

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**SUSAN G. SCHULTE**, Complainant

vs.

**WAUKESHA COUNTY TECHNICAL COLLEGE**, Respondent.

Case 117  
No. 68879  
MP-4499

**Decision No. 32785-D**

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**Appearances:**

**Susan G. Schulte**, appearing on her own behalf.

**Sean M. Scullen**, Attorney at Law, Quarles & Brady, LLP, 411 East Wisconsin Avenue, Milwaukee, WI 53202-4497, appearing on behalf of Waukesha County Technical College.

**Jina L. Jonen**, Attorney at Law, Wisconsin Education Association Council, 33 Nob Hill Road, Madison, WI 53708-8003, appearing on behalf of Wisconsin Education Association Council.<sup>1</sup>

**ORDER DENYING MOTION TO DISMISS FOR LACK OF PROSECUTION**

On May 8, 2009, Susan G. Schulte (Schulte) filed a complaint with the Wisconsin Employment Relations Commission (Commission) asserting that Waukesha County Technical College (College) had committed prohibited practices within the meaning of the Municipal Employment Relations Act by not proceeding to contractual grievance arbitration over her termination.<sup>2</sup> On August 7, 2009, the College filed a motion to dismiss the complaint. On September 15, 2009, Commission Examiner Daniel Nielsen granted the motion to dismiss, finding that the allegations raised in the complaint failed to state a claim upon which relief could be granted because although the contractual language was ambiguous, evidence submitted by the College established

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<sup>1</sup> The Wisconsin Education Association Council's (WEAC) motion to intervene was granted at the hearing and has been treated as a party for the purposes of briefing this motion.

<sup>2</sup> A more thorough rendering of the background of this case can be found in Examiner Nielsen's decision and the Commission's order on review of examiner's decision. Dec. No. 32785-A (Nielsen, 9/09) and Dec. No. 32785-B (WERC, 12/09).

that the parties to the collective bargaining agreement – i.e., the College and the collective bargaining representative – did not intend for the arbitration step of the grievance procedure to be available to individual bargaining unit members absent Union approval not present in this case. Therefore, Examiner Nielsen concluded that Schulte did not have a right to pursue arbitration with the College independent of the Union.

On September 29, 2009, Schulte filed a petition for review of Examiner Nielsen's decision with the Commission. On December 17, 2009, the Commission agreed with Examiner Nielsen that the contractual language was ambiguous on the question of whether individual bargaining unit members have the right to pursue arbitration with the College absent the participation or acquiescence of the Union. However, the Commission found that the evidence relied upon to dismiss the complaint consisted of self-serving hearsay. As such, the Commission concluded the evidence was not sufficient to definitively resolve the ambiguity against Schulte and that Schulte should have the opportunity to test the hearsay evidence at hearing. The Commission set aside the Examiner's Order and assigned the matter to Examiner Matthew Greer for further proceedings.

An evidentiary hearing was held on April 26, 2010 in Waukesha, Wisconsin before Examiner Greer. Schulte appeared at the hearing room with a representative,<sup>3</sup> but left the hearing before the hearing could begin. The reasons she gave for leaving<sup>4</sup> included 1) her concern about the number of people in the hearing room that she perceived would be witnesses and the nature of the testimony that those witnesses would deliver, 2) her concern that the hearing would delve into issues related to the underlying grievance that Schulte desired to arbitrate, 3) her belief that the documents already presented were sufficient for her to argue her case, and 4) her desire to preserve her arguments for when she went to arbitration on the grievance.

The Examiner attempted to answer Schulte's concerns by assuring her that the hearing was limited to the issue identified in the Commission's December 2009 decision,<sup>5</sup> and that she could make a motion to sequester witnesses in order to limit the number of witnesses in the hearing room. The Examiner further warned Schulte that

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<sup>3</sup> Schulte's representative did not file an appearance and was not identified on the record. He has not taken any other action on Schulte's behalf related to this case. For the purpose of this decision, Schulte has been treated as a *pro se* party.

<sup>4</sup> Schulte expressed these reasons orally in conversations prior to the hearing and in a letter from Schulte to the Examiner dated April 30, 2010. The Examiner summarized the oral conversations with Schulte on the record at the hearing following her departure.

<sup>5</sup> The Examiner offered Schulte's representative a copy of the decision, but was informed that he had a copy of it and that the substance of the decision did not affect Schulte's decision not to participate in the hearing.

the hearing would proceed despite her absence and that her ability to argue her case could be prejudiced if she did not participate. Despite these assurances and warnings, Schulte left the hearing before it could begin. The hearing proceeded and the College and WEAC presented evidence in support of their positions. Because she decided not to participate in the hearing, Schulte neither presented any evidence in support of her complaint, nor did she rebut the evidence put forth by the College and WEAC.

Following Schulte's departure, the College moved to dismiss the complaint for failure to prosecute and WEAC joined the motion. It was argued that Schulte was the party with the burden of going forward and her deliberate absence indicated that she was not willing to pursue her complaint.

