STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

KENNETH F. IRISH, Complainant, v. WASHINGTON STATE FERRIES and DIST. NO. 1, PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION, Respondents.	)	MEC Case No. 11-93 DECISION NO. 128 - MEC DECISION AND ORDER

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 n regularly before the Marine Employees' Commission (MEC) on October 18, 1993, when Kenneth F. Irish filed an unfair labor practice complaint (ULP) against Washington State Ferries (WSF) and District No. 1 Pacific Coast District, Marine Engineers Beneficial Association (MEBA). Irish alleged that WSF and MEBA had discriminated against him and other WSF Oilers by giving preferential treatment to members of MEBA who are not WSF employees. Irish alleged that the preferential treatment was

discriminatory, a violation of the union's duty of fair representation, and an unfair labor practice as defined by RCW 47.64.130.

Mr. Irish simultaneously filed a request for grievance arbitration and the instant ULP; both were based on the same factual allegations. The grievance request was docketed as MEC Case No. 10-93 and the ULP as Case No. 11-93. 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. MEC discussed the ULP allegations in its regular meeting October 22, 1993; but, pursuant to WAC 316-45-020 and 316-45-130, it was set aside until resolution of the grievance.

Based on the evidence presented in hearing on the grievance request, MEC determined that the contractual dispute procedures had not been utilized; therefore the grievance request was denied and dismissed. Decision No. 112-MEC. Thereupon Examiner Kokjer scheduled a hearing on the instant ULP for July 7 and 8, 1994. During the hearing, all parties stipulated to the admission of the transcript and exhibits from MEC Case No. 10-93 to the extent they are relevant to the instant ULP. Both respondents timely filed their answers. The hearing was held and all parties timely filed post-hearing briefs.

Having already heard and dismissed the complaint pertaining to the interpretation of the collective bargaining agreement, i.e. the grievance, this decision and order attempts to avoid reconsideration of that grievance arbitration request.

NOTE: On August 10, 1994 Governor Lowry appointed Commissioner John Sullivan to replace Donald E. Kokjer whose term had expired.

INTRODUCTION AND BACKGROUND

Complainant Kenneth F. Irish is employed by WSF as an Oiler. He is a member of and represented by MEBA. Although employed as an Oiler, Complainant Irish possesses a U.S. Coast Guard license as a Marine Engineer and is qualified thereby to promote to the level of Assistant Engineer. However, Irish contends that, because he is an Oiler employed by WSF, he is allowed only to be appointed to Assistant Engineer temporary vacancies expected to last three days or less, while longer vacancies are being filled by preferential referrals from the MEBA dispatch hall.

Irish attempted unsuccessfully to discuss the bidding procedure with MEBA representative Louie "Bud" Jacque and Vice President Bill Langley. He perceived the responses to his approach not only as negative and threatening this and other Oilers' right to bid for

Assistant Engineer vacancies, but a violation of MEBA's duty of fair representation.

Prior to 1988, WSF Wipers and Oilers were represented by the Inlandboatmen's Union of the Pacific (IBU). Virtually all hiring in engineer positions was by referrals from the MEBA dispatch hall. MEBA had represented licensed marine engineers during the entire time the State of Washington operated its ferry system. However, MEBA petitioned MEC asking for recognition also as "sole representative" of unlicensed engineroom personnel, viz., Wipers and Oilers; hearings ensued; an election was ordered and held; and on April 28, 1988 a certificate was issued declaring that Wipers and Oilers were members of the WSF/MEBA Bargaining Unit. District No. 1 MEBA v. IBU, MEC Case No. 3-87; Decision No. 38-MEC.

Instead of merging the licensed and unlicensed engineering personnel in one bargaining unit, WSF and MEBA adopted two collective bargaining agreements thereby recognizing de facto two bargaining units with MEBA as the "sole representative" of both of them.

ISSUE

1. Did WSF and/or MEBA commit unfair labor practices as defined in RCW 47.64.130 by discriminating against WSF Oilers in the filling of Assistant Engineer vacancies?

2. Did MEBA violate its duty of fair representation of WSF Oilers as required by RCW 47.64.170(1)?

If "yes," what is the remedy?

POSITIONS OF THE PARTIES

Position of Complainant Irish

Mr. Irish alleges that he and other Oilers already employed by WSF, who have USCG Marine Engineer licenses, are discriminated against in favor of other MEBA members who are dispatched from the MEBA dispatch hall, in the filling of Assistant Engineer vacancies. Irish cites a requirement that an Oiler must have a letter on file, signed by the Chief Engineer or Staff Chief Engineer of the vessel on which he would be working as an Assistant Engineer, whereas the MEBA member referred from "the Hall" does not bear that restriction.

