

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

KENNETH F. IRISH,)	MEC Case No. 10-93
)	
Grievant,)	DECISION NO. 112 - MEC
)	
v.)	
)	DECISION AND ORDER
WASHINGTON STATE FERRIES and)	
DIST. NO. 1, PACIFIC COAST)	
DISTRICT, MARINE ENGINEERS)	
BENEFICIAL ASSOCIATION,)	
)	
Respondents.)	
_____)	

Kenneth Irish, pro se, appearing for and on behalf of himself.

Christine Gregoire, Attorney General, by Robert McIntosh, Assistant Attorney General, appearing for and on behalf of Washington State Ferries.

Davies, Roberts and Reid, attorneys, by Michael R. McCarthy, appearing for and on behalf of District No. 1 Pacific Coast District, Marine Engineers Beneficial Association.

THIS MATTER came on regularly before the Marine Employees' Commission (MEC) on October 18, 1993, when Kenneth F. Irish filed a request for grievance arbitration against Washington State Ferries (WSF) and District No. 1 Pacific Coast District, Marine Engineers Beneficial Association (MEBA). Irish alleged that WSF and MEBA had violated Rule 21.11 of the MEBA/WSF Unlicensed Engineroom Employees collective bargaining agreement, and that although Irish noted that the grievance procedures in said

bargaining agreement had not been exhausted, he was providing a written "statement of good cause" for filing directly with MEC. The request for grievance arbitration was docketed as MEC Case No. 10-93.

Mr. Irish simultaneously filed an unfair labor practice complaint, docketed as MEC No. 11-93 charging the WSF and MEBA with unfair labor practices (ULP), violations of RCW 47.64.130 and WAC 316-45-030. The ULP complaint was set aside until resolution of MEC Case 10-93, pursuant to WAC 316-45-020 and 316-45-130.

Both cases were assigned to Commissioner Donald E. Kokjer to act as arbitrator and hearing examiner pursuant to WAC 316-65-070 and 316-45-130 respectively.

A notice in which both a prehearing conference and hearing dates were scheduled was timely served on the parties pursuant to WAC 316-65-080. MEC's jurisdiction to hear this matter was challenged by both respondents. Prior to the prehearing conference, MEBA stated that Irish had filed the request for grievance arbitration without the union's approval allegedly required by RCW 47.64.150. At the conference WSF further argued that RCW 47.64.150 and Rule 16 of the Unlicensed Engineerroom Employees WSF/MEBA contract compels WSF employees to follow the dispute procedures negotiated by the parties, if such language exists in the contract. Both respondents argued that the employer and union are precluded from negotiating a

prearbitration settlement of the matter if all negotiated steps are not followed.

Arbitrator Kokjer directed the parties to appear at a hearing on February 8, 1994 to argue exclusively the issue of MEC jurisdiction. A transcript of the hearing was produced, and post-hearing briefs were filed with MEC by all parties.

The following decision and order is restricted to consideration of the MEBA/WSF collective bargaining agreement, the statute (chapter 47.64 RCW) and rule (chapter 316-65 WAC) in determining the procedural challenges to the MEC's jurisdiction made by MEBA and WSF. The first question to be resolved herein is: Does the statement of "good cause for not exhausting prearbitration remedies" (WAC 316-65-020) prove or otherwise demonstrate that he was unable to or willfully restrained from exhausting said prearbitration remedies? That is, is said statement of good cause sufficient to enable MEC to accept Irish's grievance for arbitration despite his failure to exhaust his prearbitral remedies? If the answer to that question is yes, then is Irish required by the collective bargaining agreement or by statute or rule to obtain the approval of his union to file his grievance directly with MEC in order that MEC may arbitrate the grievance?

POSITIONS OF THE PARTIES

Grievant Kenneth Irish

In his request for grievance arbitration filed with the MEC, Ken Irish provided a statement of cause as to why the grievance processes in the collective bargaining agreement had not been utilized and exhausted. He argues that an employee may file request for arbitration directly with the MEC:

". . . upon showing good cause for not exhausting pre-arbitration remedies, a party may file the original request for arbitration directly with the MEC." WAC 316-65-020.

Irish also argues that MEC "has jurisdiction in this case under Section 301 of L.M.R.A. because the ferry system does affect commerce in the traffic we carry." He cites "Exhaustion of Contractual Remedies" and "Exhaustion of Internal Union Remedies" from The Developing Labor Law, Vol. II, 2nd Ed., Charles J. Norris, to support MEC jurisdiction because of hostile actions by MEBA. He also cites Vaca v. Sipes, 64 LRRM 2369, Flint Glass Blowers, Local 90 v. AFGWU, 86 LRRM 2065, and Republic Steel Corp v. Maddox, 379 US 650.

