

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

CAPTAIN DEREK DAHL,	)	MEC CASE NO. 14-90
	)	
Grievant,	)	
	)	
v.	)	
	)	
WASHINGTON STATE FERRIES,	)	and
	)	
Respondent,	)	
	)	
and	)	
	)	
CAPTAIN WILLIAM RAY,	)	MEC CASE NO. 15-90
	)	
Grievant,	)	
	)	
v.	)	DECISION AND ORDER
	)	
WASHINGTON STATE FERRIES,	)	DECISION NO. 69 - MEC
	)	
Respondent.	)	
	)	

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Captain Dave A. Boyle, Vice President, International Organization of Masters, Mates and Pilots, Pacific Maritime Region, appearing for and on behalf of the Grievants.

Ken Eikenberry, Attorney General, by Jeffrey D. Stier, Assistant Attorney General, appearing for and on behalf of the Respondent.

INTRODUCTION AND BACKGROUND

Captain Derek Dahl has been employed by Washington State Ferries (WSF) as a Master for twelve years and has been assigned to every WSF route. As of the time of the incidents involved in the present matter, Captain Dahl was Master of "C-watch" aboard the "Sealth" and the "Chelan," and had been so assigned for approximately two and one-half years, with temporary assignments on other runs.

After having been Master of other vessels, Captain William Ray has been employed by WSF since December, 1979. He has been Master on

several WSF routes before his present assignment as Chief Mate on "C-watch" on the "Sealth" and the "Chelan." He served as WSF Port Captain for more than one year.

On or about March 9, 1990, WSF suspended Captains Dahl and Ray without pay for five days. In their notices of suspension, WSF Port Captain Jerry Mecham complained that the passenger cabin of the ferry "Sealth" was dirty, the officers' cabin doors were closed and no light was visible under the doors, two crew members were asleep or loafing during duty hours, "two other crew members were walking around the vessel," and no cleaning work of any kind was being performed on February 27, 1990.

Captains Dahl and Ray filed grievances against WSF with their union, the International Association of Masters, Mates and Pilots, Pacific Maritime Region (MM&P). Their grievances were presented to the MM&P Union Delegate Committee. Having failed to reach settlement of the grievances as a result of the Union Delegate Committee's "adjudication," MM&P filed their two requests for arbitration with the Marine Employees' Commission (MEC) on their behalf on September 24, 1990.

In addition, on the advice of a member of the WSF discrimination committee, they filed complaints of discriminatory discipline with that committee. Those complaints were dismissed on the grounds that said discrimination committee dealt only with complaints of racial, sexual or ethnic discrimination.

Because the two suspensions, WSF's stated reasons therefore, and the two grievances appeared to be identical, MEC consolidated the two cases for hearing and assigned them to Commissioner Louis O. Stewart to act as Arbitrator pursuant to WAC 31-65-070. Hearings were held on November 15 and 20 and December 3, 1990. Hearing transcripts were received on January 14, 1991. Post-hearing briefs were filed by MM&P on January 7, 1991 and by WSF on February 11,

1991. Commissioners Dan Boyd and Don Kokjer did not participate in the hearings but have read the entire record and did participate in this decision.

### POSITIONS OF THE PARTIES

#### Position of Captains Dahl and Ray

Captains Dahl and Ray contend that they were suspended without pay in violation of the "progressive discipline" policy (WSF Policy Circulars 02-R1 and 03-R1) which require first an oral warning, then a written warning, before a disciplinary suspension. They claim they never received any complaints or warnings prior to their suspensions. They contend that the "C-watch" was singled out in a discriminatory manner; because five other crews are also employed on the Sealth; and no action was taken against them.

Captains Dahl and Ray say they had experienced some difficulty in dealing with their crew of five seamen, four of which including one female were of a racial minority. They explain that sometimes, when a crew member was told to perform a task, the crew member would respond that he/she was on a rest break. The officers were reluctant to insist on being obeyed, because at the time several charges of racial discrimination had been filed against WSF or certain officers. They solved their perceived dilemma by deciding that the entire crew would take 30-minute rest/lunch breaks simultaneously during the tie-up period in Bremerton roughly between 04:15 and 04:45 a.m. They contend that rest and lunch breaks are required by law, and that the Master has authority to establish said breaks whenever the timing works out most effectively.

Port Captain Mecham made a surprise inspection of the Sealth during the 04:15--04:45 break on February 27, 1990.