Mr. Irish recounts his unsatisfactory experiences when he was denied temporary promotion by WSF Dispatcher Liuska and Senior Port Engineer Davis, alleging violation of the WSF/MEBA collective bargaining agreement. He also recounts his unsatisfactory

experience when he approached MEBA Agent "Bud" Jacque and Vice President Langley, asserting that Langley threatened to change the WSF/MEBA Agreement to make it impossible for him "or any other oiler to take the temporary vacancy in Rule 21.11." Irish charges that Jacque and Langley breached the duty of fair representation by that response and attitude instead of representing him in his complaint. He complains that they did not even inform him of a "3-day rule" agreed upon by WSF and MEBA as the limited time WSF could directly promote an Oiler to a temporary vacancy. He asserts that Jacque and Langley acted in bad faith when they did not even offer him a grievance form. Then, Mr. Irish questions whether or not a grievance form exists.

Position of Respondent MEBA

MEBA asserts that Irish's complaint is without merit and must be dismissed. In order to prevail, Irish must prove that MEBA acted "arbitrarily, discriminatorily or in bad faith."

With regard to the historical differences in filling temporary vacancies, MEBA points out that MEBA is representing two sets of members with conflicting interests. On the one hand, engineers who are out of work in the Puget Sound area have long been able to get a short job now and then filling temporary vacancies on WSF ferries. The union has thus been able to provide a substantial service to those members. Now, however, the WSF Oilers who have

marine engineer licenses but who are already employed want to fill those vacancies to build up work time at the assistant engineer level.

MEBA relies on Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 97 L.Ed. 1048, 1058 in arguing that "complete satisfaction of [two sets of MEBA members] is hardly to be expected." In another case, the Supreme Court held:

> [The union} should [not] be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

Humphrey v. Moore, 375 U.S. 335, 349-50, 11 L. Ed. 2d 370, 382 (1964). (Emphasis added.)

MEBA asserts that it has no obligation to take every grievance to arbitration, but that MEBA must evaluate each grievance, and even then is not liable for good faith, non-discriminatory error of judgment in the processing of grievances.

In fact, MEBA argues, Irish had no grievance at all under Article 21.11 of the Bargaining Agreement. Even assuming MEC finds a contract violation, MEBA had a reasonable basis and was therefore not arbitrary, discriminatory or in bad faith. But Irish did not even file a grievance with MEBA; therefore MEBA cannot be found to have acted arbitrarily.

Position of Respondent WSF

WSF denies committing any unfair labor practice with respect to Complainant Irish. WSF argues that the instant complaint is "really a request for grievance arbitration masquerading as a ULP…." That grievance request has already been heard and dismissed by MEC and should be dismissed again. WSF has not been charged with discrimination on the basis of union membership, because Assistant Engineer vacancies are filled by MEBA members, whether they are WSF Oilers or are dispatched from the hiring hall; therefore, Irish's charge against WSF is completely outside the statutory definition of a ULP.

The requirement that Oilers must have a letter of qualification to promote to Assistant Engineer is not a ULUP, but may be the subject of grievance determination as to whether it is allowable under the "Management Rights" clause of the bargaining agreement.

WSF further argues that, even if there is no binding past practice, there is a binding oral agreement between WSF and MEBA to promote WSF Oilers on a watch only for vacancies of three days or less. Whether WSF has acted in accordance with its binding agreement is the subject for a grievance, not a ULP.

Having read and carefully considered the entire record, including the unfair labor practice complaint, the hearing transcript, the exhibits, and the briefs, as well as relevant testimony and exhibits from MEBA Case No. 10-93, the Commission now enters the following findings of fact.

FINDINGS OF FACT

1. The underlying events in this matter, i.e., the appointment to temporarily vacant assistant engineer positions, are governed by the Unlicensed Engineroom Employees MEBA/WSF Collective Bargaining Agreement, Rule 21.11:

> A temporary vacancy in the position of Assistant Engineer may be filled by a qualified Oiler, . . .

(Emphasis added.)

2. In order for an Oiler to qualify for filling a temporary vacancy of Assistant Engineer said Oiler is required to obtain a statement from the Chief Engineer or Staff Chief Engineer of his vessel that he is qualified—a long standing practice carried forward from the time when WSF Oilers were covered by an agreement between WSF and the Inlandboatmen's Union of the Pacific (IBU). The record is silent as to violations of Rule 21.11, either by WSF or by MEBA.

3. With regard to appointments to vacancies anticipated to last longer than three days since June 1989, if no licensed engineer is available from the MEBA hiring hall, the WSF Oiler on watch may be promoted to such vacancy.

4. With regard to "permanent" (non-temporary) vacancies, changes have evolved. Two-thirds of such vacancies are now filled by Oilers with engineer licenses and one-third by referrals from the hiring hall.

5. As stated in Decision No. 114-MEC (Greenwood, et al v. MEBA), insofar as possible, the Marine Employees' Commission has avoided delving into the internal affairs of any labor union involved in any matter before the Commission. See Vestal v.

Hoffa, 451 F. 2d 206, cert. denied, 406 U.S. 934, 92 S. Ct. 1768, 32 L. Ed. 2d 135. Besides that longstanding practice of labor relations tribunals, MEC is cognizant of the exemption of ferry employee representative unions from the Open Meetings Act, Chapter 42.30 RCW, giving Washington State employee unions specific privacy. Therefore, both in making its findings of fact and conclusions of law, MEC has attempted to take notice only of such internal union activity as directed d by the Union's own Constitution, By-Laws, or duly adopted rules, and then only when actions are deemed to be unfair or unreasonable. In the instant matter the record is silent as to the ability of a MEBA member, who is licensed as a marine engineer and who is presently employed as a WSF Oiler, to enter his/her name on the availability list at the MEBA Dispatch Center for referrals to WSF Assistant Engineer vacancies, permanent or temporary. The record is also silent as to the procedures by which engineers are referred to WSF from the hall. Therefore, there is no evidence that Messrs. Langley or Jacque or any other officer or agent of MEBA has used the referral mechanism unfairly against Irish or other Oilers.

6. Despite his statement that he, too, had "problems" with Rule 21.11, the record is also silent as to any evidence that MEBA Vice President Bill Langley has made any attempt to change Rule 21.11 to deprive Oilers of their "bumping up" opportunities by filling vacancies. On the contrary, the record is clear that despite some delays and debates, every change regarding the filling of vacancies has been in the direction of more appointments of WSF Oilers to Assistant Engineer vacancies and fewer referrals of "deep water" engineers who are on the beach.

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

CONCLUSIONS OF LAW

1. The Marine Employees' Commission (MEC) has jurisdiction over the parties and the subject matter involved in this matter. Chapter 47.64 RCW; particularly RCW 47.64.130 and 47.64.280.

2. Having made no findings of fact indicating that either WSF or MEBA discriminated against Complainant Irish or other Oilers by breaching either the Unlicensed or Licensed Engineer MEBA/WSF Collective Bargaining Agreement or the past practices of "bumping up" Oilers to fill Assistant Engineer vacancies, MEC must conclude that Kenneth Irish failed to prove his complaint of unfair labor practice against WSF or MEBA as defined by RCW 47.64.130.

3. Having made findings of fact that each change in the procedures for appointing WSF Oilers to Assistant Engineer vacancies has less restriction on Oiler "bump ups," and having made no finding of fact that MEBA Vice President Langley and Agent "Bud" Jacque have assisted or abetted in restricting Oiler "bump ups," MEC must conclude that Complainant Irish has failed to prove by any standard that they or any other MEBA officer or agent has violated their duty of fair representation as required by RCW 47.64.170.

4. The record is convincing that Mr. Irish sincerely felt that he and other Oilers have been discriminated against in the matter of "bumping up" to Assistant Engineer. However, MEC, like any other labor relations board must require convincing evidence before ordering a remedy. MEC requires proof by a preponderance of evidence. Mr. Irish simply did not meet that standard. Pursuant to Conclusions 3 and 4, MEC must conclude

the complaint filed by Complainant Irish must be denied and dismissed.

Having entered the foregoing findings of fact and conclusions of law, the Commission hereby enters the following order.

DECISION AND ORDER

1. The complaint of unfair labor practices by Washington State Ferries and the Marine Engineers Beneficial Association, filed on October 18, 1993 by Kenneth Irish, should be and is hereby dismissed.

2. The complaint of a breach of its duty of fair representation by the Marine Engineers Beneficial Association, filed on October 18, 1993 by Kenneth Irish, should be and is hereby dismissed.

DONE this 7th day of November 1994.

MARINE EMPLOYEES' COMMISSION

/s/ HENRY L. CHILES, JR., Chairman

/s/ JOHN P. SULLIVAN, Commissioner

/s/ LOUIS O. STEWART, Commissioner