STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME COUNCIL 40 AND AFSCME LOCAL 2494 (PUBLIC HEALTH NURSING BARGAINING UNIT), Complainant, vs. WAUKESHA COUNTY, Respondent.	Case 76 No. 30569 MP-1396 Decision No. 20137-A

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, 110 East Main Street, Madison, Wisconsin 53703-3354, on behalf of the Complainant.
Michael, Best & Friedrich, Attorneys at Law, by Mr. Marshall R. Berkoff, Suite 2000, 250 East Wisconsin Avenue, Milwaukee, WI 53202-4286, on behalf of the Respondent.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

AFSCME Council 40 and AFSCME Local 2494 (Public Health Nursing Bargaining Unit), herein the Union, filed the instant complaint with the Wisconsin Employment Relations Commission on October 27, 1982, alleging that Waukesha County, herein the County, had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act, herein MERA, by refusing to allow Union representatives (or its designees) to conduct an on-site job evaluation after formal mediation-arbitration proceedings had begun and prior to a scheduled mediation-arbitration hearing before Mediator-Arbitrator Michael Rothstein in order to help prove its claim at said hearing that certain bargaining unit employes classified as Public Nurse II's should be reclassified to the higher Sanitation II classification. The Commission on December 6, 1982 appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Sec. 111.07(5) and the County filed an answer on December 17, 1982, along with a Motion to Dismiss Complaint. On December 27, 1982, the County filed a brief in support of said Motion where it argued that its Motion be granted because the matter in dispute had been rendered moot and because Complainant had failed to exhaust the contractual grievance/arbitration procedure.

In the meanwhile, and after the parties had met with Arbitrator Rothstein on July 13, 1982 in an unsuccessful effort to mediate their contract dispute, hearing was held before Arbitrator Rothstein on November 18, December 7, and December 23, 1982 (subsequent hearing was held on January 20, August 27, October 6 and October 13, 1983.)

On February 10, 1983, the Union asked Arbitrator Rothstein for an order directing the County to permit an on-site job survey, but Arbitrator Rothstein by letter dated February 28, 1983 denied said request on the ground that it was untimely and would enable the Union to improperly try to rehabilitate the testimony of Professor George Hagglund after he had already testified in the mediation-arbitration hearing. After further communications between the parties and the Examiner, the Union on June 29, 1983 filed a brief in opposition to the County's Motion; that was followed by the County's July 18, 1983 reply brief in support of its Motion to Dismiss. The parties ultimately agreed to hold this matter in abeyance pending the resolution of their mediation/arbitration dispute before Arbitrator Rothstein over the terms of a 1983-84 collective bargaining agreement.

Following the issuance of Arbitrator Rothstein's August 3, 1984, decision, the Union requested that the matter be scheduled for hearing. The County, in turn, reiterated its position that the matter had been rendered moot. In support

of its position, the County on July 8, 1985, forwarded to the Examiner a part of the transcript in the hearing conducted before Arbitrator Rothstein dealing with the adequacy of the Union's job evaluation which it prepared without the benefit of the on-site inspection. In response, the Union on July 10, 1985, reiterated that the issue herein had not been rendered moot and that, furthermore, the County's denial of an on-site inspection was an important consideration in the underlying mediation/arbitration case.

Having considered the Motion, the record so far developed and the arguments of the parties, and being satisfied that the Motion to Dismiss should be granted;

NOW, THEREFORE, it is

ORDERED 1/

That Respondent's Motion to Dismiss is granted and the complaint is hereby dismissed in its entirely.

Dated at Madison, Wisconsin this 28th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

WAUKESHA COUNTY

MEMORANDUM ACCOMPANYING ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

The Union's underlying prohibited practice complaint turns on whether the County acted unlawfully when, during the midst of an ongoing mediation-arbitration proceeding, it refused to allow Union representatives to visit its work site for the purpose of conducting a job evaluation in order to help substantiate its claim in said proceeding that Public Health Nurses II's should be reclassified to the higher Sanitarian II classification, with the Union contending, and the County denying, that it has the statutory right to conduct such on-site job evaluations under these circumstances.

The County contends that the mediation/arbitration proceeding which gave rise to the instant dispute closed with the issuance of Arbitrator Rothstein's Award on August 3, 1984, and that the information sought by the Union therefore is no longer needed, thereby rendering the entire matter moot. Furthermore, the County points out that the Union's chief witness on the reclassification issue in the mediation/arbitration proceeding, Professor George Hagglund, expressly acknowledged that the study he conducted regarding the job duties of the Public Health Nurses and the Sanitarians was both reliable and complete even without an on-the-job inspection.

But the Union argues the County in fact never agreed to the reliability of Professor Hagglund's study and Arbitrator Rothstein commented in his Award:

> The County next attacks the methodology used by Hagglund to gather and analyze data for his report. The County points out that Hagglund disregarded substantial amounts of information supplied by the County, that leading questions were asked of a few public health nurses and sanitarians by a student with no job evaluation experience, that Hagglund himself never visited the County or interviewed people whose statements formed the basis for the job descriptions, and that there was no participation in the formation of job descriptions by management personnel. In addition, the same person did not gather and apply the information. According to the County, this is essential for a proper job evaluation. Thus, the job descriptions which evolved were inaccurate and incomplete.

Arbitrator Rothstein added that part of this difficulty arose because the County itself had refused to allow Union representatives to conduct an on-site evaluation, noting:

> The first question deals with the job analysis or development of job descriptions. While the County contends that the job descriptions were incomplete, one of the sources for that problem is the County itself. The Union had requested access to the work site in order to gather information and observe public health nurses and sanitarians performing their jobs. The County denied this request. Furthermore, there was no validation by supervisory personnel of the job descriptions prepared by Dr. Hagglund. Yet, overall, the job descriptions tend to be accurate. (Emphasis added.)

While therefore finding that the job descriptions themselves were accurate, Arbitrator Rothstein nevertheless was unable to give much weight to Professor Hagglund's study because of numerous flaws in the methodology he used. Accordingly, Arbitrator Rothstein ruled that there was insufficient evidence to support the Union's reclassification request.

Professor Hagglund in this proceeding has filed an affadavit wherein he claimed that an on-site inspection would have made his report "more comprehensive" and that it would have enabled him to verify some of his data in part because some

of the disputed duties were "more observable than recordable." Yet Professor Hagglund concedes in his affadavit that his report "is a reliable and complete evaluation of the information which was available" and that "it is unlikely that information I could have obtained from an on-site evaluation would alter the basic findings of the report." At the hearing before Arbitrator Rothstein, Professor Hagglund also admitted on cross-examination, "It's (i.e. his report) reliable, and it's complete."

The record shows, then, that the Union has failed to prove that the County's denial of its on-site evaluation request materially affected the Union's ability to present its reclassification claim before Arbitrator Rothstein.

Moreover, since the Union made its request after the mediation-arbitration proceeding had already commenced in order to help prepare and prove its case before Arbitrator Rothstein, there is no question but that Arbitrator Rothstein had jurisdiction to rule on this matter when the Union asked him to order the County to grant its on-site inspection request. By first refusing to grant the Union's request on February 28, 1983, and then later issuing his August 3, 1984, decision on the substantive merits of the Union's reclassification request, Arbitrator Rothstein effectively resolved this issue, thereby rendering any further proceedings moot. For as noted by the Wisconsin Supreme Court in Zieman vs. Village of North Hudson, 102 W.2d. 705, 307 N.W. 2d 236 (1981), a moot case is one which seeks a "judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing legal controversy." That certainly is the case here. Accordingly, the County's Motion to Dismiss is granted. 2/

Dated at Madison, Wisconsin this 28th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

2/ It must be emphasized that this ruling is predicated upon the very narrow facts of this case which show that the Union's request for an on-site inspection was made during the pending of the mediation/arbitration in order to shore up Professor Hagglund's subsequent testimony before Arbitrator Rothstein and that this matter has been definitively resolved. Accordingly, it is unnecessary to decide whether a union has a statutory right to insist upon on-site inspections in other circumstances, as that broader issue is not before us. Moreover, it also should be noted that the County here apparently supplied the Union, per the latter's request, with various other information including computer summaries of work analysis, health department policy and procedure manuals, non-represented employe salary schedules, etc.