

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration
Before Commissioner John P. Sullivan

DISTRICT NO. 1, MARINE)	
ENGINEERS BENEFICIAL)	MEC Case No. 10-00
ASSOCIATION on behalf of)	
GREGORY J. HERZ,)	
)	DECISION NO. 251 - MEC
Grievant,)	
)	DECISION AND AWARD
v.)	
)	
WASHINGTON STATE FERRIES,)	
)	
Respondent.)	

Davies, Roberts and Reid, attorneys, by *Jason Valtos*, appearing for and on behalf of District No. 1 Marine Engineers Beneficial Association and Gregory Herz. (Mr. Herz attended the hearing.)

Christine Gregoire, Attorney General, by *David Slown*, Assistant Attorney General, appearing for and on behalf of the Washington State Ferries.

THIS MATTER came on regularly before John P. Sullivan of the Marine Employees' Commission (MEC) when District No. 1, Marine Engineers Beneficial Association (MEBA) filed a request for grievance arbitration on behalf of Gregory Herz, asserting that Washington State Ferries (WSF) disciplined Gregory Herz without cause or justification, as the result of two separate incidents the evening of November 17, 1999.

MEBA has certified that the grievance procedures in the MEBA/WSF collective bargaining agreement (CBA) have been utilized and exhausted. MEBA has also certified that the Arbitrator's decision shall not change or amend the terms, conditions or application of said collective bargaining agreement; and that the Arbitrator's award shall be final and binding.

The parties' agreement as to the parameters of the dispute to be resolved by said Arbitrator is binding on them and on him. Such agreement is accepted, therefore, as the test for determining the rights, in the material circumstances of the parties here, including those of Mr. Herz.

The Arbitrator conducted a hearing in this matter on October 10, 2000.

POSITIONS OF THE PARTIES

(This is a disciplinary case. WSF has the burden of proof and presented its case first.)

Position of WSF

Mr. Herz was the night Relief Chief Engineer on duty at Pier 46 for the passenger-only vessels (POV) on the evening of November 17, 1999. The POV do not carry an engineer, but they do carry an unlicensed oiler on duty. Should they develop any engine trouble when they dock in Seattle at Pier 50 or 48, they can call for help from the night Relief Chief Engineer on duty.

On November 17, 1999, when the POV, M/V SKAGIT was at Pier 50 in Seattle, around 7:40 p.m., the Duty Oiler, Cody Keene, checked the sewage pump. He noticed the pump shaft was not turning. If operating properly, the shaft should have been turning. Cody Keene telephoned Mr. Herz at Pier 46, who rode his bicycle to Pier 50. Upon arrival at Pier 50, Mr. Herz rode his bicycle down the passenger transfer ramp or span used by the passengers to board the POV's.

As Mr. Herz rode down the transfer ramp, the two deck hands, George Allen and Jim Smalley shouted at him to get off his bike. Bikes are not allowed on the ramp. Mr. Herz was not aware of this. He felt there was an emergency on the SKAGIT, as it was scheduled to sail at 8:10 p.m.

AB George Allen was on the gangway as Mr. Herz arrived. Mr. Herz shoved him aside, and went into the engine room with Oiler Cody Keene. The frozen pump shaft was freed. While Mr. Herz was rotating the shaft by hand, he saw Oiler Cody Keene start to push a button that would turn on the pump. Mr. Herz grabbed his hand and stopped him from turning on the pump motor.

Mr. Herz explained to Oiler Cody Keene that turning on the engine while he had his hands on the pump shaft was dangerous. Mr. Herz then took his right hand and slapped Oiler Cody Keene, three times on his cheek or chin. He referred to this as a “dope slap.”

These two incidents involving AB George Allen and Oiler Cody Keene were investigated by WSF. Hearings were conducted, following which Mr. Herz was found guilty of misconduct. He was suspended from work for one week and directed to attend anger management classes. In addition, WSF told Mr. Herz, “This is your Last Chance Warning regarding any further violation of Rule 13 [of the Washington State Ferry Code of Conduct].”

