STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GERHARDT J. STEINKE, Complainant,

vs.

MILWAUKEE AREA VOCATIONAL, TECHNICAL, AND ADULT EDUCATION DISTRICT, Respondent.

Case 443
No. 48405
MP-2665

Decision No. 27503-D

Appearances:

Gerhardt J. Steinke, 6415 Bridge Road, Madison, Wisconsin 53713, appearing on his own behalf.

Amy Schmidt Jones and **Lucinda J. Schettler,** Michael Best & Friedrich LLP, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of Milwaukee Area Vocational, Technical, and Adult Education District.

ORDER DISMISSING COMPLAINT

Procedural History

Gerhardt Steinke (Mr. Steinke) was involuntarily separated from his employment at MATC during the spring of 1990 and has not worked there since that time. On November 18, 1992, Mr. Steinke filed a Complaint with the Wisconsin Employment Relations Commission (Commission), alleging in essence that the Respondent Milwaukee Area Vocational, Technical, and Adult Education District (MATC) had refused to arbitrate certain grievances that Mr. Steinke had filed in January and February 1990, pursuant to the collective bargaining agreement then in effect between MATC and the union representing him and other instructional employees of MATC.

The documentary record indicates that, in brief, the four grievances underlying Mr. Steinke's Complaint alleged: (A) that MATC omitted Mr. Steinke's name from a course outline he had produced for a l986 course; (B) that MATC had intercepted Mr. Steinke's mail and divested him of a key that gave him access to the interoffice mail system; (C) that MATC had removed Mr. Steinke's name from a course catalog and intercepted certain software that should have been routed to him immediately; and (D) that MATC denied Mr. Steinke access to the MATC campus on weekends.

The record further indicates that MATC denied each of the four above-described grievances on the ground that no contract violation had occurred. In addition, MATC responded to each specific grievance, in brief, as follows: as to Grievance A, MATC stated that course outlines are MATC property and MATC may choose the outline format; as to Grievance B, MATC stated that it had intercepted a mass mailing that Mr. Steinke had attempted because it was not an appropriate use of MATC mail; as to Grievance C, MATC stated that Mr. Steinke's software had not been intercepted but rather had been routed mistakenly and acknowledged that Mr. Steinke's name should not have been deleted from the 1989-91 catalog, and MATC apologized for this mistake and promised to publish future catalogs correctly; as to Grievance D, MATC stated that Mr. Steinke had been instructed not to be on MATC grounds except when the public had access, but that, since the public had some weekend access, henceforth Mr. Steinke would be permitted access during those same weekend hours.[1]

The documents reflect that the union agreed to permit Mr. Steinke to arbitrate these grievances on his own, without union involvement. At Mr. Steinke's request, he and MATC selected four different arbitrators for the four separate grievances. At this point, the path toward arbitration stopped. MATC asserts that the grievance procedure required Mr. Steinke to contact the arbitrators to begin the scheduling process; Mr. Steinke asserts that he had asked MATC to make those contacts. In any event, the contacts were not made, arbitration was not commenced, and Mr. Steinke filed the instant Complaint.

On December 17, 1992, in response to a motion from MATC, a duly-designated WERC Examiner issued an Order requiring Mr. Steinke to make his Complaint more definite and certain. On December 29, 1992, Mr. Steinke filed a response to the Examiner's Order. By letter dated January 13, 1993, the Examiner requested further clarification from Mr. Steinke. At some point thereafter, without having filed a response to the request for clarification, Mr. Steinke requested and the parties agreed to hold the instant matter in abeyance while they arbitrated another grievance Mr. Steinke had filed, one that challenged MATC's action in non-renewing his contract of employment in or about March 1990.

On March 7, 1994, although the arbitration regarding his non-renewal had not as yet concluded, Mr. Steinke requested that the Commission schedule the instant matter for hearing. By letter dated March 10, 1994, the previously-assigned Examiner renewed his request for clarification. On March 31, 1994, Mr. Steinke responded by providing certain additional information.

For approximately three years thereafter, the record contains no further correspondence or documents of any kind.

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[1] The Complaint as originally filed also alleged a refusal to arbitrate an additional grievance, which the parties refer to as "Grievance E." Mr. Steinke has acknowledged that Grievance E is moot and accordingly its status is no longer in dispute in the instant case.

