

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

JOHN PELLAND,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 26-03

DECISION NO. 403 - MEC  
SUPPLEMENT

DECISION ON APPEAL

**APPEARANCES**

*Margaret Pelland*, appearing on behalf of John Pelland.

Christine Gregoire, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries.

Wolfstone, Panchot and Bloch, by *Steve Ross*, Attorney, appearing for the International Organization of Masters, Mates and Pilots.

**NATURE OF THE PROCEEDING**

This matter was brought before the Marine Employees' Commission by means of an untimely appeal to the Hearing Examiner's decision (No. 403-MEC). On its own motion, in spite of the procedural irregularity, the full Commission has reviewed the entire record and the Hearing Examiner's decision, and has taken the argument raised in the untimely appeal into consideration.

**RECORD BEFORE THE COMMISSION**

The Commission's decision is based upon the complete record before the Hearing Examiner and upon the appeal filed on behalf of the complainant. No other party to the proceeding filed any response to the appeal. There were no cross appeals.

## **DECISION AND ORDER**

On the basis of the record in this case and the Commission's analysis of the relevant issues raised in the untimely appeal, the Marine Employees' Commission hereby affirms the Hearing Examiner's decision and makes it final. A statement of the procedure for appealing this decision is included below.

### **ANALYSIS**

The complainant brought this case against Washington State Ferries – and only against Washington State Ferries – alleging that Washington State Ferries had unilaterally altered the manner in which certain mate's positions were assigned. The complaint alleged that the change had been made without any bargaining with the union that represents those in the mates and masters positions, the Masters, Mates and Pilots Union (MM&P). The complainant alleged that he would have been assigned more often to mates' work had the alleged unilateral change not occurred. (When not working as a mate, the complainant worked as an able bodied seaman in the bargaining unit represented by the Inlandboatmen's Union of the Pacific.)

The MM&P was given notice of the action and appeared as a party necessary for the development of a complete record. However, the union was never charged with any unfair labor practice.

The Hearing Examiner, former Marine Employees' Commission chairman John Nelson, conducted a four day hearing that generated a 584 page transcript and thirty three exhibits. He issued a decision that recommended dismissal of the complaint. That is the decision under review in this proceeding.

The Hearing Examiner determined that Washington State Ferries and the Masters, Mates, and Pilots Union had agreed upon a consistent interpretation and application of the various

portions of the successive contracts dealing with temporary work assignments for the last twenty years. The Hearing Examiner determined that no change – unilateral or otherwise – had occurred during the time period covered by the unfair labor practice charge.

Furthermore, the Hearing Examiner decided that the manner in which the parties interpreted and applied the contract language was within the terms of the various portions of the contract affecting work assignments. In this circumstance, the Marine Employees' Commission has no authority to impose a different interpretation than the one the parties had agreed upon and worked under.

In his analysis, the Hearing Examiner raised the issue of whether or not the complainant had standing to argue that a unilateral change had occurred. The decision does not, however, turn on that issue in any way because the Hearing Examiner determined, and the full Commission concurs, that no unilateral change occurred.

The appeal argues that the Decision departed from MEC precedent, namely *Maringer v. WSF, Dec. No 49-MEC (1990)*.

A careful review of the cited decision emphasizes what is missing in this case. In the cited case (*49-MEC*), the Marine Employees' Commission held that WSF's elimination of the record of certain prior work hours was (a) in total conflict with the contract language (Conclusion 6) and was (b) illegal discrimination (Conclusions 10-11). In the instant case, the interpretation and application of contract language upon which the parties to the contract agreed was found to be within the scope of the various contract sections on point. In addition, there is no issue of illegal discrimination in this case aside from the claim that a particular job assignment was in retaliation for bringing the case. (The dismissal of this latter claim was not

appealed.) The present decision does not represent any departure from the cited MEC precedent because the elements upon which the earlier decision was based are not present in this case.

Irrespective of the difference of opinion between Mr. Pelland and the parties to the contract about the correct meaning and application of the contract language regarding work assignments, there were instances in which Mr. Pelland was bypassed improperly. The record shows that these matters were discussed by the representatives of the union and management. The Hearing Examiner's decision notes the parties' commitment to resolve those bypasses.