Position of MEBA

The punishment in this case was way too severe for the incident.

Mr. Herz did nothing more than lightly tap Oiler Cody Keene’s chin with the back of his fingers, three times.

AB George Allen was blocking Mr. Herz from boarding the POV, SKAGIT, where Mr. Herz was going to see if he could correct an emergency in the engine room, so the vessel could complete its scheduled departure at 8:10 p.m. from Seattle to Bremerton. Mr. Herz only brushed by Mr. Allen. Under the circumstances, the slight contact, at the most, could only be considered to be de minimus.

Both incidents were very minor and were simply mistakes of a very minor nature. The union is asking that all records of this incident be removed from Mr. Herz’ personnel file and that he be made whole from any punishment that he has suffered.

ISSUE

Did WSF have just cause to suspend the Grievant, Gregory J. Herz, for one week without pay; give him a Last Chance Warning regarding any further violation of Rule 13 of the WSF Code of

Conduct; and direct him to contact Employee Advisory Service (EAS) concerning resolution of his anger problem?

If not, what is the appropriate remedy?

DISCUSSION

A.

MEBA and WSF agree generally about the events that took place on the evening of November 17, 1999 at Pier 50 and aboard the passenger only vessel the M/V SKAGIT.

MEBA agrees that Mr. Herz intended to touch Oiler Cody Keene and AB George Allen. Regarding Keene, MEBA claims it was nothing more than three light taps with the back of the fingers to Mr. Keene's chin and it was not a violent act by Mr. Herz. Concerning AB (Able-bodied Seaman) George Allen, MEBA alleges that Mr. Allen physically blocked Mr. Herz from boarding the SKAGIT and that Mr. Herz brushed past Mr. Allen. MEBA asserts that Mr. Herz did make contact with Mr. Allen, but it was de minimus at best.

B.

Mark Nitchman, Washington State Ferries Director of Maintenance, has, since 1998, had responsibility for making decisions regarding discipline of employees for misconduct. He holds US Coast Guard licenses as an Engineer officer and as a Deck Officer. He has sailed in both capacities prior to joining WSF in 1991, first as a Port Engineer and later as Director of Maintenance.

On November 18, 1999, Mr. Nitchman first heard about a conflict that occurred on November 17 at the passenger-only facility involving the POV M/V SKAGIT. He directed Paul Brodeur, a port engineer, to conduct an investigation.

Mr. Brodeur started his investigation on November 18. He contacted Captain Kimmerly of the SKAGIT, asking him to direct crewmembers to forward their written statements to Mr. Brodeur.

He also contacted Mr. Herz, asking him for his statement regarding the incidents on the SKAGIT the previous evening.

On November 19, 1999, Mr. Brodeur received statements from the following individuals:

1. Bob Mauk, Mate, SKAGIT
2. Jim A. Smalley, AB, SKAGIT
3. George R. Allen, AB, SKAGIT
4. Cody M. Keene, Oiler, SKAGIT
5. Gregory J. Herz, Night Relief Port Chief Engineer

Mr. Brodeur received a second statement from George R. Allen, AB, on November 20, 1999.

Mr. Mauk stated that he heard Cody Keene telephone Mr. Herz and tell him the sewage transfer pump was not an emergency. He also observed Mr. Herz riding his bike down the passenger ramp and Mr. Smalley and Mr. Allen shouting at Mr. Herz to walk his bike. He heard Mr. Herz say he was on an emergency and Mr. Herz appeared to shove Mr. Allen aside.

Mr. Smalley stated that about 8:09 p.m. he saw a bike coming down the passenger ramp and he and Allen shouted at the rider (Herz) to dismount from bike and walk the bike. He did not recognize the rider as a WSF employee. He saw Mr. Herz cut by his partner, Mr. Allen.