In the meantime, Mr. Steinke and MATC engaged in a protracted arbitration hearing regarding the non-renewal of his employment, consuming 43 intermittent days of hearing and resulting in an arbitration award issued January 3, 1996. The arbitrator concluded that MATC had good cause to non-renew Mr. Steinke's employment and denied Mr. Steinke reinstatement or other remedies.

Early in 1997, about a year after receiving the arbitrator's award, Mr. Steinke contacted the Commission about the status of the instant matter and was informed that it remained assigned to the same Examiner. By date of May 8, 1997, Mr. Steinke submitted a Motion asking the Examiner to recuse himself on account of bias. The Examiner denied the Motion on May 13, 1997.

The record reflects no activity of any kind for another two and one-half years.

By letter dated November 2, 2000, the previously-assigned Examiner advised the parties that, given the passage of time and inactivity, he deemed the matter moot and would dismiss it unless good cause to the contrary was shown by December 1, 2000. By letter dated November 30, 2000, Mr. Steinke responded that he wished the matter to go forward and did not concur in any delay. On December 21, 2000, the Examiner returned the file to the Commission for reassignment in light of his [the Examiner's] impending retirement.

The record contains no evidence of activity by any party between December 2000 and June 2002. By letter dated June 4, 2002, the Commission's General Counsel advised the parties that, "Inasmuch as we have had no further communications from the parties [since December 21, 2000], please advise the Commission as to the status of this matter on or before June 21, 2002." By e-mail dated June 25, 2002, sent from Switzerland, Mr. Steinke responded that he would not be back in Madison until October 2002 and that, given the "delay and uncertainty about the WERC following its own rules, ... another 4 or 5 months should not make that much a difference." By letter dated July 3, 2002, MATC responded that the Commission should dismiss the matter, since Mr. Steinke did not meet the Commission's June 21, 2002 response date, and since "there does not appear to have been a high degree of urgency attached to it by Mr. Steinke, who is the grieving party in these matters." By letter dated Wednesday July 31, 2002, Mr. Steinke responded to MATC's letter by stating that he wanted the matters to go forward but only after he had a chance "to review the WERC physical files."

On December 19, 2002, the Commission denied MATC's June 2002 motion to dismiss, stating, inter alia,

> ... [I]t is apparent that although this matter has languished for a lengthy period of time before the agency, neither party has pressed for the matter to proceed to hearing. ... Under these circumstances, we are not persuaded that the complaint

> should be dismissed for lack of prosecution. The matter will be assigned to an examiner who will contact the parties to begin the active processing of this complaint.

MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 27503-C (WERC, 12/02), at 5.

By letter dated February 14, 2003, a newly-assigned Commission Examiner suggested several hearing dates in April 2003. On March 19, 2003, Mr. Steinke responded that he was about to leave for Switzerland and would not be back in Madison until late October 2003. In early 2004, Mr. Steinke left a telephone message at the Commission's offices asking that the Complaint be moved forward. By letter dated January 6, 2004, the Examiner asked Mr. Steinke for his available hearing dates. By facsimile transmission on March 10, 2004, Mr. Steinke requested that the matter be scheduled in May 2004 and the Examiner then proposed to the parties several dates in late May. By letters dated April 1 and May 13, 2004, the Examiner complied with the parties' requests to provide them copies of the Complaint and the entire file.[2] By e-mail dated May 24, 2004, Mr. Steinke requested that the Examiner schedule a hearing date in June, and the Examiner forwarded a copy of this e-mail to MATC counsel by letter dated May 26. By letter to both parties dated July 6, 2004, the Examiner suggested several possible hearings dates in August and September 2004. By letter dated July 19, 2004, MATC's new counsel indicated that it intended to submit a motion to dismiss the matter as moot. By letter dated July 23, 2004, the Examiner informed the parties that he would set a hearing date after receiving and ruling upon MATC's motion.

On July 30, 2004, MATC submitted a Motion to Dismiss the instant matter for mootness, for failure to follow the contractual grievance procedure, and for prejudicial delay and/or laches. By letter dated August 6, 2004, the Examiner asked Mr. Steinke to respond to MATC's motion on or before September 10, 2004. By e-mail dated August 10, 2004, Mr. Steinke replied that he was back in Europe and had not received MATC's motion. The Examiner responded by e-mail and regular mail, allowing Mr. Steinke to respond to MATC's motion when he returned from Europe and asking Mr. Steinke to keep the Examiner informed of his return. By e-mail dated December 16, 2004, Mr. Steinke informed the Examiner that he would be in Madison until April 2005 and asked to review "all ORIGINAL relevant files to unresolved issues" (emphasis in original). By letter dated December 20, 2004, the Examiner indicated that he would set a date for Mr. Steinke to respond to MATC's Motion after Mr. Steinke had reviewed the files. At some point thereafter, Mr. Steinke visited the Commission's offices and reviewed the file.

