decedent attempted to create. Therefore, obviously, the Village of Fox Lake and the Fox Lake Police Department wished to demonstrate to the public that they would quickly and severely discipline police officers. Unfortunately, ZANDER was caught up in the situation locally at the time, and in essence became a scapegoat, losing his employment permanently following an arbitration that from the beginning was designed to favor the Chief of Police and the Chief's recommendations.

29. Unfortunately, due to the nature of the arbitration, ZANDER had no right to appeal whatsoever.

30. In fact, before the police commission and represented by a competent attorney, in all probability ZANDER would have received, at worst, a much lesser disciplinary finding which would not have resulted in the permanent loss of his employment as a police officer, and in all likelihood the possibility of ever becoming involved in police work ever again.

31. In their representation of Plaintiff RUSSELL ZANDER, the Defendants ROY CARLSON, ESQ. and the Illinois Fraternal Order of Police Labor Council ("FOP") were negligent and failed to exercise a reasonable degree of care and skill, and otherwise breached the standard of care owed ZANGER in one or more of the following ways:

a) Failed to recommend to ZANDER that he should seek review by the police commission of the Village of Fox Lake;

b) Failed to completely investigate and discover the extend and details of the charges brought against ZANDER;

c) Failed to advised ZANDER they had not done a thorough and complete investigation and evaluation of the charges being brought against ZANDER;

d) Because they had not completed a thorough, complete investigation and evaluation of all possible defenses as well as the prosecutions factual basis, the Defendants were unable to properly inform ZANDER as to what proceedings would be best for ZANDER, and the methodology of those proceedings;

e) Failed to properly conduct discovery, including the interviews of all witnesses, and particularly the interviews of the students and faculty involved in the contrived charges created by the then Chief of Police to add "muscle" to the primary charge against ZANDER in order to obtain his termination;

f) Failed to retain experts, businesses, or individuals outside of the FOP for information or suggestions on how to better assist ZANDER with regard to the charges pending against him;

g) Failed to obtain competent, experienced counsel and representation to handle what was a very complicated and extensive arbitration hearing lasting two days, with a very experienced Village Prosecutor representing the Chief of Police and the Village of Fox Lake as the employer of ZANDER;

h) Failed to recognize that the treatment of ZANDER in the investigative stage through the use of a private detective agency and through other actions of the Chief of Police may have well violated the civil rights of ZANDER and to research and recommend the filing of litigation in Federal Court for redress of those wrongs;

i) Failed to properly prepare for testimony at the arbitration hearing, including a demand for the appearance of all persons executing various affidavits and other documents

which were to be submitted into evidence as a hearsay exception in order to cross examine the drafters of those documents as opposed to allowing the documents to be admitted;

j) Failed to properly subpoena and present witnesses to testify on behalf of ZANDER at the proceeding;

k) Failed to properly prepare a closing brief with appropriate argument for the defense of ZANDER, instead submitted what could best be described as a last minute 11-page brief failing to discuss the evidence properly or the common law of the State of Illinois, which might well have assisted in a fair resolution of the matter;

l) Failed to properly organize and argue that if ZANDER was guilty of any of what could be construed as minor offenses, that a period of probation or supervision was more appropriate than total termination;

m) Routinely and regularly advised ZANDER not to accept offers of settlement made by the Chief of Police and the Village of Fox Lake which would have resulted with ZANDER, in a relatively short period of time, being able to return to work as a police officer in the Village of Fox Lake thereby causing a substantial loss to ZANDER. In truth and in fact, rather than advising ZANDER not to accept the offers their advice should have been directly opposite to that if in fact they felt ZANDER had any potential liability under the charges brought.

n) Was otherwise negligent in their representation of ZANDER.

32. Had the matter been properly handled it would have proceeded before the police commission of the Village of Fox Lake who would have found, based on the evidence and existing case law as well as the reputation of ZANDER, that any penalty was to be inflicted that penalty would have been considerably less than termination of employment forever which in

essence is a "death sentence" for police officers in seeking further employment in another police agency or returning to his duties as a patrol officer in the Village of Fox Lake.

33. As a direct result of the wrongful conduct of the Defendant CARLSON, ZANDER did in fact lose his employment and is unlikely to ever obtain employment as a police officer again. ZANDER, at the time of his loss of employment was earning in excess of $50,000 a year and had at least 20 years of additional service before retirement with a pension. That loss of income, over a 20-year period, easily exceeds the sum of $1,000,000 together with a life-long pension in an approximate amount of 75% of his last 4 years of salary before employment which easily could consist of additional 7-figure sums of money but the damages suffered even exceed the loss of salary and employment benefits as the job guarantees certain other benefits to ZANDER including health insurance which, in this day and age, easily has a value of $15,000 per year through the length of his employment.

34. Therefore, the total damages suffered by ZANDER over the coming years and without reduction to present day value are well into the 7-figures; none of which would have been incurred had CARLSON and the FOP properly handled the disciplinary matters brought against ZANDER to include recommendations to ZANDER to accept various offers that were tendered by the Village of Fox Lake.

WHEREFORE your Plaintiff, RUSSELL ZANDER, prays for judgment on such verdicts as a jury of twelve (12) shall determine in his favor and against the Defendants in an amount to exceed the jurisdictional minimums of this Court plus interest, costs of suit and all other relief this Honorable Court deems just and proper.

COUNT II
(Negligence and Vicarious Liability against the
Illinois Fraternal Order of Police Labor Counsel "FOP")

35. Plaintiff incorporates Paragraphs 1 through 34 of Count I as and for Paragraphs 1 -- 34 of this Count II, as though fully set forth herein and adopted by reference hereto.

36. As aforestated, ROY CARLSON, ESQ., was a licensed attorney in the State of Illinois, and was so licensed and employed by the Illinois Fraternal Order of Police Labor Council ("FOP") during all times relative to this Complaint.

37. In the course of Defendant CARLSON's and Defendant FOP's representation of ZANDER in this matter, they obtained knowledge of Plaintiff's background history and all facts pertaining to the pending matter. The business discussions and involvement by CARLSON with the FOP began shortly after December 5, 2014 and occurred frequently when started.

38. That the Illinois Fraternal Order of Police Labor Council has no right or authority to practice law in the State of Illinois, nor does it have the right to employ an attorney to furnish legal services under its direction to members of the FOP, controlling what that attorney does through policy manuals and otherwise as created by the FOP.

39. That due to FOP's principle involvement in the disciplinary matters brought against ZANDER and its control of Defendant CARLSON, Defendant FOP assumed the same fiduciary duty to ZANDER that CARLSON had, and breached that duty by the actions set forth in Count I above.

40. Further, as a result of the business relationship between CARLSON and the Illinois Fraternal Order of Police Labor Council, being that FOP held CARLSON out to its members as the "FOP lawyer," then the Illinois Fraternal Order of Police Labor Council (FOP) should be vicariously liable for the acts and actions of CARLSON as described in Count I above.

WHEREFORE, your Plaintiff, RUSSELL ZANDER, requests entry of judgement in his favor and against Defendant, ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, for all damages incurred as a result of the wrongful behavior and actions of Defendant ROY CARLSON.

Respectfully submitted by

THE GOOCH FIRM, on behalf of RUSSELL ZANDER, Plaintiff,

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS LAW DIVISION
COUNTY DEPARTMENT, LAW DIVISION

RUSSELL ZANDER, Plaintiff, v. ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON, Defendants.	)	No. 2017 L 063098

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

NOW COME the Defendants, ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON, by their attorneys, PRETZEL & STOUFFER, CHARTERED, and move to dismiss the plaintiffs' Complaint with prejudice pursuant to 735 ILCS 5/2-619.1 of the Code of Civil Procedure. In support of this motion, the Defendants submit the attached exhibits and state as follows:

INTRODUCTION

Plaintiff, Russell Zander, has filed a two-count complaint against the defendants, the Illinois Fraternal Order of Police Labor Council ("Labor Council") and its employee, Roy Carlson, alleging legal malpractice (Count I) and seeking to impose vicarious liability upon the Labor Council for Carlson's conduct in connection his activities on plaintiff's behalf during grievance proceedings with plaintiff's former employer, the Village of Fox Lake ("the Village"), proceedings which ultimately resulted in the Village terminating the plaintiff's employment as a police officer.

As set forth below, the Court should dismiss plaintiff's Complaint for two reasons. First, the claim for legal malpractice against Carlson should be dismissed under Section 2-615 because

United States Supreme Court precedent establishes that union agents or employees like Carlson cannot be held personally liable for actions they undertake in the course of their employment in furtherance of collective bargaining rights—such as the grievance proceedings alleged by the plaintiff here. Second, the plaintiff's claims against Carlson and the Labor Council are founded on allegations that the Labor Council breached its duty of fair representation toward the plaintiff. Under Illinois law, all such claims are within the exclusive jurisdiction of the Illinois Labor Relations Board and as such must be dismissed under Section 2-619(a)(1) of the Code of Civil Procedure for lack of jurisdiction.

PERTINENT FACTS

At all relevant times in this case, defendant Roy Carlson ("Carlson") was employed by a union, the Labor Council as an attorney. (Complaint, attached hereto as Exhibit A, ¶¶3, 5, 11.) The Labor Council is a "labor organization" established pursuant to Section 2(i) of the Illinois Public Labor Relations Act, 5 ILCS 315/2(i)), and represents thousands of public safety and criminal justice employees through the State who have collective bargaining rights under the Act. (Affidavit of Richard Stomper, attached hereto as Exhibit B, ¶3.)

At all times alleged in the Complaint, the Labor Council was the exclusive bargaining representative for the Village of Fox Lake Police Department and was recognized as such by the Illinois Labor Relations Board. The Labor Council represented police officers of the Village, including the plaintiff, by its employee Carlson throughout the grievance process alleged in the Complaint pursuant to a collective bargaining agreement between the Village and the Labor Council. (Exhibit A, ¶¶9-10; Exhibit B, ¶¶3 – 6, and Exhibits A and B thereto.) Plaintiff alleges that Carlson and the Labor Council were negligent in various ways throughout plaintiff's grievance process with the Village and the resulting arbitration process and termination proceedings. (Exhibit A, ¶¶15-31.)

APPLICABLE LAW & ARGUMENT

I. Section 2-615 Argument for Dismissal: Plaintiff's Claims Against Carlson for Legal Malpractice Are Barred as a Matter of Law.

As an initial matter, the plaintiff's attempt to state a claim for legal malpractice against Carlson is contrary to law and must be dismissed. The United States Supreme Court has previously determined that union officers and employees are immune from personal liability for acts undertaken in their capacity as agents for the union, and Illinois courts have looked to federal decisions in interpreting the Illinois Public Labor Relations Act ("IPLRA"), which governs the case before this court. *Chief Judge of the Illinois Sixteenth Judicial Circuit v. Illinois State Labor Relations Board*, 178 Ill.2d 333, 338 (1997) (holding that decisions of the NLRB and Federal courts guide Illinois courts in interpreting the IPLRA).

In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), the Supreme Court held that union officers and employees are immune from personal liability for acts undertaken as union representatives, on behalf of the union. This has become known as the *Atkinson* Rule. Courts across the country have subsequently applied the *Atkinson* Rule to bar legal malpractice claims brought by union members against union attorneys for acts performed in the collective bargaining process. For example, in *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), the court held that the *Atkinson* Rule applies to a union's in-house counsel, as well as to its retained outside counsel:

> When the union uses its regular outside counsel, the services are sometimes covered under an overall retainer agreement, and there is no additional fee or charge to the union for the law firm's handling of the matter. In any event, whether it be house counsel or outside union counsel, where the union is providing the services, the attorney is hired and paid by the union to act for it in the collective bargaining process. *Peterson*, 771 F.2d at 1258.

Courts across the country have repeatedly looked to *Atkinson* and *Peterson* to hold that an attorney hired by a union to defend a union member covered under a collective bargaining agreement is an agent of the union and is therefore immune from suit. *Montplaisir v. Leighton*, 875 F.2d 1, 5-7 (1st Cir. 1989); *Best v. Rome*, 858 F. Supp. 271, 274 (D. Mass. 1994); *Mamorella v. Derkasch*, 276 A.D.2d 152, 716 N.Y.S.2d 211, 213 (App. Div. 2000); *Sellers v. Doe*, 99 Ohio App. 3d 249, 650 N.E.2d 485, 487-88 (Ohio Ct. App. 1994); *Collins v. Lefkowitz*, 66 Ohio App. 3d 378, 584 N.E.2d 64, 65 (Ohio Ct. App. 1990) (holding that an attorney who is handling a labor grievance under a collective bargaining agreement has not entered into an attorney-client relationship with the union member). This also holds true in the context of a local government employee where a state public labor relations act (such as the IPLRA) applies. *Weiner v. Beatty*, 121 Nev. 243, 248-250 (2005) (holding that Nevada Employee Management Relations Act immunized lawyers supplied by unions from legal malpractice claims).

The same logic applies to plaintiff's claims against Carlson in this case. Plaintiff alleges that, at all relevant times, Carlson was an agent/employee of plaintiff's union, the Labor Council. (Complaint, ¶¶3, 5, 11). The grievance process alleged in the Complaint was conducted pursuant to the collective bargaining agreement that was in effect at that time between the Labor Council and the Village of Fox Lake. (Exhibit B, ¶4, and Exhibit A thereto.) See, e.g., *Palmer v. Brown*, 2014 U.S. Dist. LEXIS 46698 (April 4, 2014, S.D. Ind.)(holding that allegations that a union employee mishandled collective bargaining grievance process was barred under *Atkinson*).

Illinois courts regularly look to federal decisions in interpreting the Illinois Public Labor Relations Act and follow federal law given the close parallels between the IPLRA and the National Labor Relations Act. *Illinois FOP Labor Council v. Illinois Local Labor Rels. Bd.*, 319 Ill.App.3d 729, 737-38 (1st Dist. 2001), citing *Chief Judge of the Illinois Sixteenth Judicial Circuit*, 178 Ill.2d 333 (1997) and *Rockford Township Highway Dep't v. Illinois State Labor*

Relations Board, 153 Ill.App.3d 863, 875 (2nd 1987). Accordingly, this Court should adopt the rule set forth in *Atkinson* and *Peterson* and hold that Carlson is immunized from plaintiff's legal malpractice claims as a matter of law.

Under the Supreme Court's holding in *Atkinson*, plaintiff's claims against Carlson fail to state a cause of action as a matter of law and should be dismissed with prejudice pursuant to Section 2-615 of the Code of Civil Procedure, as amending the pleadings cannot cure this legal obstacle to the plaintiff pursuing a claim against Carlson for the matters alleged.

II. Section 2-619(a)(1) Argument for Dismissal: The Illinois Labor Relations Board has Exclusive Jurisdiction Over the Matters Alleged.

Section 2-619 of the Code of Civil Procedure provides for the dismissal of an action where "the claim asserted against the defendant is barred by [an] affirmative matter avoiding the legal effect or defeating the claim." 735 ILCS 5/2-619. An affirmative matter is something in the nature of a defense that negates the alleged cause of action completely or refutes critical conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *Downers Grove Assoc. v Red Robin Intern., Inc.*, 151 Ill.App.3d 310, 315-16 (1st Dist. 1986). An affirmative matter asserted by a defendant pursuant to Section 2-619 may be supported by material evidence or an affidavit. *Nichol v. Strass*, 192 Ill.2d 233, 247 (2000). Additionally, where the existence of a document attached to a pleading or a motion is not disputed, the Court may properly consider that document for the purposes of a Section 2-619 motion. *Christmas v. Hughes*, 187 Ill.App.3d 453, 455 (1st Dist. 1989).

As set forth more fully below, plaintiff's Complaint is subject to dismissal under Section 2-619(a)(1), because plaintiff's claim is essentially one for an unfair labor practice (namely, an alleged breach of the union's duty of fair representation) arising from a dispute concerning a collective bargaining agreement. As such, the Illinois Labor Relations Board has exclusive

jurisdiction over this matter. 5 ILCS 315/5. Plaintiffs' claim is not properly before this Court and should be dismissed because the Illinois Labor Relations Board has exclusive jurisdiction over this claim.

This case arises from the collective bargaining agreement between the Labor Council and the Village of Fox Lake. (Exhibit B, ¶5 and Exhibit A thereto). As a result, it is governed by the Illinois Public Labor Relations Act. 5 ILCS 315/1, *et seq.*

The Public Labor Relations Act and case law clearly establish that a charge of an unfair labor practice is within the ***exclusive jurisdiction*** of the Illinois Labor Relations Board. 5 ILCS 315/5; *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 (4th Dist. 1998). The Appellate Court has recognized that the Board must maintain exclusive jurisdiction over claims, like Plaintiff's, which relate to alleged unfair labor practices because "inconsistent judgments and forum shopping will be inevitable if we pronounce a rule whereby breach of the duty of fair representation claims can be maintained in the circuit courts, as well as before the Board. Furthermore, our already overburdened court system would face increased amounts of unnecessary litigation." *Foley*, 199 Ill.App.3d at 11.

A claim against a union (or its lawyers) for committing malpractice during a grievance process pursuant to a collective bargaining agreement by definition constitutes an unfair labor practice in the nature of a breach of the union's duty of fair representation. *Montplaisir*, 875 F.2d at 1-4; *Arnold v. Air Midwest*, 1994 U.S. Dist. LEXIS 7628 at *19-20 (May 24, 1994 D. Kansas). The Illinois Labor Relations Board, however, has the exclusive jurisdiction to determine whether a public employee union, such as the Labor Council, breached its duty of fair representation. In *Foley*, the Appellate Court explained that, under the Illinois Public Labor Relations Act, unions have the duty to fairly represent the interests of all of their members. 199

Ill.App.3d 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; Cessna v City of Danville,* 296 Ill.App.3d 156 (4th Dist. 1998) (holding that Section 5 of the Public Labor Relations Act confers the Labor Relations Board with exclusive jurisdiction over any claims based on a breach of the duty of fair representation, even though not explicitly styled as such, and that no provision of the Act allows employees to file suit in the circuit court based on an alleged breach of the duty of fair representation.)

Pursuant to this settled precedent, the Court lacks jurisdiction over the plaintiff's claims against the Labor Council and Carlson. Plaintiff's allegations and the affidavit of Richard Stomper confirm that plaintiff's claims arise from activities undertaken by the union and its authorized representative and occurring pursuant to the collective bargaining process. As such, plaintiff's allegations constitute a claim for breach of the duty of fair representation, over which the Labor Relations Board has exclusive jurisdiction. Plaintiff's Complaint should be dismissed as to both defendants for this additional reason pursuant to Section 2-619(a)(1) of the Code of Civil Procedure.

WHEREFORE, Defendants ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON request that this Court enter an order dismissing Plaintiff's Complaint with prejudice, plus costs.

Respectfully submitted,

PRETZEL & STOUFFER, CHARTERED

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IN THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
3RD DISTRICT LAW DIVISION – ROLLING MEADOWS

RUSSELL ZANDER, Plaintiff, v. ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants.	)	No. _____ Plaintiff hereby demands a trial by jury of twelve (12) persons

COMPLAINT AT LAW

COUNT I
(Legal Malpractice)

NOW COMES, your Plaintiff, RUSSELL ZANDER, (herein also referred to as "ZANDER"), by and through his attorneys, THE GOOCH FIRM, and as and for his Complaint against ROY CARLSON, ESQ., (hereinafter also referred to as "CARLSON") and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL (hereinafter also referred to as "FOP") states the following:

1. That your Plaintiff, RUSSELL ZANDER is a resident of Lake County, Illinois and was such a resident at all times relevant to this Complaint. ZANDER was a police officer employed by the Village of Fox Lake Illinois as a patrol officer for many years, until at some point during 2014 when he was placed on administrative leave, and his employment thereafter terminated in 2016 following an arbitration hearing.

2. Defendant ROY CARLSON, ESQ., is an attorney licensed to practice law in the State of Illinois. CARLSON was admitted to the practice of law on November 6, 2014 and at the time of the actions complained of herein had been practicing law for less than two (2) years.

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3. The ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL ("FOP") is a labor union, organized primarily to provide job security and other union benefits to law enforcement agents and employees of various villages, cities, and other various governmental units in and around the State of Illinois. The FOP transacts its business in all of the collar counties around Chicago and in Cook County, Illinois. Its principle place of business is located in Western Springs, Cook County, Illinois and is also the place of business of Defendant CARLSON.

4. Venue is therefore claimed proper in Cook County, Illinois, pursuant to statute.

5. At all relevant times herein, CARLSON was an employee of FOP. However, FOP is not a law firm and is not registered to practice law in the State of Illinois.

6. Nevertheless, CARLSON has been held out to the members of the FOP as the FOP's attorney who would represent all members in labor disputes or grievances with the various employers of the police officers who were members of the FOP.

7. That on or about December 5, 2014 your Plaintiff, ZANDER had contact with an arrestee in the Fox Lake Police Station at a time when ZANDER was functioning as the officer in charge of the patrol shift. The arrestee had been arrested for public intoxication and was disruptive and disorderly in his behavior at the time.

8. After various interrogations, the Village of Fox Lake brought formal charges against ZANDER for his alleged behavior during the arrest of the aforesaid arrestee, and then went back in time imagining other wrongful conduct of ZANDER and dredged four different incidences from assignments of ZANDER which suddenly became disciplinary complaints.

9. ZANDER, after being notified of the proceedings, immediately notified FOP seeking legal representation.

10. ZANDER, although being initially assigned an experienced attorney, was subsequently assigned Defendant CARLSON to represent him. At the time, ZANDER was informed by more than one employee of FOP that Defendant CARLSON handled all grievances and termination proceedings on behalf of its members, and was a highly competent attorney. The aforesaid representations were false and materially false. In fact, as aforesaid, CARLSON had practiced law for less than two years, and was hardly experienced in the various procedures available to a police officer facing charges by his or her employer, and facing potential termination.

11. ZANDER was given no input into the selection of an attorney to represent him but rather was assigned CARLSON, who was an employee of FOP, as his attorney.

12. Nevertheless, the somewhat unusual method of requiring a person to utilize a particular attorney without allowing any input, an attorney client relationship was formed between ZANDER and CARLSON, which gives rise to this Complaint. There was no formal retainer agreement executed between ZANDER and CARLSON, rather, what happened was in fact a "cramdown" by FOP informing ZANDER if he wanted an attorney (which his union dues guaranteed him such an attorney) he would use CARLSON, and based on his acquiescence, forced or otherwise, ZANDER and CARLSON created an attorney-client relationship.

13. That by virtue of that attorney-client relationship, CARLSON and the FOP owed ZANDER certain duties, commonly referred to as the standard of care, which required CARLSON to comport his behavior to the acts and actions of a reasonably well qualified attorney practicing law in the same geographical area as CARLSON.

14. FOP, by injecting itself into the practice of law, should be held to the same standard of conduct as CARLSON, and certainly as alleged in a separate count, is vicariously liable for the actions of CARLSON.

15. In accepting the representation of ZANDER in this matter, neither CARLSON nor FOP restricted the scope of his or its representation of ZANDER, agreeing to handle the entire grievance and termination proceedings on behalf of ZANDER with the Village of Fox Lake. As aforesaid, during the initial contacts and interviews with Fox Lake, ZANDER was represented by a well experienced attorney whose last name was Mahoney. Mahoney was accompanied by CARLSON at that initial interview. Thereafter, ZANDER was informed that Mahoney was no longer involved in the matter and Defendant ROY CARLSON, who was well qualified, would be handling the balance of the proceedings.

16. That at the time of the filing of formal charges against ZANDER, ZANDER was entitled to a formal hearing before the Fox Lake Police Commission, which had authority to discipline ZANDER in any number of ways. Routinely police officers are involved in the operation of the local police commission, and routinely the police commission is made up of a number of local residents, who by oath agree to be fair and impartial in their decision-making process.

17. On information and belief, over the years many police officers have passed through the Fox Lake Police Commission (which is a civil service type of commission) with varying results and varying discipline, including absolute acquittals.

18. Under the law, following a police commission decision, a Respondent appearing before it has the rights of appeal to a Circuit Court through the Administrative Review Act, and can bring various causes of action allowed by law in both State and Federal Court based on the behavior of the police commission.

19. Additionally, upon a review of the police commission action by the village board, and a legislative action by that village board terminating the employment of a police officer, the

terminated officer has further legal rights in the Circuit Court of Lake County Illinois, as well as the Appellate and Supreme Courts of the state.

20. Plaintiff maintains and alleges on information and belief, that at this stage of the proceeding, Defendant CARLSON had never conducted a full hearing before the Fox Lake police commission or before any other police commission, as the primary attorney responsible for the hearing without assistance of another more experienced attorney.

21. In spite of the obvious benefits to proceeding before the civil service police commission of Fox Lake, CARLSON induced ZANDER to waive that right and agree to an arbitration in front of a single arbitrator, which would be binding on ZANDER, thereby cutting off any rights of review or appeal by the Circuit Court or the courts of review of the State of Illinois.

22. The behavior of ZANDER was of a minor nature. The entire disciplinary matter which was started by the Chief of Police of Fox Lake was based on his failure to report the misconduct of another police officer to his superiors in the administration of the police department. After creating that charge, the Police Chief then began looking for other charges that had never been filed against ZANDER, involving conduct that had never risen to the form of a complaint by any member of the public, and created additional charges against ZANDER based on his behavior while assigned to a local high school as a "school resource officer." The Police Chief then, having created those charges, began the disciplinary proceeding.

