STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Lawton and Cates, Attorneys 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.

## ORDER REVISING EXAMINER'S FINDINGS OF FACT AND REVERSING EXAMINER'S CONCLUSION OF LAW AND ORDER

Examiner Amedeo Greco having on July 6, 1982 issued Findings of Fact, Conclusion of Law and Order, and on July 16, 1982 issued an Amended Findings of Fact, Conclusion of Law and Order in the above entitled matter, wherein the Examiner found that the Respondent State had not failed to comply with an arbitration award requiring the Respondent State to reinstate an employe by reinstating said employe in the same classification at Menasha, Wisconsin, rather than at Oshkosh, Wisconsin, the employment site from which said employe had been discharged; and, as a result, the Examiner having dismissed the complaint filed herein by AFSCME Council 24, Wisconsin State Employee Union, AFL-CIO; and said Complainant having timely filed a petition requesting the Wisconsin Employment Relations Commission to review the Examiner's decision, as well as a brief in support thereof; and the Commission, having reviewed the entire record and briefs of Counsel filed with the Examiner and with the Commission, being fully advised in the premises, makes and issues the following

## REVISED FINDINGS OF FACT

1. That AFSCME Council 24, Wisconsin State Employee Union, AFL-CIO, hereinafter referred to as WSEU, is a labor organization representing employes for purposes of collective bargaining, and has its principal offices at 5 Odana Court, Madison, Wisconsin 53719.

2. That the State of Wisconsin, hereinafter referred to as the State, operates and maintains various agencies and departments in the operation of its governmental functions, wherein it employes various employes in diverse professional and non-professional job classifications, some of whom have selected various labor organizations to represent them for purposes of collective bargaining on wages, hours and conditions of employment; and that Department of Employment Relations, hereinafter referred to as DER, represents the State on matters relating to collective bargaining; and that DER maintains its offices at 149 East Wilson Street, Madison, Wisconsin 53702.

3. That at all times material herein WSEU has been, and is, the certified collective bargaining representative of employes of the State who are, among others, included in the statutorily created bargaining unit identified as "professional-social services;" that individuals occupying the classification of Job Services Specialist III, in the Job Service Unit of the Department of Industry, Labor and Human Relations, are included in the "professional-social services" unit; that WSEU and the State were parties to a collective bargaining agreement, effective from November 9, 1979 through June 30, 1981, which covered the wages, hours and working conditions of Job Services Specialist III, among others; and that said agreement contained among its provisions the following material herein:

management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management, however, such rights must be exercised consistently with the other provisions of this Agreement. Management rights include:

. . .

4. To suspend, demote, discharge or take other appropriate disciplinary action against employes for just cause.

. . .

ARTICLE IV

Grievance Procedure

. . .

48 Step Four: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the date of the agency's answer in Step Three, except grievances involving discharge or claims filed under ss. 230.36 of the Wisconsin Statutes must be appealed within fifteen (15) calendar days, or the grievance will be considered ineligible for appeal to arbitration. . . . The issue as stated in the Third Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the hearing.

. . .

56 The decision of the arbitrator will be final and binding on both parties of this Agreement. . . .

4. That on March 19, 1980 Harold W. Hanisch, a Job Services Specialist III employed at the Oshkosh Job Service Office of the Department of Industry, Labor and Human Relations received a written notice of discharge, effective on March 21, 1980; that on March 22, 1980 Hanisch filed a third step grievance with respect to his discharge as follows:

> I, Harold Hanisch, was discharged for falsifying placement records. The fact of the matter is, I did not do anything that has not been done throughout the State of Wisconsin. For the time I was employed, this has been going on with the approval of Supervisors, etc.
>
> It was also stated that after a memorandum dated August 28, 1979, I continued to falsify placement records. This is untrue.
>
> The relief sought was as follows:
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> Reinstatement of job without loss of any pay or fringe benefits.