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[2] At this point, MATC had changed counsel.

By its General Counsel's letter dated June 15, 2005, the Commission informed the parties that the Commission would respond directly to MATC's motion and directed Mr. Steinke to submit a response to the Motion on or before August 15, 2005 and MATC to file any rebuttal on or before August 31, 2005. Mr. Steinke submitted his response by facsimile transmission on August 12, 2005 and the District filed its reply on September 1, 2005.

For the reasons set forth in the Memorandum that follows, the Commission herewith makes and issues the following

ORDER

The Complaint is dismissed as moot.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

I dissent.

Paul Gordon /s/
Paul Gordon, Commissioner

Milwaukee Area Vocational, Technical & Adult Education District

MEMORANDUM ACCOMPANYING ORDER

MATC argues that Mr. Steinke's four grievances from 1990 are moot because of the passage of time and the fact that Steinke has not worked at MATC since 1990 and, having failed to obtain reinstatement as a result of his non-renewal arbitration, will not be working there in the future. According to MATC, even assuming the grievances alleged meritorious substantive violations of the contract, there could be no practical remedy in these circumstances for omitting Steinke's name from a course outline (Grievance A), blocking Steinke's mass mail through the MATC mail system (Grievance B), misrouting Steinke's incoming mail on one occasion and omitting his name from a 1989 course catalog (Grievance C), or preventing his access to MATC premises on a weekend before he had been terminated (Grievance D). Further, MATC argues, if the underlying grievances are moot, so also must be the instant complaint seeking an order to compel arbitration of those grievances.

In addition to mootness, MATC seeks dismissal on the ground that Mr. Steinke has failed to comply with the contractual grievance procedure and on the ground of prejudicial delay in prosecution.

In reply to MATC's motion, Mr. Steinke filed a document entitled, "Petition for Rehearing" which offered no response whatsoever to MATC's mootness argument and no suggestion as to how any of the four grievances could carry any practical legal effect. Nor has Mr. Steinke responded to MATC's alternative ground for dismissal, i.e., his failure to follow the contractual grievance procedure. On the issue of prejudicial delay, Mr. Steinke responded "I have been waiting for years for the issues to be resolved. ... Baring unexpected illness or death I stand ready to resolve the matters presented. I return to Madison in October and will be available for any related hearing for several months." As MATC anticipated in its motion, Mr. Steinke's response appears to focus largely upon his belief that MATC did not terminate his employment in a lawful manner, an issue that is not before the Commission in this matter.

The Wisconsin Supreme Court has noted with approval the following definition of a moot case:

> ... one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or which seeks a decision in advance about a right before it has actually be asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy.

WERB v. ALLIS-CHALMERS WORKERS UNION, 252 WIS. 436, 440 (1948). The last prong of this definition has generated most of the litigation in this area and is the concept upon which MATC relies in its motion here. The court has recently restated this prong as follows: "An issue is moot when a determination is sought that will have no practical effect on an existing legal controversy." SEITZINGER v. COMMUNITY HEALTH NETWORK, 270 WIS. 2D 1, 13 (2004).

Given that the mootness doctrine is a pragmatic tool for judicial efficiency, the court has articulated situations in which it is appropriate to decide a case despite its apparent mootness:

> We will decide a case, even though moot, when the issue is of great public importance, when the constitutionality of a statute is at issue, when the situation occurs so frequently that a decision is necessary to guide the circuit courts, when the issue will likely arise again and should be resolved by this court so as to avoid uncertainty, or when the issue will likely be repeated yet evade appellate review because of the length of the appellate review process.

SEITZINGER, 270 WIS. 2D at 13 (citations omitted).