The appeal argues that the processes leading to this commitment to resolve the genuine bypasses were not fair or regular. In essence, the appeal attempts to insert a duty of fair representation into the case on the basis of the grievance processing of the instances all parties agree represent bypasses.

The attempt to expand this case to include a duty of fair representation element is inappropriate.

This case was brought against the Washington State Ferries and only against the Washington State Ferries. No charge has ever been filed against any union regarding how the grievance matter was handled. (This statement should not be understood to suggest that any such charge would be or would not be appropriate.) The question of whether or not the grievance was handled correctly is not before the Marine Employees Commission in this proceeding.

The record before the Marine Employees Commission indicates that some issues of work assignment arising out of the alleged unilateral change got mixed up with the bypasses that would have violated the contract whether or not there had been a unilateral change. The decision of the Hearing Examiner correctly noted that the latter – the bypasses – were, according to the testimony in the record, resolved in the normal course of grievance handling while the former –

the assignments based on what Mr. Pelland believed was a unilateral change – were not found to represent violations because there was no unilateral change. The Hearing Examiner did not “defer” to the grievance process. He simply differentiated between the two kinds of occurrences that had been lumped together. He then dismissed the allegations based on the alleged unilateral change. The Hearing Examiner’s decision that there was no unlawful unilateral change is not based on deferral to the grievance process.

The argument raised on appeal regarding the process used by the union and management to resolve the non-unilateral change bypass issues is outside the scope of this case. The question of whether or not the parties fulfilled their commitment to the resolution of the bypasses other than those based on the unilateral change issue is not before the MEC in the current case.

The current appeal also argues that the agreed-upon work assignment practices discourage membership in the Masters, Mates & Pilots and in the Inlandboatmen’s Union. The basis of the argument is not identified in the appeal document but there is evidence in the record that indicates that the costs of membership in the Master, Mates and Pilots may make pursuing promotion an initially expensive proposition.

The claim that it may take time to recoup the costs of union membership is not the basis of a discrimination claim where there is no evidence that the cost is not the same for all similarly situated persons. The law against interfering with union membership is intended to prohibit employers from denying union members rights or benefits available to similarly situated people. That law is not intended to dictate internal union policies regarding the level of dues or initiation fees.

There was a genuine discrimination issue in the case – the argument that an onerous and erroneous work assignment was retaliation for pursuing the claims. The Hearing Examiner

rejected that claim on the basis that there was no evidence of retaliatory intent. That finding has not been appealed. That retaliation allegation of the original case is mentioned here only to provide a contrast to the attempt to stretch the anti-discrimination law to cover the issue of how much it costs to join a union or maintain membership in one. The argument that it is financially onerous to pursue a promotion does not state a claim of illegal discrimination so long as similarly situated workers are treated in the same manner.

Finally, the appeal claims that there is a unilateral change issue in this case arising from the Inlandboatmen's Union of the Pacific (IBU) contract. In fact, there is no such issue. The IBU contracts affect the right of a worker to seek promotion. In this case, as the Hearing Examiner held, there is no question that Mr. Pelland "met the requirements for promotion (Finding of Fact 3). Appellant concurs with that finding. Nothing has changed regarding the IBU contract or its interpretation and application.

Once promoted, the actual work assignments are controlled by the interpretation and application of the MM&P contract. The unilateral change allegation arose under the terms of that contract.

Ultimately, the Hearing Examiner held and the Marine Employees' Commission concurs that there was no illegal, unilateral change of terms and conditions of employment by the Washington State Ferries regarding work assignment. The parties to the controlling contract testified to their consistent interpretation and application of that contract as well as to those instances where they determined that improper bypass had occurred under that contract. The Hearing Examiner found and the Marine Employees' Commission concurs that the parties' interpretation and application of the contract language is a permissible interpretation and

application of that language. The Marine Employees' Commission does not have the right or authority to substitute its judgment for that of the parties to a contract in these circumstances.

### **RIGHT OF APPEAL**

The Commission now orders Decision No. 403-MEC to be final and binding in accordance with RCW 47.64.280. This Order will start the period running for any appeal to the Washington State Superior Court, pursuant to RCW 34.05.542 and 34.05.514.

DATED this 18th day of May 2004.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Chairman

/s/ JOHN SULLIVAN, Commissioner

/s/ JOHN BYRNE, Commissioner