In addition to the anticipated racial discrimination charges resulting from insisting on a seaman fulfilling a task when the seaman is insisting on taking his/her break, they contend that none of the three Able-Bodied Seamen could possibly be available for clean-up duties or lunch breaks while the vessel is under way. One must be steering the vessel as quartermaster; one must patrol the car deck; one must act as look-out during reduced visibility during the night watch.

They further argue that the vessel could not be as dirty as the Port Captain said it was as a result of the one trip the vessel had made across Puget Sound since "C-watch" come aboard at 2:40 that morning. If Port Captain Mecham's complaints were well founded, some of the dirty condition must have existed during prior watches.

NOTE: Captain Boyle, MM&P, objected to Arbitrator Stewart's instruction that, as complainants in this proceeding, Captains Dahl and Ray must proceed first at the hearing, and that the burden of proof lay with them. Boyle stated he had filed the Request for Arbitration by agreement on behalf of both parties, and that in fact WSF had first announced its intention to file said Request. Therefore WSF should proceed first.

#### Position of Washington State Ferries

First, WSF asserts that the burden of proof that WSF lacked reasonable grounds for discipline is on the union, and that the Union Delegate Committee's prior hearing does not shift that burden of proof.

WSF argues that Captains Dahl and Ray were properly disciplined for the failure to maintain cleanliness on the Sealath, that the maintenance duties for "C-watch" were specific and properly posted. For example, each watch was specifically required to strip and wax 300 square feet of deck per shift, and "C-watch" did not

strip and wax its assigned area of passenger deck for days at a time. Windows were to be washed daily, but "C-watch" had only washed the inside of the windows.

WSF admits that Port Captain Mecham had contacted Captain Dahl only once about cleanliness, but that Captain Mecham "perceived an attitude of apathy, or outright disdain" on the part of Captain Dahl. However, WSF asserts that Dahl's Chief Mate, Captain Ray, was "clearly aware that management was emphasizing the improvement of cleanliness on the Bremerton vessels."

WSF contends that Captain Dahl's decision that the entire "C-watch" take 30-minute rest/lunch break from 04:15 to 04:45 utilized the only available time for the crew members to turn to and do "heavy maintenance" such as stripping and waxing the deck. WSF argues that "there is no State, federal or contractual requirement that the deck crew be granted a break. ... As a matter of general practice WSF Masters do not schedule breaks. ..."

WSF contends that Port Captain Mecham had offered Captains Dahl and Ray full support in helping them to handle any intransigent crew member, but Dahl or Ray had never requested such help.

WSF cites various authorities in its argument that an employer has broad discretion in determining appropriate disciplinary action for its employees, and that the grievants are not entitled to a lesser penalty under the doctrine of progressive discipline. WSF asserts that "WSF progressively disciplined them."

(NOTE: WSF objected to Arbitrator Stewart's admission of Exhibit No. 4 on grounds that it applies to a different proceeding and contains hearsay about hearsay.)

## ISSUES

The issues to be resolved in this matter are as follows:

1. Did Washington State Ferries properly suspend Captains Dahl and Ray for five days without pay?
2. If the answer to Issue No. 1 is "No," what is the proper remedy?

The Marine Employees' commission having read the entire record now enters the following findings of fact, conclusions of law, and order.

## FINDINGS OF FACT

1. "C-watch," supervised by Captain Dahl and Chief Mate (Captain) Ray, works four graveyard shifts per week on two vessels. Beginning at 01:00 a.m. they board the Chelan at Pier 52, Seattle, and make one round-trip to Winslow. On their return to Seattle, they secure the Chelan and board the Sealth. At 02:40 a.m. they make a run on the Sealth back to Winslow, then proceed to Bremerton arriving between 04:05 and 04:20 depending upon tides and weather. After discharging vehicles and passengers, they raise the ramp until 04:50 a.m. at which time they start loading vehicles and passengers for return to Seattle. Then they make one more round trip, Seattle to Bremerton, ending the watch at 09:00 in Seattle. One day per week "C-watch" works a 09:00 a.m. to 17:00 p.m. shift.
2. The stated causes of suspension of Captain's Dahl and Ray are listed in Port Captain Mecham's letters to each, dated March 5 1990, as follows:

...At approximately 4:30 a.m. on February 27, 1990 I boarded the Sealth and found these circumstances: the cabin and windows were dirty; two crew members were lying down on passenger seats, either asleep or loafing during duty hours; the wheelhouse was unoccupied; your cabin door and the mate's door were closed and no light was visible under the doors; two other crew members were walking around the vessel; no cleaning work of any kind was being performed.