The Commission itself has seldom been hospitable to claims of mootness in the context of prohibited practice proceedings such as the present one. In particular, and consonant with the holding in ALLIS-CHALMERS, SUPRA, the Commission does not view the mere cessation of allegedly unlawful behavior as sufficient to dismiss a case for mootness, because to do so would encourage repeated unlawful conduct -- a result that is at odds with the public policy incorporated into the labor relations statutes. ID. at 441-42 and cases cited therein. SEE ALSO CITY OF WEST ALLIS, DEC. NO. 12706 (WERC, 5/74), at 5 (even though the parties were submitting their contract to arbitration, the legality of a parity clause was not moot because "'the question is of first impression and of such public interest and importance and is asserted under conditions which will immediately recur if a dismissal is granted ....'"). Similarly, an employer's unlawful unilateral change in health insurance premiums is not moot, even if the contract, once settled, includes that very change, since a dismissal for mootness "could enable parties ... to engage in unlawful conduct with total impunity if they ultimately prevail in the mediation-arbitration process." MENOMONEE FALLS SCHOOL DISTRICT, DEC. NO. 20499-A (GRECO, 7/84), AFF'D DEC. NO. 20499-B (WERC, 10/85) (Examiner's reasoning expressly adopted by Commission on review). In short, deterrence of future similar unlawful conduct can justify resolving a case even where there is little immediate practical import.

Mootness is an especially improbable defense to a complaint like the present one, alleging a refusal to arbitrate. It is black letter law that, if the parties have agreed to arbitrate certain matters (i.e., if the matters are "substantively arbitrable"), the Commission will order arbitration regardless of the merits of the underlying grievances and regardless of alleged

procedural defects in how the grievances were processed. The merits of the grievances and the procedural defects are left for the arbitrator to consider. JOHN WILEY & SONS V. LIVINGSTON, 376 U.S. 543 (1964). The Commission has extended this principle to order arbitration of grievances even where the employer has alleged that the grievances are moot, implicitly (and without separate discussion) treating mootness as a "procedural arbitrability" defense that must be left to the arbitrator. CITY OF ST. FRANCIS, DEC. NO. 13182-B (WERC, 4/75), CITING JOHN WILEY & SONS V. LIVINGSTON, SUPRA.

In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO.24948-C (WERC, 9/89), the Commission discussed more fully how a potentially moot grievance affects the viability of a complaint alleging a refusal to arbitrate that grievance. That case involved a union's complaint that a school board had refused to arbitrate a grievance concerning the reprimand of a bargaining unit member. The school board contended, among other things, that the refusal-to-arbitrate complaint was moot because the employer had already removed the reprimand from the employee's file which mooted the underlying grievance.[3] The Commission upheld the Examiner's decision that, even if the underlying grievance were moot, the union was entitled to seek a remedy (cease and desist order) that would prevent the employer from engaging in future refusals to arbitrate. ID. at 5, 14-15. The Commission also concluded that removing the reprimand was

> … irrelevant to the question of whether the refusal to arbitrate case is moot. While the removal presumably may have some impact upon the relief to which the MTEA may be entitled to receive from an arbitrator if it prevails on the merits of the grievance, the Board action does not impact on the potential relief available from the Commission in this proceeding.

ID. at 15.

We think the Commission in the MILWAUKEE case, in labeling it "irrelevant" to the refusal to bargain charge that no practical remedy would be available if the grievance were successfully arbitrated, overstated the matter. It is more accurate to say that the lack of any practical remedy for the underlying grievance does not ipso facto render a refusal to arbitrate that grievance moot. As in the MILWAUKEE case itself and in the ST. FRANCIS case, an employer's refusing to arbitrate in itself generally presents a live controversy, regardless of the status or nature of the underlying grievances or the remedies available, because the employer could repeat that refusal in the future and thereby interfere with the proper functioning of the

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[3] Our dissenting colleague points out in his footnote 1 that the Commission also discussed mootness in the context of "substantive arbitrability" in MILWAUKEE BOARD OF SCHOOL DIRECTORS, SUPRA. The discussion was in response to one of the mootness arguments the employer had raised in that case, i.e., that the employer had belatedly agreed to bargain and thus allegedly mooted the refusal-to-bargain allegation. No such argument has been raised in the instant case. We emphasize therefore, and the dissent agrees, that the present case does not involve an issue of substantive arbitrability and that this portion of the discussion in MILWAUKEE BOARD OF SCHOOL DIRECTORS has no bearing here.

dispute resolution procedures in the collective bargaining agreement. SEE ALSO GRUNAU COMPANY, INC., DEC. NO. 10937-B (WERC, 11/73) (although the underlying grievance may have been settled, the Commission held that the case brought by the union was not moot because the Commission could order the employer to cease and desist from refusing to arbitrate other disputes between the union and the employer). This concept is the foundation for the solid line of precedent, some of which cited earlier in this memorandum, to the effect that a case is not moot simply because the unlawful conduct has ceased voluntarily.

Thus, in a normal case, the fact that the underlying grievance may have little or no chance of garnering any practical relief would not moot the refusal-to-arbitrate case before the Commission, since the Commission could still provide the "practical relief" of an order to arbitrate. In a more typical case, in other words, we would agree with our dissenting colleague that mootness should be left to the arbitrator. However, despite the Commission's normal reticence regarding mootness in such cases, we find that the exceedingly unique circumstances of the present case compel a different conclusion here.

First, as to the underlying grievances, MATC is clearly correct that Mr. Steinke can garner no practical relief from arbitrating these four grievances. As a non-employee with no future likelihood of employment at MATC, he does not need special access to the premises or to the internal mail system, and he has no existing interest in the content of course outlines or his name being included in a course catalog. We emphasize that this conclusion does not stem merely from the fact that Mr. Steinke is no longer employed (a status that would apply to many grievants who nonetheless could have fully viable claims), but from the additional facts that (1) he was long ago unsuccessful in his effort to obtain reinstatement and therefore unlikely to be re-employed, and (2) an extraordinary length of time has elapsed (nearly 16 years) since the alleged offenses occurred, some of that delay attributable to Mr. Steinke, thus attenuating to the point of nullity any interest he could have in being acknowledged in a course outline or mentioned in a course catalog. We again note that Mr. Steinke himself has suggested nothing to the contrary in his response to MATC's motion.

Second, and most uniquely, unlike the normal refusal-to-arbitrate case, there is no policy or practical reason for proceeding with this matter despite the atrophied state of the underlying grievances. Mr. Steinke himself is not a party to the collective bargaining agreement that is the source of his alleged grievances; rather, that agreement is between MATC and the union representing its faculty. The institutional interest in encouraging compliance with that agreement belongs solely to the union, to whom the employer will owe a duty to arbitrate, and not Mr. Steinke, who cannot conceivably have any future recourse to that grievance procedure. Hence, while the union, if it were a party, might viably claim that it needs to arbitrate these disputes in order to garner guidance for future labor relations with MATC or even simply to ensure that MATC does not violate the contract with impunity, Mr. Steinke harbors no such interest. SEE ALSO, WATKINS V. ILHR DEPARTMENT, 69 WIS.2D 782, 796 (1975) (the plaintiff's discrimination charges were not moot, even though her employer had settled the case, because she was "still employed by the same employer … and

she is also still a member of the same union. [Hence] it cannot be said that, if discrimination is found, an order of DILHR would be useless.") Thus, unlike the situations in MILWAUKEE BOARD OF SCHOOL DIRECTORS, CITY OF ST. FRANCIS, GRUNAU, and WATKINS, the only conceivable result of ordering arbitration of these grievances for Mr. Steinke, even if he were successful, would be a determination that he had won. If such a determination were sufficient in and of itself to avoid mootness, without any other practical or policy ramification, no case would ever be moot.

Accordingly, Mr. Steinke's Complaint is dismissed.[4]

Dated at Madison, Wisconsin, this 14th day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

I dissent.

Paul Gordon /s/
Paul Gordon, Commissioner

[4] As noted earlier, MATC has also requested dismissal on the additional grounds that Mr. Steinke failed to comply with the contractual grievance procedure by failing to contact the arbitrators and that he has caused prejudicial delay in prosecution. As we have dismissed the complaint as moot, we need not address these additional arguments at length. However, we note for the record that we agree with the dissent's conclusion that the former ground is a procedural arbitrability defense that normally should be left to the arbitrator. We add that an evidentiary record about what occurred regarding arbitrator selection would be necessary to dismiss on that basis. As to the lack of timely prosecution, we do not necessarily agree with the dissent's characterization of what has transpired in this case, but we note that the Commission denied a motion on that basis in December 2002, a decision that is now the law of the case, and the record does not reflect sufficient inaction on Mr. Steinke's part since that date (December 2002) to justify a dismissal on that ground now.

Milwaukee Area Vocational, Technical & Adult Education District

Dissent of Commissioner Paul Gordon

The majority opinion dismissed the case on grounds of mootness. The opinion focuses on why the matters that Steinke is grieving would be moot and applies the ALLIS-CHALMERS principles to the grievance claims. However, this is a complaint case wherein Steinke has alleged that MATC has refused to arbitrate his grievances. This case is not moot under the ALLIS-CHALMERS principles because the matter of refusing to arbitrate is completely different than any of the merits raised in the underlying grievances. Practical relief can be granted here by way of having a hearing on the merits of the complaint to determine whether MATC has refused to arbitrate. That process will result in either an order to submit to arbitration (perhaps with specific directions) or a dismissal of the controversy over refusal to arbitrate. This is true whether or not the Union is a party to this complaint or the underlying grievances.

When mootness issues have been raised before the Commission in complaint cases alleging a refusal to arbitrate, the Commission has uniformly ruled that matters of mootness are for the arbitrator to decide as part of the arbitration process, and that it is not a matter for the Commission to decide in complaint proceedings. For example, in CITY OF ST. FRANCIS, DEC. NO. 13182-B (WERC, 4/75), a complaint alleging failure to arbitrate was meet by a claim of mootness. The Commission stated:

> With regard to the Respondent's contention that the grievance is moot and there are procedural defenses to arbitration, the Commission has held that where a party makes a claim which on its face is covered by collective bargaining agreement and subject to the grievance procedure therein, then the Commission shall make no determination as to the procedural claims or defenses, but shall leave such issues to the arbitrator for determination.[5]

Similarly, in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24948-C (WERC, 6/89), mootness was raised in a complaint proceeding concerning an alleged failure to arbitrate. The Commission again noted the difference between an arbitration proceeding and a

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[5] SEAMAN-ANDWALL CORP., DEC. NO. 5910, (1/62) and CITY OF GREEN BAY JOINT SCHOOL DISTRICT NO. 1, DEC. NO. 11021-A (11/62), setting forth the same policy as is found in JOHN WILEY & SONS, INC. V. LIVINGSTON, 376 U.S. 543, 55 LRRM 2769 (1964) wherein the U.S. Supreme Court declared the following:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

complaint proceeding, and how mootness may impact the arbitration but not the relief available in the complaint proceeding.[6] The Commission ordered the parties to proceed to arbitration.

There is no reason presented here to depart from those principles or precedents. I view these prior decisions as instructive and controlling here.

MATC contends that the WERC has embraced the concept that a case is moot when a determination is sought which, when made, cannot have any practical effect upon an existing controversy. MATC then cites several cases in support. However, the matter is more at arms length than MATC suggests. The cases cited are actually all arbitration cases, not complaint cases. These cases are an application of the principle that it is for the arbitrator to decide issues of mootness, not the Commission. Even in the cited arbitration awards, a grievance may be found by an arbitrator to be moot as to remedy, but not moot as to the underlying controversy. CITY OF MARSHFIELD, CASE 137, NO. 54936, MA-11298, AT P. 16 (BURNS, 11/01).

MATC also argues that based upon the grievance procedure in effect in 1990, the WERC must dismiss the complaint with prejudice. MATC argues that Steinke indubitably failed to fulfill his contractual duty to schedule hearings for any of the four grievances within the contractual time limit. This issue is one of procedural arbitrability, which is most appropriately left to the arbitrator to decide. MILWAUKEE BOARD OF SCHOOL DIRECTORS, SUPRA, CITY OF ST. FRANCIS., SUPRA.

Finally, MATC argues that allowing the claim to go forward would be unfair and prejudicial to MATC. MATC contends that Steinke fails to recognize or rebut that his actions over the past fifteen years have resulted in a situation where, if the matter were to proceed to arbitration, MATC would be severely prejudiced. MATC invokes the doctrine of laches.

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[6] Interestingly, MILWAUKEE BOARD OF SCHOOL DIRECTORS also applied the ALLIS-CHALMERS analysis to find that a claim of mootness might actually raise a legal issue of substantive arbitrability. That, in turn, would have a "practical legal effect", and defeat a defense of mootness. On that matter the Commission, having adopted the bulk of the Examiner's memorandum, observed that in matters of substantive arbitrability the Court or Commission is not to rule on the potential merits of the underlying claims. The Commission was specifically aware of the statement in AT&T TECHNOLOGIES, INC. V. COMMUNICATIONS WORKERS OF AMERICA, 475 U.S. 643 (1986) where the principles from the STEELWORKERS TRILOGY were discussed:

> "...[A] Court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective bargaining agreement is to be decided, not by the court asked to order arbitration, but as to parties have agreed, by the arbitrator..."

