STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK J. BENZING, Complainant,

vs.

PARAPROFESSIONAL TECHNICAL COUNCIL
WISCONSIN EDUCATION ASSOCIATION COUNCIL
BLACKHAWK TECHNICAL COLLEGE, Respondents.

Case 70
No. 59162
MP-3674

Decision No. 30023-D

Appearances:

Mark J. Benzing, 7843 West Fiebrantz Avenue, Milwaukee, Wisconsin 53211, appearing on his own behalf.

Mary E. Pitassi, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Respondents Paraprofessional Technical Council and Wisconsin Education Association Council.

Peter Albrecht, Attorney at Law, LaFollette, Godfrey & Kahn, Attorneys at Law, One East Main Street, P.O. Box 2719, Madison, Wisconsin 53701-2719, appearing on behalf of Respondent Blackhawk Technical College.

ORDER SETTING ASIDE EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S ORDER

On May 19, 2003, Examiner Stuart Levitan issued Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss Complaint and Order Denying Motion to Dismiss Amended Complaint in the above matter wherein he dismissed Complainant Benzing's August 29, 2000 complaint as untimely filed but concluded that Mr. Benzing had timely filed a March 14, 2001 amended complaint as to Respondent Blackhawk Technical College.

Mr. Benzing filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision. The parties thereafter filed written argument in support of and in opposition to the petition and the record was closed on July 23, 2003.

Having reviewed the record and being fully advised in the premises, we conclude that the Examiner erred by failing to grant Respondents' October 2001 motion that the complaint filed by Mr. Benzing be dismissed for lack of prosecution/abandonment. Based on that conclusion, we issue the following

ORDER

A. The Examiner's Findings of Fact are set aside and the following Findings of Fact are made:

1. Mark J. Benzing, herein Mr. Benzing, is a municipal employee presently residing at 7843 West Fiebrantz Avenue, Milwaukee, Wisconsin.

2. Blackhawk Technical College, herein Respondent College, is a municipal employer with offices at 6004 Prairie Road, Janesville, Wisconsin. The Respondent College employed Mr. Benzing.

3. The Paraprofessional Technical Council and Wisconsin Education Association Council, herein Respondent Unions, are labor organizations with offices at 33 Nob Hill Drive, Madison, Wisconsin. Respondent Unions served as Mr. Benzing's collective bargaining representative.

4. On August 29, 2000, Mr. Benzing filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent College and Respondent Unions had committed prohibited practices against him within the meaning of the Municipal Employment Relations Act (MERA).

5. On December 18, 2000, Respondent Unions filed a motion asking that Mr. Benzing be ordered to make the complaint more definite and certain.

6. On December 20, 2000, Commission Examiner Stuart Levitan ordered Mr. Benzing to file an amended complaint that identified the actions which constituted prohibited practices and the sections of MERA allegedly violated.

7. On March 14, 2001, Mr. Benzing filed an amended complaint.

8. On March 30, 2001, Respondent Unions and Respondent College filed a motion to dismiss a portion of the amended complaint as being untimely filed and, in the alternative, to hold the complaint in abeyance pending completion of related litigation.

By letter dated May 22, 2001 the Examiner directed Mr. Benzing to respond to Respondents' March 30, 2001 motions.

Mr. Benzing did not respond to the Examiner's May 22, 2001 directive.

9. On October 2, 2001, Respondent Unions filed another motion to dismiss on several grounds including abandonment noting Mr. Benzing's "consistent failure to comply with the Examiner's clear requests stretching over a period of nearly a year." By letter dated October 3, 2001, the Respondent College joined in the motion. By certified letter dated October 9, 2001, the Examiner directed Mr. Benzing to respond to the motion to dismiss on or before October 31, 2001.

Mr. Benzing did not respond to the Examiner's October 9, 2001 directive.

10. On January 17, 2002, the Examiner issued an Order which among other matters directed Mr. Benzing to show cause on or before February 4, 2002 why the complaint should not be dismissed for abandonment/lack of prosecution.

11. On February 4, 2002, Mr. Benzing advised the Examiner by letter as follows:

> On or around November of 2000 I mailed you and the Respondents a detailed amended complaint at your request in regards to my initial complaint that was approximately three pages in length. In March of 2001 I mailed an amended complaint to all parties. With Charles Stokes as a complainant. On April 12th I mailed to all parties all [sic] letter pointing out Charles Stokes address at your request. And other information concerning a response from Attorney Mary Pitassi.
>
> Sometime after that you replied with a detailed letter to all parties, which mentioned all the communications that had been mailed from all parties except me. After reading this

> letter I came to the conclusion that I would not be able to secure justice for the past injustices dealt to me by the other parties. To date I have yet to mail you an affidavit from Charles Stokes, (Which to my understanding should not be my responsibility to secure it should be Mr. Stokes responsibility). And an amended complaint that Charles Stokes became a party too filed with you [sic] office sometime in March of 2001. Of which was concise and in accordance with the State Statutes originally, to my knowledge.
>
> Thank you for your attention.

B. The Examiner's Conclusions of Law are set aside and the following Conclusions of Law are made:

1. Mr. Benzing's February 4, 2002 response to Examiner Levitan's January 17, 2002, directive did not show cause why his complaint should not be dismissed for abandonment of prosecution.

2. By failing to respond to the Examiner's May 22, 2001 and October 2001 directives and by failing to show cause why his complaint should not be dismissed, Mr. Benzing abandoned the prosecution of his complaint.

C. The Examiner's Order is affirmed in part and reversed in part to read:

The complaint is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of October, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

**MEMORANDUM ACCOMPANYING
ORDER SETTING ASIDE EXAMINER'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW, MAKING FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND AFFIRMING IN PART
AND REVERSING IN PART EXAMINER'S ORDER**

STATEMENT OF THE CASE

As set forth in our Conclusions of Law, we conclude in this case that the Complainant Mark Benzing was untimely in prosecuting his case. We also conclude that the Examiner erred by failing to grant Respondents' motion to dismiss the complaint for abandonment of prosecution. Hence, as explained more fully below, we reverse the Examiner's decision to proceed to hearing on any of Mr. Benzing's claims, and we dismiss his complaint in its entirety.