3. The MM&P Agreement is silent regarding rest or lunch periods. WSF has no stated policy concerning rest or lunch periods. Testimony ranged from citing unspecified Federal law or U.S.C.G. regulations that the crews must have lunch and rest breaks to the WSF assertion that ferry crews are not entitled to lunch or rest breaks. There was a common theme that the captain of a vessel determines when and if crews get their breaks, including the laissez-faire practice of allowing crew members to take rest or lunch breaks whenever they can or choose. During the hearing Arbitrator Stewart requested that the Grievants, who asserted that they were obligated by law or regulation to assign lunch and rest periods, to provide citation(s), and that the Commission could take official notice of it (them). On advice of counsel, MM&P did submit chapter 296-126 WAC as applicable. WAC 296-126-001 reads as follows:

**WAC 296-126-001 Applicability.** These standards, adopted pursuant to the authority of chapter 49.12 RCW as amended by chapter 16, Laws of 1973 2<sup>nd</sup> ex. sess., shall apply to any person employed in any industry or occupation within the state of Washington, unless:

(1) Exempted by the provisions of chapter 49.12 RCW (newspaper vendors or carriers, domestic or casual labor in or about private residences, agricultural labor as defined in RCW 50.04.150, as now or hereafter amended, and sheltered workshops, are all exempt from these provisions);

(2) Otherwise exempted in rules and regulations adopted by the industrial welfare committee of the state of Washington;

(3) Exempted by a variance issued under the provisions in WAC 296-126-130;

(4) Such person is an employee of the state or any political subdivision, or municipal corporation to the extent that these rules conflict with any statute, rule or regulation adopted under the authority of the appropriate legislative body. (emphasis supplied)

The authority for inclusion of WSF employees is found in chapter 49.12 RCW, as follows:

Chapter 49.12  
INDUSTRIAL WELFARE

**49.12.005 Definitions.** For the purposes of this chapter:

(1) . . .

(2) . . .

(3) The term "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees and for the purposes of RCW 49.12.270 through 49.12.295 also includes the state, any state institution, any state agency, ...

(4) The term "employee" means an employee who is employed in the business of his employer whether by way of manual labor or otherwise.

(5) The term "conditions of labor" shall mean and include the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

(6) . . . .



(7) . . . (emphasis supplied)

Meal periods and rest periods are specifically governed by WAC 296-126-090, as follows:

**WAC 296-126-092 Meal periods—Rest periods.** (1) Employees shall be allowed a meal period of at least 30 minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.

(2) No employee shall be required to work more than five consecutive hours without a meal period.

(3) Employees working three or more hours longer than a normal work day shall be allowed at least one 30-minute meal period prior to or during the overtime period.

(4) Employees shall be allowed a rest period of not less than 10 minutes, on the employer's time, for each 4 hours of working time. Rest periods shall be schedule as near as possible to the midpoint of the work period.

(5) Where the nature of the work allows employees to take intermittent rest periods equivalent to 10 minutes for each 4 hours worked, scheduled rest periods are not required. (Emphasis added.)

4. Captain Dahl and his Chief Mate, Captain Ray, made the decision that the entire crew of "C-watch" would take a lunch break during the tie-up period, 04:15 to 04:45 a.m., based on a perceived threat of racial discrimination charges if the officers insisted on crew members working when the crew members claimed they were on a break. The unlicensed deck hands of "C-watch" consist of four blacks (including one female) and one Caucasian. Three crew members are Able-Bodied Seamen, and the two assigned to the passenger cabin are Ordinary Seamen.

5. Port Captain Mecham did tell Captain Ray that if the officers on "C-watch" had difficulty with the crew, Mecham would back up the officers.
6. Testimony was unanimous that the crews operating vessels between Bremerton and Seattle have more difficulty in keeping vessels clean than on any other run, because of the shipyard passengers. Shortly after Mecham was appointed Port Captain, Admiral Parker (Assistant Secretary, Department of Transportation, in charge of the Marine Division) ordered Mecham to improve the cleanliness of the Bremerton vessels because he had received passenger complaints.
7. Port Captain Mecham consulted with each Master of the Seattle-Bremerton ferries, asking for ideas regarding more effective watch assignments and equitable division of maintenance duties between and among watches. It was undisputed that the only conversation between Captains Mecham and Dahl was when Mecham asked Dahl to submit ideas for more effective work crew assignments during that initial consultation. It was also undisputed that Captain Dahl told Port captain Mecham that Dahl would do whatever Mecham wanted Dahl to do, but the Port Captain Mecham never told Dahl specifically what he wanted, or that he was dissatisfied with the "C-watch" performance, and that Mecham never again spoke with Dahl about anything (even during the surprise inspection) until after the finish of "C-watch's" shift the morning of February 27, 1990.
8. During the final return to Seattle on February 27<sup>th</sup>, "C-watch" received a radio call that the entire deck crew would report to Port Captain Mecham's office after they were relieved from duty on the Sealth. When they arrived at Mecham's office, Ferry Operations Manger Armand Tiberio, Captain Donald Schwartzmann (Operations Superintendent), Director of Employee Relations Elton Eilert, and Captain Dave

Boyle (MM&P) were there with Mecham. For the first time Captain Mecham expressed dissatisfaction to Captains Dahl and Ray about their performance as deck officers of the Sealth, about scheduling common lunch breaks instead of doing heavy maintenance during the 04:15 to 04:45 tie-up, about the vessel being dirty, about allowing crew members to lie down during their breaks, and/or about the officers being in their cabins during the break. On or about March 9, 1990, Port Captain Mecham notified Captains Dahl and Ray of their suspensions without pay.

9. Discipline of WSF Deck Officers is governed by Section XXI of the 1987-1989 WSF/MM&P Agreement and the Extension Agreement thereto, dated May 23, 1990, as follows:

#### XXI. DISCIPLINE

21.01. DISCIPLINE FOR CAUSE. The employer shall have the right to discipline any Deck Officer for cause which shall be detailed and communicated in writing to both the Union and the Deck Officer involved. (emphasis supplied)

21.02. GUIDELINES FOR PERFORMANCE. The Employer shall prepare and disseminate to all Deck Officers a set of guidelines specifying rules of conduct and areas of responsibility for Deck Officers which may be modified at the Employer's discretion from time to time. Such guidelines shall list causes for termination, demotion and suspension.

21.03. INVESTIGATION OF CAUSE FOR DISCIPLINE. The employer shall have the right to hold any Deck Officer out of service pending an investigation of a possible basis for disciplining such Deck Officer and pending any hearings and appeals conducted pursuant to the provisions of this Agreement relating to disputes (Section XXII) if both the Union and the Deck Officer involved are promptly notified, in writing, of any such action. If such a Deck officer is exonerated of the charges as a result of any such hearing or appeal, he shall immediately be reinstated to

his prior position without loss of seniority; shall be paid for all time lost in the amount which he would ordinarily have earned had he been continued in service during such period; shall have all documents pertaining to the specific incident removed from his personnel file and all other records of the Employer immediately changed to reflect the disposition; and the incident shall not be used against the Deck Officer in any manner.

21.04. . . .

10. Procedures in and remedies of disputes in disciplinary cases are governed by Section XXII of the WSF/MM&P Agreement and by RCW 47.64.150, as follows:

#### XXII. DISPUTES

22.01. EXCLUSIVE REMEDY. It is understood and agreed that all disputes which may arise with regard to the interpretation or application of the terms and provisions of this Agreement shall be adjudicated in the manner herein provided. Unless the requirements of this rule are waived or modified with regard to a specific grievance by the parties, the failure to process a grievance or a defense to a grievance shall be considered as an abandonment of the grievance or the right to defend against the grievance.

22.02. CONFERENCE. In the event of a controversy, dispute or disagreement arising either out of the interpretation of this Agreement or because the Union or a Deck Officer involved feels aggrieved by treatment of the Employer, the aggrieved party may, in writing, within sixty (60) calendar days after the facts and circumstances actually become known or, in the exercise of reasonable care should have become known, request a conference to be attended by the aggrieved Deck Officer and by one (1) or more representatives of each party, with full authority to settle the dispute or controversy.