23. As aforesaid, CARLSON had induced ZANDER to agree to a sole arbitrator and a binding arbitration, which from the outset was predetermined to result in ZANDER's termination of employment. In fact, the arbitrator, in his 72-page arbitration award, found that it is improper in the circumstance of a police officer to allow an arbitrator to substitute his judgment on behalf of a Chief of Police, and made that specific finding in his aforesaid findings and Order.

24. At no time had CARLSON, if he even knew of the case law, advised ZANDER that there was common law in the State of Illinois indicating that an arbitrator was justified in stating that he would not overrule the decision of a Police Chief due to the nature of police work, during an arbitration hearing in the State of Illinois. Had ZANDER been advised of and known that fact, together with other facts learned subsequently, ZANDER never would have agreed to substitute and arbitration for a hearing before the local police commission.

25. Nevertheless, the matter proceeded through the arbitration process. CARLSON took little or no depositions or other discovery from numerous witnesses that had been created by the Chief of Police to testify against ZANDER, involving not only the primary incident, which was the arrest by other police officers of a person for public intoxication and difficulties they had with that person in the city jail. As aforesaid that arbitration expanded to then include four created incidents that had never been disciplinary matters or incidents complained of between ZANDER and students and faculty at the Gregg Community High school in 2014.

26. Incredible amounts of time were spent creating these four additional incidents to bolster the charge against ZANDER of failing to report an incident to his superiors. CARLSON took no active role in attempting to minimize those incidents or to interview, interrogate, and/or depose the parties involved.

27. Noteworthy is the fact that prior to the December 5, 2014 encounter, ZANDER had never been the subject of any disciplinary proceeding. Nevertheless, the Police Chief determined that the only suitable punishment by the time of the arbitration hearing would be the termination of ZANDER's employment.

28. At this chronological time, the Village of Fox Lake and the Fox Lake Police Department were under severe public scrutiny and criticism. This was due to the staged shooting of a Fox

Lake Police Department Lieutenant who had apparently been stealing from the various funds of the Fox Lake Police Department, and when confronted, attempted to stage his shooting which did result in his death, although the matter was found to be a suicide and not an attack by others as the decedent attempted to create. Therefore, obviously, the Village of Fox Lake and the Fox Lake Police Department wished to demonstrate to the public that they would quickly and severely discipline police officers. Unfortunately, ZANDER was caught up in the situation locally at the time, and in essence became a scapegoat, losing his employment permanently following an arbitration that from the beginning was designed to favor the Chief of Police and the Chief's recommendations.

29. Unfortunately, due to the nature of the arbitration, ZANDER had no right to appeal whatsoever.

30. In fact, before the police commission and represented by a competent attorney, in all probability ZANDER would have received, at worst, a much lesser disciplinary finding which would not have resulted in the permanent loss of his employment as a police officer, and in all likelihood the possibility of ever becoming involved in police work ever again.

31. In their representation of Plaintiff RUSSELL ZANDER, the Defendants ROY CARLSON, ESQ. and the Illinois Fraternal Order of Police Labor Council ("FOP") were negligent and failed to exercise a reasonable degree of care and skill, and otherwise breached the standard of care owed ZANDER in one or more of the following ways:

a) Failed to recommend to ZANDER that he should seek review by the police commission of the Village of Fox Lake;

b) Failed to completely investigate and discover the extend and details of the charges brought against ZANDER;

c) Failed to advised ZANDER they had not done a thorough and complete investigation and evaluation of the charges being brought against ZANDER;

d) Because they had not completed a thorough, complete investigation and evaluation of all possible defenses as well as the prosecutions factual basis, the Defendants were unable to properly inform ZANDER as to what proceedings would be best for ZANDER, and the methodology of those proceedings;

e) Failed to properly conduct discovery, including the interviews of all witnesses, and particularly the interviews of the students and faculty involved in the contrived charges created by the then Chief of Police to add "muscle" to the primary charge against ZANDER in order to obtain his termination;

f) Failed to retain experts, businesses, or individuals outside of the FOP for information or suggestions on how to better assist ZANDER with regard to the charges pending against him;

g) Failed to obtain competent, experienced counsel and representation to handle what was a very complicated and extensive arbitration hearing lasting two days, with a very experienced Village Prosecutor representing the Chief of Police and the Village of Fox Lake as the employer of ZANDER;

h) Failed to recognize that the treatment of ZANDER in the investigative stage through the use of a private detective agency and through other actions of the Chief of Police may have well violated the civil rights of ZANDER and to research and recommend the filing of litigation in Federal Court for redress of those wrongs;

i) Failed to properly prepare for testimony at the arbitration hearing, including a demand for the appearance of all persons executing various affidavits and other documents

which were to be submitted into evidence as a hearsay exception in order to cross examine the drafters of those documents as opposed to allowing the documents to be admitted;

j) Failed to properly subpoena and present witnesses to testify on behalf of ZANDER at the proceeding;

k) Failed to properly prepare a closing brief with appropriate argument for the defense of ZANDER, instead submitted what could best be described as a last minute 11-page brief failing to discuss the evidence properly or the common law of the State of Illinois, which might well have assisted in a fair resolution of the matter;

l) Failed to properly organize and argue that if ZANDER was guilty of any of what could be construed as minor offenses, that a period of probation or supervision was more appropriate than total termination;

m) Routinely and regularly advised ZANDER not to accept offers of settlement made by the Chief of Police and the Village of Fox Lake which would have resulted with ZANDER, in a relatively short period of time, being able to return to work as a police officer in the Village of Fox Lake thereby causing a substantial loss to ZANDER. In truth and in fact, rather than advising ZANDER not to accept the offers their advice should have been directly opposite to that if in fact they felt ZANDER had any potential liability under the charges brought.

n) Was otherwise negligent in their representation of ZANDER.

32. Had the matter been properly handled it would have proceeded before the police commission of the Village of Fox Lake who would have found, based on the evidence and existing case law as well as the reputation of ZANDER, that any penalty was to be inflicted that penalty would have been considerably less than termination of employment forever which in

essence is a "death sentence" for police officers in seeking further employment in another police agency or returning to his duties as a patrol officer in the Village of Fox Lake.

33. As a direct result of the wrongful conduct of the Defendant CARLSON, ZANDER did in fact lose his employment and is unlikely to ever obtain employment as a police officer again. ZANDER, at the time of his loss of employment was earning in excess of $50,000 a year and had at least 20 years of additional service before retirement with a pension. That loss of income, over a 20-year period, easily exceeds the sum of $1,000,000 together with a life-long pension in an approximate amount of 75% of his last 4 years of salary before employment which easily could consist of additional 7-figure sums of money but the damages suffered even exceed the loss of salary and employment benefits as the job guarantees certain other benefits to ZANDER including health insurance which, in this day and age, easily has a value of $15,000 per year through the length of his employment.

34. Therefore, the total damages suffered by ZANDER over the coming years and without reduction to present day value are well into the 7-figures; none of which would have been incurred had CARLSON and the FOP properly handled the disciplinary matters brought against ZANDER to include recommendations to ZANDER to accept various offers that were tendered by the Village of Fox Lake.

WHEREFORE your Plaintiff, RUSSELL ZANDER, prays for judgment on such verdicts as a jury of twelve (12) shall determine in his favor and against the Defendants in an amount to exceed the jurisdictional minimums of this Court plus interest, costs of suit and all other relief this Honorable Court deems just and proper.

COUNT II
(Negligence and Vicarious Liability against the
Illinois Fraternal Order of Police Labor Counsel "FOP")

35. Plaintiff incorporates Paragraphs 1 through 34 of Count I as and for Paragraphs 1 – 34 of this Count II, as though fully set forth herein and adopted by reference hereto.

36. As aforestated, ROY CARLSON, ESQ., was a licensed attorney in the State of Illinois, and was so licensed and employed by the Illinois Fraternal Order of Police Labor Council ("FOP") during all times relative to this Complaint.

37. In the course of Defendant CARLSON's and Defendant FOP's representation of ZANDER in this matter, they obtained knowledge of Plaintiff's background history and all facts pertaining to the pending matter. The business discussions and involvement by CARLSON with the FOP began shortly after December 5, 2014 and occurred frequently when started.

38. That the Illinois Fraternal Order of Police Labor Council has no right or authority to practice law in the State of Illinois, nor does it have the right to employ an attorney to furnish legal services under its direction to members of the FOP, controlling what that attorney does through policy manuals and otherwise as created by the FOP.

39. That due to FOP's principle involvement in the disciplinary matters brought against ZANDER and its control of Defendant CARLSON, Defendant FOP assumed the same fiduciary duty to ZANDER that CARLSON had, and breached that duty by the actions set forth in Count I above.

40. Further, as a result of the business relationship between CARLSON and the Illinois Fraternal Order of Police Labor Council, being that FOP held CARLSON out to its members as the "FOP lawyer," then the Illinois Fraternal Order of Police Labor Council (FOP) should be vicariously liable for the acts and actions of CARLSON as described in Count I above.

WHEREFORE, your Plaintiff, RUSSELL ZANDER, requests entry of judgement in his favor and against Defendant, ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, for all damages incurred as a result of the wrongful behavior and actions of Defendant ROY CARLSON.

Respectfully submitted by

THE GOOCH FIRM, on behalf of RUSSELL ZANDER, Plaintiff,

Thomas W. Gooch, III

THE GOOCH FIRM
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Cook County Atty. No. 24558

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

RUSSELL ZANDER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2017 L 063098
	)	
ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF RICHARD STOMPER

RICHARD STOMPER, hereby states and affirms as follows:

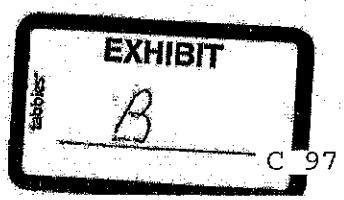
1. I am employed by the Illinois Fraternal Order of Police Labor Council ("Labor Council") as a Field Representative and have been employed in this position continuously since March 1, 2004.

2. Based on my work experience with the Labor Council and with the Village of Fox Lake bargaining unit, I have personal knowledge of the matters set forth below in this affidavit.

3. The Labor Council is a "labor organization" established in accordance with the Illinois Public Labor Relations Act (5 ILCS 315/2(i)). The Labor Council represents thousands of public safety and criminal justice employees through the State of Illinois who have collective bargaining rights under the Illinois Public Labor Relations Act.

4. At all times alleged in the Complaint, the Labor Council was the sole and exclusive bargaining agent for police officers who were employed by the Village of Fox Lake, including the plaintiff, Russell Zander.

5. A complete copy of the collective bargaining agreement that was in effect between the Labor Council and the Village of Fox Lake during the grievance process between Russell Zander and the Village of Fox Lake as alleged in the Complaint is attached to this affidavit as Exhibit A. This agreement governed the grievance process between Mr. Zander and the Village of Fox Lake alleged in the Complaint, including the proceedings that ultimately resulted in the termination of Mr. Zander's employment as a police officer by the Village of Fox Lake.



6. A complete copy of the Illinois Labor Relations Board's certification of the Labor Council as the bargaining representative for the Village of Fox Lake's police officers that was in effect throughout the grievance process between Russell Zander and the Village of Fox Lake as alleged in the Complaint is attached to this affidavit is attached as Exhibit B.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Richard Stomper

1/4/18
Date

ILLINOIS FOP LABOR COUNCIL

and

THE VILLAGE OF FOX LAKE

Police Officers And Sergeants

May 1, 2012 – April 30, 2016

Springfield - Phone: 217-698-9433 / Fax: 217-698-9487
Western Springs - Phone: 708-784-1010 / Fax: 708-784-0058
Web Address: www.fop.org
24-hour Critical Incident Hot Line: 877-IFOP911

COLLECTIVE BARGAINING AGREEMENT

BETWEEN

THE VILLAGE OF FOX LAKE, ILLINOIS

AND

ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, FOX LAKE FRATERNAL ORDER OF POLICE LODGE NO. 90

MAY 1, 2012 THROUGH APRIL 30, 2016

PREAMBLE

This Agreement entered into by the Village of Fox Lake, Illinois, (hereinafter referred to as the 'Village" or the "Employer") and the Illinois Fraternal Order of Police Labor Council, Fox Lake Fraternal Order of Police Lodge No. 90, (hereinafter referred to as the "Union"), is in recognition of the Union's status as the representative of the Village's full-time sworn peace officers below the rank of Sergeant and has as its basic purpose the promotion of harmonious relations between the Village and the Union; the establishment of an equitable and peaceful procedure for the resolution of differences; and the establishment of an entire agreement covering all rates of pay, hours of work and conditions of employment applicable to the bargaining unit employees. Therefore, in consideration of the mutual promises and agreements contained in this Agreement, the Employer and the Union do mutually promise and agree as follows:

ARTICLE I

RECOGNITION

Section 1.1 Recognition

The Village recognizes the Union as the sole and exclusive collective bargaining representative for all full-time commissioned Police Officers in the rank of Sergeant and below employed by the Police Department in the Village of Fox Lake, but excluding all other full-time commissioned Police Officers above the rank of Sergeant, and all other civilian employees, supervisors, confidential and managerial employees and all other employees excluded by the Act, and all elected officers of the Village of Fox Lake.

Section 1.2 Probationary Period

The probationary period shall be eighteen (18) months in duration from date of most recent hire by the Village. Time absent from duty or not served for any reason shall not apply toward satisfaction of the probationary period. During the probationary period, an officer is subject to all the terms, conditions, rights and benefits of this Agreement, except an officer is subject to discipline, including discharge, without cause and with no recourse to the grievance procedure.

Section 1.3 Fair Representation

The Union recognizes its responsibility as bargaining agent and agrees fairly to represent all employees in the bargaining unit, whether or not they are members of the Union.

Section 1.4 Lodge Officers

For purposes of this Agreement, the term "Lodge Officers" shall refer to the Lodge's duly elected president, vice-president, secretary, treasurer and sergeant-at-arms.

Section 1.5 Gender

Whenever the male gender is used in this Agreement, it shall be construed to include both males and females equally.

Section 1.6 Seniority

Seniority for the purposes of this Agreement shall be defined as a peace officer's length of continuous full time service with the Village since the officer's last date of hire. Sergeants shall also have seniority in that rank based on total time in rank since date of promotion. Seniority shall not include periods of unpaid leave time.

Section 1.7 Union Representation

If negotiations for a successor Agreement, including resulting interest arbitration, if any, occur during a union representative's scheduled shift, the Village will release the union representative from duty for the negotiation or arbitration session, subject to recall for urgent matters.

ARTICLE II

UNION SECURITY AND RIGHTS

Section 2.1 Dues Checkoff

While this Agreement is in effect, the Village shall deduct from each employee's paycheck once each pay period the uniform, regular monthly Union dues for each employee in the bargaining unit who has filed with the Village a voluntary, effective checkoff authorization in the form set forth in Appendix A of this Agreement. The employee shall

file copies of this form with the Chief of Police and with the Personnel Director.

If a conflict exists between that form and this Article, the terms of this Article and Agreement control. A Union member desiring to revoke the dues checkoff may do so by written notice to the Village at any time upon thirty (30) days notice. The actual dues amount deducted, as determined by the Union shall be uniform in nature for each employee in order to ease the Village's burden of administering this provision. If the employee has no earnings due for that period, the Union shall be responsible for the collection of dues. The Union agrees to refund to the employee any amounts paid to the Union in error on account of this dues deduction provision.

The Union may change the fixed dollar amount which will be considered the regular monthly fees once each year during the life of this Agreement. The Union will give the Village sixty (60) days notice of any such change in the amount of uniform dues to be deducted.

Section 2.2 Union Indemnification

The Union shall indemnify, defend and save the Village harmless against any and all claims, demands, suits or other forms of liability (monetary or otherwise) and for all legal costs that shall arise out of or by reason of action taken or not taken by the Village in complying with the provisions of this Article. If an improper deduction is made, the Union shall refund directly to the employee any such amount.

Section 2.3 Union Use of Bulletin Board

The Village will make available space on a bulletin board for the posting of official Union notices or minutes of a non-political non-inflammatory nature. The Union will limit the posting of Union notices to such bulletin board, with prior approval of the Chief of Police or his designee.

ARTICLE III

NO DISCRIMINATION

Neither the Village nor the Union shall discriminate against any officer in a manner prohibited by law on account of an officer's race, sex/gender, sexual orientation or sexual preference, color, religion, national origin, age, disability, citizenship, marital status or

civil union, veteran status, political affiliation, Union support or activity or lack of support or activity, or any other status protected by law.

ARTICLE IV

LABOR-MANAGEMENT MEETINGS

Section 4.1 Meetings Request

The Union and the Employer agree in the interest of efficient management and harmonious employee relations, that meetings be held if mutually agreed between the Union representatives and responsible administrative representatives of the Employer. If the meeting is solely to address safety issues (Section 4.4), then a member of the Village's safety committee shall attend the meeting. Such meetings may be requested by either party at least seven (7) days in advance by placing in writing a request to the other for a "labor/management meeting" and expressly providing the agenda for such meeting. Such meetings, times, and locations, if mutually agreed upon, shall be limited to:

(1) Discussion on the implementation and general administration of this Agreement;

(2) Notifying the Union of changes in conditions of employment contemplated by the Employer which may affect employees;

(3) Discussion on safety issues which affect employees.

Section 4.2 Content

It is expressly understood and agreed that such meetings shall be exclusive of the grievance procedure. Specific grievances being processed under the grievance procedure shall not be considered at "labor-management meetings", nor shall negotiations for the purpose of altering any or all of the terms of this Agreement be carried on at such meetings.

Section 4.3 Attendance

Attendance at "labor-management meetings" shall be voluntary on the employee's part, and attendance during such meetings shall not be considered time worked for compensation purposes unless otherwise mutually agreed. Normally, three (3) persons from each side shall attend these meetings, schedules permitting. Attendance at such meetings shall not interfere with required duty time, and attendance, if during duty times, is permitted only upon prior approval of the Chief of Police or his designee.

Section 4.4 Safety Issues

The parties agree to meet as necessary to discuss safety issues, which may be the topic of a "labor/management meeting". The resulting recommendations of such meetings shall be jointly submitted to the Employer or its designee.

No employee shall be required to use any equipment that has been determined by the Union and the Employer as being in a defective or disabling condition until such time as the condition is corrected.

ARTICLE V

MANAGEMENT RIGHTS

Except as specifically limited by the express provisions of this Agreement, the Village retains all traditional rights to manage and direct the affairs of the Village in all its various aspects and to manage and direct its employees, including but not limited to the following: to plan, direct, control and determine the budget and all the operations, services and missions of the Village to supervise and direct the working forces; to establish the qualifications for employment and to employ employees; to schedule and assign work; to establish work and productivity standards, and from time to time, to change said standards; to assign overtime; to contract out for goods and services to the extent the Village possessed this right prior to the execution of this Agreement: to determine the methods, means, organization and number of personnel by which such operations and service shall be made or purchased; to make, alter and enforce reasonable rules, regulations, orders and policies; to evaluate employees; to establish performance standards; to discipline, suspend and/or discharge non-probationary employees for just cause; to change or eliminate existing methods, equipment or facilities or introduce new ones; to take any and all actions as may be necessary to carry out the mission of the Village and the police department in the event of civil emergency as may be declared by the mayor, the Village administrator, police chief, or their authorized designees; to determine, in the sole direction of the mayor, that civil emergency conditions exist, which may include, but is not limited to riots, civil disorders, tornado conditions, floods or other catastrophes; and to carry out the mission of the Village; provided, however, that the exercise of any of the above rights shall not conflict with any of the express written provisions of this Agreement.

ARTICLE VI

SUBCONTRACTING

It is the general policy of the Village to continue to utilize its employees to perform work they are qualified to perform. However, the Village reserves the right to contract out any work it deems appropriate in the exercise of its best judgment and

consistent with the Village's lawful authority under Illinois Statutes to the extent that the Village possessed such a right prior to the execution of this Agreement.

ARTICLE VII

HOURS OF WORK AND OVERTIME

Section 7.1 Application of Article

This Article is intended only as a basis for calculating overtime payments and nothing in this Agreement shall be construed as a guarantee of hours or work per day or per week.

The parties agree that the five-two/five-three work schedule for officers assigned to patrol duties described in Section 7.2 below shall be instituted on or before September 1, 1998, or at such date as the next new hired officer has completed field training, whichever later occurs.

Section 7.2 Normal Workweek and Workday

Except as provided elsewhere in this Agreement, the normal workweek (Sunday through Saturday) for officers assigned to patrol duties shall consist of not more than forty-two and one-half (42.5) hours. The normal work day for such officers shall consist of eight and one-half (8.5) hours, with employees working a schedule of five (5) days on, followed by two (2) days off, five (5) days on, followed by three (3) days off. This five-two, five-three sequence of days of work and days off shall thereafter repeat itself. The normal workday and workweek (Sunday through Saturday) for officers assigned to non-patrol duties shall consist of eight (8) hours per day and forty (40) hours per week, with five consecutive days of work, followed by two (2) consecutive days off. This schedule may be modified upon mutual agreement.

Section 7.3 Shift Bidding

Between December 1 and December 15 of each year officers may submit a written bid for a permanent shift position commencing on or about May 1 and extending for a period of approximately 12 months until the next annual shift bid is effective. Sergeants and patrol officers shall bid separately. The written bids will be submitted to the Chief of Police and each employee may list a first and second choice. The assignment of employees to shifts shall be based upon the employees' bids in seniority order. The shift schedule will be posted on or before January 1 of

each year. The Chief of Police shall have the right to change shift assignments at any time for legitimate operational reasons. Upon written request, the Chief will supply the union with a written explanation for the shift assignment change. The shift bidding process shall only apply to non-probationary employees to the Patrol Division.

Section 7.4 Overtime Pay

When any officer is held over for more than fifteen (15) minutes beyond his regularly scheduled work day or duty shift as a result of events or activities which occur during his shift, or if directed to work before his regularly scheduled workday or shift, he shall be paid at a rate of one and one-half (1 1/2) times his regular hourly rate of pay subject to Section 7.4 for all hours in excess of his regularly scheduled work day, with such pay received in fifteen (15) minute segments. In addition, overtime at time and one-half (1 1/2) shall be paid for all hours worked beyond one hundred seventy one (171) hours in a twenty-eight (28) day work cycle, which said work cycle has been adopted pursuant to Section 7K of the Fair Labor Standards Act.

Section 7.5 Compensatory Time

(a) Employees may elect to receive compensatory time off in lieu of receiving overtime pay for overtime hours worked. Compensatory time off may be taken with a minimum of forty-eight (48) hours notice if scheduling permits, less than forty-eight hours if approved by the Chief or his designee, or in an emergency if approved by the Chief or his designee. No more than one hundred sixty (160) hours of compensatory time may be accumulated by any employee, and in all respects the provisions of the Fair Labor Standards Act shall be followed by the parties. The Village shall maintain compensatory time off records which shall be available for review upon reasonable request. Notice of departmental meetings shall be provided in advance, if possible, and officers called back to such meetings shall receive a minimum of two hours compensatory time at overtime rates.

(b) Upon signing of this Agreement, no employee shall be required to contribute accumulated compensatory time to the Central Compensatory Time Bank. Further, all compensatory time previously contributed to the Central Compensatory Time Bank shall be credited back to each bargaining unit employee.

Section 7.6 Court Time

Employees who would otherwise be off duty shall be paid at the overtime rate of

time and one-half (1-1/2) of their regular straight time hourly rate of pay for all hours worked when appearing in court on behalf of the Village in the capacity of a commissioned officer or when preparing for an off-duty court appearance when in the presence of a prosecuting attorney; off-duty lunch periods shall not be counted towards hours worked. Employees will be paid overtime rates for a minimum of two (2) hours for all off-duty court time worked outside regularly scheduled hours in a single day or for actual time spent, whichever is greater.

Section 7.7 Call Back Pay

An employee called back to work after having left work shall receive a minimum of two (2) hours pay at overtime rates, as provided in Section 7.4, unless the time extends to his regular work shift or unless the individual is called back to rectify his own error.

Section 7.8 Required Overtime

The Chief of Police or his designee shall have the right to require overtime work, and officers may not refuse overtime assignments.

Section 7.9 Overtime Turnsheet

When a patrol shift has less than the minimum staffing established by the Chief of Police, an officer(s) from the preceding or following shift shall be selected to fill the vacancy. Selection shall be made from an overtime turn-sheet(s) for each shift on which all officers' names shall appear. When a vacancy is to be filled, the supervisor shall contact the officer from the preceding shift and/or following shift whose name appears closest to the top of the list (i.e. from among those officers working the preceding shift and/or following shift). If he/she declines the overtime opportunity, the supervisor shall contact the officer from the preceding and/or following shift whose names appears next closest to the top of the list, and so forth until such time as an officer volunteers to work the overtime. If no officer volunteers to work the overtime, the officer whose name appears closest to the top shall be required to work the overtime. All officers who were asked to work the overtime shall have their names moved to the bottom of the list, regardless of whether they declined, volunteered or were required to work.

Section 7.10 No Pyramiding

Compensation shall not be paid (or compensatory time taken) more than once for the

same hours under any provisions of this Article or Agreement.

Section 7.11 Standby Time

When an officer is on standby for court for either the morning standby of 9:00 a.m. to 11:00 a.m. and/or the afternoon standby of 1:00 p.m. to 3:00 p.m., two (2) hours per standby will be turned in for compensation. These hours will be paid at straight time pay. If the officer wishes he may request two (2) hours in straight compensatory time. If an officer is placed on multiple consecutive standby days, the officer will be eligible for pay for all days, and both the a.m. and the p.m. time slots to which he was assigned.

Section 7.12 Overtime Avoidance

The Employer will not do any of the following things for the purpose of avoiding the payment of overtime:

1. Change an Employee's regularly scheduled day off,

2. Assign an Employee to work at a job that the Employee has not been trained to perform;

3. Change an employee's regularly scheduled work hours, other than in the event the Employer has a reasonable safety concern; provided that, the Employer may do any of the foregoing things if:

   i. Mutually agreed between the Employer and the particular Employee involved; or

   ii. There exists emergency or exigent circumstances of which the Employer had less than forty-eight (48) hours prior notice; or

   iii. Such rescheduling or reassignment is necessary to provide coverage for special events such as fireworks celebrations or parades;

   iv. Such rescheduling or reassignment is necessary to provide coverage because of illness, vacations or other manpower shortages.

ARTICLE VIII

GRIEVANCE PROCEDURE

Section 8.1 Definition

A "grievance" is defined as a dispute or difference of opinion raised by an employee or the Union against the Village involving an alleged violation or misapplication of an express provision of this Agreement.

Section 8.2 Procedure

A grievance filed against the Village shall be processed in the following manner:

Step 1: Any employee who has a grievance shall submit the grievance in writing to the Patrol Division Lieutenant specifically indicating that the matter is a grievance under this Agreement. The grievance shall contain a completed statement of the facts, the provision or provisions of this agreement which are alleged to have been violated, and the relief requested. All grievances must be presented no later than seven (7) business days from the date of the occurrence of the matter giving rise to the grievance or within seven (7) business days after the employee, through the use of reasonable diligence could have obtained knowledge of the occurrence of the event giving rise to the grievance. The Lieutenant shall render a written response to the grievance within seven (7) business days after the grievance is presented.

Step 2: If the grievance is not settled at Step 1 and the employee, or the Union if a Union grievance, wishes to appeal the grievance to Step 2 of the grievance procedure, it shall be submitted in writing to the Chief of Police within seven (7) business days after receipt of the Village's answer in Step 1, or within seven (7) business days of the time when such answer would have been due. The grievance shall specifically state the basis upon which the grievant believes the grievance was improperly denied at the previous step in the grievance procedure. The Chief of Police shall investigate the grievance and, in the course of such investigation shall offer to discuss the grievance within seven (7) days

with the grievant and an authorized business representative, if one is requested by the employee, at a time mutually agreeable to the parties. If no settlement of the grievance is reached, the Chief of Police shall provide a written answer to) business days following their meeting.

Step 3: If the grievance is not settled at Step 2 and the employee, or the Union, if a Union grievance, wishes to appeal the grievance to Step 3 of the grievance procedure, it shall be submitted in writing designated as a "grievance" to the Village Administrator within seven (7) business days after receipt of the Village's answer in Step 2, or within seven (7) business days of the time when such answer would have been due. The grievance shall specifically state the basis upon which the grievant believes the grievance was improperly denied at the previous step in the grievance procedure. The Village Administrator or his/her designee, shall investigate the grievance and, in the course of such investigation, shall offer to discuss the grievance within seven (7) business days with the grievant and an authorized Union representative if one is agreeable to the parties. If no settlement of the grievance is reached, the Village Administrator or his/her designee shall provide a written answer to the grievant, or to the Union, if a Union grievance, within ten (10) business days following their meeting.

Section 8.3 Arbitration

If the grievance is not settled in Step 3 and the Union wishes to appeal the grievance from Step 3 of the grievance procedure, the Union may refer the grievance to arbitration, as described below, within ten (10) business days of receipt of the Village's written answer as provided to the Union at Step 3:

A. The parties shall attempt to agree upon an arbitrator within seven (7) business days after receipt of the notice of referral. In the event the parties are unable to agree upon the arbitrator within said seven (7) day period, the parties shall jointly request the Federal Mediation and Conciliation Service or the American Arbitration Association to submit a panel of seven (7) arbitrators. Each party retains the right to reject one (1) panel in its entirety and request that a new panel be submitted. The parties shall alternately strike names from the panel of arbitrators. Determination as to which party strikes the first name from the panel shall be made by coin toss. The person remaining shall be the

seven (7) business days after the employee, through the use of reasonable diligence, could have obtained knowledge of the occurrence of the event giving rise to the grievance. A "business day" is defined as a calendar day exclusive of Saturdays, Sundays or holidays recognized by the Village. If a grievance is not presented by the employee or the Union within the time limits set forth above, it shall be considered "waived" and may not be further pursued by the employee or the Union. If a grievance is not appealed to the next step within the specific time limit or any agreed extension thereof, it shall be considered settled on the basis of the Village's last answer. If the Village does not answer a grievance or an appeal thereof within the specified time limits, the aggrieved employee and/or the Union may elect to treat the grievance as denied at that step and immediately appeal the grievance to the next step.

Section 8.6 Time Off

The grievant and one Union representative, or a Union representative if a Union grievance, shall be given paid time off to participate in the Step 3 meeting if the meeting is conducted on working time. No other time spent on grievance matters shall be considered time worked for compensation purposes.

ARTICLE IX

NO-STRIKE CLAUSE

Section 9.1 No Strike

Neither the Union nor any of its officers or agents, or employees of the Village will instigate, promote, sponsor, engage in, or condone any strike, sympathy strike, secondary boycott, slow-down, speed-up, sit-down, concerted stoppage of work, concerted refusal to perform overtime, concerted, abnormal or unapproved enforcement procedures or policies, work-to the rule situation, mass resignations, mass absenteeism, or picketing which in any way results in the interruption or disruption of the operations of the Village, regardless of the reason for doing so. Any or all employees who violate any of the provisions of this Article may be discharged or otherwise disciplined by the Village. Each employee who holds the position of police officer or steward of the Union occupies a position of special trust and responsibility in maintaining and bringing about compliance with the provisions of this Article. In addition, in the event of a violation of this section of this Article, the Union

agrees to inform its members of their obligation under this Agreement and to direct them to return to work.

Section 9.2 No Lock Out

The Village will not lock out any employees during the term of this Agreement as a result of a labor dispute with the Union.

Section 9.3 Penalty

The only matter which may be made the subject of a grievance concerning disciplinary action imposed for an alleged violation of Section 8.1 is whether or not the employee actually engaged in such prohibited conduct. The failure to confer a penalty in any instance is not a waiver of such right in any other instance nor is it a precedent.

Section 9.4 Judicial Restraint

Nothing contained, herein shall preclude the Village or the Union from obtaining judicial restraint and damages in the event the other party violates this Article.

ARTICLE X

HOLIDAYS

Section 10.1 Holidays

The following are paid holidays for eligible employees: New Year's Day, President's Day, Easter or The Friday before Easter, Village Election Day, Memorial Day, Fourth of July, Labor Day, Veteran's Day, Thanksgiving Day, Day after Thanksgiving, Christmas Day and the employee's birthday. Employees shall receive straight time pay for their most current regularly scheduled hours in addition to their regular pay for all such holidays worked. Employees who work on a holiday shall receive their holiday pay as stated above and an additional one-half of their regular daily pay in compensatory time off at straight time. Employees shall work all holidays when scheduled as part of their normal monthly departmental work schedules. Holiday pay shall be based on the actual holiday, not Village observed holiday if different.

Section 10.2 Personal Days

Each employee shall be entitled to one (1) personal day per year with seven (7) days notice, with the approval of the Chief of Police or his designee, or with less than seven (7)

days if approved by the Chief or his designee, or in an emergency if approved by the Chief or his designee. The employee will not be compensated for this day if it is not used. This personal day cannot be carried over to the next year nor accumulated; it must be used during the calendar year between January 1 and December 31.

ARTICLE XI

LAYOFF AND RECALL

Section 11.1 Layoff

The Village, in its discretion, shall determine whether layoffs are necessary except that the Village may not cause full-time employees to be laid off through the increased use of part-time police officers. If it is determined that layoffs are necessary, employees covered by this Agreement will be laid off in accordance with their length of service as provided in 65 ILCS 5/10-1-38.1.

Section 11.2 Recall

Employees who are laid off shall be placed on a recall list. If there is a recall, employees who are still on the recall list shall be recalled, in the inverse order of their layoff, provided they are fully qualified to perform the work to which they are recalled without further training. Employees who are eligible for recall shall be given ten (10) calendar days notice of recall and notice of recall shall be sent to the employee by certified or registered mail with a copy to the Union, provided that the employee must notify the Chief of Police or his designee of his intention to return to work within three (3) days after receiving notice of recall. The Village shall be deemed to have fulfilled its obligations by mailing the recall notice by certified mail, return receipt requested, to the mailing address last provided by the employee, it being the obligation and responsibility of the employee to provide the Chief of Police or his designee with the latest mailing address. If an employee fails to timely respond to a recall notice, his name shall be removed from the recall list.

ARTICLE XII

VACATIONS

Section 12.1 Eligibility and Allowances

All employees shall be eligible for paid vacation time after the completion of one (1) year of continuous full-time employment. Employees shall start to earn vacation allowance as of their date of hire, but cannot use vacation time until the year after it is earned. Vacation allowance shall be earned yearly based on the following schedule:

1 through 3 years	--	2 weeks
4 through 7 years	--	3 weeks
8 through 12 years	--	4 weeks
13 years and up	--	4 weeks plus one day per year thereafter with 5 weeks maximum

Employees who earn 2-3 weeks of vacation per year must utilize at least one (1) week of vacation per year and employees who earn 4-5 weeks of vacation per year must utilize at least two (2) weeks of vacation per year. In no event may any employee accumulate more than ten (10) weeks of unused vacation at any time.

For employees assigned to regular patrol duties, a week shall be defined as forty-two and one-half (42.5) hours.

Section 12.2 Vacation Pay

The rate of vacation pay shall be the employee's regular straight time rate of pay in effect for the employee's regular job classification on the payday immediately preceding the employee's vacation.

Section 12.3 Scheduling

Employees shall be awarded vacation time by the Village in accordance with Village service needs, and, if possible, the employee's desires. On January 1, the Chief of Police or his designee shall post a schedule of days available for vacation during the upcoming calendar year. The employees shall then select their vacation preferences in the order of their seniority, with the most senior employee having first choice, the next most senior employee having second choice and so on.

Employees can schedule vacation in increments of one (1) or more days provided the

Village receives twenty-one (21) days' notice unless otherwise mutually agreed. The vacation periods requested pursuant to this procedure shall be submitted to the Chief of Police or his designee for approval by January 15, and the request shall be reviewed and a vacation schedule posted on or before February 1 with a copy being sent to the Personnel Director. The Chief of Police will post approved vacation requests. Thereafter, vacation requests shall be handled on a first-requested, first-received basis, subject to the overriding scheduling needs of the Village. Such requests shall be responded to in writing by the Village to the requesting officer within twenty-one (21) days after receipt of such vacation request.

Section 12.4 Village Emergency

In case of an emergency, the Mayor or the Chief of Police, or their designee, may cancel and reschedule any or all approved vacation leaves in advance of their being taken, and/or recall any police patrol officer from vacation already in progress.

Section 12.5 Unused Vacation

In any year which an Employee is entitled to vacation time, the Employee may elect to not take one or more one week increments of vacation by notifying the Chief of Police and receiving approval from the Chief of Police. The Employee shall then work the week of unused vacation and shall be compensated at double his or her normal weekly salary for the week worked which would have otherwise been taken as a vacation week. The Chief of Police shall have the discretion to maintain a schedule of such unused vacation time so that the unused vacation time is spread out more or less evenly throughout the year. Such unused vacation time shall be permitted on a first come - first served basis where possible to maintain scheduling consistency as required in the discretion of the Chief of Police. Under no circumstances shall an employee elect to be compensated for more than 50% of his allowed vacation time.

ARTICLE XIII

SICK LEAVE

Section 13.1 Purpose

Sick leave with pay is provided as a benefit in recognition that employees do contract various illnesses from time to time and that their financial resources may be diminished in

such instances if pay is discontinued, and that it may not be in the best interest of the health of the employee or fellow employees for them to work while sick. To the extent permitted by laws sick employees are expected to remain at home unless hospitalized, visiting their doctor or acting pursuant to reasonable instructions for care of a seriously ill member of the immediate family. The parties agree that sick leave abuse is a very serious offense, and the parties further agree that the Village shall ferret out sick leave abuse with the Union assisting in all ways possible as requested by the Village.

Section 13.2 Allowances

Sick leave may be used for a non-service connected sickness or disability of an officer covered by this Agreement. An employee who calls in sick during non-work hours that they were otherwise scheduled to appear in court will be charged with a sick leave occurrence as defined in Section 13.5, and will not receive any compensation, but shall not be charged with use of sick time.

Section 13.3 Sick Days Earned and Accumulated

Employees shall be entitled to twelve (12) sick days per year. A day shall be defined as eight and one-half (8.5) for employees assigned to regular patrol duties.

These days may be accumulated up to a maximum of forty (40) days. As to sick days in excess of forty (40) days which have been unused by the time of the first payday in December each year, each employee shall be compensated at 50% for up to eight (8) such unused sick days, but if the employee has nine (9) or more unused sick days, then such employee shall be compensated at 100% for all such unused sick days. Employee's with at least twenty (20) years of service who resign, retire, or whose employment by the Village of Fox Lake Police Department is terminated for any reason other than for just cause or temporary disability shall receive compensation for their accumulated, unused sick days at the rate in effect at the time they were earned, up to a maximum of forty (40) days.

Section 13.4 Notification

Notification of absence due to sickness shall be given to the Village as soon as possible on the first day of such absence and every day thereafter no later than two (2) hours before the start of the employee's work shift or court appearance, unless it is shown that such notification was impossible. Failure to properly report an illness may be considered as absence without pay and may subject the employee to discipline as well.

Section 13.5 Written Certification and Medical Examination

If an employee requests sick leave for more than 2 consecutive days, then the Police Chief may require said employee to furnish a statement from a doctor on the third day (or later day) to cover any days following the first two consecutive days off justifying the employee's absence. In any case, no such leave in excess of seven (7) days in any 30 day period shall be granted unless the employee furnishes a written statement of illness warranting such leave, signed by a licensed physician.

Following an employee's taking three (3) consecutive sick days or seven (7) sick days in a calendar month, said employee shall not return to work until said employee furnishes a written certification signed by a licensed physician indicating that the employee has been examined and is physically able to return to work.

Following four (4) occurrences of undocumented sick leave usage per calendar year an employee shall be required to present a valid physician's excuse together with the billing statement or appointment sheet from the physician or care provider's office upon returning to duty for every subsequent occurrence of sick leave. Failure to present such documents will automatically result in an employee being charged for sick leave on a two for one basis (an employee's sick leave will be reduced by two days for every one day of sick leave) for each occurrence of sick leave following the fourth occurrence.

Continued sick leave usage and failure to provide a valid physician's excuse and billing statement may result in the Employer taking progressive and corrective disciplinary action as follows:

a) written warning
b) one-day suspension
c) three-day suspension
d) five-day suspension
e) discharge

This inclusion of the foregoing schedule of progressive and corrective disciplinary action in the parties' collective bargaining agreement is not intended to restrict or limit the Employer's ability to take different disciplinary action in other instances in accordance with the remaining provisions of the parties' agreement.

Section 13.6 Abuse of Sick Leave

Abuse of sick leave is a serious matter which may subject an employee to discipline. The

Union shall join the Village in making an effort to correct the abuse of sick leave wherever and whenever it may occur.

Section 13.7 Funeral Leave

If a death occurs among the members of an employee's immediate family, the employee will be excused from work to attend the funeral and make other necessary arrangements without loss of pay from the day of death until the day after the funeral, but not more than a total of three (3) days. However, leave may be extended beyond three (3) days at the discretion of the Chief of Police, in the event that excessive travel is required, or other unique circumstances are involved that act to extend the time period between the day of death and the day after the funeral beyond three days. Immediate family includes only parents, step-parents, brother, sister, child, step child, step-sister, step-brother, father-in-law, mother-in-law, brother-in-law, sister-in-law, wife, husband, grandchildren, grandparents, and grand parents-in-law. Verification of presence at the funeral must be submitted to the Chief of Police.

Section 13.8 Military Duty Leave

(A) Long Term Military Duty. An employee who enters active military service of the United States shall have re-employment rights as may be provided for under applicable federal law in effect at that time.

(B) Military Reserve Duty. An employee who is an active member of any recognized state or federal military reserve organization and who is compelled to fulfill a military obligation by law or regulation, shall be entitled to an unpaid leave of absence for the duration of such required military duty, without loss of seniority.

ARTICLE XIV

WAGES

Section 14.1 Wages

Employees shall be compensated in accordance with the wage schedule attached as Appendix B to this Agreement. The wage scale represents the following across-the-board increases effective: May 1, 2012 – 2%; May 1, 2013 – 2.5%, May 1, 2014 – 2.5%, and May 1, 2015 – 2.5%.

Section 14.2 Officer in Charge

In addition to the above wages, the Village shall pay an additional $2.00 per hour to each employee, excluding sergeants, for each hour spent by said employee assigned as officer in charge for all or any part of his shift. No probationary officer will be assigned as an officer in charge.

Section 14.3 Canine Maintenance

For any officer assigned to be in charge of canine maintenance, the parties agree that no more than three hours per week are necessary to care for a single dog. The Village agrees to pay to such officer three hours of straight time per week at such officer's hourly rate for all weeks in which such officer is so assigned. The Village reserves the right, in its sole discretion, to determine at any time if the Village will discontinue ownership of any and all canines, and upon discontinuance of ownership, no further compensation shall be due.

Section 14.4 Evidence Technician

Any bargaining unit employee who is required to wear a pager and remain available and in an on-call status as an Evidence Technician shall receive three (3) hours of pay at the overtime rate of pay for each such week on call. Any employee who is called in to work as a result of being on call shall receive the appropriate overtime rate of compensation in addition to any on-call compensation received under this Section.

Section 14.5 Field Training Officer (new)

Effective 05-01-09, in addition to the above wages (14.1) the village shall pay an additional one, 1, hour of compensatory time for each Field Training Officer, for each week spent by said employee assigned as Field Training Officer with Trainee.

Section 14.6Tuition Reimbursement

The Employer shall reimburse any employee for the actual cost of tuition for all Village approved police related courses from a recognized junior college, college, university or other approved training school. The employee shall be required to achieve a "C" or PASS (in a PASS/FAIL course) for all courses for which reimbursement is sought. Further, the course and/or curriculum requirements shall be presented to the Employer and approved for payment before said courses are taken. Approval must be requested not later than 45 days before

the class is scheduled to begin, unless this requirement is waived by the Village in a specific instance. Under no circumstances shall the Village be required to compensate any employee for time spent attending any such classes.

ARTICLE XV

UNIFORM ALLOWANCE

The Village will continue to provide uniforms to employees on a quartermaster system as it has in the past. Employees are responsible for cleaning and maintenance of their uniforms and shall maintain a professional appearance at all times. The uniform list of items supplied by the Village is attached to this Agreement as Appendix C. An officer assigned as a detective for more than six (6) months in any twelve (12) month period shall receive a clothing allowance, for the year, in the total amount of $500.

ARTICLE XVI

INSURANCE

Section 16.1 Health Insurance Plan

The health insurance plan in effect on the effective date of this agreement shall continue for bargaining unit employees during the term of this Agreement; provided, however, the Village reserves the right to change insurance carriers, HMO's, benefit levels, or to self-insure as it deems appropriate, as long as the new basic coverage and basic benefits for the bargaining unit employees are substantially similar to those in effect when this Agreement is ratified. Employees may elect single or dependent coverage in the Village's health insurance plan during the enrollment period established by the Village.

(a) An employee shall pay twenty percent (20%) of the premium for the medical insurance coverage selected (employee only; employee plus spouse; employee plus child(ren); or family), the amount of which shall be deducted from the employee's earnings.

(b) Opt Out Clause. Any employee who provides proof of medical insurance from another source may, during such period as may be specified by the Village, voluntarily opt out of Village provided medical insurance for the employee and his or her eligible dependents. Any such employee will, commencing with the first full month following the

opt out, be paid the gross amount of $125 per month by the Village, less applicable deductions, for each month medical insurance coverage is not provided by the Village. Said amount shall not be added to the employee's base pay.

Section 16.2 Cost Containment

The Village reserves the right to institute cost containment measures relative to insurance coverage so long as the basic level of insurance benefits remains substantially similar. Such changes may include, but are not limited to, mandatory second opinions for elective surgery, pre-admission and continuing admission review, prohibition on weekend admissions except in emergency situations, and mandatory outpatient elective surgery for certain designated surgical procedures.

Section 16.3 Section 125 Plan

The Village agrees to maintain a Section 125 plan that allows employees to deduct health insurance premiums on a pre-tax basis to the extent permitted by law. The Village shall have the right to draft, amend and administer the Plan. An employee may decline to participate.

ARTICLE XVII

MAINTENANCE OF ECONOMIC BENEFITS

All economic benefits which are not set forth in this Agreement and are currently in effect shall continue and remain in effect until such time as the Village shall notify the Union of its intention to change them. Upon such notification, and if requested by the Union, the Village shall meet and discuss such changes before it is finally implemented by the Village. Any change made without such notice shall be considered temporary pending the completion of such meeting and confer discussions. If the Union becomes aware of such a change and has not received notification, the Union must notify the Village as soon as possible and request discussions if such discussions are desired. The failure of the Union to request discussions shall act as a waiver of right to such discussion by the Union.

ARTICLE XVIII

EMPLOYEE AND OTHER STATUTORY RIGHTS

Section 18.1 Bill of Rights

The Village agrees to abide by the requirements of the "Peace Officers Bill of Rights," 50 ILCS 725/1 *et seq.*

Section 18.2 Personnel Files

The Village also agrees to abide by the requirements of the "Access to Personnel Records Act," 820 ILCS 40/1 *et seq.*

Section 18.3 Access to Arbitration

The parties agree that an alleged violation of Section 1 or 2 above may not be taken to arbitration under the grievance procedure, Article VIII, absent the specific written agreement of the Union and Village.

Section 18.4 Legal Defense

The Village will continue, for the life of this Agreement, its current policy of insuring, defending and providing representation to officers sued for actions taken within the scope of their authority, where the officer cooperates with the Village in defense of the action. This Article shall neither add to nor detract from an officer's current protection as now provided by the Village or Illinois Statutes.

Section 18.5 Posting of Details

All "extra duty" details received by the Employer which require the hiring back of an officer, shall be offered to the employees by use of a "rotating list." The Employer shall contact the officer at the top of the list and if the officer accepts the detail, or if the officer declines the detail for any reason other than a conflict with the officer's work schedule, the officer's name then goes to the bottom of the list. If the detail conflicts with the officer's work schedule then the officer's name remains at the top of the list. The Sergeants and Lieutenants shall be allowed to have their names on the rotating list.

Section 18.6 Continuous Training

To the extent that the Employer can be a member of N.E.M.R.T. at the current cost or increased costs based on increases in the standard of living, every Employee covered by

the terms of this Agreement shall have the opportunity to receive, to the extent possible, a minimum of forty (40) hours of tuition paid training per year through N.E.M.R.T. or such other training entity as determined by the Employer on a calendar year basis beginning January 1, 1994. The Employer retains the right to select employees for certain specialized training based on established criteria. However, whenever practical the training shall be evenly distributed among the employees. When the Employer assigns the employee to such a class. The employee shall be compensated for time spent in such training, per the terms of this Agreement. When an Employee requests such a class, the employee shall not be compensated for such time spent in class; however, the Employer will accommodate reasonable requests for shift trades, and use of time due, to facilitate the Employee attending such classes.

Section 18.7 Public Employee Disability Act

The Village agrees to abide by the requirements of the Public Employee Disability Act, 5 ILCS 345/1, *et seq.*

ARTICLE XIX

IMPASSE RESOLUTION

Upon the expiration of this Agreement, the remedies for the resolution of any bargaining impasse shall be in accordance with the Illinois Public Labor Relations Act, as amended, effective January 1, 1986.

ARTICLE XX

BOARD OF FIRE AND POLICE COMMISSIONERS

The parties recognize that the Board of Fire and Police Commissioners of the Village of Fox Lake has certain statutory authority over employees covered by this Agreement. Nothing in this Agreement is intended to in any way replace or diminish that authority except as provided below.

In the event an officer is disciplined and/or recommended for discipline or termination by the Chief of Police, and the officer elects under the provisions of this Agreement to appeal the discipline and/or recommended discipline or termination through the grievance-arbitration procedure rather than appear before the Board of Police and Fire Commissioners (the

"Board"), said election shall constitute a waiver of the right to any other avenue of appeal of the discipline and/or recommended discipline or termination, including the right to appear before the Board. Should an officer elect to appear before the Board, said election shall constitute a waiver of the right to any other avenue of appeal of the discipline and/or recommended discipline or termination, including the grievance-arbitration procedure.