The Examiner established a briefing schedule limited to the motion to dismiss for lack of prosecution.<sup>6</sup> The parties were provided an opportunity to submit written arguments in support of their positions, the last of which was received June 4, 2010.

### **DISCUSSION**

The Commission rarely upholds the dismissal of a complaint for lack of prosecution, particularly where the complainant is unrepresented. When it does, it is commonly premised on a history of repeated delays that cause prejudice to the other parties. *See, e.g.*, BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-D (WERC, 10/03).

The College and WEAC have not demonstrated that they have suffered prejudice as a result of Schulte's decision not to participate in the hearing. In BLACKHAWK TECHNICAL COLLEGE, *supra*, the Commission ordered dismissal in a case where the respondent suffered prejudice when a *pro se* complainant repeatedly ignored deadlines and scheduling requests from the examiner. These delays resulted in a decision issued nearly four years after the facts in the complaint had occurred. Under those circumstances, "forbearance toward a *pro se* party clashes with a respondent's legitimate interest in clarity, preservation of evidence, and closure." *Id.* at 20. In this case, the College and WEAC did not provide any evidence or argument that Schulte's decision to leave the hearing prejudiced their ability to respond to the issue at hearing. The hearing proceeded as scheduled following Schulte's departure and the College and WEAC were afforded a full opportunity to present evidence.

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<sup>6</sup> Schulte claims that she did not receive the communication from the Examiner setting the briefing schedule on the motion and requested an extension of time in which to file arguments. The Examiner concluded that the briefing schedule was properly served on Schulte and denied her request for an extension. However, relevant arguments made in two letters submitted by Schulte on April 30, 2010 and May 24, 2010 were considered in deciding this motion.

In contrast, the Commission has overturned an examiner's decision granting a motion to dismiss for failure to prosecute after a complainant ostensibly abandoned a hearing. In *MILWAUKEE PUBLIC SCHOOLS*, DEC. NO. 29482-B (WERC, 5/99), near the conclusion of a contentious first day of what would have been a multiple day hearing, the *pro se* complainant was unhappy with one of the examiner's rulings and left the hearing before it had concluded for the day. The examiner granted the respondent's motion to dismiss on the basis that the complainant indicated his unwillingness to further prosecute his case. In reversing the examiner's decision, the Commission found that the factual premise for granting the motion was incorrect - i.e., that nothing in the record indicated that complainant would not be pursuing his case further. The Commission further stated that, "even if the Complainant had indicated that he would not be attending additional days of hearing, dismissal of the complaint would not have been appropriate." *Id.* at 12.

In this case, Schulte indicated before leaving the hearing that although she was not going to participate in the hearing, she intended to continue arguing her case. Such a statement indicates that she did not intend to abandon the prosecution of her complaint by leaving the hearing, only that she had decided not to prosecute her complaint by presenting or rebutting evidence at the hearing stage of the proceedings. Accordingly, the Examiner finds that Schulte has not failed to prosecute her complaint and denies the motion to dismiss the complaint on that basis.

Although the Examiner concludes that granting a motion to dismiss is not appropriate in these circumstances, there are other consequences of Schulte's decision to leave the hearing. Consistent with the Commission's view in *MILWAUKEE PUBLIC SCHOOLS*, *supra*, once a complainant has made clear their intention not to participate further in the hearing process, the Complainant will be deemed to have waived certain rights pursuant to ERC 18.08(3)(b)<sup>7</sup>, which provides:

- (b) *Effect of failure to appear.* Unless good cause is shown, any party failing to appear and participate after due notice waives the rights listed in par. a, except the right to submit closing arguments in writing within a time period after the hearing specified for that purpose by the commission or examiner, and shall not later introduce any evidence. The commission or examiner may rely on the record as made at the hearing.

In this case, Schulte was warned by the Examiner that the hearing would take place regardless of her decision to leave. She was also made aware of the consequences of leaving, namely that she would forfeit her ability to present evidence, cross-examine witnesses, rebut evidence, and make objections. In its brief, WEAC

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<sup>7</sup> ERC 18.08(3)(b) is made applicable to this proceeding pursuant to ERC 12.05.

argues that none of the reasons Schulte provided for leaving the hearing constitute good cause. Essentially, Schulte's reasons for leaving were related to the nature of the hearing process. While it is understandable that a *pro se* complainant would have apprehension regarding the adversarial nature of the hearing, it does not follow that a complainant can unilaterally decide not to participate in a hearing with no consequences. In this case, the consequences are that Schulte has waived her right to present evidence, cross-examine witnesses, and rebut the evidence presented. She is now limited to arguing the merits of her case based on the evidentiary record that was created at the hearing in her absence.

### **ORDER**

The motion to dismiss for lack of prosecution is hereby denied. Schulte has until July 26, 2010 to file written arguments on the issue presented at the hearing, i.e., whether the evidence produced at the hearing establishes her right to proceed to arbitration with the College absent union participation or acquiescence. The College and WEAC will then have until August 25, 2010 to file a response. Schulte will then have until September 7, 2010 to file a reply.

Dated at Madison, Wisconsin, this 24th day of June, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Matthew Greer, Examiner