STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

DISTRICT NO. 1 PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION on behalf of Earl D. Warren,	)	MEC CASE NO. 13-92
Grievant,	)	DECISION NO. 97 - MEC
v.	)	DECISION AND ORDER
WASHINGTON STATE FERRIES,	)	
Respondent.	)	

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

Christine Gregoire, Attorney General, by Anne L. Spangler, Assistant Attorney General, appearing for and on behalf of Washington State Ferries.

THIS matter came on regularly before the Marine Employees' Commission (MEC) on December 16, 1992 when District No. 1 Pacific Coast District, Marine Engineers Beneficial Association (MEBA) filed a request for grievance arbitration. MEBA charged that Washington State Ferries (WSF) violated Rule 5.01 of the Unlicensed Engineroom Employees Collective Bargaining Agreement by termination of a WSF Oiler, Earl D. Warren, on August 31, 1992, for (1) excessive tardiness or absenteeism; (2) failure to give supervisor reasonable advance notice of expected absenteeism or tardiness; and (3) sleeping, wasting time, or loafing during work hours. MEBA certified that the grievance procedures in the MEBA/WSF Unlicensed Engineroom Employee Collective Bargaining Agreement (hereafter Agreement) had been utilized and exhausted.

The request for grievance arbitration was docketed as MEC Case No. 13-92 and assigned to Commissioner Donald E. Kokjer to act as arbitrator pursuant to WAC 316-65-080.

Pursuant to WAC 316-65-080, Notice of Hearing was sent to all parties, scheduling a grievance arbitration hearing on March 25, 1993. At the joint request of counsel for the union and the ferry system, the grievance arbitration hearing was continued to and held on April 20, 1993.

Briefs were originally to be simultaneously postmarked on June 8, 1993. To facilitate the addition of certain documents to supplement the record in this matter, the briefs' postmark date was ordered continued until June 22, 1993. They were both filed on that date.

STATEMENT OF THE ISSUES

At the hearing the parties significantly broadened the issue to be decided. Instead of the original complaint of an alleged violation of Rule 5.01 of the Agreement, the parties stipulated the issues to be decided are as follows:

1. Was Earl Warren terminated for just cause in compliance with the applicable collective bargaining agreement?

2. If not, what is the appropriate remedy?

POSITIONS OF THE PARTIES

District No. 1 PCD, MEBA

MEBA conceded the WSF charge of Warren's excessive absenteeism, and sleeping and loafing as stated in his termination letter. However, MEBA charged a violation of Rule 5.01 of the Agreement in that Warren's discipline was greater than that given other employees for

similar offenses. MEBA also questioned whether WSF had complied with all of the elements required in termination for just cause under Rule 21.08 of the Agreement. MEBA alleges that Warren's termination was procedurally defective because WSF failed to consult Warren's supervisor following the investigation of charges against Warren, and before imposing discipline, as required by the WSF Vessel Operating Procedures. MEBA contends that if WSF had consulted with Warren's supervisor, Staff Chief Engineer Bob Keene, prior to termination, he would have told them that he had no intention of terminating Warren; he only wanted to induce Warren to get treatment for personal problems affecting his job performance.

MEBA claims that WSF's treatment of Warren was inconsistent with past practice. It relies on several discipline cases as evidence of that inconsistency. In the case of a Vince Alberg, a WSF employee with a serious drinking problem, MEBA asserts WSF did not terminate until Alberg had failed rehab attempts twice. IBU v. WSF (Alberg), FMCS No. 90-04642 (1990).

The union asserts that Warren has made a sincere attempt at rehabilitation and his post-discharge conduct should be considered in applying just cause provisions of the collective bargaining agreement. Warren entered an alcohol and drug addiction rehabilitation program shortly after his termination. He completed a 28-day in-patient program, relapsed, began a relapse prevention program, suffered another relapse a few months later, and voluntarily checked himself into rehabilitation for an additional 14 days.

MEBA relies on Thrifty Drug Stores, 71-1 ARB ¶ 8299 wherein an arbitrator reinstated an employee who had been terminated for being drunk at work, because said employee had entered an alcohol rehabilitation program after his termination, and a doctor had testified that his prognosis was good.

In addition to IBU v. WSF (Alberg), supra, MEBA cites Morgan Adhesive Co., 87 LA 31 (1983); and Weyerhaeuser Company, 88 LA 270 (1980) for holdings similar to MEBA's proposed remedy. MEBA relies on United Industries Corp., 76 LA 417 (1980), which found the termination justifiable, but re-instated the employee on the condition that the employee complete an alcohol rehabilitation program.

Finally, MEBA seeks neither back pay nor immediate reinstatement for Warren. The union does seek an order from MEC that WSF be required to reconsider Warren for reinstatement on or about August 18, 1993 (i.e., 120 days after the April 20, 1993 hearing.)

Washington State Ferries

WSF asserts that it had just cause to terminate Warren and did everything it reasonable could to encourage rehabilitation before resorting to discharge. Warren's termination "resulted from an 'honest cause or reason' and was made in good faith by WSF management based on substantial evidence, reasonably believed to be true, and without any arbitrary, capricious or illegal reason."

There is no dispute over the many incidents of Warren's alcohol related misconduct. WSF asserts that there are limits to what an employer can and should do to help an employee overcome an alcohol related problem. Over the years, WSF gave Mr. Warren many opportunities to deal with this problem. As far back as 1988, management attempted to find out what Warren's problem was and informed him that help was available through Employee Advisory Services. Mr. Warren Continually denied have a problem and never attempted to get help. Less than a year prior to Warren's termination, he had been suspended for the same misconduct, and warned that termination might result should he fail to satisfactorily perform his duties in the future. Following the

pre-discipline meeting on August 26, 1992, WSF determined there was no indication that Warren's situation would improve, and that termination was appropriate.

WSF was willing to consider Warren's request for reinstatement in September 1992 had it been allowed to examine his treatment records and talk to his counselor, but treatment and rehabilitation records were not disclosed. A one-page status report they did receive reported a relapse and included nothing regarding Warren's prognosis.

WSF denied any violation of Rule 5.01 of the Collective Bargaining Agreement. Both the Americans with Disabilities Act and Washington statute RCW 40.60.180 exclude from coverage alcoholics whose current alcohol use prevents them from performing their job duties, or whose employment constitutes a direct threat to others' property or safety. 42 USC 12115(c)(v). WSF also contends that MEBA has not proved Warren's termination amounted to unequal treatment in comparison with other WSF employees.

Although MEBA offered IBU v. WSF (Alberg), supra, as a precedent case where arbitrators have reinstated employees who were terminated as a result of faulty performance due to alcoholism, WSF also cites IBU v. WSF (Alberg) as a precedent supporting WSF defense that Warren had not attempted to help himself under after he had been dismissed, and even then Warren had relapsed. WSF cited Goodyear Tire & Rubber Co., 92 LA 91, 95 (1988) to support the decision that WSF was justified in noting that Warren did not provide a reasonable expectation of recovery at the time of termination. Finally, WSF also cites Alberg, supra, to argue that it is unreasonable to expect an employer to carry indefinitely an employee whose chronic overindulgence presents a potential danger to himself, fellow employees and plant, or who cannot perform his duties in a responsible and efficient manner.

Having read and carefully considered the entire record, including the request for arbitration, the hearing transcript, the exhibits, and the briefs, the Commission now enters the following findings of fact.

FINDINGS OF FACT

1. Earl Warren was employed by WSF as an Oiler from 1981 until he was terminated on August 28, 1992.

2. During the later years Warren was disciplined for sleeping on watch, absenteeism and tardiness, including a one week suspension and reassignment.

3. Warren and MEBA do not dispute his job performance deficiencies in the months preceding termination. They admit that Warren has a history of alcohol and drug abuse, which started when he completed his service in Vietnam.

4. Warren did not seek treatment for his disease prior to termination. In early September 1992, following termination, he did check himself into the Lakeside Recovery Center as a patient in the drug and alcohol rehabilitation program. He completed a 28-day inpatient program at the Lakeside Center.

5. During an after-care program in November 1992 Warren suffered a relapsed and was placed in a relapse prevention program at Lakeside. Following a second relapse in March 1993 he voluntarily checked into Lakeside for a 14-day inpatient stay. He decided voluntarily to extend the program for an additional 14-day stay as an inpatient.

6. A Lakeside Recovery Center rehabilitation counselor, Paul Tribble, gave very convincing expert testimony supporting Warren. Tribble's testimony indicated that denial of the

problem is a classic symptom of alcoholism and drug addiction. Tribble further testified that since Warren has now broken through the wall of denial that he is optimistic about Warren's chances of recovery.

7. Staff Chief Engineer, Robert Keene, testified that Warren had undergone an incredible transformation for the better since their last communication prior to the termination.

8. The "applicable collective bargaining agreement" in the stipulated issue refers to the Agreement for Unlicensed Engineroom Employees by and between District 1 PCD, Marine Engineers Beneficial Association/National Maritime Union (AFL-CIO) Licensed Division and Washington State Ferries (Exhibit 1) (hereinafter "Agreement"), effective July 1, 1991 until June 30, 1993 and providing for continuation.

9. Rule 4.01 of the Agreement governs "Management Rights" as follows:

RULE 4 - MANAGEMENT RIGHTS

> 4.01 Subject to the specific terms and conditions of this Agreement, the Employer retains the right and duty to manage its business, including but not limited to the following: the right to adopt regulations regarding the appearance, dress, conduct of its employees, and to direct the work force consistent with work procedures as are necessary to maintain safety, efficiency, quality of service, and the confidence of the traveling public. The Union reserves the right to intercede on behalf of any employee who feels aggrieved because of the exercise of this right and to process a grievance in accordance with Rule 16. The existence of this clause shall not preclude the resolution of any such grievance on its merits.

10. Rule 5.01 of the Agreement requires a non-discriminatory policy of both WSF and MEBA which includes termination, as follows:

RULE 5 – NON-DISCRIMINATION

5.01 The Parties will not discriminate against any employee for activity, or lack thereof, on behalf of membership in the Union. Neither the Employer nor the Union will discriminate against any employee or applicant for employment because of race, creed, sex, age, color, or national origin, in a manner which is in violation of applicable State or Federal laws. This non-discriminatory policy shall be applicable to upgrading, demotions or transfer, layoff or termination, rates of pay or forms of compensation, recruitment or advertising, and selection for training, including apprenticeship. (Emphasis added.)

11. Step III of the Agreement Rule 16 governs the resolution of disputes by arbitration, as follows:

RULE 16 – DISPUTES

16.04 . . .

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 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 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 at 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.

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

12. Termination of bargaining unit seniority is governed by Rule 21.08 of the Agreement, as follows:

> 21.08 Termination of Bargaining Unit Seniority. Except as otherwise provided for in this Agreement, seniority shall terminate for an employee who quits, is discharged for cause, is unavailable for work, or who is on continuous layoff for more than 365 days.

13. MEC has not identified any other Agreement language which appears to have application to the instant matter.

Having entered the foregoing findings of fact, the commission now hereby enters the following conclusions of law.

CONCLUSIONS OF LAW

1. MEC has jurisdiction over the parties and the subject matter of 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 Agreement. RCW 47.64.150. Also Rule 16, III, p. 11, Agreement.

3. The burden of proof by a preponderance of evidence lies with Grievant MEBA.

4. Regarding the charge of discrimination pursuant to Agreement Rule 5.01, MEBA did not provide evidence that WSF had reinstated any other person who had been dismissed because of acts influenced by alcoholism, but who had denied having a

problem and had refused treatment until after dismissal and then suffered relapses after said treatment. Nor did MEBA prove that WSF had violated the Americans with Disabilities Act or any other state or federal statutes by terminating Warren. On the contrary, the evidence showed that WSF had for several years urged Warren to seek treatment for problems which were impacting his job performance and attendance. MEC must conclude that MEBA did not prove that WSF violated Agreement Rule 5.01

5. Agreement Rule 21.08 refers specifically to termination of seniority and not for termination of employment. However, MEC may share the interpretation with MEBA that the phrase is discharged for cause carries an implication that dismissals from the engineroom non-licensed bargaining unit may only be for cause. MEC has previously held that discipline for cause is interpreted as discipline for just cause. See discussion of "cause," "just cause," et al, in Captain Derek Dahl v. WSF and Captain William Ray v. WSF. Decision No. 73 MEC, Conclusion of Law 5 (1991). Both parties cited IBU v. WSF (Alberg), supra, in support of their positions. In Alberg, Arbitrator Gaunt held that this phrase, referring to seniority terminations, does require WSF to make its personnel terminations with "just cause." However, in reaching that conclusion, Gaunt also relied on RCW 47.64.006, in relevant part:

> The legislature declares that it is the public policy of the state of Washington to : . . . (7) promote just and fair compensation, benefits, and working conditions for ferry system employees.

(Emphasis in Gaunt's decision) IBU v. WSF (Alberg), supra. MEC agrees with Gaunt's application of RCW 47.64.006(7).

6. MEC has concluded in several cases that the requirement of "just cause" includes several tests, not tests only of the precipitating reason for discipline, but the process and the

recognition of a protected right to be treated fairly. In these prior decisions, MEC has borrowed heavily from Adolph M. Koven and Susan L. Smith, Just Cause: The Seven Tests, 1985. An abbreviated list of these tests includes:

1) Notice – Misconduct and Its Consequences
2) Reasonable Rules and Orders
3) Investigation and Due Process
4) Fairness and Objectivity
5) Proof
6) Equal Treatment
7) Appropriate Penalty and Remedy

Just Cause: The Seven Tests, passim.

7. In the interest of brevity, the results of each test will not be listed here. Suffice it to say that WSF management did put Warren on notice, and warn him several times of the jeopardy of penalty if he did not improve. WSF management did attempt to help him to help himself get medical attention and counseling. WSF did investigate several times over several years. The only WSF shortcoming that MEBA demonstrated was that Warren's immediate supervisor was not consulted following the pre-termination meeting and before the discipline was imposed pursuant to the WSF Vessel Operating Procedures and not directly pursuant to the Agreement. MEC is convinced that that one flaw was not significant enough to negate or cancel out the care and the costs WSF had provided in protecting Warren. There was no question raised about proof. In fact, MEBA stipulated that the alleged offenses had occurred. The allegations of unequal treatment pursuant to Rule 5.01 were not proven. See Conclusion of Law 4, supra. Finally, the penalty of termination had been imposed only after years of lesser penalties, including oral and written warning and one suspension. The remedy of post-termination reinstatement was lost by Warren's own relapse, and not by reason of WSF mistreatment. Finally, MEC concludes that it has no authority

to compel WSF to continue to permit more periodically unsatisfactory performance by an alcoholic employee than it would permit from a non-alcoholic employee after it has a long record of seriously trying to help said alcoholic employee to help himself. Therefore, MEC must conclude that Earl Warren was terminated with just cause in compliance with the Agreement.

Having read and carefully considered the entire record, including the initial request for grievance arbitration, the hearing transcript and exhibits, and the post-hearing briefs, this Commission now hereby enters its decision and order.

DECISION AND ORDER

1. Washington State Ferries did terminate Earl D. Warren for just cause in compliance with the applicable collective bargaining Agreement.

2. The grievance of MEBA v. WSF (Warren), docketed as MEC Case No. 13-92, is hereby dismissed.

DONE this 9th day of August 1993.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD, Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner