IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Mark Janus and **Brian Trygg**,	)	
	)	
Intervenor-Plaintiffs,	)	No. 1:15-CV-01235
	)	
v.	)	Judge: Hon. Robert W. Gettleman
	)	
American Federation of State, County, and Municipal Employees, Council 31, *et al.*,	)	Magistrate Judge: Hon. Daniel G. Martin
	)	
Defendants,	)	
	)	
and	)	
	)	
Lisa Madigan, Attorney General of the State of Illinois,	)	
	)	
Intervenor-Defendant.	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF JOINT MOTION TO DISMISS SECOND AMENDED COMPLAINT

I. The Complaint Must be Dismissed as to All Defendants under *Abood*, which Establishes the Constitutionality of Fair-Share Fees in Public-Sector Employment.

Plaintiffs devote the bulk of their responsive memorandum to arguing "that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was wrongly decided, and should be overruled by the United States Supreme Court." (Dkt. 148 at 2.) Plaintiffs nonetheless concede, as they must, that after the Supreme Court's decision in *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016), "*Abood* remains controlling precedent." *Id.* As all sides are, therefore, in agreement that *Abood* remains controlling law, and that it squarely upheld the constitutionality of fair-share fees in the public sector, *see* Second Am. Compl. ¶ 50, it is clear that plaintiffs' complaint must be dismissed. That being so, no further reply is necessary on this issue.

II. Plaintiff Trygg's Claims Are Also Barred By Claim Preclusion.

In response to the defendants' argument that plaintiff Tyrgg's First Amendment claim challenging the constitutionality of fair-share fees is barred by the *res judicata* effect of the Illinois appellate court's judgment in his action for administrative review, Trygg argues only that the appellate court lacked "subject matter jurisdiction" to adjudicate the constitutional validity of the Illinois statute under which fair-share fees are withheld from a public employee's compensation, and that its judgment therefore could not have preclusive effect as to that question. He is mistaken. The issue is governed by Illinois preclusion law. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379-83 (1985). And although Trygg is right that, under Illinois law, a judgment will not have preclusive effect over a matter as to which the court lacked subject matter jurisdiction, *Hudson v. City of Chicago*, 889 N.E.2d 210, 216 (Ill. 2008), there is no merit to his contention that the Illinois appellate court lacked jurisdiction to rule on the First Amendment issue he seeks to assert in this case.

Illinois law does not establish a general prohibition against raising constitutional issues in an action for administrative review of an agency decision. To the contrary, even though an agency lacks the authority to declare a statute unconstitutional, *Carpetland U.S.A., Inc. v. Illinois Dep't of Employment Sec.*, 776 N.E.2d 166, 192 (Ill. 2002), such a challenge may be included in an action for judicial review of the agency's decision, *Chicago Bar Ass'n v. Dep't of Revenue*, 644 N.E.2d 1166, 1170 (Ill. 1994) ("This court has long recognized that where, as here, a statute is challenged on the grounds that it violates the constitution, the constitutional issues may be raised in the context of a complaint for administrative review."); *see also Holstein v. City of Chicago*, 29 F.3d 1145, 1148 (7th Cir. 1994) (describing Illinois law); *Howard v. Lawton*, 175 N.E.2d 556, 557 (Ill. 1961). And in such a situation the court decides the constitutional issue *de*

novo. *McElwain v. Office of Illinois Sec'y of State*, 39 N.E.3d 550, 553 (Ill. 2015); *see also Holstein*, 29 F.3d at 1148; *Byrd v. Hamer*, 943 N.E.2d 115, 129-30 (Ill. App. 2011).[1]

Trygg attempts to attach significance to the fact that his action for administrative review of the Illinois Labor Board's decision was not filed in the circuit court, but instead was filed directly in the Illinois appellate court, as authorized by statute. (Dkt. 148 at 12-14.) He is again mistaken. This difference might have been relevant if the right to assert a constitutional challenge to an agency's action required filing a separate claim for *relief in addition to* the relief available in connection with a claim for on-the-record administrative review of an agency's decision (which is procedurally permitted in the circuit court, *see Dookeran v. County of Cook, Ill.*, 719 F.3d 570, 576-78 (7th Cir. 2013); *Ross v. City of Freeport*, 746 N.E.2d 1220, 1222-25 (Ill. App. 2001)). As noted above, however, filing such an additional claim is not necessary to challenge the validity of an agency's decision on constitutional grounds. *See, e.g.*, *Howard*, 175 N.E.2d at 557 (holding that alleged constitutional violation by agency as basis to contest its action need not "be pleaded in a separate count" in action seeking administrative review). In addition, Illinois Supreme Court Rule 335, which governs proceedings for direct administrative review in the appellate court, expressly adopts by reference Section 3–110 of the Illinois Administrative Review Law, which states that review extends "to *all* questions of law and fact presented by the entire record," 735 ILCS 5/3–110 (emphasis added). And that provision, in line with its plain language, includes review of constitutional issues relevant to the validity of the agency's action. *See, e.g.*, *Reich v. City of Freeport*, 527 F.2d 666, 671 (7th Cir. 1975) (holding that state court in action for administrative review had authority to consider constitutional