Applied here, regardless of how Steinke's underlying grievances are viewed or characterized, they and the defense of mootness are for the arbitrator to decide. There has been no issue of substantive arbitrability raised or argued by the parties in this case and that is not a matter for decision here.

While it is true that Steinke has made his share of requests for certain delays in processing the complaint and has not pled his case artfully or with particular clarity, there is enough responsibility for delay in this case to go around. Steinke did make several requests to have the matter scheduled for a hearing and suggested available timeframes that he was and was not available. The case has languished here at the Commission on several occasions with little or no action or prompting for years at a time. Even so, in December of 2002, when the case was ten years old, the Commission declined to dismiss it on procedural grounds. One of those was for lack of prosecution, which is essentially the same claim made now by MATC. The Commission noted that neither party had pressed the matter for hearing. MATC has some responsibility here, too. By letter of February 27, 2003, Attorney Olson, who had been representing MATC, informed the Examiner that his firm no longer represented the College and represented that MATC would contact the Examiner, presumably, to advise who will represent them. The Examiner then made several attempts to schedule the matter for hearing. A letter from the Examiner of January 6, 2004 was copied to the law firm currently representing MATC. By letter of February 20, 2004 (seven days short of a year after attorney Olson's letter) Attorney Schmidt Jones informed the Examiner and Steinke that the file had been transferred to her. Thereafter, when the Examiner offered several hearing dates in May, 2004, MATC's representatives wrote, on March 30, 2004, that they did not have access to the complaint, asked for a copy of the complaint, and indicated they would confirm their availability once they reviewed the allegations and spoke to their witnesses. The Examiner faxed a copy of the complaint to her on March 31, 2004. The next item in the file is a cover letter of May 13, 2004 from the Examiner to both parties sending them each a copy of the entire file. No hearing date was set. Steinke made several inquires seeking the status of a hearing date and by letter of July 6, 2004, the Examiner again offered Attorney Schmidt Jones hearing dates in August and September, 2004. By letter of July 19, 2004 MATC raised the issue of mootness, indicated it intended to file a motion to dismiss by the end of the month, and asked that the matter be scheduled no earlier that September (other than September 1st), or in the alternative that it not be scheduled for hearing until after the resolution of the motion. The instant motion was filed on August 2, 2004. By then, Steinke was out of the country. By letter of August 12, 2004 the Examiner requested Steinke to notify him when he returned and indicated he would then set a timetable to respond to the motion. The file contains a fax dated December 16, 2004 from Steinke to the Examiner indicating he would be in Madison until April, 2005. By letter of December 20, 2005 from the Examiner, Steinke was advised that he could review the file at the Commission offices at his convenience and afterwards the Examiner would set a timetable to respond to MATC's motion. The file next contains the July 15, 2005 letter to the parties wherein the Commission will respond to the motion and set a timetable for receipt of argument extending to August 31, 2005.

Given all of the above, the responsibility for the delay cannot be placed solely at Stienke's doorstep so as to make his actions unreasonable in the light of everyone else's. The Commission has considered similar cases. Where obstreperousness and a refusal to respond to the requests of an Examiner have been found on the part of pro se litigants, cases have been

dismissed. BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-D (WERC, 10/03). Where a pro se claimant has stood ready to advance his case despite lengthy delays, the Commission has not granted motions to dismiss. WINGRA READY-MIX, INC., DEC. NO. 31056-B (WERC, 5/05). In my view, Steinke falls into the latter category.

In my view the motion should be denied and the case scheduled for a hearing.[7]

Dated at Madison, Wisconsin this 14th day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/
Paul Gordon, Commissioner

[7] Denying the motion to dismiss would not get to the merits of the complaint. So, what should be done? Both parties have had several opportunities to have input into setting a hearing date and for various reasons it has not happened. To get this done the Commission should set a hearing date one or two months out. An Examiner should then hold the hearing on that day. If one or both parties are not able to manage their affairs with this firm hearing date in mind and do not appear, then the Examiner can consider whatever record is or is not made and rule accordingly.