Irish went through STEP I-INFORMAL of the contractual procedures to complain that he was prohibited from "bumping up" temporarily to assistant engineer as permitted by Rule 21.11. He went to his supervising engineer, who referred him to Mary Liuska, the WSF engineroom dispatcher. Ms. Liuska advised Irish to "go above her" to Ben Davis, WSF's Senior Port Engineer. Between August 25 and 31, 1993, Irish tried repeatedly to contact Ben Davis. Davis was

not available; so Irish left several messages with Davis's secretary indicating he wished to talk to Davis about "a problem with the contract." When the two finally spoke, Davis indicated to Irish that he would speak to Richard Jackson, WSF Human Resources Director. And, according to Irish, "that was the last I got any contact through the management of Washington State Ferries."

Shortly thereafter, Irish went to a regularly scheduled union meeting, prior to which he approached acting MEBA Patrolman Bud Jacque to discuss "a problem with the agreement ... that ([Irish] didn't think it was being carried out in the proper way." Jacque told Irish that he would have to speak to him at a later time, as the union meeting was about to get underway. After the union meeting, Irish spoke again to Jacque, who had been joined by MEBA West Coast Vice President William Langley, to discuss Rule 21.11, the temporary engineer officer vacancy provision of the WSF/MEBA Unlicensed Engineerroom Employees' contract. In response to Irish's description of a contractual dispute, Mr. Langley informed him point blank that the rule would be changed so that no WSF oiler would have the chance to temporarily "bump up" to an Assistant Engineer under Rule 21.11. Irish perceived Langley's remarks as so hostile that MEBA had "slammed the door in my face"; to proceed further with the union representatives would be an act of futility—his grievance request would not be fairly and justly processed by MEBA. Therefore, Irish filed a request for grievance arbitration, complete with his statement of cause as to why

prearbitration remedies had not been exhausted, directly with the MEC.

On two previous occasions, Irish had taken contract disputes regarding the same rule to union staff. He had walked into the hall, spoken with MEBA staff and had been given well-reasoned responses as to the union's position. On the occasion of the third and present dispute, the hostility displayed by West Coast MEBA Vice President Bill Langley seemed to close the door on the use of further grievance mechanisms: the MEC was the last resort.

Marine Engineers Beneficial Association

MEBA argued that Mr. Irish's grievance should be dismissed on the grounds that MEC lacks jurisdiction to hear this case. RCW 47.64.150, which governs marine employees' grievance procedures, requires that "Ferry system employees shall follow . . . the grievance procedures provided in the collective bargaining agreement," and that those "procedures shall provide for the invoking of arbitration only with the approval of the employee organization." The statute further states that only if no such grievance procedures are provided by an agreement may marine employees submit their grievances directly to the MEC. The labor agreement negotiated by WSF/MEBA for unlicensed engineroom employees does provide such procedures. Irish testified that he did not follow the contracts grievance procedures, which bars him

from directly submitting his grievance to the Marine Employees' Commission.

By exercising jurisdiction here, the MEC may leave itself open to every ferry employee who wishes to sidestep negotiated grievance procedures and file frivolous, nonmeritorious grievances. Dispute resolution mechanisms allow both union and employer to "evaluate and investigate the grievance and negotiate a settlement," thus saving time and money and enhancing labor/management relations.

Mr. Irish's claim that he is relieved from exhausting contractual grievance procedures because compliance would have been a futility is irrelevant to the question of jurisdiction. RCW 47.64.150 states that MEC may only assume jurisdiction when no contractual grievance procedures are provided. The showing of good cause required in Chapter 316-65 WAC is relevant to the merits of the case, not to the question of jurisdiction.

Finally, dismissal of this grievance does not deprive Mr. Irish of a remedy: the union does not challenge MEC's jurisdiction over unfair labor practice charges filed by the complainant.

Washington State Ferries

Washington State Ferries support's MEBA's contention that MEC has no jurisdiction in this matter, because the law requires the union's approval for invoking arbitration.

The parties have provided grievance procedures in their labor agreement, pursuant to RCW 47.4.150, paragraph 2, and Mr. Irish is required to follow those procedures. Although Mr. Irish did complete STEP I - INFORMAL of Rule 16.04, no written grievance was filed, as required by STEP II - FORMAL. Grievance machinery embodied in Rule 16 STEP III, paragraph 2 expressly provides that only the union may invoke arbitration.

Mr. Irish's contention that he had "good cause" for not exhausting contractual grievance procedures must fall: Irish did not use the word "grievance" when describing his contractual dispute, nor did he submit a written request as required by the agreement. The union could not display "hostility" to Mr. Irish's "non-existent grievance." Mr. Irish's assertions that internal union appeals mechanisms are inadequate, thus "reactivating" his grievance; however, Irish himself expressed a lack of knowledge of internal union appeals processes. Similarly, Irish failed to present evidence to support cases cited which claim that requiring exhaustion of contractual grievance procedures would unfairly prejudice his rights.

Having read and carefully considered the entire record, including but no limited to the grievance arbitration request, statement of cause, the prehearing conference and hearing transcripts, and the parties' briefs, the Marine Employees' Commission now hereby enters the following findings of fact.

FINDINGS OF FACT

1. Kenneth F. Irish is employed by Washington State Ferries as a full-time oiler.
2. Grievant Irish is a member of Dist. No. 1 PCD/MEBA.
3. Arbitration procedures for ferry employees are governed by RCW 47.64.150 as follows:

47.64.150 Grievance procedures. An agreement with a ferry employee organization that is the exclusive representative of ferry employees in an appropriate unit may provide procedures for the consideration of ferry employee grievances and of disputes over the interpretation and application of agreements. Negotiated procedures may provide for binding arbitration of ferry employee grievances and of disputes over the interpretation and application of existing agreements. An arbitrator's decision shall not change or amend the terms, conditions, or applications of the collective bargaining agreement. The procedures shall provide for the invoking of arbitration only with the approval of the employee organization. The costs of arbitrators shall be shared equally by the parties.

Ferry system employees shall follow either the grievance procedures provided in a collective bargaining agreement, or if no such procedures are so provided, shall submit the grievances to the marine employees' commission as provided in RCW 47.64.280. (Emphasis added.)

4. Pursuant to the foregoing statute, the WSF/MEBA Unlicensed Engineroom Employees 1989-1991 Agreement contains dispute resolution steps in Rule 16.04, as follows:

STEP I - INFORMAL

1. In the event of a dispute arising out of the interpretation of this Agreement, the aggrieved employee, the Union or the Union Steward shall as soon as possible, but in no event more than sixty (60) calendar days after the facts and circumstances become known, or in the exercise of reasonable care should have become known, orally present the grievance to the employee's supervisor or his designee.

2. If the grievance is not resolved within five (5) days after such notification when (sic) the Union and/or employee may submit the matter to Step II as hereinafter provided.

STEP II - FORMAL

1. Within fifteen (15) days of original notification the Union and/or employee may file a written statement of the grievance to the Director of Employee Relations, or his designee. Said grievance statement will contain the following information: a detailed explanation of the grievance including all facts surrounding the grievance, the specific provisions of the Agreement alleged to be violated, and the specific remedy requested to resolve the dispute. (Emphasis added.)

2. Within ten (10) days of receipt of the grievance the Employer will arrange and convene a meeting with the grievant and Union representatives for the purpose of adjusting or resolving such grievance. The Employer will provide its decision, within five (5) days of said meeting in writing, to the Union and grievant(s).

3. Within ten (10) days of the termination or suspension without pay of an employee, the Director of Employee Relations or his designee will arrange and convene a meeting with the grievant and Union if requested by either of the aforementioned parties.

STEP III - ARBITRATION

1. Within ten (10) days of the receipt of the Employer's decision if the matter has not been satisfactorily resolved the Union may submit the matter to arbitration by [sic] as herein provided.

2. In the event either party decides to submit the matter to arbitration, it will notify the other party of this action and will refer the dispute to the Marine Employees' Commission for a final resolution. If

DECISION AND ORDER - 10

mutually agreed between the Employer and the Union, the matter may be referred to another independent third party

instead of the Marine Employees' Commission for a final resolution.

3. The arbitrator selected shall conduct a hearing of which the facts and arguments relating to the dispute shall be heard. The arbitrator shall have no power or authority to alter, add to, or subtract from the terms of the Agreement. The jurisdiction of the arbitrator shall be limited to rendering a decision solely on the issue(s) presented to him. (Emphasis added.)

4. The arbitrator's decision shall be final and binding on the Union, affected employee(s) and the Employer.

5. Rule 16.02 of the WSF/MEBA labor agreement defines a grievance as: "any dispute which may arise between the parties involving the interpretation, application, or alleged violation of any provision of this Agreement."

6. The grievance arbitration rules governing the Marine Employees' Commission procedures, Chapter 316.65 WAC state

WAC 316-65-010 Grievance—Who may file. A statement of grievance may be filed by the department of transportation, an exclusive representative of employees or their agents, an employee or by the parties jointly, pursuant to RCW 47.64.150.

WAC 316-65-020 Grievances—Arbitration request—Limitations. Unless another purpose is stated by the party filing a statement of grievance, it shall be construed as a request for grievance arbitration by the commission in accordance with RCW 47.64.150. The commission shall consider such a request for arbitration valid only after any applicable dispute remedies in the pertinent collective bargaining agreement have been exhausted, and within the time limits specified in such agreement. If the collective bargaining agreement does not contain a remedial procedure for disputes, or upon showing good cause for not exhausting prearbitration remedies, a party may file the original request for arbitration directly with the commission. Unless otherwise specified in the agreement, a request for grievance arbitration may be filed not more than ninety days after the party filing such grievance knew or should

DECISION AND ORDER - 11

have known of the alleged injury, injustice, or violation. (Emphasis added.)

* * *

WAC 316-65-050 Grievance arbitration—Contents of request. Each grievance arbitration request shall contain:

(1) The name, address and telephone number of the department and the name, address and telephone number of the marine division's principal representative for the purposes of collective bargaining.

(2) The name, address and telephone number of the exclusive employee representative and the name, address and telephone number of its principal representative.

(3) Identification of the request as (a) A request for appointment of an arbitrator' (b) a request for arbitration of a grievance dispute arising under chapter 47.64 RCW; or (c) a request for the submission of a list of names from the dispute resolution panel created by WAC 316-55-110.

(4) A clear and concise statement of the facts constituting the alleged injury, injustice or violation, including names, dates, places and participants in the occurrence(s), and the number of employees affected thereby.

(5) A statement that the remedial processes of the pertinent collective bargaining agreement have been utilized and exhausted, or a statement of cause as to the reason(s) why such processes were not utilized.

(6) The agreement of the requesting party, or parties jointly, that the arbitrator's decision on the grievance shall not change or amend the terms, conditions, or applications of the collective bargaining agreement.

(7) The agreement of the requesting party, or the parties jointly, that the arbitration award shall be final and binding upon the parties.

(8) The signature(s) and, if any, title(s) of the representative(s) of the requesting party (parties). (Emphasis added.)

DECISION AND ORDER - 12

7. In previous years, on two separate occasions, Mr. Irish and MEBA representatives "adjusted" disputes brought by Mr. Irish regarding Rule 21.11. Mr. Irish had walked into the union hall, discussed the issue(s) with his union representatives

and although no grievances were filed on his behalf, Mr. Irish was satisfied with the reasons for the union's interpretation of the rule.

8. Testimony is uncontroverted that Mr. Irish did comply with Step I of MEBA/WSF Rule 16.04. Irish did notify Washington State Ferries management by his approach to his supervising engineer, to Dispatcher Mary Liuska and by his telephone communication with Senior Port Engineer Ben Davis. In that conversation, Davis informed Irish that he would talk to Human Resources Director Richard Jackson, the management representative with whom he dealt on such matters. Apparently, Davis never followed through with this representation.
9. The record is not uncontroverted with regard to Irish's notice to MEBA that Irish "had a problem with Rule 21.11." Irish had previously asked MEBA officials twice for advice concerning that "bump-up" rule and had come away feeling that his problem had been solved. On this occasion, his initial approach to Patrolman Bud Jacque appeared also to be satisfactory; but MEBA Vice President Bill Langley on hearing that Irish "had a problem with Rule 21.11" indicated that Rule 21.11 was a problem for him also, and he intended to change it. There is no record that Irish said anything to Langley like "But I have a grievance against Washington State Ferries under Rule 21.11 as presently written."
10. Rule 16.04, pp. 1, WSF/MEBA Unlicensed Engineroom Employees labor agreement emphasizes the "firm intention . . . to resolve any grievance at the local level. The term 'local

DECISION AND ORDER - 13

level' as herein used means 'Union representative and Employer representative.'" Union Stewards, which the union may elect or designate, and who shall be recognized by the employer, are to be the "authorized representatives of the Union for settling grievances and disputes."