5. That on April 19, 1980 the State, by Donald R. Weinkopf, one of its Personnel Managers, in writing, denied the grievance, indicating that Hanisch was "terminated for intentionally falsifying placement records;" that said grievance proceeded to arbitration before Arbitrator Frank P. Zeidler, who conducted hearing in the matter, at Oshkosh, Wisconsin, on October 3, 30 and 31, and November 11, 1980; that said Arbitrator issued his written award on January 19, 1981, consisting of forty-six (46) pages, single spaced, wherein he thoroughly set forth the issue to be determined, the summaries of the testimony of the witnesses, the

positions and arguments of the parties, his discussion with respect thereto, as well as his award; and that in the discussion portion of the award the Arbitrator stated as follows:

> DISCUSSION. From the foregoing recitation of the background of facts and testimony, the arbitrator holds certain opinions and comes to certain conclusions:
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> 1. There is a standard method of achieving a credit for a hire. This is the method prescribed in the "WIDS" definition, namely that a job order had to exist before a referral, the referral had to be made, the applicant hired, the applicant had to appear on the job, and thereafter Job Service had to confirm this presumably through the private employer.
>
> 2. The arbitrator concludes from the testimony that the employees of the Oshkosh Job Service Office generally knew of this definition either from the possession of a handbook, or the availability of a handbook. This included the grievant.
>
> 3. The WIDS definition appears not to have been frequently discussed in meetings, but the arbitrator is not in doubt that the employees, including the grievant, knew about its requirements.
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> 4. There were types of hires taken in the Oshkosh office and elsewhere under the method described as "Job Development" whereby applicants would be sent to a private employer from whom the Job Service had received no job order. If the applicant was hired, Job Service would take credit. This occurred in a variety of ways, on occasion through informal arrangements with the private employers. This would result in a referral date being made before the job order date. Management accepted this type of hire as valid in that service was rendered.
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> 5. In job development a referral so made was to have noted on the referral card the letters "JD", but this was not always done.
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> 6. There was a Job Service policy to search files for applicants when a job order came in, in order to insure equity of access to jobs based on the Richey decision. However, the evidence is that the grievant found this policy to his disliking and operated off of private lists of applicants he thought job ready; and he was in disagreement with the file search policy. Though the grievant states that in using such lists he did not discriminate against applicants, the arbitrator finds that the private list method of sending applicants for referral did not conform to the principle of equity of access and was discriminatory.
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> 7. The grievant had difficulty with his supervisors for his methods of operation and was considered to be hurting the morale of the department in opposing department policy in hiring and referrals.
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> 8. None of the referrals which the grievant contends were of the job development type were marked as such.
>
> 9. The department itself countenanced job development without having job orders in advance and took credit for hires so made through the activities of other employees as in the case of the United Parcel Service.
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> 10. There was a policy in the department of not referring applicants to a company which continued to hire the applicants on seasonal work, such as in the case of the Miles Kimbal Company. In the case of referrals made to the Miles Kimball Compay, a Limited Term Employee sent notices to some seasonal workers who were continually hired and was advised by

Mr. Stamborski that this was in error. She went to the Director. This occurred in July or August 1979. Rectification for credit improperly taken was not made on this until the spring of 1980. Some justification can be made for the lateness of the rectification, because the lists of seasonal hiring were not available till after the Christmas season. Nevertheless there is some justification to the concern of the Union that this was a tardy action on the part of the Employer.

No discipline was given to anyone for this error. The arbitrator believes that none was due because of the inexperience of the employee involved who, though she may have started in 1978 as an employee, was an LTE employee and also shifted from position to position.

11. In the matter of checking on whether applicants were referred by Job Service, the evidence is that some applicants would not admit such referral, and some employers for various reasons would not know if they were so referred.

12. As to whether, if the grievant is found to have fraudulently entered data into records, yet by implication he is excused because the Director also caused fraudulent entry into records on time worked entries, the arbitrator finds no substance to the charge that the Director caused fraudulent entries to be made. The testimony supports the conclusion that the Director with respect to the WIN incident was acting on the orders of superiors in Madison to have employees put more of their future working time into the WIN program, and that he otherwise counseled employees who did not know how to make out time sheets. Moreover fraud on the part of management would not excuse fraud on the part of an employee.

13. As to whether the principal reason for the grievant being disciplined was because he had policy differences with the Director and his immediate supervisor, the evidence is that they had put a poor evaluation on his work for a number of reasons, but the arbitrator does not find that this was the reason for the discipline in this matter.

14. The matter of the differences that the grievant had with the policy in operating the Job Bank and Job Board likewise do not appear to be the reason for his discipline in this matter. Further the arbitrator does not find grounds that the Director or the office operated the Job Bank to the detriment of applicants or of the grievant in his functions as equal opportunity officer.

15. The arbitrator does not find that the Director discriminated against his employees on a matter of parking.

16. To the arbitrator the weight of credibility must be given to the Director's contention that he informally discussed the import of his memorandum of August 28, 1979 with both the grievant and Mr. Stamborski.

17. With respect to the meeting of February 21, 1980, the pre-disciplinary meeting, the arbitrator on the basis of the testimony is of the opinion that the grievant did not admit that he had falsified records in every place that he had been, but rather that he acknowledged that he had engaged in the certain practices under dispute and did so on the grounds that he was following the past practices of the office.

18. With respect to this same meeting, the arbitrator is of the opinion that the Director did not give any commitment that the alleged improper practices were to be overlooked if the grievant did not engage in them after August 28, 1979; but did indicate he did not want to be punitive or vindictive; and that the grievant and Mr. Bigler, however, went away with the impression that only the matters after August 28, 1979 would be taken into consideration if there was any discipline.

19. The evidence in the opinion of the arbitrator is that at sometime during the course of investigation of his conduct, the grievant alleged that with respect to other accounts, there were the same improprieties as he had engaged in; and that an investigation was made on these allegations. Two employees, Mr. Keenan and Mr. Stamborski, were orally reprimanded for taking improper credit for hires.

20. With respect to the activities of the grievant himself improper hires were taken both before and after August 28, 1979, based on the WIDS definition of what a proper credit for a hire is to be. However some of these can be attributed to the concept of job development, and some to his practice of "routing" which the arbitrator considers a variety of "job development". Some referral cases have no explanation as to what happened other than entries being made on the referral card; and some are clearly seriously improper claims, such as a double claim for the same individual referral, and the claim for an applicant, Wendy Hansman, referred by Manpower, Inc.

There is some credence to be given to the Union claim that if the grievant were falsifying the records, he would not have written a job order after a referral date.

21. The matter of the weight to be given to the documents put into evidence by the Employer that the companies and applicants in a number of cases denied being referred must be given consideration. The documents in effect constitute a form of hearsay evidence, since no individual connected with any company and no individual applicant appeared to give testimony or be cross-examined. The arbitrator holds then that this type of evidence is insufficient to prove an intent on the part of the grievant to place in the employee's records fraudulent entries. The arbitrator declines to make the assumption that even though none of these hearsay items are supported by witnesses, certainly some of them must be fraudulent.

22. However, the records both before and after August 28, 1979, show a serious deficiency on the part of the grievant in his ability to make proper entries and to claim credit for hires which he could properly document. On this basis discipline was merited in some form.

23. The discipline given was for "violation of work rules pertaining to intentionally falsifying records and violation of Job Service policies . . ." The arbitrator finds on the basis of the record that the charge of intentionally falsifying records is insufficiently sustained for the arbitrator to conclude that the grievant beyond reasonable doubt was engaged in falsifying records as to claims of service rendered leading to hires. The arbitrator does find that there was substantial violation of Job Service policies, particularly with the ignoring of the WIDS policy on taking credit for hires, and that such substantial violations particularly after August 28, 1979, could not be justified under the claim of past practice. Again, the double claim for an individual and the Hansman entry are cited.

24. For the foregoing reasons, the arbitrator holds that there was insufficient cause to discharge the grievant for intentional falsification of records, but sufficient cause to impose a form of discipline.

25. It is to be noted that the Director gave an oral reprimand to Messrs. Keenan and Stamborski, and the Union argues tht if this grievant made any improper entries, the most discipline he should receive should be an oral reprimand under the concept of equal administration of discipline. The record indicates that the extent of improper entries by the

grievant considerably exceeded those known from the evidence about Messrs. Keenan and Stamborski; and further that the grievant did not adhere sufficiently to the policy of equal access through searching the file for eligible applicants to meet the policy of equal access. The extent of these deficiencies as found in the record is such as to lead the arbitrator to the conclusion that while the grievant should not be discharged but rather reinstated, he should be reinstated as of this award, without back pay, in effect receiving an extended layoff as discipline.

6. That the Arbitrator set forth his award as follows:

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.

7. That upon receipt of the above award, and on a date not established in the record, the State unilaterally assigned Hanisch, as a Job Service Specialist III, to its office at Menasha, Wisconsin, rather to its office at Oshkosh, Wisconsin, where Hanisch was employed prior to his termination on March 21, 1980; and that thereafter, and on May 19, 1981, WSEU filed the complaint initiating the instant proceeding, alleging that the State failed to comply with the award of the Arbitrator.

Upon the basis of the above and foregoing Revised Findings of Fact, the Commission makes and issues the following

## REVERSED CONCLUSION OF LAW

1. That the State of Wisconsin and its officers and agents, by reemploying Harold W. Hanisch in its Menasha Job Service Office, rather than reinstating Harold W. Hanisch in its Oshkosh Job Service Office, as required in the arbitration award issued by Arbitrator Frank P. Zeidler on January 19, 1981, failed and refused, and continues in failing and refusing, to comply with said award, and that in said regard the State of Wisconsin, its officers and agents, committed, and are committing, an unfair labor practice within the meaning of Sec. 111.84(1)(e) of the State Employment Labor Relations Act.

Upon the basis of the above and foregoing Revised Findings of Fact and Reversed Conclusion of Law, the Commission makes and issues the following

## REVERSED ORDER 1/

IT IS HEREBY ORDERED that the State of Wisconsin, its officers and agents, shall immediately:

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1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final

(Continued on Page Seven)

1. Cease and desist from fully complying with the arbitration award issued by Arbitrator Frank P. Zeidler on January 19, 1981, relating to the grievance involving the discharge of Harold W. Hanisch, a Job Service Specialist III, from his employment in the Job Service Office at Oshkosh, Wisconsin.

2. Take the following affirmative action, which the Wisconsin Employment Relations Commission deems will effectuate the policies of the State Employment Labor Relations Act:

a. Reinstate Harold W. Hanisch to his former position in the Job Service Office at Oshkosh, Wisconsin, pursuant to the arbitration award issued by Arbitrator Frank P. Zeidler on January 19, 1981.

b. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the date of this decision, as to what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

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1/ (Continued)
order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

## MEMORANDUM ACCOMPANYING ORDER REVISING EXAMINER's FINDINGS OF FACT AND REVERSING EXAMINER'S CONCLUSION OF LAW AND ORDER

### THE PLEADINGS

The Union, in the complaint filed herein, alleged that the State failed to comply with the award of arbitration requiring the State to reinstate Hanisch as a Job Service Officer III, and that, as a result, the State committed an unfair labor practice in violation of the State Employment Labor Relations Act (SELRA). The Union, among other things, requests that the State be ordered to comply with the Award. The Union did not specifically allege the manner in which the State had failed to comply with said award.

In its answer, the State generally denied the allegations of the complaint, and without alleging that it had complied with the award, requested that the complaint be dismissed.

### THE EXAMINER'S DECISION

Following a hearing in the matter, and receipt of briefs filed by Counsel, the Examiner issued his decision on July 6, 1982, and amended same only to include a footnote setting forth the statutory provision relating to the procedure for appeal of Examiner's decisions in complaint cases to the Commission, namely Sec. 111.07(5), Wis. Stats.

In his Findings of Fact the Examiner included, verbatim, the "award" as issued by Arbitrator Zeidler, and as set forth in our Revised Finding of Fact 6. The Examiner concluded that the State, in returning Hanisch to employment at the Job Service Office in Menasha, rather than the Oshkosh office from which Hanisch had been discharged, had complied with the award, resulting in the dismissal of the complaint filed by the Union.

The Examiner, in support of the dismissal, set forth, in material part, the following rationale:

> 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.
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> 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. (Footnote omitted.)
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> 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 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 (sic) 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. (Footnote omitted.) Aplying 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.

THE PETITION FOR REVIEW

The Union, following receipt of the Examiner's decision, timely filed a petition, requesting the Commission to review the Examiner's decision, and a brief in support thereof, contending that the Examiner erred in concluding that the award had been complied with. The Union in material part argued that the State, in reemploying Hanisch at the Menasha office, rather than at the Oshkosh office from which he had been previously discharged, did not "reinstate" said employe as required in the award of arbitration. Counsel for the State filed no brief in opposition to the petition for review, apparently relying on the arguments made in its "letter brief" to the Examiner, prior to the issuance of the latter's decision.

DISCUSSION

The Berg case considered by the Examiner is Berg V. Seaman, a decision of our Supreme Court, reported in 224 Wis. 263 (1937), wherein the Court, in determining the application and meaning of a then existing statutory provision applicable to the then existing Bureau of Personnel, and relating to removals of permanent State employes, prohibiting same, except for just cause, and requiring the Personnel Board, after a public hearing as to the cause for removal, to "either sustain the action of the appointing officer, or shall reinstate the employe fully . . .", interpreted the term "reinstatement" as follows:

> The point of controversy is whether the word "reinstatement" in the statute cited means reinstatement in the position occupied by the employee before her discharge, or reinstatement in the service of the institution. We are of opinion that the word means reinstatement to the position from which the employee was removed when she was discharged. The order was to offer re-employment. Re-employment is not reinstatement, much less is re-employment in the service is a position entirely different from the service performed by the employee in the position from which she was removed reinstatement. Re-employment under the order of the personnel board, if the plaintiff would accept the position offered, would not be reinstatement in the position from which she was removed and the personnel board's is limited to reinstatement.

The fact that the Court was considering the term in a civil service setting rather than in an arbitration setting is not a sufficient basis to ignore the Court's "definition" of the term. The Court succinctly stated that "the word

means reinstatement to the position from which the employee was removed . . .". Hanisch was terminated from his position at Oshkosh and not from a position at Menasha.

Here, as is apparent in the "DISCUSSION" portion of the award, set forth in Revised Finding of Fact 5, it is clear that the relationship between Hanisch and his superiors at the Oshkosh office was other than harmonious. 2/ Yet, despite this, the only "penalty" set forth by the Arbitrator, in his award applicable to Hanisch was "loss of back pay and other benefits." Had the Arbitrator intended that Hanisch be transferred out of the Oshkosh office he would have said so.

During the course of the hearing before the Examiner, the State established that it reinstated Hanisch at Menasha, rather than Oshkosh, for the reason that a vacancy existed at the former office, and that at the time the former position of Hanisch at Oshkosh had been permanently filled by another employe prior to the issuance of the award. The State further argues that had it initially reinstated Hanisch at Oshkosh it could exercise its right to then transfer him to Menasha. The fact that no vacancy existed at Oshkosh does not excuse the non-compliance of the award, since the State could have transferred the replacement employe to the Menasha office. Further, had the State reinstated Hanisch at Oshkosh and then transferred him to Menasha, it could very well have found itself being charged with not complying with the award.

We have, therefore, reversed the Examiner, and have concluded that the State did not comply with the award by reinstating Hanisch at Menasha, and that thereby the State committed an unfair labor practice in violation of SELRA, and to remedy such violation, we have ordered that Hanisch be reinstated to his position at the Job Service Office in Oshkosh.

Dated at Madison, Wisconsin this 22nd day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

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2/ Especially paras. 12 through 15 of the "DISCUSSION."