Mr. Allen stated he and his partner, Mr. Smalley, observed a rider on a bicycle with the headlight on riding down Pier 50 bridge to the SKAGIT. The rider went past a sign that read "Bicycles must be walked." "My partner and I shouted, as we are required to do, 'Please walk your bike.' We shouted this several times." The passenger bridge goes from the permanent dock at Pier 50 to a floating barge and the SKAGIT was tied to the barge with a gangway or boarding ramp going from the barge to the SKAGIT.

He attempted to explain to the bike rider, Mr. Herz, that all bicycles have to be walked down the ramp. He said he was cut off in mid-sentence and Mr. Herz placed his hand on Mr. Allen's chest and shoved him aside. Mr. Herz said, "Get out of my way. I have an emergency."

He asked Cody Keene what the emergency was. Mr. Keene stated there was no emergency and he had told Mr. Herz that on the phone.

Mr. Allen's second statement, dated November 19, 1999, was received by Paul Brodeur on November 20, 1999. Mr. Allen referred to an incident on November 19 at about 1905 (7:05 p.m.) on board the SKAGIT at Pier 46. When Mr. Herz boarded the vessel he confronted Mr. Allen and told him that Mr. Allen had a problem with authority, that he (Mr. Herz) was a Chief Engineer with the WSF and that Mr. Allen "had better watch out in the future."

Mr. Allen felt Mr. Herz was upset that he and Mr. Smalley had shouted at him to walk his bike down the transfer bridge. When Mr. Allen tried to explain why they were shouting at the unknown rider, Mr. Herz cut him off and shoved him aside.

Mr. Keene was the duty oiler on the SKAGIT at Pier 50 on the evening of November 17, 1999. He was checking the sewage pump motor and noticed the shaft was sticking. He notified the Port Relief Chief at Pier 46. Mr. Keene told the Chief Engineer it was no emergency as the sewage tank was less than half full. The Chief Engineer, when answering the phone identified himself as Greg.

Mr. Keene saw an unknown bicycle rider, who turned out to be Greg Herz, riding down the passenger ramp from Pier 50 to the barge where the SKAGIT was moored. While Mr. Allen and Mr. Smalley were shouting at Mr. Herz to dismount. Mr. Herz continued to ride his bicycle down on to the barge. Mr. Keene recognized Mr. Herz as a WSF engineer, but he did not know him or his name. Mr. Keene saw Mr. Herz shove AB Allen out of his way as he boarded the SKAGIT.

Mr. Herz went below to the engine room with Mr. Keene and directed Mr. Keene to put a pipe wrench on the shaft to see if he could free it. Mr. Herz went up to the Captain about departure time. While he was gone, Mr. Keene freed the shaft.

When Mr. Herz returned, he wanted to see the shaft turn for himself. Mr. Keene took this to mean Mr. Herz wanted him to start the pump motor. Mr. Keene moved to start the motor. Mr.

Herz removed his hand from the shaft and made some comment about Mr. Keene's intelligence. Mr. Herz then started the pump motor. After that, Mr. Herz turned to Mr. Keene and slapped him three times with the back of his hand to Mr. Keene's cheek. Mr. Keene had not met Mr. Herz before the evening of November 17, 1999.

Mr. Herz was the night Port Relief Chief Engineer on duty and was stationed at Pier 46 on the evening of November 17, 1999. When he was advised of the possible trouble with the sewage pump, he thought it might be an emergency situation.

Mr. Herz agreed to the sequence of events as noted by AB Allen and Duty Oiler Keene. Mr. Herz intentionally came in physical contact with both Mr. Allen and Mr. Keene as follows:

- Mr. Allen was between Mr. Herz and the gangplank. Mr. Herz removed him from his path by pushing, shoving or grabbing his arm and moving him away.
- Mr. Keene was in the engine room and Mr. Herz thought he was reaching to start the pump's motor. Mr. Herz stopped Mr. Keene and then took the back of the four fingers of his right hand and slapped Mr. Keene three times on the right cheek, which Mr. Herz called a "dope slap."

