STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME COUNCIL 24, WISCONSIN STATE EMPLOYEE UNION, AFL-CIO,	:	
Complainant,	:	Case CLXII No. 28057 PP(S)-82
vs.	:	Decision No. 18793-A
STATE OF WISCONSIN (PROFESSIONAL-SOCIAL SERVICES),	:	
Respondent.	:	

Apopearances

Lawton and Cates, Atorneys at Law, 110 East Main Street, Madison, Wisconsin, 53703, by Mr. Richard V. Graylow, appearing on behalf of the Complainant.

Mr. Sanford Cogas, Attorney at Law, Department of Employment Relations, State of Wisconsin, 149 East Wilson Street, Madison, Wisconsin 53702, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AMEDEO GRECO, HEARING EXAMINER: AFSCME Council 24, Wisconsin State Employee Union, AFL-CIO, herein the WSEU, filed a complaint with the Wisconsin Employment Relations Commission, herein Commission, alledging that the State of Wisconsin, (Professional Social Services), herein the Employer, had committed an unfair labor practice within the meaning of Section 111.84(1)(e) of the State Employment Relations Act, herein SELRA. The Commission thereafter appointed the undersigned to act as Examiner to make and issue Findings of Fact, Conclusion of Law and Order, as provided for in Section 111.07(5), Wis. Stats. Hearing was held on November 2, 1981 at Madison, Wisconsin. The parties thereafter filed briefs.

Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Complainant WSEU is a labor organization which has its principal place of business at 5 Odana Court, Madison, Wisconsin 53719. It is the certified bargaining agent for, among others, the professional social services bargaining unit employed by the Employer.

2. Respondent Employer has its principal place of business at Madison, Wisconsin 53702.

3. WSEU and the Employer are parties to a collective bargaining agreement which provides for final and binding arbitration in Article IV, Section 56.

4. Harold Hanisch, employed by the Employer since 1970, was discharged on March 19, 1980. At that time, he was employed as a Job Service Specialist III at the Oshkosh, Wisconsin Job Service Office of the Department of Industry, Labor and Human Relations, herein DILHR.

5. The WSEU grieved Hanisch's discharge and subsequently appealed it to final and binding arbitration to arbitator Frank Zeidler. On January 19, 1981 Arbitrator Ziedler issued his award, wherein he found that the Employer lacked just cause to discharge Hanisch. In so finding, Ziedler ruled:

> AWARD. In the grievance of Harold W. Hanisch, Job Service Specialist III, Oshkosh Job Service Office, that he was discharged without just cause for intentionally falsifying records, the arbitrator holds that the grievant violated the policies of the Job Service, and that discipline in some form is merited. However the Employer has violated Article IV Section 9 in making that form of discipline to be discharge, since the charge of intentional falsification of records is not proven, but rather only that of violating Job Service policies. The extent of policy violation of the grievant is extensive enough to warrant that

while the grievant is to be reinstated, it is to be without back pay or other benefits.

6. In his decision, Ziedler did not expressly state that Hanisch should or should not be reinstated to his former job at the Oshkosh office. In addition, none of the parties in the arbitration proceding ever raised that issue. Furthermore, Ziedler did not retain jurisdiction after the issuance of his Award.

7. Following Ziedler's award, the Employer unilaterally assigned Hanisch to the Menasha Job Service Office as a lead worker of the Employment Assistance unit. Both Oshkosh and Menasha are part of the Northeast District of DILHR. There is no evidence that either the WSEU or the Employer ever attempted to seek clarification from Ziedler as to whether Hanisch had to be reinstated to the Oshkosh office where he formerly worked, or the Menasha office, where he was ultimately assigned.

CONCLUSION OF LAW AND ORDER

The Employer, in re-employing Harold Hanisch as a Job Service Specialist III at the Menasha office, has not refused to abide by Ziedler's award dated January 19, 1981, and it has not violated Section 111.84(1)(e), Wis. Stats.

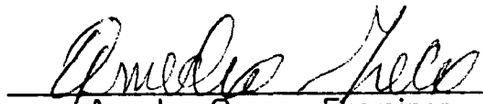
Upon the basis of the above Findings of Fact and Conclusions of Law, the Examiner hereby enters the following

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 6th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY 
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The WSEU maintains that Hanisch must be offered his former position at the Oshkosh office. It argues that the meaning of "reinstatement" in Ziedler's Award should be understood by reading it together with the Award's decision entitled, "Background", in which the arbitrator recited that Hanisch worked at the Oshkosh office as a Job Specialist III at the time of his discharge. Additionally, the WSEU cites Berg v. Seaman, 224 Wis. 263 (1937), for the proposition that "reinstatement" means "re-employment in the identical position from which the employe was discharged." Finally, the WSEU asserts that the Employer has a past practice of reinstating employes to their prior positions following reinstatement awards, and that said past practice should govern this case.