We begin by setting forth the full procedural history of this matter. On August 10, 2000, Mark Benzing submitted his initial complaint alleging that the Respondent Unions and the Respondent College had committed a variety of prohibited practices within the meaning of Secs. 111.70(3)(a) and 111.70(3)(b), Stats. The Commission notified Mr. Benzing that he had failed to include payment of the full filing fee and that the complaint would not be processed until he had done so. On August 29, 2000, the Commission received the full filing fee from Mr. Benzing. After conciliation efforts failed, on December 20, 2000 the Commission appointed Stuart Levitan, a member of its staff to serve as Examiner.

The initial complaint stated:

> For the past ten years I the complainant was employed at Blackhawk Technical College. In the membership of the Paraprofessional Technical College, which belong to the Wisconsin Educational Association Council (hereinafter BTC, PTC, and WEAC). During my employment I the complainant and several others had had problems with the union and the employer when it came to issues regarding better working condition and matters concerning employment etc. At times the union would have meetings of matters that concerns me and would conduct the meetings with me present or under the circumstances, represented.
>
> I and the several members of the department that I previously mentioned. Had engaged in lawful concerted activities. The Respondent PTC and WEAC, who only (sic) almost every issue would disagree and make any attempt to initiate any type of settlement with the employer BTC, unless the employer BTC, suggested the settlement and/or near settlement it's (sic) self.

The other two members of the department who assisted me and initiated their own grievances and/or complaints against the oppressive and determine to have are department represent the second or third class employees below all others b (sic) the Respondent BTC. Had dismissed the two members by 1994 wrongfully. The most active after a major decision handed down to them by a State Department and Commission of which a formal grievance was filed with all the respondents by myself and supported by several members of the department. And looked down with scorn and lies by the administrators involved in the grievance process. Denied and set aside (as most other grievances and complaints) by the Respondents PTC and WEAC regardless of the amount of time we asked for assistance.

In 1999 I was administered a three day suspension for an action that another member of the department had committed more times than myself and received less discipline. On the last step before arbitration I realized that the Respondent BTC, was not investigating all the facts that I informed it of as extenuating circumstances. I took it upon myself to gather the information myself and presented it at the final step before arbitration. I requested the Respondent's representatives from WEAC to assist me as she did in other grievances at this step and she wouldn't. I also expected their (sic) to be union representative at the grievance meeting which commenced in mid August or September 1999 (since I had been informed that the union always has representative from the Chief Steward years) and none was present.

And to my surprise the Respondent's PTC executive committee in a letter dated August 12, 2000 decided (without me being present at the grievance committee meeting and submitting any input of my own which I normally would be allowed to do) not to proceed to arbitration, with the three-day suspension grievance #99-05. Prior to the final grievance meeting held by the Respondent BTC, with myself mentioned above. An event which never happened in the past. And was initiated not in accordance with the CBA.

Also the Respondent on one occasion retaliated, harassed and targeted me during an (sic) departmental meeting (which caused the majority of the participants at the meeting to conclude that I was being verbally attacked/harassed) and in another matter I was purposely skipped in a voluntary overtime scheduling on several different occasions.

After receiving the letter from the union's president I attempted to submit the evidence (on several different occasions) I had gathered which would verify my allegation BTC was targeting, retaliating and discriminating against me for my

> lawful activities in the hopes that PTC, WEAC, would reconsider their decision. Not to proceed to arbitration. Since the grievance was still well within the contractual time frame. And for more than a month I received no reply. See attached exhibits.
>
> By the inactions and actions the Respondents committed unfair and prohibited labor practices. In violations (sic) of Wisconsin Statutes 111.70(3)(a) 1, 2, 3, 5 and 111.70(3)(b) 1, 2 and (3)(c).
>
> As a remedy I fully believe that appropriate discipline action should be initiated and administered to all persons involved in the prohibited practice complaint. Dismissal of the three-day suspension with compensation of the moneys and benefits forfeit (sic) because of the Respondents (sic) unlawful actions against me. Along with any legal fees. And any other remedies the Wisconsin Employment Relations Commission believes appropriate.

By letter dated December 15, 2000, the Respondent Unions filed a motion asking the Examiner to issue an Order to Make Complaint More Definite and Certain. The Examiner issued an Order to that effect on December 20, 2000, without, however, setting a deadline for compliance. On March 14, 2001, Mr. Benzing filed the following Amended Complaint purporting to add another party (Charles Stokes) and also adding new prohibited practice charges within the meaning of Secs. 111.70(3)(a) and 111.70(3)(b), Stats.

> On March 13, 2000 in the evening a committee of the paraprofessional Technical councle (sic) informed myself and other custodians that since they the (Committee) didn't want to axcept (sic) a pay cut that they subsequently tentatively agreed with the employer Black Hawk Technical College that the custodial dept. members would be laid (sic) without any opportunity in the future for re-hire or to be called back from lay off. And they couldn't utilize their bumping rights. The majority of the membership (to my knowledge) agreed to this action for varies (sic) reasons. The majority as friendship to the members, who would benefit from the agreement. In the process the College was allowed to retaliate against myself, for past grievances. And discriminated against. Subsequent other custodial members with less seniority than myself were discharge. (sic) One being the complainant mention (sic) with me Mr. Charles Stokes, Losted (sic) benefits and pay. By the employer who acted in discriminatory and prejudice (sic) manner in its decision as did the union/both respondents.

On March 30, 2001, the Respondent Unions filed a Motion to Dismiss the Amended Complaint and/or Hold it in Abeyance, on grounds of timeliness and duplication of litigation then pending before the federal Equal Employment Opportunities Commission (EEOC) and the Wisconsin Equal Rights Division (ERD). By letter dated March 30, 2001, the Respondent College joined the Unions' motion.

