

ORIGINAL

IN THE SUPREME COURT OF OHIO

Westlake Civil Service Commission, et al.	:	Case No. 13-0052
	:	
Appellants,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
	:	
Richard O. Pietrick,	:	Court of Appeals Case No. 98258
Appellee.	:	

APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS APPEAL AS MOOT

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**APPELLANTS' RESPONSE TO APPELLEE'S  
MOTION TO DISMISS APPEAL AS MOOT**

**A. Introduction**

Appellee, Richard O. Pietrick (hereinafter "Pietrick"), misstates material facts in his motion and further misstates the law concerning the concept of mootness, all as set forth herein. It is requested that the Motion to Dismiss be denied.

**B. Statement of Facts**

Pietrick misstates certain material facts concerning the status of this matter at the trial court level and the actions of Appellants (hereinafter "Westlake") in regard to the trial court's order. Further, Pietrick conveniently ignores the fact that pending before this Court is a Renewed Motion to Stay the lower court's order.

After the Eighth District Court of Appeal's decision affirming the lower court's order was issued, Pietrick filed his Motion to Set Hearing for Determination of Back Wages and Benefits Due. Pietrick did not seek clarification of the trial court's order that he be placed into the position of captain. The lower court did not state how Westlake should place Pietrick into a position for which no vacancy existed and into a position which Pietrick did not hold, prior to demotion. Pietrick did not request that the lower court clarify the method used to place him into the position of captain. As a result, the method by which the same was done, was determined by the City in an effort to comply with the court order and create the least amount of disturbance within the existing ranks of the fire department. The appointment of Pietrick to captain is fully reversible should Westlake's current Motion to Stay be granted.

Westlake responded to the Motion to Set Hearing for Determination of Back Wages and as of this date, no hearing has been set nor has any decision been made by the trial court on said motion. Westlake also filed its Notice of Appeal as well as its Memorandum in Support of

Jurisdiction and Motion to Stay in the Ohio Supreme Court. On February 20, 2013, prior to any decision concerning the acceptance of jurisdiction, this Court denied Westlake's initial Motion to Stay. After this Court's denial of a stay and at the request of Pietrick via phone calls from his legal counsel demanding compliance with the lower court order, Westlake was obligated to appoint Pietrick to the position of captain and calculate the back pay owed. Westlake tendered a check for same, which check Pietrick had voluntarily failed to cash. (The circumstances of Westlake's compliance with the lower court order is further set forth in Westlake's Renewed Motion to Stay.) Contrary to the representation made by Pietrick to this Court, Westlake did not establish his captaincy by ordinance and did not "unilaterally and voluntarily" take action. Westlake acted under and pursuant to a subsisting trial court order to pay back pay and place Pietrick into the position of captain. Westlake placed Pietrick into the judicially created position of captain pursuant to the lower court's order, not by passing an ordinance establishing another (a fourth) captaincy and appointing Pietrick to the position by councilmatic action. As the Motion to Stay filed in the Ohio Supreme Court had been denied, Westlake was compelled to comply with the lower court's order and did so in good faith and at the insistence of Pietrick's counsel.

As this Court is aware, jurisdiction was originally denied but, pursuant to a Motion for Reconsideration and based upon the existence of an issue of great public and general interest, this Court has now accepted jurisdiction. Westlake has filed a Renewed Motion to Stay, having issued a stop order for the check which remained uncashed on the date the City's renewed motion was filed and as Westlake is further able to reinstate Pietrick back into the position of fireman without interruption to the appointed ranks within the Fire Department.

### C. Law and Argument

Pietrick ignores an important tenet of the doctrine of mootness, as expressed in the case of *In re Suspension of Huffer* (1989) 47 Ohio St.3d 12, 546 N.E.2d 1308; citing *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 505 N.E.2d 966:

“Likewise, if a case involves a matter of public or great general interest, the court is vested with jurisdiction to hear the appeal, even though the case is moot.”

47 Ohio St.3d at page 14

As this Court has accepted jurisdiction and granted a discretionary appeal on the very same basis as the exception to mootness, that is, the case involves a matter of public or great general interest, the basis exists for denial of the requested Motion to Dismiss.

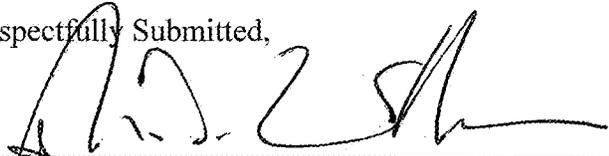
Moreover, as is also set forth in *Huffer, supra*, a case is not moot if the issues are capable of repetition, yet evading review. *See, Huffer*, citing *State ex rel. The Repository v. Unger* (1986) 28 Ohio St.3d 418, 504 N.E.2d 37. Herein, the erroneous decision of the Eighth District has the harmful potential of repetition in the faulty application of Ohio Revised Code §124.34(A) to civil service employees disciplined for misconduct. On the basis of potential repetition that may evade review, the issue is, as a matter of law, not moot and the Motion to Dismiss must be denied.

Lastly, as an analysis of the facts clearly indicates, the factual basis for mootness has not been met. The cases cited by Pietrick deal with voluntary payment and satisfaction of judgment, a circumstance that has not occurred, as of yet, in this litigation. If it had and were there circumstances that rendered it impossible for stay, Westlake would not have filed its Renewed Motion for Stay. There is certainly an actual controversy that continues to exist, and the existence of such a controversy precludes dismissal based on mootness. *Dudek v. United Mine Workers of America*, 164 Ohio St. 277 (1955).

**D. Conclusion**

The Motion to Dismiss not only mistakes the actions of Westlake in the instant matter, but clearly ignores the law in the State of Ohio as to the doctrine of mootness. This Court's re-considered determination to accept jurisdiction over the objection of Pietrick (wherein he could have raised the argument of mootness in his Memorandum in Opposition to Westlake's Motion for Reconsideration, but failed to do so, thereby waiving the opportunity to raise it now after jurisdiction has been accepted) was sound and in accordance with the law in Ohio that this is a matter of great public interest and may properly be considered. Further, the controversy between the parties still exists. Accordingly, Pietrick's Motion to Dismiss should be denied.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy Appellants' Response to Appellee's Motion to Dismiss Appeal as Moot was sent by ordinary U.S. mail on this 29<sup>th</sup> day of July, 2013.

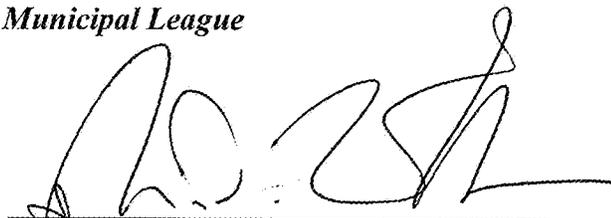
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