In cases where the Chief of Police recommends to the Board the discipline or termination of an officer, and the officer elects to challenge such recommendation through the grievance-arbitration procedure, then the Chief's recommendation shall become effective immediately and the officer shall abide by the recommended discipline and/or termination unless and until the disciplinary action is reversed through the grievance-arbitration process. It is the intent of this provision to allow the Chief of Police to impose suspensions of greater than five (5) calendar days and to terminate employees effective immediately when the employee elects to challenge the same through the grievance-arbitration process instead of appearing before the Board.

ARTICLE XXI

OUTSIDE EMPLOYMENT

No employee of the Village shall be employed in any other business, position or occupation that interferes in any way with his Village Position or with the full and proper performance of his duties. An employee engaged in outside employment must first notify the Chief of Police of such employment. The Village may withdraw approval for outside employment upon just cause.

ARTICLE XXII

LIGHT DUTY POSITION

The Employer, whenever possible, shall provide one light duty position for an employee who is injured. The Employer's obligation is limited to a total of one position regardless of whether at such time there is more than one (1) employee who is injured. Further, the Employer is not required to provide, or create any such position; however, the Employer shall make every reasonable attempt to accommodate an injured employee if such

work is available. The light duty shall be limited to a six (6) month period, unless extended by the Employer at the Employee's discretion. This provision is not subject to seniority, but rather is subject to a "first occurrence" request basis, and ""on the job" injuries shall take precedence over off duty injuries.

ARTICLE XXIII

SAVINGS CLAUSE

In the event any Article, Section or portion of this Agreement should be held invalid and unenforceable by any board, agency or court of competent jurisdiction, such decision shall apply only to the specific Article, Section or portion thereof specifically specified in the board, agency or court decision; and upon issuance of such a decision, the Village and the Union agree to immediately begin negotiations on a substitute for the invalidated Article, Section or portion thereof.

ARTICLE XXIV

DRUG TESTING

Section 24.1. General Policy Regarding Drugs and Alcohol.

The use of illegal drugs and the abuse of alcohol by employees present unacceptable risk to the safety and well-being of other employees and the public, invites accidents and injuries, and reduces productivity. In addition, such use and abuse violates the reasonable expectations of the public that the police officers who serve and protect them obey the law and be fit and free from the adverse effects of drug and alcohol use.

In the interest of employing persons who are fully fit and capable of performing their jobs, and for the safety and well-being of employees and residents, the parties hereby establish a screening program implementing the stated policy regarding drug and alcohol use by employees.

The Village has the responsibility to provide a safe work environment as well as a paramount interest in protecting the public by ensuring its employees are physically and emotionally fit to perform their jobs at all times.

For these reasons, the abuse of prescribed drugs, or the illegal use, possession, sale or transfer of illegal drugs, cannabis or non-prescribed controlled substances by employees is strictly prohibited on or off duty except as may be required in the course of performing acts of duty as is the use of alcohol while on duty. Violation of these policies and any provision of this Article will result in disciplinary action up to and including discharge.

Section 24.2. Definitions

A. "Drugs" shall mean any controlled substance as defined in the Federal Controlled Substances Act (21 U.S.C. 802) and in the Illinois Controlled Substances Act (720 ILCS 570/100 et seq.), the Cannibas Control Act (720 ILCS 550/1 et seq.), the Ephedra Prohibition Act (720 ILCS 602/1 et seq.), the Methamphetamine Control and Community Protection Act (720 ILCS 646/1 et seq.) and the Use of Intoxicating Compounds Act (720 ILCS 690/0.01 et seq.) as well as federal or state regulations promulgated and relating to these laws, for which the person tested does not submit a valid pre-dated prescription. Thus, the term "drugs" includes both abused prescription medications and illegal drugs.

B. "Impairment" due to drugs or alcohol shall mean a condition in which the employee is unable to properly perform his/her duties due to the effects of a drug

in his/her body. "Impairment" due to alcohol shall be presumed when a blood alcohol content of .04 or more is measured.

C. The term "drug abuse" includes the use of any controlled substance which has not been legally prescribed and/or dispensed, or the abuse of a legally prescribed drug which results in impairment while on duty.

D. The term "alcohol abuse" includes the use of alcohol while on duty or which otherwise causes an employee to be unable to properly perform his/her job duties.

E. The term "Village" includes the Chief of Police or his/her designee.

F. The term "supervisor" includes an Officer-In-Charge ("OIC") on the same or different shift.

Section 24.3. Prohibitions

Except as may be required in the course of performing acts of duty, Employees shall be prohibited from:

A. Consuming or possessing alcohol or illegal drugs at any time while on shift on any of the Village's premises or job sites, including all of the Village's buildings, properties, vehicles and the employee's personal vehicle while engaged in the business of the Village.

B. Using, selling, purchasing or delivering any illegal drug.

C. Being impaired due to alcohol or drugs while on duty.

D. The consumption of alcoholic beverages shall be subject to the following:

1. If a supervisor orders an employee to report to work or an employee accepts a voluntary overtime assignment during the employee's usual non-working time, the employee must disclose to the supervisor whether he/she has consumed any alcohol within the last eight hours, the amount of alcohol consumed, and the time period over which the employee consumed the alcohol.

2. If, after this disclosure, the employee is ordered to report to work he/she will not be disciplined if the employee is in violation of the .04 limit. It will be the responsibility of the employee to determine his/her fitness for work and disclose this information to the supervisor. If the employee reports to work under this section and is later determined to be at or over a .08 alcohol content then the employee may be disciplined.

Section 24.4. Administration of Tests

A. Informing Employees Regarding Policy. New employees will be supplied with and sign a receipt for a copy of this Agreement, including the Policy on Drug and Alcohol Screening, as part of the new employee orientation. The Village and the Union acknowledge the goals of this policy, namely, that employees of the Police Department be fit and free from the adverse effects of the use of illegal drugs and the abuse of alcohol and legal drugs. However, it is the responsibility of all members of the Police Department to be aware of, and adhere to, this policy and rules and procedures contained herein.

B. When Tests May be Compelled. Upon written order from a supervisor, an employee shall proceed, as directed by the order, to the collection location indicated on the order and fully cooperate with the drug/alcohol screening process. Refusal of an employee to comply with the order for a drug/alcohol screening will be considered as a confirmed positive test and as a refusal of a direct order and may subject the employee to discipline.

The Village may require employees to submit to alcohol or drug testing at a time and place designated by the Village under the following circumstances:

1. Reasonable Suspicion. Where the Village has reasonable suspicion of drug or alcohol abuse, a test may be ordered and the employee may be required to report for testing. Reasonable suspicion exists if the facts and circumstances warrant

rational inferences by a supervisor or superior that a person is using or is physically or mentally impaired due to being under the influence of alcohol or illegal drugs. When a supervisor has a reasonable suspicion that an employee is impaired, that supervisor shall confirm that suspicion with another supervisor. Both supervisors' observations shall be confirmed in writing.

In addition to other reasons cited in this Section, reasonable suspicion may be based upon the following:

a. Observable phenomena, such as direct observation of use and/or the physical symptoms of impairment resulting from using or being under the influence of alcohol or controlled substances; or

b. Information provided by an identifiable third party which is independently investigated by the Police Chief or his designee and determined to be reliable or valid.

2. Accidents/Injuries. When a member is involved in an on-the-job accident or injury in which there is a personal injury requiring medical treatment by a third party away from the site, a fatality, or property damage where one or more vehicles is towed from the accident site, a supervisor shall conduct a preliminary investigation promptly and, as part of the investigation, shall evaluate the member's appearance and behavior. Drug and alcohol testing will be required, unless an employee's medical condition or other circumstances make it unadvisable.

3. Arrest or Indictment. When a member has been arrested or indicted for conduct involving alcohol abuse and/or illegal drug related activity on or off duty, the Police Chief may require drug/alcohol screening. The Chief may also or instead of a drug/alcohol screening, make a mandatory referral for an evaluation of the

existence of a substance abuse problem. If the certified substance abuse professional or other licensed physician or psychologist acceptable to the Village and to the Union indicates that a treatment program is recommended, that treatment program will be viewed as mandatory in accordance with the existing language in the drug/alcohol policy. If the evaluation indicates a treatment program is not necessary, the treatment program would not be mandatory.

C. Order to Submit to Testing. The employee shall be permitted to consult with a representative of the Union at the time the order to test is given, provided that such consultation does not result in unreasonable delay of the test. To avoid such delay, the Village may permit an on duty officer or other designated representative of the Union to represent the employee and accompany him to the testing collection location at no loss of pay to such Union officer or designated representative. Further, a representative may be present at the time the test is given. A refusal to submit to such testing may subject the employee to discipline, but the employee's taking of the test shall not be construed as a waiver of any objection or rights that he/she may have. When testing is ordered, the employee may be removed from duty and placed on leave with pay pending the receipt of results, unless there are separate grounds for the leave to be without pay.

Section 24.5. Testing Procedures

In conducting the test authorized by this Agreement, the Village shall use only a laboratory certified by SAMHSA.

The conduct of the test and the standards to be followed in the testing shall conform to current SAMHSA standards, but are summarized here.

A. The initial test shall be a six (6) panel urine drug screen. The specimen shall be tested using the Enzyme Multiplied Immunoassay Technique (EMIT) screening method; positive initial

results must be confirmed through the gas chromatography mass spectrometry (GC/MS) method, or some other scientifically accurate method of confirmation that is approved by the United States Department of Transportation, as well as be confirmed by a Medical Review Officer following national standards.

B. A sufficient sample shall be collected to allow for: (1) initial screening; (2) a confirmatory test; and (3) a sufficient amount to be set aside reserved for later testing if requested by the employee.

C. Collection and testing must include the use of tamper proof containers and must observe proper chain of custody procedures.

D. The laboratory shall retain a portion of the tested sample so that the employee may arrange for another confirmatory test to be conducted by a licensed clinical laboratory certified by SAMHSA of the employee's choosing, from a list provided by the Village, and at the employee's expense. Once the portion of the tested sample is delivered to the clinical laboratory selected by the employee, The employee shall be responsible for maintaining the proper chain of custody for said portion of the tested sample.

Section 24.6. Voluntary Request for Assistance

Employees are encouraged to voluntarily seek treatment, counseling and/or other support and assistance for an alcohol or drug related problem. There shall be no adverse employment action taken against an employee who voluntarily seeks assistance unless the request follows: (1) the testing of an employee; (2) the initiation of an investigation into the employee's performance or misconduct; (3) actions which if known by the Village provide cause to believe the employee has engaged in criminal conduct; (4) or the employee is otherwise found to be in violation of this policy. When voluntary assistance is requested under this policy, the employee may use a Village sponsored Employee Assistance Program (EAP) to obtain referrals, treatment, counseling and other support and all such requests shall be treated as confidential

pursuant to the Village's normal procedures in the operation of its EAP.

Village support of employee use of an EAP shall not be construed as an obligation on the part of the Village to retain an employee on active status throughout the period of rehabilitation if it is appropriately determined that the employee's use of alcohol or drugs prevents such individual from performing regular job duties or whose continuance on active status would constitute a direct threat to the property or safety of others. The Village may, however, require reassignment of the employee with or without pay if he is then unfit for duty in his current assignment and if another assignment is available in which the employee is qualified and able to perform.

The Village may make available through an EAP a means by which the employee may obtain referrals and treatment. When undergoing treatment and evaluation, the employee shall be allowed to use accrued sick leave and/or paid leave and/or be placed on unpaid leave pending treatment.

Section 24.7. Disciplinary Action for Confirmed Positive Test Results

A. First Positive. The first confirmed positive test for drugs or found to be under the influence of alcohol result will be cause for disciplinary action up to and including disciplinary suspension not to exceed 120 calendar days if the employee agrees to the following conditions: (1) the employee may be mandatorily referred to an Employee Assistance Program (EAP) for evaluation, diagnosis and development of a treatment plan consistent with generally accepted standards; (2) the employee will be required to cooperate in the treatment plan as determined by the physician(s) Substance Abuse Professional involved; (3) discontinue use of illegal drugs or abuse of alcohol; (4) undergo unannounced periodic drug and/or alcohol screening for a period of up to 24 months; (5) successfully complete the prescribed treatment including participation in "after care" treatment if prescribed; and (6) sign an agreement consenting to said conditions. Failure to comply with these conditions of continued employment shall be cause for discharge. The Village may use the

positive test as evidence of impairment. Such evidence shall not preclude the introduction of other evidence on the issue of impairment.

B. Second Positive — During Treatment. If an employee has a first confirmed positive test under the previous paragraph A of this Section and enters a treatment program, and thereafter that employee who is not working has a subsequent confirmed positive test result while the employee is in treatment, as a result of unannounced periodic drug and/or alcohol screening, the employee shall be permitted one, and only one such positive result provided that the employee's participation in the EAP shall be extended to up 12 months, if deemed necessary by the treating Substance Abuse Professional from the period of the subsequent positive test. Once an employee returns to work, any subsequent positive result in either an alcohol or drug screening shall result in the employee's discharge, which shall be final and binding on the Union and the employee and the penalty shall not be subject to the grievance procedure of this collective bargaining agreement.

C. Second Positive — other than During Treatment. An employee who has a first confirmed positive test under Paragraph A of this Section and subsequently has another confirmed positive test under the testing procedures of this Article shall be discharged, which discharge shall be final and binding on the Union and the employee and the penalty shall not be subject to the grievance procedure in the collective bargaining agreement.

Section 24.8. Duty Assignment

If the EAP or treatment program (e.g., outpatient treatment) allows the employee to continue to work during the treatment, the Village shall maintain the individual's previous employment status. If an employee participates in a treatment program which precludes continued employment, the employee shall use available leave and compensation benefits. Such leave, including sick leave, vacation time and/or unpaid leave, may not exceed one (1) year. At the end of the leave, unless otherwise required by law, the

employee shall be returned to his former position with no loss of seniority or benefits accumulated prior to his leave. If the employee is not released for full duty after being on leave for a period of one year, the employee's employment will be terminated.

Section 24.9. Insurance Coverage

For employees enrolled in the Village's health insurance plan, the cost of the treatment program may be covered in whole or in part by that plan. The employee shall be responsible for any expenses not covered by the health insurance or EAP.

Section 24.10. Confidentiality of Positive Test Results

The results of drug and alcohol tests, if positive after a review by a Medical Review Officer approved jointly by the Village and the Union, will be disclosed to the Police Chief and other Village officials as may be necessary. The employee, upon request, shall receive a copy of all test results submitted to the Village. If the employee consents in writing, test results will be disclosed to the Union. Test results will not be disclosed externally except where the person tested consents, or as required by legal process. Any employee whose drug/alcohol screen is confirmed positive shall have an opportunity at the appropriate stage of the disciplinary process to refute said results.

Section 24.11. Alcohol Test Standards

An employee shall be considered impaired with a .04 or higher concentration of blood alcohol constituting a positive test result. An employee shall be considered unimpaired with less than .04 concentration of blood alcohol constituting a negative test result. Percentage by weight of alcohol in the blood shall be based upon grams of alcohol per 100 milliliters of blood. Alcohol testing shall be done by breath sampling if medically necessary. Discipline for violation of these standards shall be as set forth in this Article.

Section 24.12. Right to Appeal

Except as stated otherwise in this Article, the Union and/or the employee, with or without the

Union, shall have the right to file a grievance concerning any testing permitted by this Agreement contesting the basis for the order to submit to the tests, the administration of the tests, the significance and accuracy of the tests, the consequences of the testing or results, or any other alleged violation of this Article. All challenges arising from the same test shall be consolidated into a single grievance.

ARTICLE XXV

ENTIRE AGREEMENT

This agreement constitutes the complete and entire Agreement between the parties, and concludes collective bargaining between the parties for its term. This Agreement supersedes and cancels all prior practices and agreements, whether written or oral, which conflict with the express terms of this Agreement. If a past practice is not addressed in this Agreement, it may be changed by the employer as provided in the management rights clause, Article IV. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law or ordinance from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. The Union specifically waives any right it may have to impact or effects bargaining for the life of this Agreement.

ARTICLE XXVI

RESIDENCY

Bargaining unit employees shall maintain their residence within thirty-five (35) miles of the village limits of the Village of Fox Lake. Existing employees whose residence is further than thirty-five (35) miles shall not be required to move as a result of this provision; however should any existing employee whose residence is further than thirty-five (35) miles from the village limits of Fox Lake move from their current residence they shall be required to establish their new residence in accordance with this provision. Newly hired employees shall be required to establish residence in accordance with this provision upon completion of their probationary period or as may be extended by the Village.

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ARTICLE XXVII

LATERAL HIRES

A lateral hire shall be defined as an employee having been certified by the Illinois State Training Board as a police officer and must have been employed as a full-time police officer. The Village shall have the right to place a laterally hired employee between the "Starting" and "After 3 Year" rate of pay on the parties salary matrix. However, any lateral hire with less than three (3) years of service as a full-time police officer cannot be placed any higher on the salary matrix than equal to his or her full-time years of police experience. An officer's actual service with the Department shall be used for all other purposes (i.e., vacation selection, promotion, shift selection).

ARTICLE XXVIII

DURATION

This Agreement shall be effective as of May 1, 2012, and shall remain in force and effect until April 30, 2016. It shall be automatically renewed from year to year thereafter unless either party shall notify the other in writing at least seventy (70) days prior to the anniversary date that it desires to modify this Agreement. In the event that such notice is given, negotiations shall begin no later than sixty (60) days prior to the anniversary date. In the event that either party desires to terminate this Agreement, written notice must be given to the other party no later than ten (10) days prior to the desired termination date, which shall not be before the anniversary date.

Executed this _____ day of _____ 2013, after receiving official approval by the President and Board of Trustees and ratification by the Union membership.

FOR THE ILLINOIS FOP LABOR COUNCIL AND FOX LAKE FOP LODGE 90

FOR THE VILLAGE OF FOX LAKE, ILLINOIS

4819-7191-2467.1 4/19/2013 2:15 PM

APPENDIX "A"

FRATERNAL ORDER OF POLICE

TO: TREASURER
VILLAGE OF FOX LAKE

I, _____ request and authorize the Village of Fox Lake Treasurer to withhold the appropriate amount of dues from my wages for both the Illinois Fraternal Order of Police Labor Council and the Fraternal Order of Police Lodge No 90.

_____ _____
Print Name Date

_____
Signature

APPENDIX B

SALARIES

During the term of this Agreement, officers shall be paid the annual salaries set forth below.

Years of Service Patrol	5/1/2012 2%	5/1/2013 2.5%	5/1/2014 2.5%	5/1/2015 2.5%
Starting	$49,381	$50,616	$51,881	$53,178
After 1 Year	$52,633	$53,949	$55,298	$56,680
After 2 Years	$55,886	$57,283	$58,715	$60,183
After 3 Years	$59,138	$60,616	$62,131	$63,685
After 4 Years	$62,391	$63,951	$65,550	$67,189
After 5 Years	$65,643	$67,284	$68,966	$70,690
After 6 Years	$68,895	$70,617	$72,383	$74,193
After 7 Years	$68,895	$70,617	$72,383	$74,193
After 8 Years	$74,062	$75,914	$77,812	$79,757
After 9 Years	$74,062	$75,914	$77,812	$79,757

Sergeants wages shall be 8% above the top patrol rate.

APPENDIX C

UNIFORM ITEMS

1	dress cap
1	utility cap
2	ties
4	short sleeve shirts
4	long sleeve shirts
4	trousers
1	holster
1	magazine pouch
1	service weapon
1	squad jacket
1	hat shield
1	badge
1	name plate
1	tie bar
1	rain coat
1	rain cap
1	three-season jacket
1	vest

The foregoing, while issued to officers, remains the property of the Police Department and shall be returned upon severance from employment.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Village of Fox Lake, Employer and Illinois Fraternal Order of Police Labor Council, Petitioner	**Type of Election: Board Directed** Case No. S-RC-09-051

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Illinois Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no valid objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the Illinois Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for **Illinois Fraternal Order of Police Labor Council**

and that, pursuant to Sections 6(c) and 9(d) of the Illinois Public Labor Relations Act, the said labor organization is the exclusive representative of all the employees INCLUDED in the existing **S-VR-39** bargaining unit in the classification of

Sergeant

as set forth below, and are found to be appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT:

Included: All full-time commissioned police officers in the rank of Sergeant and below employed by the Police Department in the Village of Fox Lake.

Excluded: All other full-time commissioned police officers above the rank of Sergeant and above, and all other civilian employees, supervisors, confidential and managerial employees and all other employees excluded by the Act, and all elected offices of the Village of Fox Lake.

Issued at Springfield, Illinois, August 31, 2009.

ILLINOIS LABOR RELATIONS BOARD

John Brosnan

John Brosnan, Executive Director

EXHIBIT
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B
C 148

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Village of Fox Lake,

Employer

and

Illinois Fraternal Order of Police Labor Council,

Petitioner

Case No. S-RC-09-051

DATE OF
MAILING: August 31, 2009

AFFIDAVIT OF SERVICE OF CERTIFICATION OF REPRESENTATIVE

I, the undersigned employee of the Illinois Labor Relations Board, certify that on the date indicated above I served the above-entitled document(s) by first class mail upon the following persons, addressed to them at the following addresses:

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Lori Novak, Illinois Labor Relations Board

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

The following are the parties of record in this proceeding in Case No. S-RC-09-051

1. Illinois Labor Relations Board, State Panel
2. Village of Fox Lake, Employer
3. Illinois Fraternal Order of Police Labor Council, Petitioner

IN THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
THIRD DISTRICT LAW DIVISION – ROLLING MEADOWS

RUSSELL ZANDER, Plaintiff, v. ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants.	)	No. 17 L 63098 Plaintiff hereby demands a trial by jury of twelve (12) persons

RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

NOW COMES, your Plaintiff, RUSSELL ZANDER (hereinafter referred to as "ZANDER") and as and for his Response to Defendants', ROY CARLSON, ESQ and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL (hereinafter referred to as "CARLSON"), Motion to Dismiss Plaintiff's Complaint, states to the Court the following:

INTRODUCTION

Defendants focus much of their argument on the fact that the attorney is immune from a legal malpractice suit under a collective bargaining agreement. However, the most important distinction in this case is that this is not a case involving collective bargaining. The case law in support of Defendants' arguments does not apply because ZANDER's case is not a case of involving a collective bargaining agreement.

The facts of this case are straightforward in that there was an attorney-client relationship between the Plaintiff ZANDER and Defendant CARLSON. Based on this attorney-client relationship, CARLSON deviated from the standard of care as an attorney.

STANDARD OF REVIEW FOR SECTION 2-615

1. A Motion to Dismiss pursuant to section 2-615 attacks the legal sufficiency of the Complaint by alleging defects on its face. *Weisblatt v. Colky*, 265 Ill.App.3d 622, 625 (1st Dist. 1994). Section 2–615 motions "raise but a single issue: whether, when taken as true, the facts alleged in the Complaint set forth a good and sufficient cause of action." *Visvardis v. Ferleger*, 375 Ill.App.3d 719, 723 (1st Dist. 2007), quoting *Scott Wetzel Services v. Regard*, 271 Ill.App.3d 478, 480 (1995).

2. When the legal sufficiency of a Complaint is challenged by a section 2–615 Motion to Dismiss, all well-pleaded facts in the Complaint are taken as true and a reviewing court must determine whether the allegations of the Complaint, construed in a light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004); *King v. First Capital Financial Services Corp.* 215 Ill.2d 1, 12 (2005). A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that will entitled the plaintiff to recover. *Zedella v. Gibson*, 165 Ill.2d 181, 185 (1995).

STANDARD OF REVIEW FOR SECTION 2-619

3. A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that will entitle the plaintiff to recover. *Zedella v. Gibson, supra*, at 185 (1995). The Court must view all the factual allegations in the light most favorable to the plaintiff. *Lloyd v. County of DuPage*, 303 Ill.App.3d 544, 688 (2nd Dist. 1999). Also, the Court must construe the facts liberally in favor of the plaintiff. *Id.* In ruling on a 2-619 motion, the Court may consider pleadings, affidavits and depositions. *Weisblatt v. Colky*, 265

Ill.App.3d 622, 625 (1st Dist. 1994). The purpose of a Motion to Dismiss under section 2–619 of the Code of Civil Procedure is to afford litigants a means to dispose of issues of law and easily proved issues of fact at the outset of a case, reserving disputed questions of fact for a jury trial. *Zedella v. Gibson, supra,* at 185.

4. Section 2–619(a)(9) of the Code of Civil Procedure permits involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." An "'affirmative matter,' in a section 2–619(a)(9) motion, is something in the nature of a defense which negates the cause of action completely". The moving party thus admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter to defeat the plaintiff's claim." *Van Meter v. Darien Park Dist.*, 207 Ill.2d 359, 367 (Ill., 2003).

ARGUMENT

Under Section 2-615

I. ZANDER's Claims Must Be Allowed to go Forward Because Immunity Does Not Apply.

1. Under Defendants' Section 2-615 argument, (See Motion to Dismiss attached, without exhibits, as **Exhibit A**) Defendants must take all well-pleaded facts in the Complaint as true.