22.03. DELEGATE COMMITTEES. In the event that such a dispute or controversy is not

settled or resolved at such a conference, or within ten(10) days thereafter, the aggrieved party shall, within thirty (30) working days of the date of such conference, request in writing, a hearing before the Union Delegate Committee, and such a hearing shall be promptly held in accordance with the rules of the Committee, which shall render its written adjudication subsequent to the hearing. A copy of such adjudication shall be mailed to all parties involved. Representatives of the Washington State Ferry System shall be furnished notice of and be entitled to attend the meetings of the Delegate Committee which involve disputes or disagreements concerning interpretation of the Agreement. A copy of such adjudication shall be mailed to all parties involved upon rendition.

22.04. ARBITRATION. In the event that the Employer or the Union feels aggrieved by the adjudication of the Delegate Committee, the aggrieved party shall, within thirty (30) calendar days of such adjudication, notify all parties of its intent to refer the matter to arbitration.

22.05. IMPANELING ARBITRATORS. Within ten (10) working days of any such Notice of Intent to Arbitrate, the parties shall attempt to reach agreement on an impartial arbitrator to hear the matter. In the event that the parties are unable to agree on an arbitrator within ten (10) working days, either party may thereafter request a list of five qualified arbitrators from the Federal Mediation and Conciliation Service. The parties shall thereafter alternately strike names from the list until only one arbitrator remains, who shall hear and decide the issues presented. A hearing date shall be established at which time the controversy or dispute shall be tried, de novo, before the arbitrator selected, and without consideration being given to any prior adjudications in the case.

22.06. HEARING AND DECISION. The arbitrator shall issue his decision not later than thirty (30) calendar days from the date of the closing of the hearings, or if oral hearings have been waived, then from the date of transmitting the final statements and proofs

to the arbitrator. The decision shall be in writing and shall set forth the arbitrator's opinion, conclusions and decision on the issues submitted.

22.07. FINALITY OF AWARD. The adjudication of the arbitrator shall constitute an award, and shall be final and binding upon all parties represented at the hearing, as stated in RULE 22.06. . . .

The Marine Employees' Commission, having entered the foregoing background, positions of the parties, statement of issues, and findings of fact, now enters the following conclusions of law.

#### CONCLUSIONS OF LAW

1. MEC has jurisdiction over the subject matter of this case, by agreement of the parties. Arbitration by the Marine Employees' Commission should be substituted for the Federal Mediation and Conciliation Service process in Section 22.05, 1987-89 MM&P/WSF Collective Bargaining Agreement. The parties have authority to agree to modification of dispute procedures. Section 22.01, ibid.
2. The MM&P objection to the rule by Arbitrator Stewart that the burden of proof in this matter lies with Captains Dahl and Ray, and that they would proceed first, should be overruled. Even if the actual filing of the Request for Arbitration was made by Captain Boyle with mutual consent of the parties, the allegations of violation of their rights and the demand of corrective action therefore were made by Captains Dahl and Ray. The nature of the proceeding has not changed; so the burden of proof rests with them. Even though the arbitrator has discretion to vary the procedure if he has reason to believe that the other party possesses the basic facts of the case, the party asserting a claim usually presents its case first. Elkouri and Elkouri, How Arbitration Works, 4<sup>th</sup> Ed., BNA, 1985, p. 226.

3. The WSF objection to the admission of Exhibit No. 4 on the grounds of irrelevancy and hearsay should be overruled, and Arbitrator Stewart sustained. Regarding the WSF arguments that Exhibit 4 was a document used in a different appeal process, that it was a confidential document used by WSF management in that other case, and that it contains hearsay, were all noted by Stewart. MM&P declared the document to be material and critical to their case. The document had been furnished to Captains Dahl and Ray by WSF management personnel; so confidentiality did not exist. And Stewart noted that hearsay is admissible in arbitration cases. He took the pains of advising the parties that the grievants could testify only to those entries concerning which they had personal knowledge. He further advised the parties that if testimony by other persons to whom any statements were attributed in Exhibit 4 were needed, he could use his power of subpoena to obtain the best evidence. In fact, after that very restricted admission of Exhibit No. 4, MM&P neither proceeded to show how the information in Exhibit 4 affected the grievants' cause by testimony nor based any argument on it. MEC did not find it necessary to refer to that document in any way in reaching the decision herein.
4. MEC may not change or amend the terms, conditions or applications of the MM&P/WSF Collective Bargaining Agreement. RCW 47.64.150. The modification cited in Conclusion of Law No. 1 reflects an agreement between the parties in this case, authorized in that Agreement and is not an amendment initiated by the Commission.
5. Although the proviso that WSF has "the right to discipline any Deck Officer for cause" may appear to be satisfied by the

listing of reasons for suspension in Port Captain Mecham's letters to Captains Dahl and Ray, and although the listing of reasons was detailed and in writing (see Finding of Fact No. 9), "discipline for cause" brings into play several other factors. The Commission must conclude that there is no significant difference between suspension for "just cause," "justifiable cause," "proper cause," or quite commonly "cause." Arbitrator Joseph D. McGoldrick, in Worthing Corp., 24 LA 1, 6-7 (1955), as cited in Elkouri and Elkouri, ibid., p. 652 f. See also, Katz in 74 LA 176, 179; Shanker in 73 LA 1050, 1055; Buckwalter in 44 LA 1208; Harris in 29 LA 567, 571; ibid.

6. The Commission must conclude that the proper and specific prior notice concerning any lack of performance or its consequences required by "discipline for cause" was not met. For example, even after Captain Dahl told Port Captain Mecham that Dahl would do whatever Mecham wanted, there is no evidence in the record that Mecham ever even suggested any improvements to Dahl. See Tennessee Forging Steel Corp., 69-11 ARB pp. 8282 (1968); John A. Volpe Construction Co., Inc., 45 LA 535 (1965); American Standard, 30 LA 231 (1958).
7. The Commission must also conclude that the required specific prior notice of penalty required by "discipline for cause" was not met. Port Captain Mecham's indirect and vague references to Captain Ray regarding the implied threat of tougher standards if Ray didn't like the present assignment charts (Exhibits 3 and 10) were made only to Ray, and not Dahl, and were at best, only generalities left to Ray's imagination. MEC must conclude that a prior notice of penalty for faulty performance is deficient "if it is not clear and specific enough to let employees know how misconduct will be punished. Potter Electric Signal Co., Inc., 75 LA 50 (1980).



8. Although Chapter 49.12 RCW and WAC 296-126-092, cited in Finding of Fact No. 3, supra, require that "C-Watch" be allowed a meal period of a least 30 minutes, although testimony was substantially unanimous that Masters have authority to determine said meal periods, although WSF has no official policy to the contrary, and although Captains Dahl and Ray did decide to establish a "universal" lunch period of 30 minutes at approximately mid-way in the "C-Watch" shift, the suspensions of Dahl and Ray were largely based on Port Captain Mecham's later insistence that WSF crew members are not entitled to lunch breaks and that Dahl and Ray had chosen their lunch period at the only time "heavy maintenance" could be accomplished. If the "heavy maintenance" had taken place during the 04:15-04:45 tie-up in Bremerton, and the crew started loading passengers and cars at 04:50, the Sealth would have started back for Seattle, and the three Able Bodied Seamen, at least, never would have had a lunch break as required by WAC 296-126-092. MEC must conclude that the "reasonable rules and orders" required by "discipline for cause" were not met. Ampco Metal Inc., 3 LA 374, 379 (1946); Standard Oil Co., 11 LA 689 (1948); especially Metal Speciality Co., 39 LA 1265 (1962).
  
9. MEC must conclude that Port Captain Mecham's surprise inspection and his later decision that "C-Watch" should be doing "heavy maintenance" between 04:15 and 04:45 instead of taking a lunch break does pass the "Business-Relatedness" test for "termination for cause." However, Mecham's failure to contact the deck officers of the Sealth (because their cabin doors were closed) in order to learn the reason no work was being done at that time, and the lack of specific WSF regulations regarding lunch breaks and the common practice that Masters of WSF vessels determine when crew members have such breaks, and the lack of communications between Mecham and the "C-Watch" officers, all combine to convince MEC that the

complete and objective supervision required by "termination for cause" was not met. "The Discipline Issue in Arbitration-Employer Rules," Labor Law Journal, 15 (1964) 562; but see Prasow and Peters, Arbitration and Collective Bargaining, McGraw-Hill (1970) 210-12.