11. The record herein is clear that Mr. Irish sought the assistance of Patrolman Bud Jacque, the nearest equivalent of union steward, pursuant to Rule 16.04, to act as his representative for the purpose of settling grievances at the "local level."
12. After his negative response from MEBA VP Langley, Mr. Irish did not file a written statement of his grievance with WSF himself "[w]ithin fifteen (15) days of original notification . . . of grievance to the Director of Employment Relations, or his designee," in accordance with Rule 16.04, Step II - FORMAL, paragraph 1.
13. On October 18, 1993, Ken Irish filed an unfair labor practice complaint with the MEC, in which he alleged that the Washington State Ferries had interfered with, restrained or coerced employees in the exercise of rights, and encouraged or discouraged membership in employee organization by discrimination in regard to: hiring, tenure or any term or condition of employment, in violation of RCW 47.64.130. He further alleged that PCD No. 1/MEBA had restrained or coerced employees in the exercise of rights guaranteed by Chapter 47.64 RCW and caused or attempted to cause an employer to discriminate against an employee in violation of RCW 47.64.130.
14. WAC 316-65-020 and-050 require a showing of good cause as to why prearbitral contractual remedies have not been utilized and exhausted before a party may file the original request for

DECISION AND ORDER - 14

arbitration directly with the MEC. In accordance with WAC 316-65-020 and -050, Mr. Irish did provide MEC with a statement of cause as to why the prearbitral remedial

processes of the collective bargaining agreement were not utilized.

Having entered the foregoing findings of fact, the Marine Employees' Commission now hereby enters the following conclusions of law.

CONCLUSIONS OF LAW

1. MEC has general jurisdiction over the labor-management relations between and among the employee, employer, labor union, and subject matter involved in this case. Chapter 47.64 RCW; specifically RCW 47.64.150 and 47.64.280.
2. MEC may not change or amend the terms, conditions or applications of the Unlicensed Engineroom Employees MEBA/WSF collective bargaining agreement. RCW 47.64.150.
3. The arbitrator selected (either MEC or an independent third party) shall no power to alter, add to, or subtract from the terms of the Agreement. MEBA/WSF Bargaining Agreement, Rule 16.04, Step III, paragraphs 2 and 3.
4. The first sentence of Rule 16.04, Step II - FORMAL could be considered somewhat ambiguous. (See Finding of Fact 4.) The verb may file could possibly be construed as not mandatory, but permissive, for either the employee or the union to file a written statement of the grievance. However, such a reading would render the Step II as practically useless in obtaining settlements at the "local level" before proceeding to arbitration. This Commission concludes that the correct

DECISION AND ORDER - 15

interpretation is that either the employee or the union must proceed to the second step, but one of them must.

5. Irish did comply with Step I - Informal. He did timely present his grievance orally to his supervisor, and to the supervisor's designee, Dispatcher Mary Liuska, and approximately three days later to her designee, Senior Port Engineer Ben Davis. The grievance was not resolved within five days; therefore either he or MEBA could have submitted the matter to Step II - FORMAL in writing within fifteen days. Irish did not submit the required written statement, nor did he actually request MEBA do so. Neither in Irish's "statement of good cause" nor during the February 8, 1994 hearing nor in his post-hearing brief, did Irish ever attempt to show cause as to why he did not avail himself of the Step II contractual opportunity to present his grievance to WSF in writing. Neither the citation of Section 3, L.M.R.A. nor any of the cases upon which Irish depends relieve him of the burden of completing his contractual remedy under Rule 16.04, Step II. Whether or not MEBA was obligated to fulfill Step II may be determined during deliberation on Irish's ULP. WSF was not required to convene the meeting described in Step II, paragraph 2, because WSF never received said written statement from either Irish or MEBA. This Commission must conclude that the requirement in RCW 47.64.150, second paragraph, that if grievance procedures are provided in the collective bargaining agreement, "[f]erry employees shall follow [said] grievance procedures." Likewise, assuming arbitral jurisdiction when Step II wasn't completed would fly in the face of the arbitration limitation of Step III of the Agreement. This Commission must conclude that Irish failed to satisfy the "good cause" requirement of WAC 316-65-020 and must decline jurisdiction in this grievance proceeding.

DECISION AND ORDER - 16

6. Because MEC has determined that it lacks jurisdiction in this grievance, MEC should proceed no further. Therefore, even though MEC has carefully considered its jurisdiction on employee grievances without union sanction several times

previously, the applicability of union approval in the instant matter must remain moot. Voracheck v. U.S., 337 F.2d 797 (8th Cir. 1974).

7. The question of culpability in alleged violation of RCW 47.64.130 (unfair labor practice) as charged by Irish is now available for resolution and should be scheduled for hearing as soon as practicable. WAC 316-45-020.

The Commission having reached the foregoing findings of fact and conclusions of law now hereby enters the following decision and order.

DECISION AND ORDER

The request for grievance arbitration filed by Kenneth F. Irish against Washington State Ferries and Dist. #1 Pacific Coast District, Marine Engineers Beneficial Association is hereby dismissed for lack of Marine Employees' Commission jurisdiction.

DONE this 11th day of April, 1994.

MARINE EMPLOYEES' COMMISSION

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner