STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

DISTRICT NO. 1 MARINE ENGINEERS BENEFICIAL ASSOCIATION on behalf of DAVID WILLIAMS, Grievant, v. WASHINGTON STATE FERRIES, Respondent.	MEC Case No. 13-00 DECISION NO. 305 - MEC DECISION AND AWARD

Carol L. Hepburn, appearing for and on behalf of the Grievant, David Williams.

Mario Micomonaco, appearing on behalf of the union, Marine Engineers Beneficial Association.

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 D. Nelson of the Marine Employees' Commission (MEC) on June 28, 2000 when the Union, Marine Engineers Beneficial Association filed the grievance on behalf of David Williams which was designated MEC Case No. 13-00. Thereafter, pursuant to extensive settlement discussions, the parties reached a settlement of the issues raised by the grievance. On October 30, 2001, an arbitration hearing was held to determine whether the settlement entered into between the Washington State Ferries and Grievant Williams, represented by his attorney Hepburn with concurrence from MEBA representative Micomonaco, had been complied with fully. The provision of said settlement agreement enabling this arbitration is paragraph 2 (b) that states as follows:

> WSF shall advise the Health Care Authority of the correction of Williams' record and the reinstatement of Williams' original date of hire and in good faith WSF shall take all steps necessary to reinstate Williams' life insurance to its October, 1999 status of Parts A Subscriber Basic Life AD & D, Part C Subscriber Optional Life, Part D Subscriber Supplemental Life, and Part E Subscriber Optional AD &D without dependents, and his long term disability insurance to its status of Basic LTD with 90 day waiting period and Optional LTD with 180 day waiting period. The parties agree that, because the steps necessary and the existence of any concomitant payments or requirements for reinstatement have yet to be determined, that ultimate resolution of this aspect of the grievance is not yet possible. Therefore, it is agreed that the MEC shall retain jurisdiction of that portion of the grievance which relates to reinstatement of employee insurance benefits. In the event this final aspect of the grievance is not resolved it may be brought before the MEC for hearing and disposition.

The Settlement Agreement, from which paragraph 2(b) is excerpted above, was entered into evidence at the time of hearing as Joint Exhibit #1. The parties agreed upon the hearing record that the scope of the hearing was thus limited to the reservation contained in paragraph 2(b). The merits of the underlying grievance were disposed of in total by the undertaking of the parties in settling the dispute. The respective parties and representatives signed the settlement on various dates between June 18, 2001 and July 26, 2001.

An additional issue was raised during the course of the October 30, 2001 hearing when Counsel for the Grievant indicated an intention to file for attorney fees should the Grievant prevail. This issue will be dealt with more fully later.

POSITIONS OF THE PARTIES

Grievant Williams

Williams understood the language of the settlement to obligate WSF to take full responsibility for reinstatement of his insurance coverage. He testified that to him the meaning of paragraph 2(b) of the settlement meant that WSF would determine what steps needed to be taken to reinstate Williams' coverage and if payment were required, WSF would pay them.

Washington State Ferries

WSF takes the position that it fully complied with paragraph 2(b) of the settlement agreement when it contacted the Health Care Authority to correct Williams' record and reinstatement of Williams' original date of hire. Upon notifying Williams that he could be fully reinstated to the exact insurance coverage he had prior to the incident giving rise to the original grievance, the same coverage he had in October 1999, as if that coverage had been in place continuously from that time to present, WSF takes the position that the cost of such reinstatement is Williams' to bear. WSF does not pay such costs for other employees, as these are considered to be the employees' cost of the insurance coverage. WSF proposed that as an alternative available to Williams, he could opt to re-qualify and sign up for new coverage, with no back premiums. WSF communicated these options to Williams. WSF contends that the Health Care Authority (HCA) would not permit any remedy other than that proposed to Williams.

THE ISSUE

Did the Washington State Ferries fulfill its obligations agreed to in paragraph 2(b) of the Settlement Agreement? If not, what remedy attaches? Is this case, if decided for the Grievant, appropriate for the awarding of Attorney fees?

DISCUSSION

At the outset it should be noted that the settlement entered into between the Grievant's representatives and the WSF purported to settle all outstanding issues which arose from the grievance filed on behalf of David Williams in MEC Case 13-00. The reservation in paragraph 2(b) was to allow the parties to work out details relating to requirements for reinstatement of employee insurance benefits. There were no issues relating to Williams' movement from the position of Oiler to Assistant Engineer, which were not addressed by the settlement. The parties

engaged in protracted settlement negotiations leading to the settlement, and while there was some evidence adduced that some ministerial performance had yet to be achieved, no one takes the position that the settlement was not fulfilled in any term other than the paragraph 2(b) issue.

There is no dispute that had Williams continued his employment as an Oiler he would have continued to have his insurance coverages described in paragraph 2(b) in effect without interruption. Similarly, if he had not been treated as a new hire when he was reclassified as Assistant Engineer, his coverage would have continued under the licensed agreement. In either of these cases, Williams would have had to pay the employee portion of the costs of uninterrupted insurance. WSF does not pay the employee portion of costs for any covered employee. The question before the Arbitrator then is whether the operation of paragraph 2(b) requires the WSF to pay a cost that it would not pay for any other employee?

There is no question that WSF mistakenly terminated Williams' insurance coverages when it reclassified him from Oiler to Assistant Engineer. This error occurred when Williams went from the unlicensed agreement between WSF and MEBA to the licensed agreement covering the same parties. The effect of making this change was to treat Williams as a new employee for purposes of the contract coverage. This was also the issue which lead to the grievance filing and to the protracted settlement discussions. This matter was disposed of with the entry of the settlement agreement. Whatever the merits to the course of action taken by Williams in changing his position from that of an Oiler under the unlicensed agreement, to that of an Assistant Engineer under the licensed agreement, as well as the attendant compensation due to him, these issues were resolved when the parties entered into the settlement agreement. The Arbitrator can not and should not look behind the settlement. The issue of what the parties intended by paragraph 2(b) of the settlement is at the bottom of this case. Williams posits that

his understanding was that WSF would make all of the payments necessary to reinstate the insurance coverages and bring him current in this benefit. WSF takes a contrary view and contends that Williams, like any other employee of WSF is responsible for making the employee contributions to his insurance coverage. The case is made somewhat more cloudy in that by paying the back premiums to insure continuous coverage and to enjoy the rates that recognize Williams' health and age at the time he was first covered, there is a perception that because no benefits were claimed during this period, the payment now would be for a time that Williams "went bare" and had none of the specified insurance coverage. While an option for Williams is to apply for coverage as a new applicant this would not work for Williams in that he is now older, and may have some issues which raise concern over his eligibility for certain forms of disability.

In looking to the language of paragraph 2(b) there is no specific requirement as to which party to the settlement will pay the premiums. Rather, there is a statement that WSF will advise the Health Care Authority (HCA), of the correction of Williams' record and the reinstatement of Williams' original date of hire and in good faith WSF shall take all steps necessary to reinstate Williams' life insurance to its October, 1999 status. The paragraph goes on to say: "The parties agree that, because the steps necessary and the existence of any concomitant payments or requirement for reinstatement have yet to be determined, that ultimate resolution of this aspect of the grievance is not yet possible."

WSF did contact the HCA, as it had agreed to, and was advised of what steps were necessary to complete Williams' reinstatement. These steps were communicated to Williams in the form of the options to pay his missed premiums, or to reapply as a new applicant.

The wording of the quote, above, from paragraph 2(b) regarding concomitant payments needs to be analyzed to reach a resolution here. Concomitant is defined in *Webster's New Collegiate Dictionary* as an adjective meaning: accompanying; conjoined; attending. Usage of the word, while not rare, is still not an everyday word of labor relations. That it was used in the context of the disputed settlement paragraph leads me to the conclusion that it was intended and that from the definition it is not clear that WSF intended or agreed to make the back premium payments on Williams' behalf. Neither is it clear that Williams agreed solely to make the back premium payments. A more logical construction is that WSF intended to make whatever payments are made as the Employer's portion of such insurance coverage, and that Williams would make payments that were apportioned as employee payments.

Further support for the construction favoring concomitant payments flows from the longstanding practice under a variety of contracts WSF has with various labor organizations, wherein the employee portion of costs is borne by employees. Additionally, Labor Relations Director Mike Manning testified that in situations where WSF has had terminations overturned, the resulting back payments have been based upon having all of the employee deductions in place before the termination, with that amount then taken as a deduction from the back pay owed. In other words, the WSF has not considered the employee portion of the benefit contribution to be the Employer's expense.

I am mindful, of course, that we are dealing with a settlement here, and that any past practice is of limited value in reading meaning into the settlement language. However, there is no express agreement as to which party agrees to pay any back premiums. Contrast that absence of express agreement with paragraph 2(c) which states: "Vacation scheduling and 'certain other rights' shall continue to be administered in compliance with Sub-section 20(a)(1) of the Licensed

collective bargaining agreement. Accrual of Williams' annual leave time shall be calculated based upon the May 6, 1993 original hire date."

It is of course possible that the parties were unaware of the back premium liability when they entered into the settlement language which formed paragraph 2(b). Even if the concept of liability was unknown to the parties, their reference to concomitant payments or requirements…to be determined, suggests that this issue was left open, with neither party expressly agreeing to fully shoulder the burden. When the requirements were made clear to WSF, which then informed Williams of his obligations or options, I believe the WSF met its burden under paragraph 2(b).

That WSF has raised the possibility that Williams can meet this back premium burden by entering a long-term payroll deduction program is clear on the record. The parties are encouraged to follow this procedure in resolution of this issue.

While the Grievant here argues that the operation of RCW 49.48.030 should be interpreted in the extant case as providing for the recovery of attorney fees, the result of this arbitration obviates that remedy, as Grievant is not a prevailing party.

Awards of attorney fees have not been part of the standard list of tools utilized by the Marine Employees' Commission, and I would not have ordered them in this case even if Grievant had prevailed. The controversy present in this case derives from the collective bargaining agreement(s) under which the Grievant first brought his case. The settlement reached would not have taken place in the absence of the CBA, and as such, appear not to qualify for an award of attorneys fees.

Based upon the foregoing discussion, the Arbitrator now enters the following conclusions of law.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction over the parties and subject matter in this case. Chapter 47.64 RCW; especially RCW 47.64.150 and 47.64.280.

2. The MEC may not change or amend the terms, conditions or applications of the collective bargaining agreements between MEBA and WSF.

3. The parties to this proceeding left open the involvement of the MEC through a reservation contained in paragraph 2(b) of the settlement agreement, which resolved all other issues.

4. Grievant did not establish by a preponderance of the evidence that WSF had agreed to pay the employee costs of the insurance benefits in paragraph 2(b) of the settlement agreement for the period of time that Grievant was not covered.

5. WSF took the steps it agreed to take under paragraph 2(b) of the settlement agreement.

6. Grievant Williams is not a prevailing party in this matter and is therefore not eligible for recovery of attorney fees.

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AWARD

In accordance with the foregoing findings and conclusions, the grievance before the MEC in these proceedings is denied. The grievance docketed as MEC Case No. 13-00, is hereby dismissed.

DATED this ____ day of February 2002.

MARINE EMPLOYEES' COMMISSION

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JOHN NELSON, Arbitrator

Approved by:

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JOHN BYRNE, Commissioner