STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DONALD J. STUCKART, Complainant,

vs.

AFSCME, WISCONSIN STATE EMPLOYEES UNION, COUNCIL 24, Respondent.

Case 9
No. 66948
Cw-3673

Decision No. 32234-A

Appearances:

Donald J. Stuckart, 2725 Glendale Avenue, Green Bay, Wisconsin 54313, appearing on his own behalf.

Kurt C. Kobelt, Lawton & Cates, Attorneys at Law, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Respondent.

ORDER DENYING MOTION TO DISMISS

On May 3, 2007, Complainant Donald J. Stuckart (hereafter "Stuckart") filed a complaint with the Wisconsin Employment Relations Commission, alleging that Respondent AFSCME, Wisconsin State Employees Union, Council 24 (hereafter "WSEU Council 24") had committed an unfair labor practice, by refusing to participate in arbitration relating to a fair share challenge filed by Stuckart. On July 10, 2007, WSEU Council 24 filed a motion to dismiss the complaint, on the grounds that the arbitration hearing had been scheduled and the case, therefore, was moot. Written arguments related to the motion to dismiss were filed by both parties, the last of which was received on August 15, 2007. Having considered the motion to dismiss, as well as the arguments of the parties, the Examiner issues the following

ORDER

The motion to dismiss the complaint is hereby denied.

Dated at Madison, Wisconsin, this 3rd day of October, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

gjc
32234-A

AFSCME, WISCONSIN STATE EMPLOYEES UNION, COUNCIL 24

**MEMORANDUM ACCOMPANYING ORDER
DENYING MOTION TO DISMISS**

The instant matter relates to whether WSEU Council 24 committed an unfair labor practice when it allegedly refused to participate in an arbitration of a fair share challenge that had been brought forth by Stuckart. In recognition of the drastic consequences that flow from granting a motion to dismiss and denying an evidentiary hearing, a complaint that is the subject of such a motion must be construed liberally, in favor of the complainant, and the motion should be granted only if no interpretation of the facts alleged would entitle the complainant to relief. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 15915-B (Hoornstra, with final authority for WERC, 12/77); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94).

The complaint asserts that, through Stuckart's employment at the Green Bay Correctional Institution, he pays fair share dues to WSEU Council 24 or to an affiliated local union. On January 13, 2006, Stuckart filed a fair share challenge, in the form of a grievance, with WSEU Council 24, which grievance challenged a 2006 fair share dues payment. The grievance was not resolved, and, at some point, Stuckart began to seek an arbitration hearing regarding the matter. Repeatedly, Stuckart's requests for a hearing were either ignored or he was told that he was not entitled to such a hearing. On May 3, 2007, Stuckart filed the instant complaint with the Wisconsin Employment Relations Commission, alleging that the refusal on the part of WSEU Council 24 to participate in an arbitration hearing constituted an unfair labor practice. Finally, on June 20, 2007, subsequent to the filing of Stuckart's complaint, a notice of arbitration hearing pertaining to Stuckart's grievance was issued.

WSEU Council 24 contends that the instant complaint should be dismissed. The rationale advanced by WSEU Council 24, in support of its motion to dismiss, is that the case is now moot because an arbitration hearing regarding Stuckart's fair share challenge was scheduled for and, in fact, conducted on July 31, 2007. Stuckart, therefore, already has received the remedy he sought.

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 been 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, 440-441 (1948). The court has recently reiterated, with regard to the last of these definitions of a moot case, that "[a]n 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). It is this definition of mootness that WSEU Council 24 argues applies to the present case.

Here, WSEU Council 24 ostensibly has ceased the allegedly unlawful behavior that formed the basis of Stuckart's complaint, by having participated in the July 31, 2007 hearing. That being the case, WSEU Council 24 is correct in asserting that a resolution of the instant case on the merits cannot offer the practical remedial effect of ordering that the sought after hearing be held. The Commission,

however, does not view the mere cessation of allegedly unlawful behavior as sufficient basis for dismissing a case for mootness. MILWAUKEE AREA VOCATIONAL, TECHNICAL, AND ADULT EDUCATION DISTRICT, DEC. NO. 27503-D (WERC, 10/05). 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*. In other words, deterrence of future similar unlawful conduct can justify resolving a case, even where there is little immediate practical import. *Id*. In the present case, Stuckart specifically has sought to have "a record of this violation be recorded in public record", alluding to the deterrence value of a decision on the merits. WSEU Council 24, on the other hand, has denied any wrongdoing. An answer to the question of whether the alleged refusal to arbitrate, under the present circumstances, constituted an unfair labor practice – and any deterrence of similar conduct that could result from such an answer – represents a legal effect that undermines the assertion that this case is moot.

The present case also is not appropriate for dismissal under a theory of mootness, given the standard set forth in CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO V. HUDSON, 475 U.S. 302 (1986). Specifically, our Supreme Court held in that case that the constitutional requirements for a union's collection of agency fees include, among other things, "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker". *Id*. at 310. Though the hearing in the present case has been held, the question remains as to whether, given the circumstances, it was held in a "reasonably prompt" fashion. Moreover, the fundamental, constitutional nature of the right at stake dictates that the Examiner uses caution to see that the merits of this dispute are heard.

For the above reasons, the motion is hereby denied.

Dated at Madison, Wisconsin, this 3rd day of October, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

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