10. As cautioned by counsel for WSF, MEC must be cognizant of the restraint required in substituting its judgment for that of WSF management about (1) whether there was a lack of performance by Captains Dahl and Ray as alleged, (2) whether "progressive discipline" must be or was invoked by WSF, and/or (3) whether the penalty of five days' suspension was the proper severity of punishment. Niagara Frontier Transit System, 24 LA 783, 785 (1955). On the other hand, MEC can and must determine whether "summary discipline" was justified in this case or whether "progressive discipline" was required under the "discipline for cause" clause in Section 21.01 of the MM&P/WSF Agreement. "Summary discipline" is justified in "extremely serious offenses such as stealing, strike a foreman, persistent refusal to obey a legitimate order, etc., ... Less serious infractions of plant rules or of improper conduct such as ... careless workmanship ..." do not justify summary disciplinary which does not meet the tests for "discipline for cause." Huntington Chair Co., Inc., 24 LA 490, 491 (1955). If Port Captain Mecham was dissatisfied with the performance of "C-Watch" under Captains Dahl and Ray he could have given them specific instructions for improvement, told them the penalties for non-improvement (if needed), and even then invoked a milder penalty aimed at correction (especially since he considers Captain Dahl to be one of his better Masters). See the restatement of Huntington Chair with respect to penalty in R.E. Phelan Co., Inc., 75 LA 1051, 1053 (1980).

11. Although MEC may not substitute its judgment as to whether the crew assignments were reasonably divided, in Exhibits No. 3 and 10, MEC may conclude that the charts and footnotes are not clear and/or are contradictory. Exhibits 3 and 10 indicate that "over the side windows" and shelter deck windows will be washed by "A-Watch." Footnote No. 3 indicates that 9:00 to 5:00 crews wash all inside windows in cabins and inside and outside windows on shelter decks. "C-Watch" works one 9:00 to 5:00 shift per week. But "dirty windows" during the 01:00-0:900 watch are cited as cause for discipline. In addition, the watch assignments in Exhibits 3 and 10 are not precisely congruent with those in "Deck Crew Maintenance Responsibilities" in WSF Policy Circular No. D-2.
12. MEC must conclude that the investigation (surprise shipboard inspection) conducted by Port Captain Mecham was not complete. For example, because the officers' cabin doors were closed and no lights showed under the doors, Mecham did not knock on either door, or enter, or discuss the condition of the vessel, or even make his presence known to them.
13. In consideration of the foregoing findings of fact and conclusions of law, MEC must conclude that WSF did not properly suspend Captains Dahl and Ray and withhold five days' pay from them, under Section 21.01 of the MM&P/WSF Agreement, nor under the WFS "progressive discipline" policy.
14. MEC must then further conclude that certain remedies must be ordered, including:
  - A. Declaring the suspensions null and void;
  - B. Restoration of lost wages and benefits;
  - C. Restoration of lost seniority time, if any;
  - D. Revoking any notice of discipline to other agencies;
  - E. Purging of records; prohibiting reference to this incident in any future discipline against Captains Dahl and Ray.

Having entered the foregoing background of the case, positions of the parties, statement of issues, findings of fact and conclusions of law, the Marine Employees' Commission now enters the following decision and order.

DECISION AND ORDER

1. The five days' suspensions without pay of Captain Derek Dahl and Captain William Ray were each in violation of Section 21.01 of the 1987-1989 Collective Bargaining Agreement between Washington State Ferries (WSF) and the International Association of Masters, Mates and Pilots (MM&P) and should be and are hereby declared null and void.
2. WSF shall immediately make Captains Dahl and Ray each whole by payment of the five days' withheld wages and all related monetary benefits.
3. WSF and MM&P shall immediately restore any time lost to Captains Dahl and Ray, if any, in the Masters seniority rankings as a result of these suspensions.
4. WSF shall immediately rescind and retract any notice which may have been provided to U.S.C.G. or any other agency regarding the discipline described in this case.
5. WSF shall immediately purge from the personnel files of each Captains Dahl and Ray, and any other WSF records, any copies of Port Captain Mecham's disciplinary letter and/or any other records referring in any way to their suspensions and/or any other references to the incidents involved in this present case; provided that one copy of this decision shall be filed in the personnel file of Captain Derek Dahl and Captain William Ray; and provided further that in no way shall this decision be construed as evidence of any non-performance,

faulty performance, or anything other than their full and competent performance.

6. The suspensions and the incidents described herein shall not be used in any manner in any future disciplinary procedure.

DONE THIS 13<sup>th</sup> day of March, 1991.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD

/s/ DONALD E. KOKJER

/s/ LOUIS O. STEWART