[1] The court in an action for judicial review may consider such a constitutional challenge forfeited if the issue was not raised before the agency or backed by evidence offered in support. *Carpetland U.S.A., Inc.*, 776 N.E.2d at 192; *Texaco-Cities Service Pipeline Co. v. McGaw*, 695 N.E.2d 481, 489 (Ill. 1998). But that is not a limit on the court's jurisdiction.

challenges to agency action and that, where it did so, collateral estoppel barred relitigation of same constitutional issues in subsequent federal suit); *Howard*, 175 N.E.2d at 557; *Head-On Collision Line, Inc. v. Kirk*, 343 N.E.2d 534, 538 (Ill. App. 1976). In both situations, therefore, the court entertaining an action for administrative review has "jurisdiction" to consider a constitutional attack on an agency's action, and, under Illinois law, the court's judgment has preclusive effect in later litigation. *See Little v. Illinois Dep't of Revenue*, 626 Fed. Appx. 160, 162 (7th Cir. 2015) (nonprecedential disposition) (holding state court judgment in administrative review action barred federal-law claim arising from same group of operative facts).

Those principles are dispositive here. In the earlier litigation, Trygg was required to raise, or to risk losing, all available legal challenges to the fair-share deductions. Confronted with a statutory requirement that fair-share fees be withheld from his compensation, Trygg could have, but did not, challenge the constitutionality of the entire statutory framework. First before the Labor Board, and then in the Illinois appellate court, he chose to pursue only the right the statute provided: to have these fair-share fees paid to a charity of his choice instead of to the union representing his bargaining unit.[2] In these circumstances, he cannot now ask for fundamentally

[2] Trygg also argues that the Illinois appellate court was not a forum in which he could assert his First Amendment challenge to fair-share fees because "[i]n an appellate court, parties can raise constitutional objections to actions of *the deciding agency*," but "[h]ere, it is the Teamsters and CMS, and not the ILRB, that are violating Trygg's First Amendment rights." (Dkt. 148 at 14 n.3, emphasis in original.) This argument is legally and factually unsound. The Teamsters and CMS were both parties to the unfair labor practice claim Trygg filed against them in the Labor Board, in which he asserted a violation of his rights related to fair-share fees withheld from his compensation. (Dkt 146-3 at 2-8.) And although his action for administrative review challenged only the Board's rejection of his claimed *statutory* right not to have any fair-share fees *paid to the union*, nothing prevented him from challenging the *constitutionality* of having *anything withheld* from his pay. *Cf. Evanston Firefighters Ass'n Local 742 v. Ill. State Labor Relations Bd.*, 609 N.E.2d 790, 797 (Ill. App. 1993) (reversing Board and holding that enforcement of municipal policy against certain communications violated employees' First Amendment rights and constituted an unfair labor practice). And that claim, if successful, would have resulted in reversal of the Labor Board's decision.

inconsistent relief — that *no fair-share fees at all* be withheld from his compensation — based on the claim that the statute violates the First Amendment.

Conclusion

The intervenor-plaintiffs' complaint should be dismissed.

Dated: September 9, 2016

Respectfully submitted,

FELDMANWASSER

/s/ Carl R. Draper
Carl R. Draper
1307 S. Seventh Street
Springfield, IL 62703
(217) 544-3403

Attorney for Defendant General Teamsters Professional & Technical Employees Local Union No. 916

LISA MADIGAN
Attorney General of Illinois

/s/ Richard S. Huszagh
Gary S. Caplan
R. Douglas Rees
Richard S. Huszagh
Assistant Attorneys General
100 West Randolph Street
Chicago, IL 60601
(312) 814-3498

Attorneys for Michael Hoffman, in his official capacity as Director of the Illinois Department of Central Management Services, and Intervenor-Defendant the People of the State of Illinois

DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH

/s/ Melissa J. Auerbach
Melissa J. Auerbach
Stephen A. Yokich
8 South Michigan Avenue, 19th Floor
Chicago, IL 60603
(312) 372-1361

BREDHOFF & KAISER, P.L.L.C.

/s/ John M. West
John M. West
805 Fifteenth Street, N.W., Suite 1000
Washington, DC 20005
(202) 842-2600

Attorneys for Defendant American Federation of State, County, and Municipal Employees, Council 31, AFL-CIO

CERTIFICATE OF SERVICE

I, John M. West, an attorney, hereby certify that on September 9, 2016, I caused the foregoing **Defendants' Reply Memorandum in Support of Joint Motion to Dismiss Second Amended Complaint** to be filed electronically with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

I further certify that as of September 9, 2016, there are no nonregistered participants upon whom service by U.S. Mail is required.

/s/ John M. West
John M. West