2. In ZANDER's Complaint, ZANDER pleads that an attorney-client relationship was formed between ZANDER and CARLSON. (See Complaint attached as **Exhibit B**, ¶12, 13.)

3. Based on the fact that there was a formation of the attorney-client relationship, CARLSON owed a duty to ZANDER to exercise a reasonable degree of care and skill. CARLSON failed to do so.

4. It is important to note that Defendants cite cases outside of Illinois to support their position. After a review of the cases cited by Defendants, including the out-of-state cases, this Court must find that the facts in Defendants' cited cases are distinguishable, and that this legal malpractice action does not involve a collective bargaining process.

5. The Illinois Public Labor Relations Act ("IPLRA") defines collective bargaining as "bargaining over terms and conditions of employment, including hours, wages, and other conditions of employment, as detailed in Section 7 and which are not excluded by Section 4." See 5 ILCS 315/3(b). The IPLRA does not mention that termination proceedings fall under the collective bargaining process.

6. Defendants' cases are distinguishable as follows:

Montplaisir v. Leighton, 875 F.2d 1 (1st Cir. 1989), former air traffic controllers brought a legal malpractice action against the union attorneys claiming that they participated in a strike only based on assurances by attorneys that they would not lose their jobs. None of the workers, had an individual attorney-client relationship with Defendants at any time. Rather, Defendants were retained by, and acted on behalf of, the Professional Air Traffic Controllers Organization while conducting the pre-strike counseling to the workers. *Montplaisir v. Leighton, generally.*

ZANDER's case does not involve negligent advice given about participation in a strike. The *Montplaisir* attorneys did not have an attorney-client relationship with the union workers.

Best v. Rome, 858 F. Supp. 271, 274 (D. Mass. 1994), after a grievance arbitration that Plaintiff lost, Plaintiff sued the attorney and law firm which handled arbitration, alleging breach of fiduciary duty, attorney malpractice, intentional infliction of emotional distress, and violations of state consumer protection law. The Court held that attorney and law firm were immune from

liability to union member *to extent that they acted on behalf of union during collective bargaining process*, the attorney and law firm did not represent union member personally in arbitration, and the attorney did not perform negligently in arbitration. *Best v. Rome*, generally.

ZANDER's case was not a grievance nor during the collective bargaining process. ZANDER was advised by CARLSON to waive his rights before a civil service police commission and advised to agree to a single arbitrator binding arbitration. (See Complaint, ¶21, 23, 28-31), which ultimately confirmed the termination of ZANDER.

In *Collins v. Lefkowitz*, 66 Ohio App. 3d 249 (Ohio Ct. App. 1990), Plaintiff brought a legal malpractice action against the union attorney Defendant for failing to timely perfect a notice of appeal after an adverse ruling. The Court adopted the *Atkinson* Rule and held that appellant's state action for legal malpractice against Defendant, the union attorney, is preempted by federal labor law. *Collins v. Lefkowitz, supra,* generally.

ZANDER's case is distinguishable from *Collins* because ZANDER is not complaining of filing a timely appeal. ZANDER's complaints are clearly the representation by CARLSON during ZANDER's termination proceedings. When making its determination the Court looked to *Atkinson* and *Peterson*. However, as more fully argued below, the holdings in *Atkinson* and *Peterson* do not apply to ZANDER's case.

Mamorella v. Derkasch, 276 A.D.2d 152 (App. Div. 2000), Plaintiff was fired from her position of a teacher and principal. Defendant was an attorney for the union and began representing Plaintiff at the arbitration for her grievance against the school and after a hearing, the grievance was denied. The Plaintiff filed an action against the Defendant for legal malpractice and against the union for the negligence of Defendant. The union moved for

summary judgment on the ground that Defendant was an independent contractor and the union could not be held liable for any alleged negligence or malpractice by Defendant. The Supreme Court agreed and further determined that Plaintiff's legal malpractice claim is preempted by Federal labor law, and that plaintiff was limited to only bringing an action against the union for breach of the duty of fair representation. *Mamorella v. Derkasch, supra*, generally.

This case is distinguishable from ZANDER's case because *Mamorella* involved a school teacher filing a grievance and having an independent contractor represent her during the grievance proceedings. In this case, CARLSON is not an independent contractor and there is no dispute that he was employed by the FOP. (See Complaint, ¶5-6). ZANDER did not file a grievance but was going through termination proceedings in which CARLSON breached the standard of care while representing ZANDER.

Sellers v. Doe, 99 Ohio App. 3d 249 (Ohio Ct. App. 1994), a teacher filed a legal malpractice action against attorneys who had been provided by the union and who represented teacher in unsuccessful appeal of disciplinary action which resulted in the dismissal of her employment. The Appellate Court held that attorneys were immune from suit as agents of unions under the *Atkinson* rule as the attorneys' services were provided to the teacher by the union and teacher never personally engaged services of attorneys. *Sellers v. Doe, supra,* generally.

Similar to the previous case, ZANDER's case does not involve teachers. ZANDER has specifically pled that there was an attorney-client relationship between ZANDER and CARLSON. The *Sellers* Court applied the *Atkinson* rule, but as argued below, *Atkinson* does not apply to ZANDER's case.

Weiner v. Beatty, 121 Nev. 243 (2005), a school principal filed suit against the union and against the attorney who was hired by union to represent him during an investigative interview and subsequent arbitration hearing. The Court found that Beatty's representation of Weiner arose out of the collective bargaining agreement and that Beatty is protected from a malpractice suit. *Weiner v. Beatty, supra*, generally.

Again, similar to the other cases cited, ZANDER's case does not involve collective bargaining and is not a claim for breach of duty of fair representation.

7. The main thrust of Defendants' argument are the cases *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) and *Peterson v. Kennedy*, 771 F.2d 1244 (1985). After review of the two case this Court will determine that these cases are also not applicable to the fact pattern in ZANDER's case.

8. In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), employees participated in a strike and the company filed a lawsuit for damages against the union and the member-employees. The complaint alleged that an existing collective bargaining agreement between the union containing a promise by the union not to strike over any cause which could be the subject of a grievance under other provisions of the contract. The officers and agents of the union were charged with breach of the collective bargaining contract and tortious interference with contractual relations. *Atkinson v. Sinclair Refining Co., supra*, generally.

The Defendants filed a Motion to Dismiss the Complaint alleging that all of the issues in the suit were referable to arbitration under the collective bargaining contract. The Supreme Court held that the national labor policy requires that when a union is liable for damages for violation

of the no-strike clause, its officers and members are not liable for these damages. *Atkinson v. Sinclair Refining Co., supra,* generally, at 249.

9. *Atkinson, supra,* is distinguishable from ZANDER's case because ZANDER's case does not involve a breach of a collective bargaining contract nor any issues regarding clauses of such a contract. ZANDER's facts are different than *Atkinson*. In ZANDER's case, ZANDER, a union member, is bringing a cause of action against his attorney CARLSON, and his union, FOP, for breach of the standard of care in representing ZANDER during his termination proceedings. Unlike *Atkinson*, ZANDER's claims are not in relation to breaching any collective bargaining agreements, but instead breaching the standard of care as an attorney. ZANDER's claims must be allowed because under *Atkinson*, ZANDER's claims are not based on CARLSON's acts undertaken on behalf of the union. CARLSON's acts, because of the attorney-client relationship, were on behalf of and for the benefit of ZANDER.

10. To further support ZANDER's position that his case does not involve a grievance, the *Atkinson* Court defined a grievance as "any difference regarding wages, hours or working conditions between the parties hereto or between the employer and an employee covered by the working agree-hereto or between the Employer and an employee covered by this working agreement". *Id.*, at 242. ZANDER's underlying case was not a grievance regarding wages, hours or working conditions. ZANDER did not file any grievances, it was his employment termination proceedings.

11. The *Atkinson* Court stated that there is the "express, flat limitation that arbitration boards should consider only employee grievances". There is no mention of the arbitration boards considering termination proceedings. This confirms that the advice of CARLSON to ZANDER

to have a single arbitrator, in a binding arbitration, consider ZANDER's termination proceedings instead of the police commission was negligent advice.

12. In *Peterson v. Kennedy*, 771 F.2d 1244 (1985) the Plaintiff signed a contract to play football from 1976 to 1978. During a game in 1976 he was injured and did not play. In 1977 Plaintiff was notified that he was cut from the team and would not receive compensation under the injury protection clause of the contract. Plaintiff filed a complaint alleging that the union had breached its duty of fair representation by erroneously advising Peterson to file an injury grievance. The Complaint included a professional malpractice claim against the union attorneys for the same misconduct. The Plaintiff argued that there must be an exception to the *Atkinson* Rule if the union employee is an attorney. The Court did not agree stating, the attorney performs a function in the collective bargaining process that would otherwise be assumed by the union's business agents or representatives, the rationale behind the *Atkinson* rule is squarely applicable. *Peterson v. Kennedy, supra,* generally.

13. The *Peterson* rationale that an attorney should not be liable for malpractice was based on not having an attorney-client relationship with the union member. Here, CARLSON had an attorney-client relationship with ZANDER. The *Peterson* Court's findings were based on the representation during a collective bargaining process. This did not exist in ZANDER's case.

14. The *Peterson* Court found situations where union members are able to directly sue the attorney.

> "There are other instances in which union members whose grievances are improperly handled may recover damages from an attorney. Our decision does not preclude malpractice suits by union members who have themselves retained counsel to process grievances on their behalf, even though the individual or firm also serves as the union's regular outside counsel and is employed at the union's suggestion. Union members may

> also sue attorneys whether or not the attorneys are employed by the union where the legal services provided are wholly unrelated to the collective bargaining process; *e.g.*, drafting a will, handling a divorce or litigating a personal injury suit. In such cases the *Atkinson* rule is inapplicable." *Peterson v. Kennedy*, *supra*, at 1259.

15. Even though CARLSON was employed by the FOP, ZANDER had a direct attorney-client relationship with CARLSON. Also, because ZANDER's termination was unrelated to the collective bargaining process, *Atkinson* is inapplicable and under *Peterson*, ZANDER has a proper cause of action against CARLSON. ZANDER's case is also distinguishable from *Peterson v. Kennedy, supra,* because ZANDER did not file a breach of breach of duty of fair representation.

16. The *Peterson* Court also cited to *Weitzel v. Oil Chemical & Atomic Workers*, 667 F.2d 785 (9th Cir.1982) that based on an attorney-client relationship a union member could sue his attorney finding, "if such a relationship had been formed, the firm would not have been acting primarily on behalf of the union or as the union's agent in the collective bargaining process. Rather, it would have been serving as private counsel to the individual grievant." *Peterson v. Kennedy, supra*, at 1260.

17. The *Peterson* Court cited to *Aragon v. Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir.1985), that held a malpractice claim against a union's outside law firm cannot be disposed of on summary judgment due to questions of fact such as, "where outside union counsel represents the grievant is whether counsel was retained by and was working on behalf of the union or the individual member. If the former, a malpractice suit may not be brought by the grievant; if the latter, the answer will often be to the contrary." *Peterson v. Kennedy, supra*, at

1260-1261. Based on the attorney-client relationship, CARLSON was clearly working on behalf of ZANDER's termination proceedings, thus a malpractice suit may be brought by ZANDER.

18. Defendants are attempting to argue that because CARLSON is an attorney for the FOP, then he does not owe a duty to his client and that that any union employee is immune from any wrongdoing on behalf of their client. This is illogical. This theory would give any union attorneys the ability to breach the standard of care as an attorney with no consequences.

19. ZANDER's allegations that there was an attorney-client relationship must be taken as true and therefore, ZANDER is able to sue CARLSON directly. The Court in *Niezbecki v. Eisner & Hubbard, P.C.*, 186 Misc.2d 191, 198-199 (N.Y., Nov. 1, 1999) agreed stating, if the union attorney or another attorney agreed specifically to represent a union member directly as an individual client, not as a union member, the member could sue the attorney for malpractice or breach of contract. (internal citation omitted). *Id.*

20. Assuming *arguendo*, that this Court finds that ZANDER did not have an attorney-client relationship with CARLSON, ZANDER would still be able to maintain a cause of action against the attorney as a third party.

21. *Niezbecki v. Eisner & Hubbard, P.C., supra*, stated that the union collectively may sue its attorney for malpractice or breach of contract. *Id.*, at 199. The union, FOP, would have a cause of action against CARLSON. If this Court believes that the attorney-client relationship is between the FOP and CARLSON, ZANDER, under this argument should be considered a nonclient third party.

22. As argued below, third party nonclients are able to sue the attorney if the intent of the attorney-client relationship is to benefit the third party nonclient.

23. *Schechter v. Blank*, 254 Ill.App.3d 560 (1st Dist., 1993) discussed an attorney's duty to a third party, "An attorney owes a duty to a third party only where the attorney was hired by the client specifically for the purpose of benefitting that third party. The *Pelham* court stated that, in order for a nonclient third party to succeed in a negligence action against an attorney, 'he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.' The *Pelham* court asserted that the 'key consideration' for determining if the attorney owed a duty to the third party was whether the attorney was 'acting at the direction of or on behalf of the client to benefit or influence [the] third party.'" (citations omitted) *Schechter v. Blank, supra,* at 564

24. Here, the attorney-client relationship between CARLSON and the FOP was to benefit the union members, i.e. ZANDER. *Pelham v. Greisheimer*, 92 Ill.2d 13, 20 (1982), confirms this by stating, "to establish a duty owed by the defendant attorney to the nonclient the nonclient must allege and prove that the intent of the client to benefit the nonclient third party was the primary or direct purpose of the transaction or relationship." *Id.*, at 20-21.

25. The intent of CARLSON was specifically to benefit the nonclient third party, ZANDER. The benefit that ZANDER was to receive was CARLSON's representation of ZANDER throughout the entire termination proceedings that conformed with the standard of care. (See Complaint, ¶10-13, 15.)

26. Therefore, because the primary purpose and intent of the attorney-client relationship, (CARLSON the union attorney and the FOP, the union) was to benefit or influence the third party (union members, ZANDER) ZANDER has the able to sue CARLSON directly.

27. When reviewing the allegations of ZANDER's Complaint as true, this Court must

find that ZANDER has a cause of action against CARLSON for legal malpractice due to the attorney-client relationship or alternatively as a third party nonclient.

ARGUMENT

Under Section 2-619

II. The Illinois Public Labor Relations Board does not have exclusive jurisdiction over ZANDER's Complaint allegations.

28. Next Defendants incorrectly state that under 5 ILCS 315/5 the Illinois Public Labor Relations Board has exclusive jurisdiction to hear ZANDER's case because ZANDER's claim is essentially for unfair labor practice, alleging a breach of the union's duty of fair representation and stemming from the collective bargaining act. (See Defendants' Motion to Dismiss, **Exhibit A**, pg. 5-6.) This is not true. ZANDER's case is not for an alleged breach of the FOP's duty of fair representation, it is for the breach of the standard of care by CARLSON, and subsequently the FOP must be vicariously liable for these actions.

29. The Illinois Public Labor Relations Act, in pertinent part states, "It is the purpose of this Act to regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements." See 5 ILCS 315/2.

30. As previously defined, collective bargaining does include termination procedures. Similarly, the Illinois Public Labor Relations Act's purpose does not exclusively regulate termination proceedings nor legal malpractice causes of action against an attorney that was handling the termination proceedings.

31. Defendants cite to *Foley v. American Federation of State, County, and Mun. Employees, Council 31, Local No. 2258*, 199 Ill.App.3d 6 (1st Dist., 1990), claiming that the Public Labor Relations Act establishes that charges of unfair labor practice are within the Illinois Labor Relations Boards' exclusive jurisdiction. (See Defendants' Motion to Dismiss, **Exhibit A**, pg. 6.) *Foley v. American Federation of State, County, and Mun. Employees, Council 31, Local No. 2258, supra,* is not applicable to ZANDER's case because ZANDER's case does not involve breach of duty of fair representation by the union this is a state law legal malpractice action against the attorney, CARLSON, who failed to properly advise and represent ZANDER during termination proceedings.

32. Defendants state that the Illinois Labor Relations Board has the exclusive jurisdiction to determine whether a public employee union, such as the Labor Council, breached its duty of fair representation. (See Defendants' Motion to Dismiss, **Exhibit A**, pg. 6.) This is not the case with ZANDER. ZANDER is not suing a public employee union based on a breach of duty of fair representation. ZANDER's cause of action against the FOP is vicarious liability. (See Complaint, Count II).

33. Accordingly, this Court must find that this Court has proper jurisdiction to hear ZANDER's state claims for legal malpractice and vicarious liability.

CONCLUSION

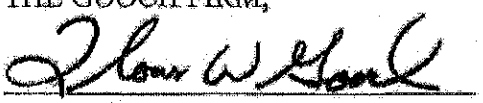
All factual allegations in ZANDER's Complaint must be taken as true when this Court makes a determination whether ZANDER has a proper cause of action against CARLSON. When doing so, this Court will find that ZANDER does. After review of the factual allegations in ZANDER's Complaint this Court must find that there was a direct attorney-client relationship

between ZANDER and CARLSON which gives rise to the legal malpractice claims. Alternatively, if this Court believes that the attorney-client relationship is between CARLSON and the FOP, then as a third party nonclient, ZANDER has rights to sue CARLSON because the attorney-client relationship between FOP and CARLSON was to directly benefit ZANDER.

This Court must find that because ZANDER's claims are not based on collective bargaining proceedings nor unfair labor practices, that the Illinois Labor Relations Board does not have exclusive jurisdiction over the proceedings Instead, ZANDER's claim for vicarious liability are proper before this Court. However, if this Honorable Court grants, Defendants' Motion to Dismiss, ZANDER prays for a reasonable amount of time to file a First Amended Complaint.

WHEREFORE, your Plaintiff RUSSELL ZANDER prays that this Honorable Court denies Defendants', ROY CARLSON, ESQ and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL's, Motion to Dismiss and for any other relief this Court deems equitable and just. If this Honorable Court grants Defendants' Motion to Dismiss, Plaintiff prays for a reasonable amount of time to file a First Amended Complaint.

Respectfully submitted,
RUSSELL ZANDER, by his attorneys,
THE GOOCH FIRM,



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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

RUSSELL ZANDER, Plaintiff, v. ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON, Defendants.	)	No. 2017 L 063098

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

NOW COME the Defendants, ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON, by their attorneys, PRETZEL & STOUFFER, CHARTERED, and move to dismiss the plaintiffs' Complaint with prejudice pursuant to 735 ILCS 5/2-619.1 of the Code of Civil Procedure. In support of this motion, the Defendants submit the attached exhibits and state as follows:

INTRODUCTION

Plaintiff, Russell Zander, has filed a two-count complaint against the defendants, the Illinois Fraternal Order of Police Labor Council ("Labor Council") and its employee, Roy Carlson, alleging legal malpractice (Count I) and seeking to impose vicarious liability upon the Labor Council for Carlson's conduct in connection his activities on plaintiff's behalf during grievance proceedings with plaintiff's former employer, the Village of Fox Lake ("the Village"), proceedings which ultimately resulted in the Village terminating the plaintiff's employment as a police officer.

As set forth below, the Court should dismiss plaintiff's Complaint for two reasons. First, the claim for legal malpractice against Carlson should be dismissed under Section 2-615 because

United States Supreme Court precedent establishes that union agents or employees like Carlson cannot be held personally liable for actions they undertake in the course of their employment in furtherance of collective bargaining rights—such as the grievance proceedings alleged by the plaintiff here. Second, the plaintiff's claims against Carlson and the Labor Council are founded on allegations that the Labor Council breached its duty of fair representation toward the plaintiff. Under Illinois law, all such claims are within the exclusive jurisdiction of the Illinois Labor Relations Board and as such must be dismissed under Section 2-619(a)(1) of the Code of Civil Procedure for lack of jurisdiction.

PERTINENT FACTS

At all relevant times in this case, defendant Roy Carlson ("Carlson") was employed by a union, the Labor Council as an attorney. (Complaint, attached hereto as Exhibit A, ¶¶3, 5, 11.) The Labor Council is a "labor organization" established pursuant to Section 2(i) of the Illinois Public Labor Relations Act, 5 ILCS 315/2(i)), and represents thousands of public safety and criminal justice employees through the State who have collective bargaining rights under the Act. (Affidavit of Richard Stomper, attached hereto as Exhibit B, ¶3.)

At all times alleged in the Complaint, the Labor Council was the exclusive bargaining representative for the Village of Fox Lake Police Department and was recognized as such by the Illinois Labor Relations Board. The Labor Council represented police officers of the Village, including the plaintiff, by its employee Carlson throughout the grievance process alleged in the Complaint pursuant to a collective bargaining agreement between the Village and the Labor Council. (Exhibit A, ¶¶9-10; Exhibit B, ¶¶3 – 6, and Exhibits A and B thereto.) Plaintiff alleges that Carlson and the Labor Council were negligent in various ways throughout plaintiff's grievance process with the Village and the resulting arbitration process and termination proceedings. (Exhibit A, ¶¶15-31.)

APPLICABLE LAW & ARGUMENT

I. Section 2-615 Argument for Dismissal: Plaintiff's Claims Against Carlson for Legal Malpractice Are Barred as a Matter of Law.

As an initial matter, the plaintiff's attempt to state a claim for legal malpractice against Carlson is contrary to law and must be dismissed. The United States Supreme Court has previously determined that union officers and employees are immune from personal liability for acts undertaken in their capacity as agents for the union, and Illinois courts have looked to federal decisions in interpreting the Illinois Public Labor Relations Act ("IPLRA"), which governs the case before this court. *Chief Judge of the Illinois Sixteenth Judicial Circuit v. Illinois State Labor Relations Board*, 178 Ill.2d 333, 338 (1997) (holding that decisions of the NLRB and Federal courts guide Illinois courts in interpreting the IPLRA).

In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), the Supreme Court held that union officers and employees are immune from personal liability for acts undertaken as union representatives, on behalf of the union. This has become known as the *Atkinson* Rule. Courts across the country have subsequently applied the *Atkinson* Rule to bar legal malpractice claims brought by union members against union attorneys for acts performed in the collective bargaining process. For example, in *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), the court held that the *Atkinson* Rule applies to a union's in-house counsel, as well as to its retained outside counsel:

> When the union uses its regular outside counsel, the services are sometimes covered under an overall retainer agreement, and there is no additional fee or charge to the union for the law firm's handling of the matter. In any event, whether it be house counsel or outside union counsel, where the union is providing the services, the attorney is hired and paid by the union to act for it in the collective bargaining process. *Peterson*, 771 F.2d at 1258.

Courts across the country have repeatedly looked to *Atkinson* and *Peterson* to hold that an attorney hired by a union to defend a union member covered under a collective bargaining agreement is an agent of the union and is therefore immune from suit. *Montplaisir v. Leighton*, 875 F.2d 1, 5-7 (1st Cir. 1989); *Best v. Rome*, 858 F. Supp. 271, 274 (D. Mass. 1994); *Mamorella v. Derkasch*, 276 A.D.2d 152, 716 N.Y.S.2d 211, 213 (App. Div. 2000); *Sellers v. Doe*, 99 Ohio App. 3d 249, 650 N.E.2d 485, 487-88 (Ohio Ct. App. 1994); *Collins v. Lefkowitz*, 66 Ohio App. 3d 378, 584 N.E.2d 64, 65 (Ohio Ct. App. 1990) (holding that an attorney who is handling a labor grievance under a collective bargaining agreement has not entered into an attorney-client relationship with the union member). This also holds true in the context of a local government employee where a state public labor relations act (such as the IPLRA) applies. *Weiner v. Beatty*, 121 Nev. 243, 248-250 (2005) (holding that Nevada Employee Management Relations Act immunized lawyers supplied by unions from legal malpractice claims).

The same logic applies to plaintiff's claims against Carlson in this case. Plaintiff alleges that, at all relevant times, Carlson was an agent/employee of plaintiff's union, the Labor Council. (Complaint, ¶¶3, 5, 11). The grievance process alleged in the Complaint was conducted pursuant to the collective bargaining agreement that was in effect at that time between the Labor Council and the Village of Fox Lake. (Exhibit B, ¶4, and Exhibit A thereto.) See, e.g., *Palmer v. Brown*, 2014 U.S. Dist. LEXIS 46698 (April 4, 2014, S.D. Ind.)(holding that allegations that a union employee mishandled collective bargaining grievance process was barred under *Atkinson*).

Illinois courts regularly look to federal decisions in interpreting the Illinois Public Labor Relations Act and follow federal law given the close parallels between the IPLRA and the National Labor Relations Act. *Illinois FOP Labor Council v. Illinois Local Labor Rels. Bd.*, 319 Ill.App.3d 729, 737-38 (1st Dist. 2001), citing *Chief Judge of the Illinois Sixteenth Judicial Circuit*, 178 Ill.2d 333 (1997) and *Rockford Township Highway Dep't v. Illinois State Labor*

Relations Board, 153 Ill.App.3d 863, 875 (2nd 1987). Accordingly, this Court should adopt the rule set forth in *Atkinson* and *Peterson* and hold that Carlson is immunized from plaintiff's legal malpractice claims as a matter of law.

Under the Supreme Court's holding in *Atkinson*, plaintiff's claims against Carlson fail to state a cause of action as a matter of law and should be dismissed with prejudice pursuant to Section 2-615 of the Code of Civil Procedure, as amending the pleadings cannot cure this legal obstacle to the plaintiff pursuing a claim against Carlson for the matters alleged.

II. Section 2-619(a)(1) Argument for Dismissal: The Illinois Labor Relations Board has Exclusive Jurisdiction Over the Matters Alleged.

Section 2-619 of the Code of Civil Procedure provides for the dismissal of an action where "the claim asserted against the defendant is barred by [an] affirmative matter avoiding the legal effect or defeating the claim." 735 ILCS 5/2-619. An affirmative matter is something in the nature of a defense that negates the alleged cause of action completely or refutes critical conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *Downers Grove Assoc. v Red Robin Intern., Inc.*, 151 Ill.App.3d 310, 315-16 (1st Dist. 1986). An affirmative matter asserted by a defendant pursuant to Section 2-619 may be supported by material evidence or an affidavit. *Nichol v. Strass*, 192 Ill.2d 233, 247 (2000). Additionally, where the existence of a document attached to a pleading or a motion is not disputed, the Court may properly consider that document for the purposes of a Section 2-619 motion. *Christmas v. Hughes*, 187 Ill.App.3d 453, 455 (1st Dist. 1989).

As set forth more fully below, plaintiff's Complaint is subject to dismissal under Section 2-619(a)(1), because plaintiff's claim is essentially one for an unfair labor practice (namely, an alleged breach of the union's duty of fair representation) arising from a dispute concerning a collective bargaining agreement. As such, the Illinois Labor Relations Board has exclusive

jurisdiction over this matter. 5 ILCS 315/5. Plaintiffs' claim is not properly before this Court and should be dismissed because the Illinois Labor Relations Board has exclusive jurisdiction over this claim.

This case arises from the collective bargaining agreement between the Labor Council and the Village of Fox Lake. (Exhibit B, ¶5 and Exhibit A thereto). As a result, it is governed by the Illinois Public Labor Relations Act. 5 ILCS 315/1, *et seq.*

The Public Labor Relations Act and case law clearly establish that a charge of an unfair labor practice is within the ***exclusive jurisdiction*** of the Illinois Labor Relations Board. 5 ILCS 315/5; *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 (4th Dist. 1998). The Appellate Court has recognized that the Board must maintain exclusive jurisdiction over claims, like Plaintiff's, which relate to alleged unfair labor practices because "inconsistent judgments and forum shopping will be inevitable if we pronounce a rule whereby breach of the duty of fair representation claims can be maintained in the circuit courts, as well as before the Board. Furthermore, our already overburdened court system would face increased amounts of unnecessary litigation." *Foley*, 199 Ill.App.3d at 11.

A claim against a union (or its lawyers) for committing malpractice during a grievance process pursuant to a collective bargaining agreement by definition constitutes an unfair labor practice in the nature of a breach of the union's duty of fair representation. *Montplaisir*, 875 F.2d at 1-4; *Arnold v. Air Midwest*, 1994 U.S. Dist. LEXIS 7628 at *19-20 (May 24, 1994 D. Kansas). The Illinois Labor Relations Board, however, has the exclusive jurisdiction to determine whether a public employee union, such as the Labor Council, breached its duty of fair representation. In *Foley*, the Appellate Court explained that, under the Illinois Public Labor Relations Act, unions have the duty to fairly represent the interests of all of their members. 199

Ill.App.3d 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; Cessna v City of Danville,* 296 Ill.App.3d 156 (4th Dist. 1998) (holding that Section 5 of the Public Labor Relations Act confers the Labor Relations Board with exclusive jurisdiction over any claims based on a breach of the duty of fair representation, even though not explicitly styled as such, and that no provision of the Act allows employees to file suit in the circuit court based on an alleged breach of the duty of fair representation.)

Pursuant to this settled precedent, the Court lacks jurisdiction over the plaintiff's claims against the Labor Council and Carlson. Plaintiff's allegations and the affidavit of Richard Stomper confirm that plaintiff's claims arise from activities undertaken by the union and its authorized representative and occurring pursuant to the collective bargaining process. As such, plaintiff's allegations constitute a claim for breach of the duty of fair representation, over which the Labor Relations Board has exclusive jurisdiction. Plaintiff's Complaint should be dismissed as to both defendants for this additional reason pursuant to Section 2-619(a)(1) of the Code of Civil Procedure.

WHEREFORE, Defendants ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON request that this Court enter an order dismissing Plaintiff's Complaint with prejudice, plus costs.

Respectfully submitted,

PRETZEL & STOUFFER, CHARTERED

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IN THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
3RD DISTRICT LAW DIVISION – ROLLING MEADOWS

RUSSELL ZANDER, Plaintiff, v. ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants.	)	No. _____ Plaintiff hereby demands a trial by jury of twelve (12) persons

COMPLAINT AT LAW

COUNT I
(Legal Malpractice)

NOW COMES, your Plaintiff, RUSSELL ZANDER, (herein also referred to as "ZANDER"), by and through his attorneys, THE GOOCH FIRM, and as and for his Complaint against ROY CARLSON, ESQ., (hereinafter also referred to as "CARLSON") and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL (hereinafter also referred to as "FOP") states the following:

1. That your Plaintiff, RUSSELL ZANDER is a resident of Lake County, Illinois and was such a resident at all times relevant to this Complaint. ZANDER was a police officer employed by the Village of Fox Lake Illinois as a patrol officer for many years, until at some point during 2014 when he was placed on administrative leave, and his employment thereafter terminated in 2016 following an arbitration hearing.

2. Defendant ROY CARLSON, ESQ., is an attorney licensed to practice law in the State of Illinois. CARLSON was admitted to the practice of law on November 6, 2014 and at the time of the actions complained of herein had been practicing law for less than two (2) years.

3. The ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL ("FOP") is a labor union, organized primarily to provide job security and other union benefits to law enforcement agents and employees of various villages, cities, and other various governmental units in and around the State of Illinois. The FOP transacts its business in all of the collar counties around Chicago and in Cook County, Illinois. Its principle place of business is located in Western Springs, Cook County, Illinois and is also the place of business of Defendant CARLSON.

4. Venue is therefore claimed proper in Cook County, Illinois, pursuant to statute.

5. At all relevant times herein, CARLSON was an employee of FOP. However, FOP is not a law firm and is not registered to practice law in the State of Illinois.

6. Nevertheless, CARLSON has been held out to the members of the FOP as the FOP's attorney who would represent all members in labor disputes or grievances with the various employers of the police officers who were members of the FOP.

7. That on or about December 5, 2014 your Plaintiff, ZANDER had contact with an arrestee in the Fox Lake Police Station at a time when ZANDER was functioning as the officer in charge of the patrol shift. The arrestee had been arrested for public intoxication and was disruptive and disorderly in his behavior at the time.

8. After various interrogations, the Village of Fox Lake brought formal charges against ZANDER for his alleged behavior during the arrest of the aforesaid arrestee, and then went back in time imagining other wrongful conduct of ZANDER and dredged four different incidences from assignments of ZANDER which suddenly became disciplinary complaints.

9. ZANDER, after being notified of the proceedings, immediately notified FOP seeking legal representation.

10. ZANDER, although being initially assigned an experienced attorney, was subsequently assigned Defendant CARLSON to represent him. At the time, ZANDER was informed by more than one employee of FOP that Defendant CARLSON handled all grievances and termination proceedings on behalf of its members, and was a highly competent attorney. The aforesaid representations were false and materially false. In fact, as aforesaid, CARLSON had practiced law for less than two years, and was hardly experienced in the various procedures available to a police officer facing charges by his or her employer, and facing potential termination.

11. ZANDER was given no input into the selection of an attorney to represent him but rather was assigned CARLSON, who was an employee of FOP, as his attorney.

12. Nevertheless, the somewhat unusual method of requiring a person to utilize a particular attorney without allowing any input, an attorney client relationship was formed between ZANDER and CARLSON, which gives rise to this Complaint. There was no formal retainer agreement executed between ZANDER and CARLSON, rather, what happened was in fact a "cramdown" by FOP informing ZANDER if he wanted an attorney (which his union dues guaranteed him such an attorney) he would use CARLSON, and based on his acquiescence, forced or otherwise, ZANDER and CARLSON created an attorney-client relationship.

13. That by virtue of that attorney-client relationship, CARLSON and the FOP owed ZANDER certain duties, commonly referred to as the standard of care, which required CARLSON to comport his behavior to the acts and actions of a reasonably well qualified attorney practicing law in the same geographical area as CARLSON.

14. FOP, by injecting itself into the practice of law, should be held to the same standard of conduct as CARLSON, and certainly as alleged in a separate count, is vicariously liable for the actions of CARLSON.

15. In accepting the representation of ZANDER in this matter, neither CARLSON nor FOP restricted the scope of his or its representation of ZANDER, agreeing to handle the entire grievance and termination proceedings on behalf of ZANDER with the Village of Fox Lake. As aforesaid, during the initial contacts and interviews with Fox Lake, ZANDER was represented by a well experienced attorney whose last name was Mahoney. Mahoney was accompanied by CARLSON at that initial interview. Thereafter, ZANDER was informed that Mahoney was no longer involved in the matter and Defendant ROY CARLSON, who was well qualified, would be handling the balance of the proceedings.

16. That at the time of the filing of formal charges against ZANDER, ZANDER was entitled to a formal hearing before the Fox Lake Police Commission, which had authority to discipline ZANDER in any number of ways. Routinely police officers are involved in the operation of the local police commission, and routinely the police commission is made up of a number of local residents, who by oath agree to be fair and impartial in their decision-making process.

17. On information and belief, over the years many police officers have passed through the Fox Lake Police Commission (which is a civil service type of commission) with varying results and varying discipline, including absolute acquittals.

18. Under the law, following a police commission decision, a Respondent appearing before it has the rights of appeal to a Circuit Court through the Administrative Review Act, and can bring various causes of action allowed by law in both State and Federal Court based on the behavior of the police commission.

19. Additionally, upon a review of the police commission action by the village board, and a legislative action by that village board terminating the employment of a police officer, the

terminated officer has further legal rights in the Circuit Court of Lake County Illinois, as well as the Appellate and Supreme Courts of the state.

20. Plaintiff maintains and alleges on information and belief, that at this stage of the proceeding, Defendant CARLSON had never conducted a full hearing before the Fox Lake police commission or before any other police commission, as the primary attorney responsible for the hearing without assistance of another more experienced attorney.

21. In spite of the obvious benefits to proceeding before the civil service police commission of Fox Lake, CARLSON induced ZANDER to waive that right and agree to an arbitration in front of a single arbitrator, which would be binding on ZANDER, thereby cutting off any rights of review or appeal by the Circuit Court or the courts of review of the State of Illinois.

22. The behavior of ZANDER was of a minor nature. The entire disciplinary matter which was started by the Chief of Police of Fox Lake was based on his failure to report the misconduct of another police officer to his superiors in the administration of the police department. After creating that charge, the Police Chief then began looking for other charges that had never been filed against ZANDER, involving conduct that had never risen to the form of a complaint by any member of the public, and created additional charges against ZANDER based on his behavior while assigned to a local high school as a "school resource officer." The Police Chief then, having created those charges, began the disciplinary proceeding.

23. As aforesaid, CARLSON had induced ZANDER to agree to a sole arbitrator and a binding arbitration, which from the outset was predetermined to result in ZANDER's termination of employment. In fact, the arbitrator, in his 72-page arbitration award, found that it is improper in the circumstance of a police officer to allow an arbitrator to substitute his judgment on behalf of a Chief of Police, and made that specific finding in his aforesaid findings and Order.

24. At no time had CARLSON, if he even knew of the case law, advised ZANDER that there was common law in the State of Illinois indicating that an arbitrator was justified in stating that he would not overrule the decision of a Police Chief due to the nature of police work, during an arbitration hearing in the State of Illinois. Had ZANDER been advised of and known that fact, together with other facts learned subsequently, ZANDER never would have agreed to substitute and arbitration for a hearing before the local police commission.

25. Nevertheless, the matter proceeded through the arbitration process. CARLSON took little or no depositions or other discovery from numerous witnesses that had been created by the Chief of Police to testify against ZANDER, involving not only the primary incident, which was the arrest by other police officers of a person for public intoxication and difficulties they had with that person in the city jail. As aforesaid that arbitration expanded to then include four created incidents that had never been disciplinary matters or incidents complained of between ZANDER and students and faculty at the Gregg Community High school in 2014.

26. Incredible amounts of time were spent creating these four additional incidents to bolster the charge against ZANDER of failing to report an incident to his superiors. CARLSON took no active role in attempting to minimize those incidents or to interview, interrogate, and/or depose the parties involved.

27. Noteworthy is the fact that prior to the December 5, 2014 encounter, ZANDER had never been the subject of any disciplinary proceeding. Nevertheless, the Police Chief determined that the only suitable punishment by the time of the arbitration hearing would be the termination of ZANDER's employment.

28. At this chronological time, the Village of Fox Lake and the Fox Lake Police Department were under severe public scrutiny and criticism. This was due to the staged shooting of a Fox

Lake Police Department Lieutenant who had apparently been stealing from the various funds of the Fox Lake Police Department, and when confronted, attempted to stage his shooting which did result in his death, although the matter was found to be a suicide and not an attack by others as the decedent attempted to create. Therefore, obviously, the Village of Fox Lake and the Fox Lake Police Department wished to demonstrate to the public that they would quickly and severely discipline police officers. Unfortunately, ZANDER was caught up in the situation locally at the time, and in essence became a scapegoat, losing his employment permanently following an arbitration that from the beginning was designed to favor the Chief of Police and the Chief's recommendations.

29. Unfortunately, due to the nature of the arbitration, ZANDER had no right to appeal whatsoever.

30. In fact, before the police commission and represented by a competent attorney, in all probability ZANDER would have received, at worst, a much lesser disciplinary finding which would not have resulted in the permanent loss of his employment as a police officer, and in all likelihood the possibility of ever becoming involved in police work ever again.

31. In their representation of Plaintiff RUSSELL ZANDER, the Defendants ROY CARLSON, ESQ. and the Illinois Fraternal Order of Police Labor Council ("FOP") were negligent and failed to exercise a reasonable degree of care and skill, and otherwise breached the standard of care owed ZANGER in one or more of the following ways:

a) Failed to recommend to ZANDER that he should seek review by the police commission of the Village of Fox Lake;

b) Failed to completely investigate and discover the extend and details of the charges brought against ZANDER;

c) Failed to advised ZANDER they had not done a thorough and complete investigation and evaluation of the charges being brought against ZANDER;

d) Because they had not completed a thorough, complete investigation and evaluation of all possible defenses as well as the prosecutions factual basis, the Defendants were unable to properly inform ZANDER as to what proceedings would be best for ZANDER, and the methodology of those proceedings;

e) Failed to properly conduct discovery, including the interviews of all witnesses, and particularly the interviews of the students and faculty involved in the contrived charges created by the then Chief of Police to add "muscle" to the primary charge against ZANDER in order to obtain his termination;

f) Failed to retain experts, businesses, or individuals outside of the FOP for information or suggestions on how to better assist ZANDER with regard to the charges pending against him;

g) Failed to obtain competent, experienced counsel and representation to handle what was a very complicated and extensive arbitration hearing lasting two days, with a very experienced Village Prosecutor representing the Chief of Police and the Village of Fox Lake as the employer of ZANDER;

h) Failed to recognize that the treatment of ZANDER in the investigative stage through the use of a private detective agency and through other actions of the Chief of Police may have well violated the civil rights of ZANDER and to research and recommend the filing of litigation in Federal Court for redress of those wrongs;

i) Failed to properly prepare for testimony at the arbitration hearing, including a demand for the appearance of all persons executing various affidavits and other documents

which were to be submitted into evidence as a hearsay exception in order to cross examine the drafters of those documents as opposed to allowing the documents to be admitted;

j) Failed to properly subpoena and present witnesses to testify on behalf of ZANDER at the proceeding;

k) Failed to properly prepare a closing brief with appropriate argument for the defense of ZANDER, instead submitted what could best be described as a last minute 11-page brief failing to discuss the evidence properly or the common law of the State of Illinois, which might well have assisted in a fair resolution of the matter;

l) Failed to properly organize and argue that if ZANDER was guilty of any of what could be construed as minor offenses, that a period of probation or supervision was more appropriate than total termination;

m) Routinely and regularly advised ZANDER not to accept offers of settlement made by the Chief of Police and the Village of Fox Lake which would have resulted with ZANDER, in a relatively short period of time, being able to return to work as a police officer in the Village of Fox Lake thereby causing a substantial loss to ZANDER. In truth and in fact, rather than advising ZANDER not to accept the offers their advice should have been directly opposite to that if in fact they felt ZANDER had any potential liability under the charges brought.

n) Was otherwise negligent in their representation of ZANDER.

32. Had the matter been properly handled it would have proceeded before the police commission of the Village of Fox Lake who would have found, based on the evidence and existing case law as well as the reputation of ZANDER, that any penalty was to be inflicted that penalty would have been considerably less than termination of employment forever which in

essence is a "death sentence" for police officers in seeking further employment in another police agency or returning to his duties as a patrol officer in the Village of Fox Lake.

33. As a direct result of the wrongful conduct of the Defendant CARLSON, ZANDER did in fact lose his employment and is unlikely to ever obtain employment as a police officer again. ZANDER, at the time of his loss of employment was earning in excess of $50,000 a year and had at least 20 years of additional service before retirement with a pension. That loss of income, over a 20-year period, easily exceeds the sum of $1,000,000 together with a life-long pension in an approximate amount of 75% of his last 4 years of salary before employment which easily could consist of additional 7-figure sums of money but the damages suffered even exceed the loss of salary and employment benefits as the job guarantees certain other benefits to ZANDER including health insurance which, in this day and age, easily has a value of $15,000 per year through the length of his employment.

34. Therefore, the total damages suffered by ZANDER over the coming years and without reduction to present day value are well into the 7-figures; none of which would have been incurred had CARLSON and the FOP properly handled the disciplinary matters brought against ZANDER to include recommendations to ZANDER to accept various offers that were tendered by the Village of Fox Lake.

WHEREFORE your Plaintiff, RUSSELL ZANDER, prays for judgment on such verdicts as a jury of twelve (12) shall determine in his favor and against the Defendants in an amount to exceed the jurisdictional minimums of this Court plus interest, costs of suit and all other relief this Honorable Court deems just and proper.

COUNT II

(Negligence and Vicarious Liability against the
Illinois Fraternal Order of Police Labor Counsel "FOP")

35. Plaintiff incorporates Paragraphs 1 through 34 of Count I as and for Paragraphs 1 – 34 of this Count II, as though fully set forth herein and adopted by reference hereto.

36. As aforestated, ROY CARLSON, ESQ., was a licensed attorney in the State of Illinois, and was so licensed and employed by the Illinois Fraternal Order of Police Labor Council ("FOP") during all times relative to this Complaint.

37. In the course of Defendant CARLSON's and Defendant FOP's representation of ZANDER in this matter, they obtained knowledge of Plaintiff's background history and all facts pertaining to the pending matter. The business discussions and involvement by CARLSON with the FOP began shortly after December 5, 2014 and occurred frequently when started.

38. That the Illinois Fraternal Order of Police Labor Council has no right or authority to practice law in the State of Illinois, nor does it have the right to employ an attorney to furnish legal services under its direction to members of the FOP, controlling what that attorney does through policy manuals and otherwise as created by the FOP.

39. That due to FOP's principle involvement in the disciplinary matters brought against ZANDER and its control of Defendant CARLSON, Defendant FOP assumed the same fiduciary duty to ZANDER that CARLSON had, and breached that duty by the actions set forth in Count I above.

40. Further, as a result of the business relationship between CARLSON and the Illinois Fraternal Order of Police Labor Council, being that FOP held CARLSON out to its members as the "FOP lawyer," then the Illinois Fraternal Order of Police Labor Council (FOP) should be vicariously liable for the acts and actions of CARLSON as described in Count I above.

WHEREFORE, your Plaintiff, RUSSELL ZANDER, requests entry of judgement in his favor and against Defendant, ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, for all damages incurred as a result of the wrongful behavior and actions of Defendant ROY CARLSON.

Respectfully submitted by

THE GOOCH FIRM, on behalf of RUSSELL ZANDER, Plaintiff,

Thomas W. Gooch, III

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#25017

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

RUSSELL ZANDER,	)	
	)	
Plaintiff,	)	
v.	)	No. 2017 L 063098
ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON,	)	
	)	
Defendants.	)	

FILED B - 7
2018 MAR -8 PM 3:30
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

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NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on the 8th day of March, 2018, we have filed with the Clerk of the Circuit Court of Cook County, Illinois, Law Division, the attached:

DEFENDANT'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

PRETZEL & STOUFFER, CHARTERED

By: Matthew J. Egan
Matthew J. Egan

One South Wacker Drive
Suite 2500
Chicago, Illinois 60606-4673
(312)346-1973

PROOF OF SERVICE

I, **the undersigned**, being first duly sworn on oath, deposes and says that this Notice and the attached were served on the parties, as above addressed, by enclosing a copy of same in an envelope addressed to each party, sealing said envelope and depositing same in the United States Mail Chute located at One South Wacker Drive, Chicago, Illinois 60606-4673, on the 8th day of March, 2018.

[X] **Under penalties as provided by law pursuant to 735 ILCS 5/1-109 I certify that the statements set forth herein are true and correct.**

Connie McLean
Signature

Zander v. Illinois FOP Labor Council
2017 L 063098

SERVICE LIST

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#25017

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

RUSSELL ZANDER, Plaintiff, v. ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON, Defendants.	)	No. 2017 L 063098

DEFENDANTS' REPLY IN
SUPPORT OF THEIR MOTION TO DISMISS

NOW COME the Defendants, ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL ("FOP Labor Council") and ROY CARLSON, by their attorneys, PRETZEL & STOUFFER, CHARTERED, and reply as follows to plaintiff's Response to the defendants' Motion to Dismiss:

INTRODUCTION

Plaintiff's Response strains to distinguish the cases cited in the Motion to Dismiss. Specifically, plaintiff contends that his claim is legally distinguishable from the claims the United States Supreme Court addressed in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), and its progeny because (1) plaintiff has alleged the existence of an attorney-client relationship between himself and defendants, and (2) the "grievance and termination proceedings" as described throughout the Complaint did not involve a collective bargaining process.

Plaintiff's arguments are contrary to the allegations of the Complaint itself. They are also refuted by the plain terms of the collective bargaining agreement between his employer and the FOP Labor Council, which accompanied the affidavit of Richard Stomper attached to the Motion

to Dismiss. For these reasons, as more fully set forth below, the Complaint must be dismissed with prejudice.

I. Plaintiff Cannot State a Cause of Action for Legal Malpractice.

Although pleadings are to be liberally construed in considering a motion to dismiss, pleadings are to be construed strictly against the pleader. *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 421 (1981). This Court is not required to reach unreasonable and unwarranted conclusions or to draw unreasonable and unwarranted inferences to sustain the sufficiency of the complaint. As such, "[l]egal conclusions, speculation and conjecture must be ignored by the court." *Butitta v. First Mortgage Corp.*, 218 Ill.App.3d 12, 15 (1st Dist. 1991). Cases cited by defendants, asserting that plaintiff's underlying employment dispute with the Village of Fox Lake was not a grievance, was unrelated to the provisions of the collective bargaining agreement, and instead constituted "termination proceedings." (Response, pp. 6-11.) This assertion is baseless. The Complaint itself establish that defendants' conduct from which the plaintiff's claims arise related to the grievance process governed by the collective bargaining agreement between the FOP Labor Council and the Village of Fox Lake. See, e.g. Complaint, ¶6 ("CARLSON has been held out to the members of the FOP as the FOP's attorney who would represent all members in labor disputes or grievances..."); ¶10 ("ZANDER was informed by more than one employee of FOP that Defendant CARLSON handled all grievances and termination proceedings..."); ¶15 ("[n]either CARLSON nor FOP restricted the scope of his or its representation of ZANDER, agreeing to handle the entire grievance and termination proceedings on behalf of ZANDER with the Village of Fox Lake."). As these allegations are construed strictly against plaintiff, his argument that this case does not deal with collective bargaining must be rejected by this Court.

In addition to conflicting with his pleadings, plaintiff's arguments are nothing more than a request for this Court "to draw unreasonable and unwarranted inferences to sustain the sufficiency of the complaint," which is expressly forbidden. *Butitta*, 218 Ill.App.3d at 15. Indeed, plaintiff himself alleges that he waived his right to proceed before the Village of Fox Lake's civil service police commission and instead agreed to an arbitration. Complaint, ¶¶21, 23.

The collective bargaining agreement between the Village of Fox Lake and the FOP Labor Council confirms that such a waiver can only occur pursuant to the Collective Bargaining Agreement: "In the event an officer is disciplined and/or recommended for discipline or termination by the Chief of Police, and the officer elects under the provisions of this Agreement to appeal the discipline and/or recommended discipline or termination through the grievance-arbitration procedure rather than appear before the Board of Police and Fire Commissioners (the "Board"), said election shall constitute a waiver of the right to any other avenue of appeal of the discipline and/or recommended discipline or termination, including the right to appear before the Board." (Affidavit of Richard Stomper, Ex. B thereto, Article XX.)

Plaintiff also attempts to distinguish *Atkinson* and its progeny by asserting that his claim arose out of an attorney-client relationship between him and defendant Carlson. (Response, p. 6-11.) Plaintiff argues that, because he has alleged the existence of such a relationship, the Court must accept the allegation as true.

This argument, however, was explicitly rejected by those cases cited by Plaintiff in his Response. See, e.g. *Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985)("We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an 'attorney-client' relationship in the ordinary sense with the particular union member who is asserting the underlying grievance."); *Niezbecki v. Eisner & Hubbard*, P.C., 717 N.Y.S.2d 815, 821 (N.Y.Civ.Ct. 1999)("While the union may

provide legal services by employing in-house counsel or hiring outside counsel for a specific proceeding, no attorney-client relationship between counsel and members results.")

Moreover, as noted above, this Court should not accept as true "[l]egal conclusions, speculation and conjecture." *Butitta*, 218 Ill.App.3d at 15. In particular, Illinois courts will not accept the existence of an attorney-client relationship where it contradicts the underlying facts. *Torres v. Divis*, 144 Ill.App.3d 958, 963 (2nd Dist. 1986)(rejecting as conclusory an allegation of attorney-client relationship).

The attorney-client relationship is a voluntary, contractual relationship that requires the consent of both the attorney and client. *In re Chicago Flood Litigation*, 289 Ill. App. 3d 937, 941 (1st Dist. 1997). In the present case, plaintiff himself alleges that Carlson was an employee of the FOP Labor Council, which is a labor union, he was given no input as to the selection of an attorney, and Carlson was "forced" upon plaintiff by means of a "cramdown." (Complaint, ¶¶10-12.) As such, the factual allegations of the Complaint do not suffice to set forth the existence of an attorney-client relationship between Carlson and the plaintiff individually and apart from plaintiff's membership in the union. Accordingly, the Complaint does not adequately allege the existence of an attorney-client relationship. *Peterson*, 771 F.2d at 1258.

Instead, the plaintiff's allegations make clear only that Carlson—an employee of the FOP Labor Council —represented Plaintiff during the course of the grievance proceedings related to the Village of Fox Lake's efforts to discipline plaintiff. (Complaint, ¶¶15-29.) Plaintiff further alleges that Carlson and his employer, the FOP Labor Council, were negligent in the manner that they represented the plaintiff during the course of these proceedings. (Complaint, ¶31.) Under *Atkinson* and the other cases cited in the Motion to Dismiss, plaintiff cannot state a claim for legal malpractice against either of the defendants. This Court should therefore dismiss the Complaint with prejudice for failure to state a claim.

II. Dismissal is Also Appropriate Because the Illinois Labor Relations Board has Exclusive Jurisdiction Over the Matters Alleged.

Plaintiff's Complaint is also subject to dismissal under Section 2-619(a)(1), because the claim is essentially one for an unfair labor practice (namely, an alleged breach of the union's duty of fair representation) concerning "grievance and termination proceedings" which arose from a collective bargaining agreement. As such, the Illinois Labor Relations Board has ***exclusive jurisdiction*** over this matter. 5 ILCS 315/5. *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 (4th Dist. 1998). Plaintiff's claim is not properly before this Court and should be therefore be dismissed with prejudice for lack of jurisdiction.

This case arises from the collective bargaining agreement between the FOP Labor Council and plaintiff's employer, the Village of Fox Lake. (Affidavit of Richard Stomper, ¶5 and Exhibit A thereto). Specifically, as noted above, an individual officer may elect to appeal disciplinary and termination proceedings—which would normally proceed before the Village's Board of Fire and Policy Commissioners—through the grievance-arbitration procedure pursuant to Article XX of the collective bargaining agreement. This is precisely what plaintiff himself alleges here. (Complaint, ¶¶21, 23, 25.) As a result, plaintiff's protestations to the contrary notwithstanding, his claim amounts to a claim against the FOP Labor Council for breach of the duty of fair representation and is therefore governed by the Public Labor Relations Act. 5 ILCS 315/1, *et seq.*

Illinois law is clear that a claim against a union (or its lawyers) for committing malpractice during a grievance process conducted to a collective bargaining agreement constitutes an alleged unfair labor practice, e.g., a breach of the union's duty of fair representation. *Montplaisir*, 875 F.2d at 1-4; *Arnold v. Air Midwest*, 1994 U.S. Dist. LEXIS

7628 at *19-20 (May 24, 1994 D. Kansas). Indeed, even in the *Niezbecki* case (which plaintiff himself cites), the court held that the remedy for a union member pertaining for an attorney's alleged misconduct in arbitration proceedings is to sue the union for breach of the duty of fair representation. 717 N.Y.S.2d at 822

Furthermore, plaintiff did not even attempt to distinguish *Cessna v City of Danville,* 296 Ill.App.3d 156 (4th Dist. 1998), which held that Section 5 of the Public Labor Relations Act confers the Labor Relations Board with exclusive jurisdiction over any claims based on a breach of the duty of fair representation, even though such claims are not explicitly styled as such, and that no provision of the Act allows employees to file suit in the circuit court based on alleged conduct that would constitute a breach of the duty of fair representation.

In light of the well-settled precedent both within and without Illinois, the Court lacks jurisdiction over plaintiff's claim against the FOP Labor Council and Carlson. The record establishes that the allegations forming the basis of the Complaint arise from activities undertaken by the union and its authorized representative which occurred pursuant to the collective bargaining process. As such, as the Appellate Court in *Cessna* recognized under similar circumstances, plaintiff's allegations constitute a claim for breach of the duty of fair representation regardless of his attempts to style it as something else. As a result, the Labor Relations Board has exclusive jurisdiction over this matter. Plaintiff's Complaint should therefore be dismissed as to both defendants for this additional reason pursuant to Section 2-619(a)(1) of the Code of Civil Procedure.

WHEREFORE, for the reasons set forth above and in their previously filed Motion to Dismiss, Defendants ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON request that this Court enter an order dismissing Plaintiff's Complaint with prejudice, plus costs.

Respectfully submitted,

PRETZEL & STOUFFER, CHARTERED

By: _____
Matthew J. Egan

Matthew J. Egan
Brendan J. Nelligan
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Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Zander

v.

Carlson, et al

No. 2017 L 63098

4:360

ORDER

This matter coming before the Court for hearing on Defendants Motions to Dismiss the Complaint, the Court being fully advised following oral argument it is hereby ORDERED

(1) the Court takes the motion under advisement;

(2) matter is continued to April 30, 2018 at 9:00 a.m. for ruling

ENTERED
JUDGE MARTIN S. AGRAN - 1630
MAR 30 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTERED:

Dated: ,

Attorney No.: 25017
Name: Pretzel / B. Nelligan
Atty. for: Carlson & FOP
Address: 15. Wacker #2500
City/State/Zip: Chicago IL 60606
Telephone: 312-346-1973

Judge 1630
Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ZANDER

v.

CARLSON & IFOP LABOR COUNCIL

No. 2017 L 003098

4271
8004

ORDER

This matter coming before the Court for ruling on Defendants' Motion to Dismiss, the Court being fully advised following oral argument, for the reasons set forth in Court and the attached memorandum, it is hereby ORDERED:

(1) Defendant's 2-615 motion is granted with prejudice as to Defendant Carlson;

(2) Defendants' 2-619 (a)(1) motion is granted with prejudice as to Defendant Illinois Fraternal Order of Police Labor Council.

ENTERED
JUDGE MARTIN S. AGRAN - 1630
APR 30 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Attorney No.: 25017
Name: B. Nelligan / Pretzel & Stouffer
Atty. for: Defendants
Address: 1 S. Wacker # 2500
City/State/Zip: Chicago IL 60606
Telephone: 312-346-1973

ENTERED:

Dated:

Judge

Judge's No.

1 of 3

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

IN THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
THIRD DISTRICT LAW DIVISION – ROLLING MEADOWS

RUSSELL ZANDER, Plaintiff, v. ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants.	)	No. 17 L 63098 Plaintiff hereby demands a trial by jury of twelve (12) persons

PLAINTIFF'S MOTION TO RECONSIDER ORDER DATED APRIL 30, 2018

NOW COMES, your Plaintiff, RUSSELL ZANDER (hereinafter referred to as "ZANDER") by and through his attorneys, THE GOOCH FIRM, and as and for his Motion as aforementioned, states to the Court the following:

INTRODUCTION

On April 30, 2018, this Honorable Court entered an Order dismissed Plaintiff's Complaint with prejudice as to both Defendants. (See April 30, 2018 Order attached as **Exhibit A**) The Court found that Defendant CARLSON was immune from suit. When making this ruling, the Court stated that there are no Illinois cases on the issue of immunity, and the Court based its ruling on the case law under *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) and *Carino v. Stefan*, 376 F.3d 156, 160 (3rd Cir.2004). More importantly, this Honorable Court should reconsider its ruling as to the extent of the immunity to the Defendants, based on Defendant CARLSON having malpractice insurance. Respectfully, ZANDER requests that this Honorable Court reconsider its ruling as to the dismissal with prejudice of his Complaint.

STANDARD FOR RECONSIDERATION

1. "In a motion to reconsider, a party should bring before the court newly discovered evidence, changes in the law or errors in the court's prior application of existing law." *Universal Scrap Metals, Inc. v. J. Sandman and Sons, Inc.*, 786 N.E.2d 574, 508 (1st Dist., 2011).

ARGUMENT

1. In this case, ZANDER is requesting this Honorable Court to reconsider its finding that Defendant CARLSON was immune from this legal malpractice suit.
2. The basis for reconsideration is error in the prior application of the existing law.
3. The Court noted that there are no Illinois cases on immunity. Thus this is a matter of first impression and there must be an exception carved when union attorneys can be sued for breaching the standard of care in representing their client, which includes breaching the Supreme Court Rules of Professional Conduct.
4. It is also important to note that when representing a union member, the union attorney owes a fiduciary duty to that particular union employee and thus creating the attorney-client relationship.
5. In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), employees participated in a strike and the company filed a lawsuit for damages against the union and the union members. The complaint alleged that the collective bargaining agreement contained a promise by the union not to strike over any cause which could be the subject of a grievance under other provisions of the contract. The officers and agents of the union

were charged with breach of the collective bargaining contract and tortious interference with contractual relations. *Atkinson v. Sinclair Refining Co.*, *supra*, generally.

6. The Defendants filed a Motion to Dismiss the Complaint alleging that all of the issues in the suit were referable to arbitration under the collective bargaining contract. The Supreme Court held that the national labor policy requires that when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages. *Atkinson v. Sinclair Refining Co.*, *supra*, generally, at 249.

7. *Atkinson, supra,* discussed the three clauses of s 301, "One makes unions suable in the courts of the United States. Another makes unions bound by the acts of their agents according to conventional principles of agency law (cf. s 301(e)). At the same time, however, the remaining clause exempts agents and members from **personal liability** for judgments against the union (apparently even when the union is without assets to pay the judgment)." (Emphasis added) *Atkinson*, *supra,* at 248.

8. In further discussions regarding the third clause, *Atkinson* stated, the legislative history of s 301(b) makes it clear that this third clause was a deeply felt congressional reaction against the Danbury Hatters case and an expression of legislative determination that the aftermath of that decision was not to be permitted to recur. *Id.*

9. The Danbury Hatters case (*Loewe v. Lawlor*, 208 U.S. 274, 28 S.Ct. 301, 52 L.Ed. 488; *Lawlor v. Loewe*, 235 U.S. 522, 35 S.Ct. 170, 59 L.Ed. 341, *Loewe v. Savings Bank of Danbury*, 236 F. 444 (C.A.2d Cir.)), involved an action against union members to recover the employer's losses. The union was not named as a party, nor was judgment entered

against the union itself. Instead a large money judgment was entered against the individual union members. *Id.*, at 248, generally.

10. The purpose of the third clause of s 301 was to be able to sue and recover from the union itself and prevent the Danbury Hatters case from occurring again, where the individual personal judgments against union members caused many union members to lose their homes. *Id.*

11. In comparison, in bankruptcy proceedings, if an attorney has malpractice insurance the malpractice case can be pursued against the attorney, to the extent of the insurance coverage.

12. In *Green v. Welsh*, 956 F.2d 30 (US Ct. App., 1992), the Court allowed the Plaintiff's claim for negligence against the Defendants to proceed. The Plaintiff was able to recover against the Defendants, not personally but to the extent of the liability insurance coverage. (Emphasis added) *Green v. Welsh, supra*, generally.

13. Under the Bankruptcy Code, section 11 U.S.C.A. § 524 (2010) protects a debtor discharged in bankruptcy from personal liability.

14. *Green v. Welsh, supra*, stated that "the relief accorded the debtor by these provisions does not extend to other parties:

> 'Except as provided in subsection (a)(3) of this section, *discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.*' 11 U.S.C. § 524(e) (1988) (emphasis added).

Together, the language of these sections reveals that Congress sought to free the debtor of his personal obligations while ensuring that no one else reaps a similar benefit." *Id.*, 33.

15. *Green v. Welsh, supra,* cited to many cases and Courts for the same principle that a bankruptcy discharge does not bar a suit to recover against the insurer;

"*See, e.g. In re Jet Florida Systems, Inc.,* 883 F.2d 970, 976 (11th Cir.1989) (section 524(e) permits a plaintiff to proceed against the debtor to establish liability as a prerequisite to recover from an insurer);
In re Greenway, 126 B.R. 253, 255 (Bankr.E.D.Tex.1991) (discharge order does not bar continuation of state court action to determine liability of debtor solely as a prerequisite to recovery from debtor's insurance carrier);
In re Peterson, 118 B.R. 801, 804 (Bankr.D.N.M.1990) (injunction provided by §524 does not bar FDIC from establishing the liability of the debtor so as to proceed against bank employee insurer);
In re Traylor, 94 B.R. 292, 293 (Bankr.E.D.N.Y.1989) (discharge does not release debtor's insurer from liability);
In re Lembke, 93 B.R. 701, 702-03 (Bankr.D.N.D.1988) (section 524 injunction permits suit to recover from debtor's insurer);
In re White, 73 B.R. 983, 984-86 (Bankr.D.D.C.1987) (injunction issued pursuant to debtor's discharge does not bar a lawsuit against the debtor that will affect only the assets of the debtor's insurer);
*In re Mann,*58 B.R. 953, 959 (Bankr.W.D.Va.1986) (section 524 does not prohibit tort claimant from maintaining a pending suit against discharged debtor to effectuate recovery under claimant's uninsured motorist coverage).
Some courts have reached the same result by modifying the injunction to permit the tort suit to continue. *See, e.g. In re Walker,* 927 F.2d 1138, 1142-44 (10th Cir.1991) (section 524(e) permits a creditor to bring a direct suit against the debtor where establishment of the debtor's liability is a prerequisite to recovery from a state fund);
In re Dorner, 125 B.R. 198, 202 (Bankr.N.D.Ohio 1991) (modification of section 524 injunction appropriate to enable defendant in tort action to establish debtor's liability for purposes of setoff and apportionment);
In re McGraw, 18 B.R. 140, 143 (Bankr.W.D.Wis.1982) (section 524 injunction can be modified to permit continuation of suit provided that creditors are enjoined from collecting any judgment from debtor)." *Id.*, at 33-34.

16. This must also be applied to a case for a union attorney. Under *Atkinson*, the reasoning for the immunity against union members and agents is to prevent union members and agents from being personally liable on a judgment against them.

17. In this case, as of the date of drafting this instant Motion, CARLSON was reported to have malpractice insurance. Thus, since CARLSON can avoid a personal liability

judgment against him due to the malpractice insurance coverage, the *Atkinson* Rule does not and should not apply.

18. Similarly, under *Green v. Welsh*, *supra*, ZANDER's claim for legal malpractice must be allowed to go forward to the extent that CARLSON's malpractice insurance covers the damages complained of by ZANDER.

19. The malpractice insurance that CARLSON is reported to have thus allows for an exception to the *Atkinson* Rule immunity from personal judgments.

20. This Honorable Court should reconsider the extent of the *Atkinson* Rule immunity for purposes of a personal judgment versus liability by the insurance carrier and find that cases where attorneys that are immune but carry malpractice insurance, can be sued at least to the extent of their malpractice insurance policy limits.

21. In *Carino v. Stefan*, 376 F.3d 156, 160 (3rd Cir. 2004), the Plaintiff brought an action against the union attorney and attorney's employer for legal malpractice in representing her in connection with labor grievance proceeding against her employer. Carino was discharged from her job due to misconduct. She was assigned the Defendants as her attorneys in the arbitration hearings. Carino had certain conditions to settling and agreed to withdraw her grievance if the employer accepted the conditions. Stefan had Carino sign a "grievance release" without explaining what the forms meant. Carino later realized that the forms she signed made no reference to the employer accepting her conditions. Carino filed a legal malpractice complaint against the attorney and firm, and the Court found that the Defendants were immune from suit. See *Carino v. Stefan*, *supra*, generally.

22. An aspect of the *Carino, supra,* case that must be reconsidered is that attorneys must not be treated the same as other union agents because attorneys have separate rules to follow.

23. The *Carino* Court cited to cases that stated, *Montplaisir,* 875 F.2d at 7 ("For purposes of the *Atkinson* principle, attorneys must be treated the same as other union agents.) *Peterson v. Kennedy,* 771 F.2d 1244, 1258 (9th Cir.1985), *cert. denied,* 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986) ("Where, as here, the attorney performs a function in the collective bargaining process that would otherwise be assumed by the union's business agents or representatives, the rationale behind the *Atkinson* rule is squarely applicable.")." (Emphasis added) *Id.*, at 160. This is illogical because as attorneys we are held do a higher professional standard based on the Supreme Court Rules and wiping that away to force a principle to apply, is unreasonable and disregards the Supreme Court Rules for Professional Conduct.

24. When discussing whether lawyers are "a breed apart" *Montplaisir v. Leighton,* 875 F.2d 1 (1st Cir. 1989), state that "the appropriate test for *Atkinson* immunity ought not to be the actor's identity, occupation, or formal position, but rather, the role that he played" ... "It is not much in doubt that, ordinarily, an attorney is the client's "agent" within the traditional legal import of that term." *Id.*, at 6. Even if this Court is to consider that CARLSON was an agent of the FOP, as an agent, CARLSON is still an attorney that must comply with the Supreme Court Rules of Professional Conduct and must be held liable if he breaches that duty to comply.

25. The *Atkinson* Rule has opened the door to allow attorneys to completely disregard the Rules of Professional Conduct and be shielded by immunity.

26. *Ferri v. Ackerman*, 100 S.Ct. 402 (U.S. 1979) compared the immunity of a prosecutor or judge compared to a defense counsel and stated that "the essential office of appointed defense counsel is akin to that of private counsel and unlike that of a prosecutor, judge" and held that "federal law does not now provide immunity for court-appointed counsel in a state malpractice suit brought by his former client." *Id.*, at 205.

27. The appointment of CARLSON to represent ZANDER during his proceedings is more similar to a defense counsel being appointed in a case, rather than a prosecutor, who is a public servant. Under *Ferri*, *supra*, like a defense counselor not having immunity to state legal malpractice claims, CARLSON must not be afforded this immunity.

28. Although not specifically mentioned in this Court's ruling, the issue of ZANDER's rights as a third party, if not as a direct party, to sue the Defendants must also be reconsidered because the attorney-client relationship between the Defendants was for the benefit of ZANDER to represent him in the termination proceedings.

29. The intent of CARLSON representing ZANDER was specifically to benefit the nonclient third-party, ZANDER, and CARLSON should have conformed with the standard of care. (See Complaint, ¶10-13, 15.)

30. *Warren v. Williams*, 313 Ill.App.3d 450 (1st Dist., 2000), a police officer was sued with the village by an arrestee in a civil rights action. After a default judgement was entered against the officer, he brought a claim for legal malpractice against the village attorney. The Circuit Court and the Appellate Court affirmed, that the attorney-client relationship between the village and the attorney created duty of reasonable care on part of the attorney toward the officer. *Warren v. Williams, supra*, generally.

31. The lawyer-client relationship required is not necessarily a relationship between the lawyer and the plaintiff, since non-clients may be third party beneficiaries entitled to sue for malpractice. *Id.*, at 453.

32. In our view, there was an attorney-client relationship between Williams and the Village in the instant case that resulted, when the attorney filed an appearance for the plaintiffs. (internal citations omitted) *Id.*, at 453.

33. The Appellate Court found that even though there was no contract between the officer and the attorney, a duty of reasonable care was nevertheless imposed. *Id.*, at 454.

34. Once the attorney filed his appearance, he was the officer's attorney of record and the case could proceed. *Id.*, at 455.

35. In ZANDER's case, although there was no direct engagement agreement signed between ZANDER and CARLSON, CARLSON owed ZANDER a duty of reasonable care and CARLSON breached this duty.

36. More important the argument that ZANDER did not pay attorney's fees to CARLSON is a fallacy because ZANDER paid union dues, which are used to pay the attorneys.

37. Lastly, this Honorable Court should reconsider its ruling depending on *Foley v. American Federation of State, County, and Mun. Employees, Council 31, Local No. 2258*, 199 Ill.App.3d 6 (1st Dist., 1990), that there is a lack of jurisdiction.

38. The *Foley* case dealt with issues that involved a breach of duty of fair representation by the union. The Court held that a breach of duty of fair representation is an unfair labor practice within the Board's exclusive jurisdiction. *Id.*, at 12. However, the Illinois Public

Labor Relations Act does not exclusively regulate legal malpractice causes of action against an attorney that was handling the termination proceedings.

39. ZANDER's case is distinguishable from *Foley* because the case does not involve a breach of duty of fair representation. ZANDER's case is a state law legal malpractice case.

WHEREFORE, your Plaintiff RUSSELL ZANDER prays that this Honorable Court reconsider the Order from April 30, 2018 that dismissed the case with prejudice and for any other relief this Court deems equitable and just.

Respectfully submitted,
RUSSELL ZANDER, by his attorneys,
THE GOOCH FIRM,

Thomas W. Gooch, III

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Sabina D. Walczyk
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2017-L-063098
CALENDAR: K
CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
LAW DIVISION
CLERK DOROTHY BROWN

Order

(Rev. 02/24/05) CCCH 602

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ZANDER

v.

CARLSON & IFOP Labor Council

No. 2017 L 063098

ORDER

This matter coming before the Court for ruling on Defendants' Motion to Dismiss, the Court being fully advised following oral argument, for the reasons set forth in Court and the attached memorandum, ~~it~~ it is hereby ORDERED:

(1) Defendant's 2-615 motion is granted with prejudice as to Defendant Carlson;

(2) Defendants' 2-619 (a)(1) motion is granted with prejudice as to Defendant Illinois Fraternal Order of Police Labor Council.

Attorney No.: 25017
Name: B Nelligan / Pretzel & Stouffer
Atty. for: Defendants
Address: 1 S. Wacker # 2500
City/State/Zip: Chicago IL 60606
Telephone: 312-346-1973

ENTERED:

Dated:

ENTERED
JUDGE MARTIN S. AGRAN - 1630
APR 30 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge

EXHIBIT
A

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1 of 3

C 227

Zander v Illinois Fraternal Order of Police Labor Council,
2017 L 63098

Defendants Illinois Fraternal Order of Police Labor Council and Roy Carlson's §2-619.1 Motion To Dismiss Plaintiff's Complaint

I. Immunity §2-615

Rockford Township Highway Dep't v. Illinois State Labor Relations Bd., 153 Ill. App. 3d 863, 874-75 (2d Dist. 1987) - As the legislative history of the ILPRA indicates a close parallel between the Illinois act and the National Labor Relations Act, we will follow Federal law in resolving this question.

Burbank v. Illinois State Labor Relations Bd., 128 Ill. 2d 335, 345 (1989) - We deem it appropriate, in light of the close parallel between section 10(a) of the Illinois Public Labor Relations Act (Ill. Rev. Stat. 1985, ch. 48, par. 1610(a)) and section 8(a) of the National Labor Relations Act (NLRA) (29 U.S.C. § 158(a) (1982)), to examine Federal interpretations of the NLRA where those decisions are consistent with the purposes of our Act. Of course, where the legislature has modified the Act, or otherwise departed from the NLRA's statutory scheme, it can be inferred that it intended a different result, and, with respect to those changes, Federal authority may be of limited value.

Atkinson v. Sinclair Refining Co., 370 U.S. 238, 249 (1962) - We have already said in another context that § 301 (b) at least evidences "a congressional intention that the union as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it". This policy cannot be evaded or truncated by the simple device of suing union agents or members, whether in contract or tort, or both, in a separate count or in a separate action for damages for violation of a collective bargaining contract for which damages the union itself is liable.

Carino v. Stefan, 376 F.3d 156, 160 (3rd Cir. 2004) - Our court has recognized that *Atkinson* provides individual union members and officers immunity from suit for union wrongs. And, "with monotonous regularity, other courts of appeals have cited *Atkinson* to foreclose state-law claims, however inventively cloaked, against individuals acting as union representatives within the ambit of the collective bargaining process.

Plaintiff was a police officer for the Village of Fox Lake. Plaintiff alleges in his legal malpractice complaint that Carlson was an employee of FOP and that he was held out to the members of the FOP as the FOP's attorney who would represent all members in labor disputes or grievances with the various employers of the police officers who were members of the FOP. (Cmplt, ¶¶ 6-7). Carlson was assigned to represent Plaintiff in a termination hearing brought by the Village. Plaintiff alleges the union provided him with an inexperienced attorney and that Carlson's inexperience resulted in Plaintiff being terminated.

2 of 3

Relations between the Village and the FPO were governed by the Collective Bargaining Agreement which was in effect at the time. Sec 1.1 of the Collective Bargaining Agreement states in pertinent part that "the Village recognizes the Union as the sole and exclusive collective bargaining representative for all full time commissioned Police Officers in the rank of Sergeant and below. Sec. 1.3 states "The union recognizes its responsibility as bargaining agent and agrees fairly to represent all employees in the bargaining unit, whether or not they are members of the Union." Article V states in pertinent part: "Except as specifically limited by the express provisions of this Agreement, the Village retains all traditional rights to manage and direct the affairs of the Village in all its various aspects and to manage and direct it employees, including but not limited to the following: *** to discipline, suspend and/or discharge non-probationary employees for just cause; ***.

There are no Illinois cases on the issue of immunity. *Atkinson* which is a U.S. Supreme Court case and by which I am bound was an appeal from the 7th Circuit. Relying on *Atkinson* and *Carino*, Defendant Carlson is immune from suit. As such Defendant Carlson's §2-615 Motion To dismiss is granted.

II. Lack of Jurisdiction §2-619(a)(1)

Foley v. American Federation of State, County, & Municipal Employees, etc., 199 Ill. App. 3d 6, 10-11(1st Dist. 1990) - Because the Illinois Public Labor Relations Act and the IELRA were both enacted to provide "a comprehensive regulatory scheme for public sector collective bargaining in Illinois" we find that the Compton policy concerns are equally applicable to the case at bar. Inconsistent judgments and forum shopping will be inevitable if we pronounce a rule whereby breach of the duty of fair representation claims can be maintained in the circuit courts, as well as before the Board. Furthermore, our already overburdened court system would face increased amounts of unnecessary litigation. *** Accordingly, we uphold the circuit court's determination that breach of a duty of fair representation is an unfair labor practice within the Board's exclusive jurisdiction. *Id.* at 12.

This case is about the union's failure to provide the Plaintiff with fair representation. As such, this is an unfair labor practice within the Illinois Labor Relations Board's exclusive jurisdiction. Accordingly, Defendant Illinois Fraternal Order of Police Labor Council's §2-619(a)(9) Motion To dismiss is granted.

3 of 3

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, THIRD DISTRICT

ZANDER
Plaintiff,

v.

CARLSON & FOP
Defendant

No. 17 L 003098

BRIEFING ORDER

This cause coming on for entry of a briefing schedule on the Motion of Movant, Plaintiff Zander for §2-615 Dismissal ____, §2-619 Dismissal ____, §2-1005 Summary Judgment ____, Other X Motion to Reconsider 4/30/2018 Order; the Court being fully advised in the premises;

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Response of Defendant is due on 7/10, 2018.
2. The Reply of Plaintiff is due on 7/24, 2018.
3. No extension of time for a response or reply will be allowed unless good cause is shown and the extension is sought prior to its due date. If you ask for time to file a written response and fail to do so, oral argument will be waived.
4. **Without prior leave of court**, the following page limitations (exclusive of exhibits) will apply:
   a. **15** pages, double spaced, 12 pt. type with one inch margins for any Motion and Memorandum in support (combined) or any Response or Brief by non-movant.
   b. **5** pages, double spaced 12 pt. type with one inch margins for Reply by movant.
   c. **Pages in violation of the page limitations will be disregarded by the Court.**
5. The Court will allow no more than 3 citations in support of any proposition.
6. **Footnotes are discouraged. Any footnote in excess of 10 and any footnote in excess of 5 lines will be disregarded by the Court.**
7. **MOVANT'S DUTY TO THE COURT:**
   a. Without exception, the movant shall provide this Court with a complete set of all courtesy copies on 7/25/18, 2018.
   b. **NOTE** that your motion may be stricken by this Court for failure to provide courtesy copies at the time due.
   c. Courtesy copies are to include the following:
      1) the Motion and supporting memorandum (if any), Response and Reply;
      2) the current Complaint, Answer and any other relevant pleadings or orders;
      3) all exhibits referred to in any pleadings; and
      4) copies of all case law and statutes relied upon, by all parties.
8. Other _____
9. The parties shall appear in Room 204 on 7/31, 2018 at 9:30 AM/PM for oral argument.

ENTERED
JUDGE MARTIN S. AGRAN - 1630

ENTERED: JUN 05 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge 1630 Judge's No.

Attorney No. 25017
Name: Pickel / B. Nellson
Attorney For: Defendants
Address: 1 S. Wacker #2500
City: Chicago IL 60606
Telephone: 312-346-1973

C 230

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

761.078771 (538)

FILED
7/10/2018 3:19 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2017L063098

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

RUSSELL ZANDER,	)	
	)	
Plaintiff,	)	
v.	)	No. 2017 L 063098
ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON,	)	
	)	
Defendants.	)	

NOTICE OF FILING

TO: Thomas W. Gooch, III, 209 South Main Street, Wauconda, IL 60084
gooch@goochfirm.com and office@goochfirm.com

PLEASE TAKE NOTICE that on the 10th day of July, 2018, we have electronically filed with the Clerk of the Circuit Court of Cook County, Illinois, Law Division, the attached:

DEFENDANTS' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER

PRETZEL & STOUFFER, CHARTERED

By: /s/ Brendan J. Nelligan

Firm No.: 25017
One South Wacker Drive, Suite 2500
Chicago, Illinois 60606-4673
312-346-1973 bnelligan@pretzel-stouffer.com

PROOF OF SERVICE

I, **the undersigned**, a non-attorney being first duly sworn on oath, deposes and says that this Notice and the attached were electronically filed and served on the parties, as above addressed, **via e-mail** and by enclosing a copy of same in an envelope addressed to each party, sealing said envelope and depositing same in the United States Mail Chute located at One South Wacker Drive, Chicago, Illinois 60606-4673, on the 10th day of July, 2018.

[X] **Under penalties as provided by law pursuant to 735 ILCS 5/1-109 I certify that the statements set forth herein are true and correct.**

Signature

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

RUSSELL ZANDER,	)	
	)	
Plaintiff,	)	
v.	)	No. 2017 L 063098
	)	
ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON,	)	Hon. Judge Agran
	)	
Defendants.	)	

DEFENDANTS' RESPONSE BRIEF IN
OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER

NOW COME the Defendants, ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL ("FOP Labor Council") and ROY CARLSON, by their attorneys, PRETZEL & STOUFFER, CHARTERED, and for their Response Brief in opposition to plaintiff's Motion to Reconsider the Court's April 30, 2018 Order dismissing Plaintiff's Complaint with prejudice, states as follows:

INTRODUCTION

Plaintiff has filed a Motion to Reconsider the Court's April 30, 2018 Order dismissing with prejudice Plaintiff's Complaint against both Defendants with prejudice. A motion to reconsider is designed to apprise the trial court of newly discovered evidence, a change in the law, or error in the court's earlier application of the law. *Pence v. Northeast Ill. Reg'l Commuter R.R. Corp.*, 398 Ill. App. 3d 13, 16 (1st Dist. 2010). However, "[t]rial courts should not allow litigants to stand mute, lose a motion and then frantically gather material to show that the court erred in its ruling." *Compton v. Country Mutual Life Ins.*, 382 Ill.App.3d 323, 331 (1st Dist. 2008).

In this case, Plaintiff has not pointed to any additional evidence or change in the law, but

merely asserts (among other things) that this Court erred in dismissing the Complaint with prejudice on April 30, 2018. In doing so, Plaintiff raises a new argument for the first time in this Motion to Reconsider, which should be rejected. Moreover, Plaintiff's argument is substantively erroneous, as it simply ignores well-established precedents from the United States Supreme Court, several Courts of Appeals throughout the country, as well as the Illinois Appellate Court. This Court should deny Plaintiff's Motion to Reconsider because this Court was entirely correct in its April 30, 2018 Order which (1) dismissed Plaintiff's claims against Carlson pursuant to the U.S. Supreme Court's ruling in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), and its progeny under 735 ILCS 5/2-615, and (2) dismissed Plaintiff's claim against the FOP Labor Council for lack of jurisdiction under 735 ILCS 5/2-619(a)(1), because the claim is essentially one for an unfair labor practice over which the Illinois Labor Relations Board has exclusive jurisdiction.

ARGUMENT

I. This Court Should Deny Plaintiff's Motion Because It Raises New Legal Theories Not Previously Asserted.

The purpose of a motion to reconsider is to bring to a court's attention: (1) newly discovered evidence; (2) changes in the law; or (3) errors in the court's previous application of existing law. A reconsideration motion is not the place to raise a new legal theory or factual argument, and any legal theories or factual arguments not previously made are considered waived. *State Farm Mut. Auto. Ins. Co. v. Progressive N. Ins. Co.*, 2015 IL App (1st) 140447, ¶68. Because Plaintiff is now raising arguments for the first time in his Motion to Reconsider, they should be considered waived by this Court and the Motion to Reconsider should be denied.

In the Defendants' Motion to Dismiss, they argued that Plaintiff's claims were barred by 735 ILCS 5/2-615 and the *Atkinson* rule set forth the United States Supreme Court, which

foreclosed state law claims against agents of unions for violations of a collective bargaining agreement and held that the union itself was the sole source of recovery for any injuries inflicted by it. Defendants also argued that because Plaintiff's claim arose from the collective bargaining agreement between the FOP Labor Council and Plaintiff's employer, the Village of Fox Lake, the Illinois Labor Relations Board had exclusive jurisdiction over this matter under *Foley v. American Federation of State, County, and Municipal Employees*, 199 Ill.App.3d 6, 12 (1st Dist. 1990), therefore requiring dismissal pursuant to 735 ILCS 5/2-619(a)(1).

In response, Plaintiff argued that the facts of this case were distinguishable from *Atkinson*, 370 U.S. 238, because his case did not arise from a collective bargaining agreement. Response, pp. 7-8. Plaintiff also distinguished another case relied upon by Defendant, *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), arguing that the case was distinguishable because he alleged the existence of an attorney-client relationship between himself and Carlson, directly. Response, pp. 9-11. Plaintiff *never asserted* the argument that he now raises in his Motion to Reconsider—that because of an unalleged fact (that Carslon maintains malpractice insurance), he should be allowed to pursue a claim for legal malpractice against Carlson notwithstanding the directly controlling contrary authority of *Atkinson* because the U.S. Bankruptcy Code authorizes claimants to proceed against debtors who have insurance policies. Motion to Reconsider, pp. 4-5.

As an initial matter, because the Plaintiff had ample opportunity to raise this argument predicated upon the U.S. bankruptcy Code in his previously filed Response Brief or at oral argument on April 30, 2018, he cannot now raise this new argument on a Motion to Reconsider. The Court should deny Plaintiff's motion for this reason alone.

More substantively, and contrary to Plaintiff's arguments, the rule set forth in *Atkinson*

(and applied to union attorneys like Carlson in *Peterson* and *Carino v. Stefan*, 376 F.3d 156 (3rd Cir. 2004)) simply held that, pursuant to Congressional intent in passing the Labor Management Relation Act, Plaintiff's union "is the sole source of recovery for injury inflicted by it," and that this policy may not be circumvented by permitting state court actions against union officials or agents. *Atkinson*, 370 U.S.at 249. Plaintiff was at all times free to pursue his action against the FOP Labor Council in a timely way before the Illinois Labor Relations Board. 5 ILCS 315/5. *Foley v. American Federation of State, County, and Municipal Employees*, 199 Ill.App.3d 6, 12 (1st Dist. 1990). Plaintiffs citations to the U.S. Bankruptcy Code or cases interpreting it are beside the point. In sum, Plaintiff's reliance upon the decision in *Green v. Welsh*, 956 F.2d 30 (2nd Cir. 1992)(interpreting Bankruptcy Code) and *Ferri v. Ackerman*, 444 U.S. 193 (1979)(rejecting immunity of court-appointed defense counsel) simply have no bearing on the issues before this Court.

Further, Plaintiff cites to *Warren v. Williams*, 313 Ill.App.3d 450 (1st Dist. 2000) for the proposition that he should be allowed to sue Carlson for legal malpractice based upon a third-party beneficiary theory of liability. Of course, this argument is directly contrary to what he previously argued in Response to the Motion to Dismiss (seeking to distinguish *Peterson* on the grounds that he had alleged a direct attorney-client relationship with Carlson). Moreover, Warren has nothing to do with the rule set forth in *Atkinson* and likewise has no bearing on this Court's April 30, 2018 judgment.

For the above reasons, Plaintiff's Motion to Reconsider this Court's April 30, 2018 Order as to Defendant Carlson should be denied.

II. Dismissal is Also Appropriate Because the Illinois Labor Relations Board has Exclusive Jurisdiction Over the Matters Alleged.

Plaintiff urges this Court to reconsider its holding and to ignore the controlling authority of *Foley* because he asserts his claim was one for legal malpractice and not one for an unfair labor practice. Plaintiff dogmatically makes this assertion without proof or supporting authority. Contrary to Plaintiff's assertion, numerous courts have found claims against a union (or its lawyers) for committing malpractice during a grievance process pursuant to a collective bargaining agreement by definition constitute an unfair labor practice in the nature of a breach of the union's duty of fair representation. *Montplaisir v. Leighton*, 875 F.2d 1, 1-4 (1st Cir. 1989); *Arnold v. Air Midwest*, 1994 U.S. Dist. LEXIS 7628 at *19-20 (May 24, 1994 D. Kansas). Illinois courts look to federal decisions like *Montplasir* and *Arnold* in interpreting the Illinois Public Labor Relations Act ("IPLRA"), which governs the case before this court. *Chief Judge of the Illinois Sixteenth Judicial Circuit v. Illinois State Labor Relations Board*, 178 Ill.2d 333, 338 (1997)(holding that decisions of the NLRB and Federal courts guide Illinois courts in interpreting the IPLRA).

Furthermore, Plaintiff did not even attempt to distinguish *Cessna v City of Danville,* 296 Ill.App.3d 156 (4th Dist. 1998), which held that Section 5 of the Public Labor Relations Act confers the Labor Relations Board with exclusive jurisdiction over any claims based on a breach of the duty of fair representation, even though such claims are not explicitly styled as such, and that no provision of the Act allows employees to file suit in the circuit court based on alleged conduct that would constitute a breach of the duty of fair representation.

In light of the well-settled precedent both within and without Illinois, the Court was absolutely correct when it dismissed Plaintiff's Complaint against the FOP Labor Council and Carlson for lack of jurisdiction. The record clearly established that the allegations forming the

basis of the Complaint arose from activities undertaken by the union and its authorized representative which occurred pursuant to the collective bargaining process. For this additional reason, Plaintiff's Motion to Reconsider should be denied in its entirety.

CONCLUSION

This Court was eminently correct when it dismissed Plaintiff's Complaint against Defendants Carlson and FOP Labor Council with prejudice on April 30, 2018. Plaintiff's Motion to Reconsider must be rejected for all of the reasons set forth in the Motion to Dismiss, Defendants' previously filed Reply Brief in Support of the Motion, as well as for the reasons set forth above.

WHEREFORE, Defendants, ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON requests that the Court enter an order denying Plaintiff's Motion to Reconsider in its entirety.

Respectfully submitted,

PRETZEL & STOUFFER, CHARTERED

By: /s/ Brendan J. Nelligan

One of the Attorneys for Defendants ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL and ROY CARLSON

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IN THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
THIRD DISTRICT LAW DIVISION – ROLLING MEADOWS

RUSSELL ZANDER, Plaintiff, v. ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants.	)	2017L063098 No. 17 L 63098 Plaintiff hereby demands a trial by jury of twelve (12) persons

REPLY IN SUPPORT OF MOTION TO RECONSIDER ORDER DATED APRIL 30, 2018

NOW COMES, your Plaintiff, RUSSELL ZANDER (hereinafter referred to as "ZANDER") by and through his attorneys, THE GOOCH FIRM, and as and for his Reply in support of his Motion as aforementioned, states to the Court the following:

1. In their Response, Defendants first argue that ZANDER has raised new issues in the Motion to Reconsider.
2. The basis for ZANDER's Motion is error in the prior application of the existing law, specifically the application of the *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) case which discussed the individual personal judgments against union members and on that basis created the immunity.
3. However in applying this case to ZANDER's case, ZANDER respectfully believes that the Court erred in not taking into consideration the personal liability of CARLSON to the extent of what his malpractice insurance covered.

4. As mentioned in the Motion, the *Green v. Welsh*, 956 F.2d 30 (US Ct. App., 1992) case allowed the Plaintiff to recover against the Defendants to the extent of the liability insurance coverage.
5. The mention of the bankruptcy issues merely compares the cases and shows that under *Atkinson v. Sinclair Refining Co., supra*, Defendant CARLSON should still remain liable to the extent of his malpractice coverage.
6. ZANDER is requesting this Honorable Court to reconsider the extent of the *Atkinson* Rule immunity for purposes of a personal judgment versus liability by the insurance carrier.
7. Rather than distinguishing or disputing ZANDER's cases, CARLSON simply argues that the cases or arguments "have no bearing".
8. CARLSON states in the Response that ZANDER's argument regarding suing based on a third-party beneficiary theory is completely contrary to what he previously argued in his Response to the Motion to Dismiss. This is not true.
9. ZANDER argued this theory in the alternative if this Court did not agree with his first arguments. As part of ZANDER's Response to the Motion to Dismiss, ZANDER discussed the duty to third parties.
10. This Honorable Court should also reconsider this argument and alternatively allow ZANDER's claims to go forward as a third-party beneficiary of the relationship.
11. CARLSON argues that *Warren v. Williams*, 313 Ill.App.3d 450 (1st Dist., 2000), has nothing to do with *Atkinson* and has no bearing on the April 30, 2018 judgment, however this is incorrect because ZANDER argued this theory in the Motion to Dismiss response

and asks this Court to reconsider this theory in the alternative, thus this case is in fact relevant and has a bearing on the April 30, 2018 Order.

12. Lastly, CARLSON argues that the Illinois Labor Relations Board has exclusive jurisdiction and that *Foley v. American Federation of State, County, and Mun. Employees, Council 31, Local No. 2258*, 199 Ill.App.3d 6 (1st Dist., 1990).

13. However this Court should also reconsider its ruling as to jurisdiction because this case did not deal with a breach of duty of fair representation by the union. Moreover, the Illinois Public Labor Relations Act does not exclusively regulate legal malpractice causes of action against an attorney that was handling the termination proceedings.

14. Similarly, *Cessna v. City of Danville*, 269 Ill.App.3d 156 (4th Dist., 1998) involved a claim based on a breach of the duty of fair representation. This is not the case in ZANDER's Complaint. ZANDER does not bring a cause of action based on a breach of the duty of fair representation, but a state law legal malpractice claim against his attorney. The cases of *Foley v. American Federation of State, County, and Mun. Employees, Council 31, Local No. 2258*, 199 Ill.App.3d 6 (1st Dist., 1990) and *Cessna v. City of Danville*, 269 Ill.App.3d 156 (4th Dist., 1998) are therefore easily distinguishable from this case.

15. Thus, for the reasons set forth this Honorable Court should reconsider the April 30, 2018 Order.

WHEREFORE, your Plaintiff RUSSELL ZANDER prays that this Honorable Court reconsider the Order from April 30, 2018 that dismissed the case with prejudice and for any other relief this Court deems equitable and just.

Respectfully submitted,
RUSSELL ZANDER, by his attorneys,
THE GOOCH FIRM,

Thomas W. Gooch, III

Thomas W. Gooch, III
Sabina D. Walczyk
THE GOOCH FIRM
209 S. Main Street
Wauconda, IL 60084
ARDC: 3123355
Cook Co Atty No.: 24558
gooch@goochfirm.com

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Zander
v.
Carlson et al.

No. 17 L 63098

ORDER

Matter before the Court on hearing on Plaintiff's Motion to Reconsider after hearing argument the Court fully advised in the premises

IT IS ORDERED:

- Plaintiff's Motion to Reconsider order Dated April 30, 2018 is denied. The Court finding that Plaintiff's motion raised new legal theories and facts and failure to raise these theories and facts prior to Motion to Reconsider resulted in waiver. The Court further finds ~~not erring in~~ its previous application of the law was not in error.

Attorney No.: 58209
Name: S. Walczyk / Gooch
Atty. for: Zander TT
Address: 209 S. main
City/State/Zip: Wauconda IL 60084
Telephone: 8475260110

ENTERED:
JUDGE MARTIN S. AGRON - 1630
JUL 31 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
CK. COOK COUNTY, IL
DEPUTY CLERK

Dated: _____

Judge 1630
Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No.

APPEAL TO THE FIRST DISTRICT APPELLATE COURT
FOR THE STATE OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

RUSSELL ZANDER, Plaintiff/Appellant,	)	No. 2017 L 63098
v.	)	Honorable Judge Martin S. Agran
ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants/Appellees.	)	Date of Final Order: 7/31/2018 Notice of Appeal Filed: 8/27/2018

NOTICE OF FILING

TO: Brendan Nelligan (bnelligan@pretzel-stouffer.com)
Pretzel & Stouffer, Chartered
One South Wacker Drive, Suite 2500
Chicago, IL 60606

PLEASE TAKE NOTICE that on August 27, 2018 I caused to be filed with the Clerk of the Circuit Court of Cook County, Illinois the attached *Notice of Appeal*.

Thomas W. Gooch, III, Esq.

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedures, the undersigned certifies that she served a copy of the foregoing to whom it is addressed via electronic mail and E-File on August 27, 2018 before 5:00 p.m. in Wauconda, Illinois.

THE GOOCH FIRM
209 South Main Street
Wauconda, Illinois 60084
847-526-0110
Cook County #24558
gooch@goochfirm.com

No.

APPEAL TO THE FIRST DISTRICT APPELLATE COURT
FOR THE STATE OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

RUSSELL ZANDER, Plaintiff/Appellant,	)	No. 2017 L 63098
v.	)	Honorable Judge Martin S. Agran
ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants/Appellees.	)	Date of Final Order: 7/31/2018 Notice of Appeal Filed: 8/27/2018

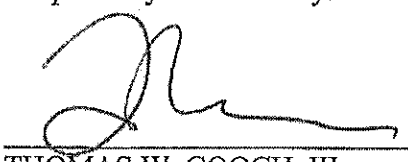
NOTICE OF APPEAL

The Plaintiff/Appellant, RUSSELL ZANDER by and through his attorneys, THE GOOCH FIRM, pursuant to Supreme Court Rule 303, appeal to the Appellate Court of Illinois, for the First Appellate District, from the Decision of the Circuit Court of the Cook County, Illinois, finding against Plaintiff/Appellant and for Defendants/Appellees on the dismissal of Plaintiff/Appellant's Complaint with prejudice, on April 30, 2018 and the final Order entered on July 31, 2018, which denied Plaintiff/Appellant's Motion to Reconsider.

Plaintiff/Appellant seeks reversal of the Orders of April 30, 2018, dismissing the cause with prejudice and July 31, 2018 denying reconsideration. Plaintiff/Appellant seeks a remand of this cause to the Circuit Court of Cook County, Illinois for further proceedings.

Dated: August 27, 2018

Respectfully submitted by:



THOMAS W. GOOCH, III
Attorney for the Plaintiff/Appellant

THE GOOCH FIRM
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TABLE OF CONTENTS TO THE RECORD ON APPEAL

No.: 125691

IN THE

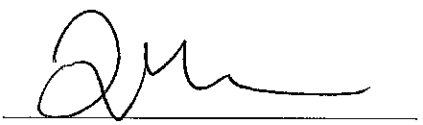
SUPREME COURT OF ILLINOIS

RUSSELL ZANDER, Plaintiff/Appellant, v. ROY CARLSON, ESQ. and THE ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Defendants/Appellees.	)	Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 1-18-1868 There Heard on Appeal from the Circuit Court of the First Judicial Circuit, Cook County, Illinois, No. 2017 L 63098 The Honorable Judge Martin S. Agran Petition for Leave to Appeal Allowed: March 25, 2020

NOTICE OF FILING-PROOF OF SERVICE

The undersigned certifies that she electronically submitted through the Odyssey E-filing System: *APPELLANT'S BRIEF* with the Clerk of the Illinois Supreme Court and served a copy of the foregoing via electronic mail on June 1, 2020 to the following attorney:

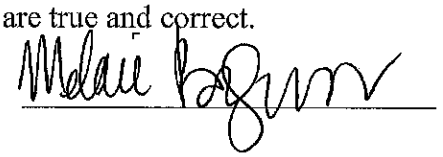
Brendan Nelligan (bnelligan@pretzel-stouffer.com)
Pretzel & Stouffer, Chartered
One South Wacker Drive, Suite 2500
Chicago, IL 60606



Thomas W. Gooch

PROOF OF SERVICE

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



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