The Employer, on the other hand, insists that it has properly reinstated Hanisch, thereby fully complying with the Ziedler award. It contends that Berg is inapposite because that case did not involve an arbitration award. The Employer argues that arbitrators use "reinstatement" to mean both re-employment to the exact position from which the employe was discharged and re-employment in a similar, but not identical position at a different location. Lastly, it claims that it has the right under the collective bargaining agreement to reassign work and that, as a result, it could call Hanisch back at the Oshkosh office and then immediately reassign him to the Manasha office. The Employer also maintains that it has the right to reassign Hanisch because Ziedler found Hanisch's job performance to be deficient.

Turning now to the merits of the issue herein, it is true that Berg includes a definition of reinstatement that appears to support the WSEUs position. That case, however, does not address the narrow question presented in the instant dispute. In Berg, the Court did not interpret an arbitration award, but rather, it reviewed a Personnel Board order under the Civil Service Statutes. There, an employe in the position of "graduate nurse" had been discharged. In reviewing the discharge, the Personnel Board found that her behavior did not warrant a complete discharge, and ordered the hospital superintendent to offer her employment as a "physiotherapy aid," a lesser position. The Court determined that the Personnel Board sought to order reemployment at a clearly different position, when in fact the applicable statute limited its power to reinstatement to an employe's former job.

Here, on the other hand, the instant dispute does not arise under the Civil Service Statutes and the Employer did not attempt to assign Hanisch to totally different job duties which were dissimilar to the ones he had previously performed. 1/

Furthermore, the term "reinstatement" is ambiguous enough so that it can mean either that an aggrieved employe must be returned to his/her former job duties and/or that the employe must perform those duties at the same previous location. By virtue of this ambiguity, it follows that the term "reinstatement" is not a term of "art" which carries with it a clearly defined meaning. As a result, when Ziedler ordered a "reinstatement," it is not clear whether he thereby also necessarily ordered that Hanisch had to be reinstated to his former job at the Oshkosh office. As a result, there is no basis for finding that his use of the term "reinstatement" was meant to have the same meaning as the applicable Civil Service statutes in Berg. That is especially so when it is noted that the parties in the arbitration hearing neither raised this issue nor cited Berg to the Arbitrator.

In addition, there is no merit to WSEU's additional claim that the Employer's past practice of always assigning discharged employes to their prior work locations supports its position. For, in considering whether a party has

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1/ Similarly without merit is the WSEUs claim that this case is controlled by Handal v. American Mut. Cas. Co., 79 Wis. 2d 67 (1976) and Estate of Knippel, 7 Wis. 2d 335 (1958), as those cases, like Berg, did not center on the meaning of an Arbitrator's Award.

unlawfully refused to comply with a valid arbitration award, it is improper to go outside the face of the award itself. Rather, the complainant in such a case has the burden of proving through a satisfactory purponderance of the evidence that respondent has refused to comply with the terms of the award itself. Moreover, it is well established that the Commission will find such a violation only if a complainant has met its burden of proof. As a result, a violation will not be found when the award does not expressly provide for matter in issue. 2/ Applying that burden of proof here, it must be concluded that Ziedler's order of reinstatement was ambiguous on its face and that, therefore, the Employer did not violate the award when it reinstated Hanisch to the Menasha office.

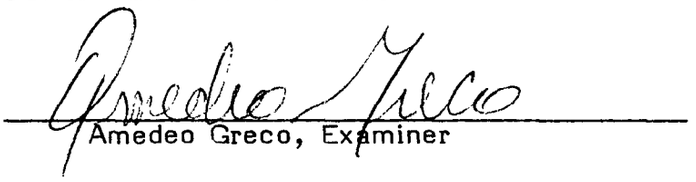
In so finding, I am mindfull that there was testimony that Hanisch's daily activities after his reinstatement to the Menasha office were slightly changed so that he then spent somewhat more time in that office than he had in the Oshkosh office. However, since he is still a Job Service Specialist III, and because no evidence was offered that his salary was adversely affected, it appears that these changes were not so serious so as to find that he now is performing a totally dissimilar job. 3/

I am also aware, of course, that dismissal of the complaint does not resolve the question of what Ziedler intended when he ordered reinstatement. However, that problem could have been resolved if the parties herein both requested Ziedler to clarify his award, something which they have failed to do. Moreover, the instant problem could have been avoided if the WSEU in the arbitration proceeding had asked Ziedler to retain jurisdiction if he sustained the grievance.

Lastly, while the Employer contends that it has the contractual right to transfer Hanisch to another job site under the contractual management's right clause, it is unnecessary to resolve that issue here, as such matters involving contractual interpretation must be resolved through the contractually provided for arbitration procedures rather than through the instant complaint proceeding.

Dated at Madison, Wisconsin this 6th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Amedeo Greco, Examiner

2/ See, for example, Milwaukee Metropolitan Sewerage District, Decision No. 18018-B (11/81).

3/ At the Hearing, WSEU also argued thata Hanisch's post-Award positions was federally funded and therefore would make him more vulnerable to lay-offs than previously. However, that part of the complaint was withdrawn in consideration of the WSEUs right to file a separate grievance should such a layoff occur.