C.

Operating Port Engineer, Paul H. Brodeur was the designated investigating officer for the two incidents involving Mr. Herz on November 17, 1999. He also conducted face-to-face interviews as part of conducting a fair investigation and this would give the individuals an opportunity to present their vision of what took place.

On December 17, 1999, he interviewed:

1. Duty Oiler Cody Keene.
2. AB George R. Allen.

Mr. Keene's interview was essentially the same as his written statement of November 18, 1999.

Mr. Allen's interview was the same as his two written statements on November 18 and 19, 1999. Mr. Allen reiterated that Mr. Herz was trying to intimidate him by saying he was a Chief Engineer with WSF and Mr. Allen, "had better be careful, better watch out."

In late December 1999 or early January 2000 Mr. Brodeur interviewed Mr. Herz in the presence of his MEBA union representative.

Mr. Brodeur, in his January 3, 2000 letter to Mr. Herz, gave "notice," forewarning Mr. Herz of the possible consequence to him of disciplinary action as the result of his conduct on November 17, 1999. Mr. Herz was advised that if true, the charges could constitute a violation of WSF's Code of Conduct and subject him to disciplinary action. An investigatory meeting was scheduled on January 12, 2000, and Mr. Herz was advised to bring a representative of his choice.

Mr. Herz was further advised that the meeting was to determine whether in fact, there was sufficient cause to start the disciplinary process and to schedule a pre-disciplinary hearing.

D.

In item 7 of the Request for Grievance Arbitration, statement of facts, MEBA stated that Mr. Herz was logged in the vessel's official logbook on or about the 18th of November and that this was a violation of 46 CFR 11502, "Entry of Offenses in Logbook." They further state that Mr. Herz was not provided a copy of the logging, nor given an opportunity to make a reply to the charges and have that reply entered into the official logbook and further, he was never notified he was in fact logged in the official logbook of the vessel.

The operation of the SKAGIT on the inland waters of Puget Sound on a route between Seattle and Bremerton does not meet the requirements or standards of 46 CFR 11301 and 46 CFR 78.37-10(1) that would have to be met as a prerequisite for the vessel to maintain an official logbook. The law did not require the SKAGIT to maintain an official logbook.

FINDINGS OF FACT

1. On January 12, 2000, the investigatory meeting was held at WSF headquarters at 2911-2nd Avenue, Seattle, Washington. The following individuals were in attendance:
 - (a) Gregory Herz, Port Relief Chief Engineer
 - (b) Paré Abbott, MEBA Union Representative and a Licensed Chief Engineer
 - (c) Michael Manning, WSF Labor Relations Manager
 - (d) Tim Browning, Port Engineer
 - (e) Paul Brodeur, Investigator, Operating Port Engineer

2. Mr. Herz testimony at the January 12, 2000 meeting was that he physically pushed his way past AB Green and lightly struck Mr. Keene on the cheek with the back of his fingers, which he calls a “dope slap.” Mr. Herz thought it would be inappropriate to “dope slap” someone if you did not know them. Mr. Herz met Cody Keene for the first time the evening of November 17, 1999.

3. On January 25, 2000, Mark Nitchman, Director of Maintenance, who acts as the judge or disciplinarian in alleged misconduct cases wrote a letter to Mr. Herz to advise him it was his intent to suspend him without pay for seven days; to refer Mr. Herz to the Employee Advisory Service (EAS) for possible anger management problems; and to issue a Last Chance Warning that any further threats or acts of violence in the work place will be cause for immediate termination. Mr. Nitchman advised his intention was based upon Paul Brodeur’s investigation based upon written and oral statements as well as an investigatory hearing. Mr. Nitchman stated this possible discipline was based upon Mr. Herz’ conduct on November 17, 1999 which was a violation of WSF’s Code of Conduct, Rule 13.

It was Mr. Nitchman’s intention to suspend Mr. Herz from February 16 through February 27, 2000. It turned out Mr. Herz was not scheduled to work those days and another letter to Mr. Herz was written January 28, 2000.

4. Mr. Nitchman's letter of January 28, 2000 referred to his January 25 letter, but changed the days of Mr. Herz' suspension to February 23 through February 29, 2000, when Mr. Herz was scheduled to work. This letter also referred to the mandatory referral to EAS for possible anger management problems and a Last Chance Warning for any future violations of the WSF Code of Conduct.

Mr. Nitchman further advised that a summary of the description of the evidence would be available for Mr. Herz' review, inspection and copying during WSF business hours. In addition, Mr. Herz was advised of his right to respond to the charges orally or in writing and that this must be done prior to February 10, 2000. This date was changed to February 15 for a pre-disciplinary hearing.

5. The following individuals were present for the February 15, 2000 meeting at WSF headquarter in Seattle:
 - (a) Gregory Herz, Port Relief Chief Engineer
 - (b) Paré Abbott, MEBA Union Representative
 - (c) Thom Paul, Attorney for Mr. Herz
 - (d) Michael Manning, WSF Labor Relations Manager
 - (e) Tim Browning, Port Engineer
 - (f) Paul Brodeur, Investigator, Port Engineer
 - (g) Mark Nitchman, Directory of Maintenance

Mr. Nitchman was in essence the hearing officer. He had not talked to any of the parties or crewmembers of the SKAGIT. He had been furnished copies of Paul Brodeur's investigation including statements and interviews Brodeur had conducted as well as his summaries and synopsis that was sent to the US Coast Guard.

Mr. Herz, as well as Mr. Paul, his legal counsel and Mr. Abbott had opportunity to present evidence to the Hearing Officer, Mr. Nitchman of Mr. Herz side of the incidents and mitigating considerations during the hearing.

6. Mr. Nitchman testified at the hearing on October 10, 2000, concerning another shoving of a crewmember on one of the ferries. That incident involved a person being shoved near the head of a set of stairs. The person pushed did not lose footing and did not fall down the flight of stairs, but there was the possibility the person could have fallen down the stairs and been seriously injured. The person who did the shoving was a WSF employee as was the person shoved. After a thorough and complete investigation, the person who did the shoving was terminated.
7. The Washington State Ferries Code of Conduct applies to all WSF employees regardless of position. The rule that Mr. Herz violated is as follows:

13. Threats of Violence

Use of obscene language when addressing customers or employees, violence, or threats of violence against a customer/co-worker.

8. The Code of Conduct was distributed to all employees at WSF in March 1996 and was posted in all places frequented by WSF employees. The Code became effective in June 1996 and has been enforced from that time to the present.

Chief Engineer Herz has been employed by WSF since June 1987. In November 1999, Mr. Herz was a Relief Chief Engineer, a select and elite group, based upon his experience, ability and seniority. There is no doubt he was well aware of the Code of Conduct since he had worked under the Code for three years.

9. Outside of the statement of facts (item 7) of the Request for Grievance Arbitration, there was no testimony or exhibit produced at the hearing that an official vessel logbook existed or was maintained on the SKAGIT or that were any entries pertaining to Mr. Herz made in any logbook. The law did not require an official logbook. 46 CFR 11301 and 46

CFR 78.37-10(1). There was no testimony presented regarding any logging of Mr. Herz in the vessel SKAGIT official logbook and no copy of an official logbook entry pertaining to Mr. Herz was presented at the hearing.

10. Under date of February 18, 2000, Mark Nitchman, Director of Maintenance and the WSF Hearing Officer who conducted the hearing on February 15, 2000, issued his findings which included the following:

(a) Mr. Herz admitted to pushing AB Allen aside when boarding the SKAGIT on November 17, 1999.

(b) Mr. Herz also admitted slapping Oiler Keene three times on the face.

This conduct was in violation of Rule 13 under the Washington State Ferry Code of Conduct as defined in the *Human Resource Book*. Mr. Nitchman's disciplinary order of February 18, 2000, involved three separate directions to Mr. Herz because of his violence to co-workers. He was:

(a) Given a Last Chance Warning regarding any further violation of Rule 13 and advised that any further violations of this type would result in termination.

(b) Suspended without pay from his position as Relief Chief Engineer for Washington State Ferries for a period of seven (7) days February 23, 2000 through February 29, 2000.

(c) Required to contact EAS with regard to arriving at a resolution of his anger management problems.

11. Mr. Herz was suspended for seven (7) days without pay. He testified that his lost pay was somewhere between a low of \$2800 to a high of \$4200, as a result of his suspension.

The Commission having entered the foregoing findings of fact, now hereby enters the following conclusions of law.

CONCLUSIONS OF LAW

1. The Marine Employees Commission has jurisdiction over the parties and subject matter of this case. Chapter 47.64 RCW; especially RCW 47.64.150 and RCW 47.64.280.
2. MEC may not change or amend the terms, conditions or applications of the MEBA/WSF Collective Bargaining Agreement. RCW 47.64.150.
3. Koven and Smith, in *Just Cause: The Seven Tests* (2d ed. 1992), sets out the tests required to determine whether discipline meets the just cause standard. WSF's discipline of Gregory Herz satisfied all the requirements of the just cause standard embodied in the seven tests.

Notice

- (a) WSF gave Mr. Herz forewarning or foreknowledge of the possible or probable disciplinary consequences of Mr. Herz' conduct by the letters of January 3, 25, 28, 2000, regarding the investigatory meeting on January 12 and the pre-disciplinary hearing on February 15, 2000.

Reasonable Rules

- (a) The Washington State Ferry Code of Conduct became effective June 1996. It includes Rule 13 of section 19 which reads as follows: "Threats or Acts of Violence. Use of obscene language when addressing customers or employees or violence and threats of violence against a customer or co-worker."
- (b) Rule 13 is reasonably related to the orderly, efficient and safe operation of the business of operating and maintaining the vessels in the WSF fleet.

Investigation

- (a) WSF made an effort to discover whether Mr. Herz did, in fact, violate the WSF Code of Conduct. Statements were obtained from the SKAGIT crewmembers. Mr. Herz and the principal participants were personally interviewed by the investigator, Mr. Brodeur.

Fair Investigation

- (a) All parties aboard the SKAGIT on the evening of November 17, 1999 furnished statements at the request of Mr. Brodeur. The parties prepared the statements themselves; no one prepared them for their signature.
- (b) Mr. Brodeur personally interviewed Mr. Allen and Mr. Keene. He also interviewed Mr. Herz with his MEBA union representative present.
- (c) Mr. Brodeur conducted an investigatory hearing on January 12, 2000. Mr. Herz was present with his MEBA union representative.

Proof

- (a) A proper charge is one that is reasonably clear and specific; here it is a violation of Rule 13.
- (b) The charge must be made known to the employee before discipline is imposed. Mr. Herz was advised specifically by letters on January 3, 25 and 28, 2000.
- (c) The proof of the proper charge was by the investigative statements, including that of Mr. Herz.
- (d) The proof of the violation was made at the pre-disciplinary hearing on February 15, 2000.
- (e) The disciplinary notification was not given until after the pre-disciplinary hearing.

Equal Treatment

- (a) There was testimony involving two other employees of WSF, where one pushed or shoved the other one who was in close proximity to a flight of stairs aboard a vessel. While the person shoved did not fall down the stairs, there was a possibility of falling down the stairs. In that case, the perpetrator was terminated.
- (b) Mr. Herz intentionally pushed or shoved Mr. Allen and intentionally struck Mr. Keene three times with the back of his right hand. Mr. Herz was suspended for one week, directed to attend an anger management course and given a last chance warning. This discipline was substantially less than termination.

Penalty

The degree of discipline administered by WSF in the Mr. Herz case, as noted above, is reasonably related to:

- (a) the seriousness of Mr. Herz' proven offense or violations and;
 - (b) Mr. Herz' record in WSF service since June 1987.
4. In 1975, the U.S. Supreme Court put its stamp of approval on an employee's right to union representation in an investigative interview, even before formal grievance machinery is set in motion. *J. Weingarten v. NLRB*, 420 US 251, 95 S. Ct. 959, 963, 965 (1975).
- (a) When Brodeur first interviewed Mr. Herz in late December 1999 or early 2000, Mr. Herz had his MEBA union representative present.
 - (b) At the January 12, 2000, investigatory meeting, Mr. Herz had his MEBA Union representative, Mr. Abbott present.
 - (c) At the pre-disciplinary hearing on February 15, 2000, Mr. Herz was represented by his attorney, Mr. Thom Paul, as well as Mr. Abbott.

Mr. Herz received his full Weingarten rights as to representation.

5. There was a proper *Loudermill* hearing. The name “Loudermill” comes from the U.S. Supreme Court case *Cleveland Board of Education v. James Loudermill*, 470 US 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). *Loudermill* was based on the 14th amendment to the constitution which forbids states from depriving persons of life, liberty or property without “due process of law.” The U.S. Supreme Court held that due process of law requires “some kind of hearing” prior to the discharge of an employee who has a constitutionally protected interest in continued employment.

While Mr. Herz was not terminated or discharged, he was suspended for one week with a loss of wages of between \$2800 and \$4200. *Loudermill* stands for the proposition that there must be a hearing prior to discipline that could include discharge. A hearing is required to fulfill the requirement of “due process of law.” In Mr. Herz case, a hearing was conducted on February 15, 2000.

Mr. Herz was given reasonable notice before the hearings of January 12 and February 15, 2000, as well as notification of the charges against him that were such that an ordinary person would understand them. At the hearings on January 12 and February 15, Mr. Herz, had a chance to present his side of the story and present mitigating considerations before any discipline was imposed. Mr. Herz had a meaningful opportunity to be heard.

The decision-maker, Mr. Nitchman, did not conduct the investigation, which was done by Brodeur. Mr. Nitchman was not personally embroiled in the events leading up to his decision to suspend Mr. Herz for one week as well as directed to seek anger management and a last chance warning. Mr. Nitchman made his decision as to the discipline for Mr. Herz after the hearing of February 15.

The incidents involving Mr. Herz occurred on November 17, 1999. WSF’s investigation by Brodeur started the following day. The investigation was completed by the end of 1999 or early 2000 when Brodeur finished his personal face-to-face interview of the

major parties. An investigatory hearing was held January 12, 2000 and a pre-disciplinary hearing on February 15, 2000. Mr. Herz attended both hearings and was represented by his MEBA Union Representative at both hearings. At the February 15 hearing he was represented by his attorney Mr. Thom Paul.

WSF's conduct met all the requirements of *Loudermill* standards for suspension of Herz.

Washington courts have endorsed *Loudermill*. See *Wash. Educ. Ass'n v. State*, 97 Wn.2d 899, 908, 652 P.2d 1347 (1982); *Bullo v. City of Fife*, 50 Wn. App. 602, 749 P.2d 749 (1988); *Nickerson v. City of Anacortes*, 45 Wn. App. 432, 752 P.2d 1027 (1986).

6. There was no evidence produced at the hearing of any official logbook for the SKAGIT, maintained on the vessel or that there were any entries made pertaining to Mr. Herz for the incidents on November 17, 1999.

The Code of Federal Regulations, Title 46 Shipping, does not require any official logbook on the SKAGIT operating on a route between Seattle and Bremerton. See 46 CFR 11301 and 46 CFR 78.37-10(1).

7. It was admitted by Mr. Herz and his counsel that Mr. Herz intentionally, physically contacted Mr. Allen and Mr. Keene. The witnesses testified that Mr. Herz pushed or shoved Mr. Allen out of his way. Mr. Herz slapped Mr. Keene in the face three times with the back of his right hand. He called this a "dope slap".

Assault and battery is defined as "any unlawful touching of another which is without justification or excuse." Black's Law Dictionary (5th ed.)

In *State v. Parker*, 81 Wn. App. 731, 915 P.2d 1174 (1996), the Court stated at page 737, "The intentional unlawful touching of another is an assault." and the Court addressed the elements of fourth degree assault, defined as the intentional touching of another body.

The Court also states at page 736, “The essential elements of fourth degree assault are found in RCW 9A.36.041(1): ‘A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second or third degree, or custodial assault, he or she assaults another.’ Intent is a court-implied element of assault in the fourth degree.”

Mr. Herz’ conduct on November 17, 1999 involving the incidents with Mr. Allen and Mr. Keene was a serious matter and could have resulted in Mr. Herz being charged with fourth degree assault. It was proper for WSF to discipline to the extent that they did in Mr. Nitchman’s letter of February 18, 2000.

8. Mr. Herz’ conduct on November 17, 1999 where he intentionally came in contact with Mr. Allen and Mr. Keene was such that he was found to have violated Rule 13 of section 19 of the Washington State Ferry Code of Conduct as defined in the *Human Resource Handbook*.

The first item of his discipline was as follows:

1. If your behavior does not change and you have further acts of violence against any other co-worker your employment with WSF will be terminated. This is your Last Chance Warning regarding any further violation of Rule 13.

The Last Chance Warning was issued as part of the discipline given to Mr. Herz. It was not a Last Chance Agreement that was worked out with Mr. Herz, the MEBA and WSF contributing to the agreement. Should Mr. Herz be charged with violating Rule 13, he would still be able to grieve and arbitrate the threshold issue of the breach. Mr. Herz here has not waived his right to appeal sanctions or discipline upon a finding of a breach or violation of Rule 13. *Stewart v. United States Postal Serv.*, 926 F.2d 1146, 1149 (Fed. Cir. 1991).

The CBA signed by MEBA and WSF covering Licensed Engineer contains in “Section 23 – Disputes,” broad grievance and arbitration clauses and therefore the presumption of

arbitrability is applicable concerning the issue of the breach or violation. There is nothing in item 1, the “Last Chance Warning” that in any way attempts to exclude the issue of arbitration. *United Steelworkers v. Lukens Steel Co.*, 969 F.2d 1468, 1475. (3d Cir. 1992).

Should Herz be charged with a violation of Rule 13 at some time in the future, he would have the right to grieve and arbitrate the threshold question of whether he had in fact committed violations of Rule 13. In other words, WSF can not tell Mr. Herz, “You violate Rule 13 and you are terminated.” Mr. Herz still has the right to have the matter arbitrated.

9. Mr. Herz has completed his seven (7) day suspension, effective Wednesday, February 23 through February 29, 2000. He has also completed the anger management program, a confidential counseling service administered by Jan Paul of WSF’s Employee Advisory Service Program (EAS).

Mr. Herz has not been charged to date with any violation of Rule 13 of section 19 of the WSF Code of Conduct, as defined in the *Human Resource Handbook*.

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AWARD

For the reasons summarized above, MEBA's grievance filed on behalf of Relief Chief Engineer Gregory J. Herz is denied.

DATED this _____ day of December 2000.

MARINE EMPLOYEES' COMMISSION

JOHN P. SULLIVAN, Arbitrator

Approved By:

JOHN D. NELSON, Chairman

DAVID E. WILLIAMS, Commissioner