By letter dated May 22, 2001, the Examiner directed Mr. Benzing to submit: (1) a clear and concise statement of the facts constituting the alleged prohibited practices; (2) an explanation of why his Amended Complaint should be deemed timely; (3) a notarized statement from Mr. Stokes if he wished to be added as a Complainant; and (4) a statement as to why the proceeding should not be held in abeyance pending the initial determination by the EEOC on Mr. Stokes' race discrimination charge. Again, the Examiner's Order contained no deadline for compliance.

Mr. Benzing filed no response to any of the directives in the Examiner's May 22, 2001 letter.

Some four and a half months later, on October 2, 2001, the Respondent Unions filed another Motion to Dismiss, this time for claim or issue preclusion, based upon the EEOC's May 23, 2001 Dismissal and Notice of Rights, and also for abandonment, noting Mr. Benzing's "consistent failure to comply with the Examiner's clear requests stretching over a period of nearly a year." By letter dated October 3, 2001, the Respondent College joined the Unions' motion. By certified letter dated October 9, 2001, the Examiner directed Mr. Benzing to respond to the Unions' Motion to Dismiss on or before October 31, 2001.

Again, Mr. Benzing filed no response.

On January 17, 2002, the Examiner issued an Order Granting in Part and Denying in Part Motion to Dismiss Complaint and Amended Complaint and Order to Show Cause. In his decision, the Examiner dismissed against the Respondent Unions the newly added claim in the Amended Complaint alleging that Respondent Unions and the College had negotiated certain provisions in the collective bargaining agreement in retaliation for Mr. Benzing's grievances and other protected, concerted activity. The Examiner concluded that, since Mr. Benzing's Amended Complaint itself alleged that the Respondent Unions had ratified the agreement on March 13, 2000, the Amended Complaint filed on March 14, 2001 was untimely by one day as against the Unions. However, since the Amended Complaint also alleged that the College had ratified the agreement on March 15, 2000, it was timely by one day as to the College. He therefore did not dismiss that claim in the Amended Complaint against the Respondent College. As to the timeliness objections to the original Complaint, he erroneously assumed that Mr. Benzing's original complaint had been properly filed on August 10, 2000, whereas in fact it had not been properly filed until August 29, 2000 when the full fee had been paid. The Examiner therefore concluded that Mr. Benzing had timely challenged the Unions' August 12,

2000 refusal to submit his suspension grievance to arbitration. Since a timely filed allegation that a union breached its duty of fair representation (DFR) also renders timely the underlying breach of contract claim, 1/ the Examiner also declined to dismiss the claim against the College that the suspension had breached the collective bargaining agreement. All other allegations in the original and Amended Complaint were dismissed as failing to contain "a clear and concise statement of the facts" as required by Commission Rule ERC 12.02(2)(c). The Examiner also noted that the putative new Complainant Mr. Stokes had never submitted a signed complaint or statement indicating that he wished to be joined and therefore was not deemed a party.

1/ LOCAL 950, INTERNATIONAL UNION OF OPERATING ENGINEERS, DEC. NO. 21050-F (WERC, 11/84).

Regarding the Respondents' joint motion to dismiss for abandonment, the Examiner's January 17, 2002 decision noted that Mr. Benzing had been "extremely difficult to contact," that he had substantially failed to comply with the directives contained in the Examiner's May 22, 2001 letter, and that he had not responded at all to the Examiner's October 9, 2001 certified letter which had stated that the record would be closed by October 31, 2001. Nonetheless, rather than granting the motion for abandonment, the Examiner once again directed Mr. Benzing to show cause why the matter should not be dismissed for failure to advance the litigation. He set a February 4, 2002 deadline.

On February 4, 2002, Mr. Benzing submitted a letter to the Examiner stating in full as follows:

> On or around November of 2000 I mailed you and the Respondents a detailed amended complaint at your request in regards to my initial complaint that was approximately three pages in length. In March of 2001 I mailed an amended complaint to all parties. With Charles Stokes as a complainant. On April 12th I mailed to all parties all [sic] letter pointing out Charles Stokes address at your request. And other information concerning a response from Attorney Mary Pitassi.
>
> Sometime after that you replied with a detailed letter to all parties, which mentioned all the communications that had been mailed from all parties except me. After reading this letter I came to the conclusion that I would not be able to secure justice for the past injustices dealt to me by the other parties. To date I

> have yet to mail you an affidavit from Charles Stokes, (Which to my understanding should not be my responsibility to secure it should be Mr. Stokes responsibility). And an amended complaint that Charles Stokes became a party too filed with you [sic] office sometime in March of 2001. Of which was concise and in accordance with the State Statutes originally, to my knowledge.
>
> Thank you for your attention.

By letter dated February 4, 2002, the Examiner sent the Respondents a copy of Mr. Benzing's February 4, 2002 submission, stating, "I take it that this is Mr. Benzing's effort to show cause why this proceeding should not be dismissed with (sic) abandonment." The Examiner's letter did not comment on the sufficiency of Mr. Benzing's effort nor expressly invite a response.

By letter dated March 6, 2002, the Examiner asked Mr. Benzing for a telephone number "so we can schedule the above-cited matter for hearing." By letter dated March 13, 2002, the Unions objected to the Examiner's apparent intention to schedule the matter for hearing, stating that Mr. Benzing's February 4 response regarding the Unions' abandonment claim "falls far short of the mark of establishing cause," and "implies that he decided not to proceed further with the matter." The Respondent Unions noted that the Examiner had given Mr. Benzing "four chances to explain his Complaint, and/or why it should not be dismissed" and that Mr. Benzing had either failed to reply at all or replied insufficiently. The Respondent Unions' letter urged the Examiner to dismiss the complaint for abandonment, arguing:

> A Complainant does not have the luxury of bringing a Respondent before the power of the State but then delaying the hearing until memories have faded, employees have moved on, and the eventual proceedings are crippled by defects caused by the delay. Respondents have the right to defend their interests in a timely and expeditious fashion. That has not been possible here due to Mr. Benzing's consistent inaction.

By letter dated March 20, 2002, the Respondent College wrote "to echo the concerns that were raised in" the Unions' March 13 letter and to join the Unions' motion to dismiss.

On March 21, 2002, the Examiner received a letter from Mr. Benzing, asking for copies of all complaints and amended complaints he had filed, instructions concerning an affidavit from Mr. Stokes, and instructions regarding the procedure for appealing the Examiner's January 17, 2002 decision. Mr. Benzing enclosed with his letter a three-page affidavit discussing his alleged discriminatory treatment by the College and the Unions since 1993. He also enclosed a set of Interrogatories dated March 20, 2002 that he had served upon

the Unions and asked the Examiner to "note that until these interrogatories are answered too (sic) in whole, I will be un-able to proceed to a hearing." By letter dated March 22, 2002, the Unions replied that Mr. Benzing had no right under Commission rules to compel answers to interrogatories prior to hearing and pointing out that the Respondents' March 13 Motion to Dismiss was still pending.

Both the Respondent Unions' March 13, 2002 Motion to Dismiss and their March 22, 2002 letter to the Examiner state on their face that they were copied to Mr. Benzing as well as other individuals. It is not clear whether the Unions used the Beloit address for Mr. Benzing contained in the Examiner's January 17, 2002 decision. The record contains no specific notification to the Examiner or the Respondents of Mr. Benzing's change of address other than Mr. Benzing using his Milwaukee address as letterhead in his February 4, 2002 submission. 2/

Thereafter, until July 19, 2002, the record contains no written correspondence or other documents, including no decision on the Respondents' abandonment motion, then pending before the Examiner since October 2, 2001. On July 19, 2002, the Examiner received a letter from Mr. Benzing, enclosing a copy of his March 2002 letter to the Examiner, asking for a reply to that letter, referring to an interim telephone conversation with the Examiner, and stating that he had "still" not received a copy of the Respondents' Motion to Dismiss. With the July 19, 2002 letter, Mr. Benzing also enclosed an affidavit from Charles Stokes.

By letter dated July 22, 2002 3/ the Examiner sent the Respondents a copy of Mr. Benzing's July 19 letter and the Stokes affidavit. The Examiner asked the Respondents to advise whether they had served a copy of their March 13, 2002 letter on Mr. Benzing. By letter dated July 24, 2002, sent to Mr. Benzing's Milwaukee address, the Unions informed him that they had copied their motion and letters to him but had "most likely" mailed them to the Beloit address as it appeared on the Examiner's January 2002 decision. The Unions included a copy of their March 13 Motion to Dismiss. By letter dated July 30, 2002, 4/ the Examiner directed Mr. Benzing to "provide any written response you wish to make to the Respondents' Motion to Dismiss postmarked no later than August 15, 2002." As requested by Mr. Benzing, the Examiner also included copies of Mr. Benzing's complaint and amended complaint.

2/ The first indication in the record of Mr. Benzing's move from Beloit to Milwaukee is in Mr. Benzing's submission filed on February 4, 2002, which states his Milwaukee address in the letterhead. The Examiner's January 17, 2002 decision had been mailed to Mr. Benzing's Beloit address but apparently was received by him, given his response on February 4, 2002 to the February 4, 2002 deadline set forth in that decision.

3/ The date stated on the letter is July 22, 2001. Apparently the reference to "2001" was a typographical error, as the letter clearly is in response to Mr. Benzing's July 19, 2002 letter.

4/ The date on this letter is July 30, 2001. It is obvious from its content, including the deadline established of August 15, 2002, that the reference to "2001" is a typographical error and was intended to be 2002.

On August 15, 2002, Mr. Benzing filed a "written response to the Respondents' Motion to Dismiss dated March 13th 2002," stating in full as follows:

> On January 17, 2002 you sent me a letter which had enclosed a copy of an Order Granting in Part and Denying in Part a Motion to Dismiss the Complaint and Amended Complaint and Order to Show Cause with an accompanying Memorandum. I responded to your order prior to the deadline of February 4th 2002. With a letter requesting that you send me any documents I would need to file an appeal of your Decision No. 30023-B mention (sic) above etc.
>
> I also stated in my letter if the time lines for the appeal of you [sic] decision wouldn't allow me to receive materials and file a timely appeal to consider my letter as an appeal to your decision. To this date I have not received any correspondence concerning my request for an appeal of your decision 30023-B.
>
> Some time latter (sic) around March 6th 2002 you contacted me in order to set a date and time for a hearing which we did and you informed me that you would contact me as soon as you had confirmed with the Respondents and secured a mutually agreed upon date. I immediately sent both Respondents' attorneys a request for answers to Interrogatories of which the Respondents did not recognize me as having the right to request.
>
> After reading the Respondent Wisconsin Education Association Council's and the Paraprofessional Technical Council's attorneys letter dated March 13th 2002 alleged Motion to Dismiss its obvious to me that the attorney has attempted to degrade and discriminate against me in regards to any input I submit. On several occasions she alleges that I alluded details which she could draw conclusions from and the letter doesn't conform to her mold of a proper response by a Complainant.
>
> Also the letter disregards the fact that I replied to your order dated January 17th 2002 with explanations which also obviously showed that I wasn't in any respect attempting to abandoned (sic) and/or prosecute. There is also no discussion of the affidavit submitted by Mr. Charles Stokes, which supported my original and

> amended complaint and again displayed are intentions of following through with this action. In regards to the attorneys (sic) depiction of my responses not being adequate is hard for me to believe since on every occasion to my knowledge I submitted the requested information and it was clear and concise.
>
> The Respondent's (sic) earlier in this action wanted the luxury of having the Commission hold this matter in abeyance why? For their conveyance? (sic) This matter is still being investigated by other government entities. Even though it has been brought out of abeyance by whose request, the Respondents request? It wasn't brought out of abeyance by my request or Mr. Stokes (sic). The record will also show neither Mr. Stokes nor I made any objections to the Respondents (sic) request for this matter to be held in abeyance.
>
> It is obvious to me that the Respondents current motion is one sided since the memories haven't faded to Mr. Stokes or me the ones who the discriminatory/illegal actions were taken against. The actions weren't taken against the Respondents. And because of the aforementioned I believe the Respondents have no grounds for this motion and the Motion to Dismiss should be denied.

On August 21, 2002, Mr. Benzing submitted a letter to the Examiner with additional documents, including an Initial Determination of Probable Cause issued on June 21, 2000 by the State's ERD relating to some of the charges he had pending before the Commission in the instant case. He stated, inter alia:

> Also after reading a copy of the complaint dated August 10, 2000 mailed to me several weeks ago by you. I realized that some how I accidentally mailed to the Examiner if not all parties a rough draft of my complaint instead of the final draft. As soon as I am able to locate the final draft I will send a copy to all parties in this matter.

On September 9, 2002, Mr. Benzing submitted what he labeled "a final draft of the complaint I filed with the Employment Relations Commission in August of 2000." By letter dated September 13, 2002, the Examiner asked the Respondents to advise him on their "plans for responding to Mr. Benzing's complaint of September 5, 2002, received in this office September 9."

On October 14, 2002, the Respondent College submitted a Motion to Dismiss Mr. Benzing's Amended Complaint. As grounds, the College stated: (1) Mr. Benzing's claims of sex, color, and race discrimination are outside the Commission's jurisdiction; and (2) to the extent Mr. Benzing asserts that his 3-day suspension in May 1999 violated MERA, it should be dismissed as moot, because the College and Mr. Benzing had reached a settlement of Mr. Benzing's ERD claim pursuant to which the College had expunged the three-day suspension and thus already provided the entire relief Mr. Benzing sought.

On October 17, 2002, the Respondent Unions submitted a motion urging:

> . . . that the Examiner dismiss the so-called 'final draft' as untimely and improperly filed, whether it be considered an amendment or a new Complaint. We also move that Mr. Benzing's August 17 documents be ruled not to be part of the record in this case at this time, and that Mr. Benzing be directed to cease submitting to your attention voluminous documentation that has little or no obvious connection with his pleadings until or unless he is able to offer them as exhibits at a hearing, with the opportunity of both the College and the Association to object. Finally, we renew our March 13, 2002 Motion that the remaining Complaint be dismissed in its entirety.

By letter to Mr. Benzing, dated December 12, 2002, the Examiner noted that Mr. Benzing had not submitted any reply to the Respondents' motions to dismiss and asked him to submit any reply by Monday, January 6, 2003. By letter dated January 8, 2003, the Examiner wrote to Mr. Benzing as follows:

> This is to confirm that you have left a message on my telephone voice mail informing me that you will not be filing a reply to the Respondents' motion to dismiss.
>
> This now closes the record on this aspect of the proceeding. The parties may expect my decision with sixty (60) days.

On May 19, 2003, the Examiner issued Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss Complaint and Order Denying Motion to Dismiss Amended Complaint. In his Memorandum, the Examiner took notice at length of Mr. Benzing's several previous cases before the Commission, from which he concluded that Mr. Benzing was well acquainted with Commission processes, including the need for clear and concise allegations.

He disregarded Mr. Benzing's "final draft" of his original complaint, because he concluded that "Mr. Benzing is trying to pass off a later-created document as having been drafted two years earlier than it was, in an attempt to address deficiencies which had been exposed in the document he now calls a 'rough draft.'" (Dec. No. 30023-C at 31). He revisited his earlier decision regarding the timeliness of Mr. Benzing's initial complaint and, based on the corrected filing date of August 29, 2000, dismissed that entire complaint as untimely as to all Respondents stating as follows:

> The underlying events occasioning Mr. Benzing's initial complaint were the three-day disciplinary suspension the college imposed and the union's subsequent decision not to pursue grievance #99-05 to arbitration. The union communicated that decision to Mr. Benzing by letter of August 12, 1999. Mr. Benzing filed his complaint on August 29, 2000 - more than one year after the event constituting the union's alleged prohibited practice, and several months more than that after the event constituting the college's alleged prohibited practice.

ID. at 32.

The Examiner's decision summarized the allegations in the Amended Complaint of March 14, 2001, as "alleging that when the college insisted on laying off the custodians and eliminating their bumping rights as part of the agreement for a new early retirement benefit, it did so to retaliate against him for past grievances." (ID. AT 33). He noted that he had already dismissed that claim against the Respondent Unions as untimely in his January 2002 decision. However, since the Respondent College was alleged to have ratified the agreement in question on March 15, 2000, he concluded that the claim was timely by one day as to the College and should proceed to hearing. Finally, he denied Mr. Benzing's attempt to add Mr. Stokes as a Complainant, because Mr. Stokes' affidavit had not included any allegations of prohibited practices under MERA, but rather centered entirely on race and gender discrimination charges.

The Examiner's May 19, 2003 decision did not address the Respondents' longstanding and recurrent motions to dismiss the case for abandonment or the Respondent College's motion to dismiss the suspension claim as moot.

DISCUSSION

As the Examiner observed in the Memorandum accompanying his May 2003 decision in this case, "[t]his case has had a long and tortuous path . . . ." (DEC. NO. 30023-C AT 20). We note that the Statement of the Case setting forth the record of proceedings fills nearly eleven single-spaced pages in a matter that had not yet been set for hearing.

The Examiner's decision was issued nearly four years after the earliest of the alleged unlawful conduct. We believe that Mr. Benzing himself was largely responsible for the excessive delay. As discussed more fully below, he repeatedly failed to respond to directives and virtually admitted in his February 4, 2002 submission that he had done so intentionally. 5/ The Examiner exacerbated the delay by failing to provide deadlines and/or to enforce what deadlines he did set. As set forth in our Order, we have concluded that the Examiner should have but erroneously failed to dismiss the entire complaint for lack of prosecution. We do so now and have made Findings of Fact and Conclusions of Law that warrant the dismissal.

5/ While this fact is not central to our decision, we note, as did the Examiner, that Mr. Benzing is an experienced litigator before this agency who has been advised repeatedly of the procedural requirements pertaining to WERC complaints and who may justly be held to the fruits of his repeated failure to comply.

We are aware that Mr. Benzing may find our Order surprising and unanticipated, since none of the Respondents have specifically addressed the abandonment issue in connection with the instant petition for review. However, once a petition for review is filed by any party, we have authority to conduct a *de novo* review of the entire matter. JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/92); TRANS AMERICA INSURANCE CO. V. DILHR DEPARTMENT, 54 WIS.2D 252 (1971); STATE V. INDUSTRIAL COMMISSION, 233 WIS. 461 (1940). Thus, we have examined the parties' arguments on the abandonment issue set forth in earlier submissions to the Examiner. Ultimately, we are persuaded dismissal for abandonment is appropriate due to our responsibility to the Respondents in this case, who were brought before us over three years ago and who since then have diligently tried to clarify and advance the litigation in a timely and appropriate fashion. We conclude that it would be unjust to impose upon them the burden and expense of defending so late in the game against claims that were neglected for long periods of time by Complainant Benzing even after he was specifically advised that his neglect had become an issue.

Given our decision to dismiss the entire case for Mr. Benzing's failure to advance the litigation, we will comment only briefly upon the issues raised in Mr. Benzing's petition for review and upon one other legal conclusion on which we and the Examiner take different views.

Mr. Benzing makes essentially four points in his petition for review. First, he appears to concede that he "made a decision not to reply to the Respondents' motion" after being directed to do so in the Examiner's letter dated December 12, 2002, because he did not trust

the Examiner to utilize the correct filing dates and because he believed the Examiner had misled him about the Stokes affidavit. In our view, Mr. Benzing's statements in this regard confirm our impression that he deliberately chose at times to disregard legitimate motions and directives intended to move the process along. That he did so out of a belief that he would not be treated fairly does not excuse his lack of response. Even an inexperienced litigant (which Mr. Benzing is not) should realize that the appropriate way to assert a claim of bias would have been in the response to the directive or by requesting Commission review of the Examiner's directive - not by simply ignoring it.

Second, Mr. Benzing objects to the Examiner's dismissal of his March 14, 2001 claim against the Respondent Unions, because he believes the relevant date of the Unions' action was not the date of the Technical Council's ratification vote (March 13, 2000) but rather the date on which the Council informed the College about that vote. We agree with the Examiner that the relevant date is the date Mr. Benzing learned of the ratification vote, i.e., March 13, 2000, not the date on which the Council informed the College of the ratification vote. Moreover, nothing in Mr. Benzing's complaints or associated documentation indicates that the Council conveyed its vote to the College on a date later than March 13, 2000.

Third, Mr. Benzing urges us to view his "final draft" complaint, filed on September 9, 2002, as a legitimate replacement for his initial complaint of August 2000, because he did not realize he had filed the wrong draft until July 30, 2002, when the Examiner sent him a copy of the original complaint. Contrary to the Examiner's approach on this issue, we do not believe it is appropriate in the context of a motion to dismiss to probe the credibility of Mr. Benzing's assertions regarding the initial and final "drafts" of his August 2000 complaint. Instead, we see nothing in the "final draft" that would overcome the timeliness flaws in the initial and amended complaints. The "final draft" states at one point that "For myself these illegal actions started around April of 1993 and continued throughout my employment until April of 2001." Later in the document, Mr. Benzing states, "My employment ended with the Respondent in April of 2000." In all other documentation that accompanied Mr. Benzing's submissions, he clearly asserts that his employment terminated in April 2000; hence we construe the reference to "April of 2001" as a typographical error. Even if Mr. Benzing were attempting to "correct" the dates in his August 2000 complaint in an effort to circumvent the one-year limitations period, he alleges nothing in his "final draft" complaint that remotely resembles a "clear and concise" account of actionable conduct by the Respondents other than the events that were alleged in his original and amended complaints.

Fourth, Mr. Benzing claims that the Examiner exhibited bias toward him by reciting at length previous Benzing litigation at the Commission, which Mr. Benzing saw as "prejudicial criticism and name-calling." Mr. Benzing's petition for review also alluded to the Examiner's bias based upon political contributions he had received from Respondent WEAC earlier in his career. As discussed above, the Examiner should not have discredited without a hearing

Mr. Benzing's assertions about the newly-discovered "final draft" and it would have been sufficient to conclude that Mr. Benzing's "final draft" did not alter his original and amended complaints in any material way. However, neither this error nor the record as a whole reflects bias on the part of the Examiner. In evaluating how much leeway to provide Mr. Benzing in his approach to the instant litigation, the Examiner properly considered Mr. Benzing's long history of practice before the agency, in which the Commission's rules regarding clear and concise pleading and its one-year limitations period had been called to Mr. Benzing's attention repeatedly. As to the Respondent WEAC campaign contribution, the Examiner had informed all parties of that contribution at the outset of the litigation (by letter dated December 20, 2000) and Mr. Benzing had raised no timely objection. Nor did the Examiner handle the proceedings in a manner that unduly favored WEAC, given the Examiner's initial (erroneous) decision that the August 2000 complaint had been timely filed against WEAC and its affiliate, the Paraprofessional Technical Council, and given the many subsequent opportunities that the Examiner gave Mr. Benzing to respond to WEAC's motions.

Lastly, we think it important to note that we disagree with the Examiner's conclusion that Mr. Benzing's August 29, 2000 initial complaint was untimely regarding the three day suspension and the Respondent Unions' refusal to take the corresponding grievance to arbitration. Construing Mr. Benzing's allegations and documentation liberally, it appears on the face of the complaint that Respondent Paraprofessional Council had decided on August 8, 1999, not to advance the suspension grievance to arbitration and that Mr. Benzing's correspondence of August 12 and 16, 1999 comprised a request that both Respondent Unions reconsider the grievance decision in light of certain additional information that he wished to provide. Further, Respondent WEAC's letter of August 17, 1999, could have opened up the possibility that the Respondent Council would reconsider if Mr. Benzing actually provided additional information. Mr. Benzing thereafter purported to provide additional information, and the Respondent Council did not finally close the window of opportunity until its letter dated September 10, 1999 - which was within the one year prior to Mr. Benzing filing his initial complaint on August 29, 2000. As noted earlier in our decision, a timely filed duty of fair representation claim would also render timely the underlying breach of contract claim. Of course, this liberal construction of the complaint would be subject to proof at an evidentiary hearing and Respondents could then renew their timeliness defense.

Given the foregoing, but for our dismissal of the entire complaint for abandonment, there would have been elements of Mr. Benzing's complaint as to both Respondent Unions and Respondent College that would have gone to hearing. Thus, we do not dismiss the complaint for lack of prosecution lightly. As an agency, we are highly protective of the interests of *pro se* litigants, who are often unfamiliar with legalisms such as "stating a claim" or the

difference between evidence and argument. The Commission has previously endorsed a "strong preference . . . for affording litigants a day in court and a trial on the issues." PRAIRIE HOME CEMETERY, DEC. NO. 22316-B (WERC, 10/85). In that case, an Examiner had dismissed a complaint solely because the complainant had failed to appear for hearing. The Commission reversed, enunciating the following standard:

> Only where the failure to appear is intentional or so recurrent as to represent an outright affront to the administrative process do we believe it appropriate to dismiss a complaint for lack of prosecution or to grant relief to a party based upon an ex parte record.

ID. at page 3, citing HEDTCKE V. SENTRY INS. CO., 109 WIS. 2D 461, 468 (1982). The HEDTKE analysis itself has been summarized recently as follows:

> The interests of justice require the court to consider the sometimes contradictory interests in affording litigants a day in court, and in ensuring prompt adjudication. In making this assessment, the court should look to such factors as 'whether the dilatory party has been acting in good faith, and whether the opposing party has been prejudiced.' A court should also consider the existence of prompt remedial action as 'a material factor' in assessing both the reasonableness of the delay and the interests of justice.

RUTAN V. MILLER, 213 WIS.2D 94, 101-102 (CT. APP. 1997) (citations omitted).

The Court of Appeals has recognized that the HEDTKE analysis is an application of the Rules of Civil Procedure (Sec. 801.01(2), Stats.) that does not bind administrative agencies. VERHAAGH V. LIRC, 204 WIS.2D 154, 162 (CT. APP. 1996). The court noted that LIRC's statute, Sec. 102.18 (1) (a), Stats., gave it discretion to dispose of a matter by ". . . default without a hearing." ID. at 160. 6/ However, to govern the agency's discretion, the court endorsed a set of considerations quite similar to those in HEDTKE: ". . . [T]he agency is entitled to exercise its discretion based upon its interpretation of its own rules of procedure, the period of time elapsing before the answer was filed, the extent to which the applicant has been prejudiced by the employer's tardiness and the reasons, if any, advanced for the tardiness." ID.

6/ The WERC's hearing procedures are governed in this respect by Sec. 227.44 (5), which contains language nearly identical to the cited portion of LIRC's procedural statute.

While the Commission traditionally has interpreted its discretion narrowly when it comes to default orders, certain aspects of the Commission's procedures require that those default mechanisms be meaningful. Unlike some analogous forums, such as the National Labor Relations Board, 7/ the EEOC, 8/ and the Wisconsin ERD, 9/ our complaint procedures do not include an initial investigation or a preliminary probable cause determination regarding the merits of claims. Nor do the Commission's processes encompass routine depositions or rudimentary discovery such as might test the validity of a complainant's charges prior to trial. Rather, a charging party who files a complaint alleging cognizable prohibited practices under MERA is entitled to proceed directly to a formal evidentiary hearing, transcribed by a court reporter, and not infrequently involving multiple days of testimony. In fairness to respondents, therefore, and in order to preserve the Commission's increasingly more scarce resources, we allow pre-hearing motions to ferret out allegations that on their face fall outside the Commission's jurisdiction, are untimely, or are so vague that the respondent cannot prepare for hearing. In deciding such motions, we give latitude to complainants, especially those who are unrepresented, showing patience with missed deadlines, inarticulateness, lost documents, difficulty in being contacted, etc. Mr. Benzing himself has benefited from such latitude in this case and in the past, as shown in the Examiner's recitation of previous Benzing litigation. However, there comes a point when forbearance toward a *pro se* party clashes with a respondent's legitimate interest in clarity, preservation of evidence, and closure. In our view, this point was surpassed in the present case and dismissal is warranted.

7/ See National Labor Relations Act, 29 U.S.C. Sec. 160 (b); NLRB Rules and Regulations, 29 C.F.R. Sec. 102.9 – 102.19; NLRB Statements of Procedure, Sec. 101.4.

8/ See, Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-5(b); EEOC Regulations, 29 C.F.R. Sec. 1601.7 – 1601.28.

9/ See, Sec. 111.39, Stats.

We note first that those aspects of Mr. Benzing's initial and amended complaints that meet the one-year limitations period do so by exceedingly narrow margins. The evidence was already less than fresh at the time the claims were filed. Thereafter, the Respondents did everything they could to clarify the claims and move the matter forward. Mr. Benzing, in contrast, completely ignored two pivotal directives from the Examiner:

> (1) the May 22, 2001 directive (following Mr. Benzing's Amended Complaint) that Mr. Benzing submit (1) a clear and concise statement of the facts constituting the alleged prohibited practices; (2) an explanation of why his Amended Complaint should be deemed timely; (3) a notarized statement from Mr. Stokes if he wished to be added

> as a Complainant; and (4) a statement as to why the proceeding should not be held in abeyance pending the initial determination by the EEOC on Mr. Stokes' race discrimination charge;
>
> (2) the Examiner's October 9, 2001 letter, sent by certified mail, directing Mr. Benzing to respond by October 31, 2001 to the Respondents' October 2, 2001 motion to dismiss for claim or issue preclusion and abandonment. The Respondents rested their abandonment claim on the fact that Mr. Benzing had failed to respond to the Examiner's May 22, 2001 directive for over four months.

At this point Mr. Benzing clearly should have known that his claims were jeopardized by his silence and inaction. The prospect of "abandonment" had been brought forcefully to his attention via certified mail. Unlike a motion to dismiss for lack of timeliness, lack of jurisdiction, or failure to state a claim, which could be decided without a response based upon the Examiner's review of the record or the law, a motion based upon a lack of responsiveness inherently demands a response. Nonetheless, the October 31, 2001 deadline came and went with no response from Mr. Benzing. Moreover, Mr. Benzing's silence continued for several more months. By the time the Examiner issued his first decision on January 17, 2002, Mr. Benzing had failed to communicate with the Examiner or the Respondents since he filed his Amended Complaint on March 14, 2001, a period of nearly ten months. He had not clarified his Amended Complaint, he had not explained why he believed his claims were timely, he had not complied with instructions about adding Mr. Stokes, and he had not protested when his silence had been read as abandonment. In this context, the Examiner erred in his January 17, 2002 decision when, instead of dismissing Mr. Benzing's claims for lack of prosecution, he offered Mr. Benzing yet another chance to respond to the Respondents' motion to dismiss for abandonment by issuing an Order to Show Cause.

Mr. Benzing's response to the Examiner's patience was to submit a letter on February 4, 2002 (set forth in full at pages 3 and 4, above) that virtually concedes that he intentionally chose not to prosecute the matter in the interim: "After reading [the Examiner's] letter I came to the conclusion that I would not be able to secure justice for the past injustices dealt to me by the other parties." He goes on to state that he has not mailed an affidavit from Mr. Stokes, as the Examiner requested, apparently because it "should not be my responsibility. . . ." Finally he appears to claim that he did not respond earlier because he viewed the amended complaint of March 14, 2001 as originally filed to be "concise and in accordance with the State Statutes. . . ."

In renewing their motion to dismiss on March 13, 2002, the Respondents state that Mr. Benzing's February 4 submission "falls far short of the mark of establishing cause" and "implies that he decided not to proceed further with the matter. . . . Respondents have the

right to defend their interests in a timely and expeditious fashion. That has not been possible here due to Mr. Benzing's consistent inaction." We agree. The Examiner erred a second time when he failed to grant the Respondents' motion to dismiss after receiving Mr. Benzing's inadequate February 4 submission in response to the Examiner's January 17, 2002 Order to Show Cause.

It is true that Mr. Benzing's interest in his claims was apparently renewed after February 4, 2002. We have previously noted that the Respondents have not brought the abandonment issue before us by filing their own petition for review. We further acknowledge, as did the Examiner, that his handling of the case contributed to the delay and confusion. 10/ Therefore, these are not ideal circumstances in which to terminate a complainant's case without a hearing, but they are sufficient. We observe that the Respondents, despite parrying various legal maneuvers by Mr. Benzing during the last stages of these proceedings, never ceased to insist that the Examiner decide their motion to dismiss for "abandonment," first filed in October 2001. Moreover, we also note that the Respondent Unions, who largely developed and pressed the abandonment argument, had lost much incentive to petition for review of the Examiner's May 2003 decision for failing to decide the abandonment motion, because that decision had dismissed all claims against the Respondent Unions on other grounds. On a balanced consideration of the legitimate interests of the Respondents as well as those of Mr. Benzing, we conclude that Mr. Benzing forfeited his claims when he chose not to respond to legitimately posed and appropriately conveyed inquiries about whether he had abandoned them. We believe it would be an unjust use of our processes to compel the Respondents to expend further time and resources on this matter so long after the alleged events took place. Moreover, we cannot sanction the procedural chaos reflected in this record. Orderly case handling requires that directives and deadlines established by the agency are subject to reasonable enforcement.

10/ We have also considered: (1) that the March 13, 2002 iteration of the Respondent Unions'' motion to dismiss may not have reached Mr. Benzing until July 2002 because of his move from Beloit to Milwaukee; and (2) that Mr. Benzing filed another response to the abandonment issue thereafter on August 15, 2002, which is quoted verbatim at pages 12 through 13, above. Neither point undermines our conclusion. We first note that it is Mr. Benzing's responsibility to notify the Commission and the parties of a change of address, if he wishes to receive materials pertinent to his pending case. Second, whether or not Mr. Benzing received the Unions' March 13 materials is immaterial to our conclusion that his claims should have been dismissed at least as of February, 2002, when he failed to show cause as directed in the Examiner's January 2002 decision. Finally, Mr. Benzing's August 2002 submission relies heavily upon statements he claims to have made in his February 4 submission, whereas in fact all of those statements are derived from his March 21, 2002 letter to the Examiner. See pages 9 through 13, above. Finally, Mr. Benzing seems to assert in his August 15, 2002 submission that he did not respond to the abandonment motion because he assumed the matter had been held in abeyance based upon the Respondents' March 30, 2001 motion. While we have given thought to this assertion,

we ultimately find it both far outside the time frame in which it should have been raised (i.e., by October 31, 2001) and insufficient on the merits, because it would have been unreasonable for any party to have concluded that the matter was held in abeyance after the Examiner's letter of May 22, 2001 and his certified letter of October 9, 2001.

For the foregoing reasons, we dismiss Mr. Benzing's complaint in its entirety for lack of timely prosecution.

Dated at Madison, Wisconsin, this 27th day of October, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

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