STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

SUE MOSER, Grievant, v. WASHINGTON STATE FERRIES, Respondent.	MEC CASE NO. 3-06 DECISION NO. 492 - MEC DECISION AND AWARD

APPEARANCES

Carla Kiiskila, Attorney, appearing on behalf of Grievant Sue Moser.

Rob McKenna, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries (WSF).

PROCEDURAL POSTURE

On August 2, 2005, Grievant, Sue Moser, filed with the Marine Employees Commission a Request for Grievance Arbitration. Ms. Moser sought to challenge the Washington State Ferries' decision to remove her from the position of Terminal Supervisor. Neither the Inlandboatmen's Union ("IBU") nor Ferry Agents, Supervisors, Project Administrators Association ("FASPAA") represented Ms. Moser in this arbitration because each collective bargaining agreement exempts probationary separations from the contractual grievance process. On April 10 and May 16, 2006, the MEC conducted this arbitration hearing and, on July 30, the MEC received the parties' briefing. This is the Arbitrator's decision.

FACTUAL BACKGROUND

Sue Moser has been an employee of the Washington State Ferries since 1999, starting her career as an on call terminal attendant. By all accounts, Ms. Moser performed exceedingly well as in her role as a terminal attendant. In 2003, the Ferry System promoted Ms. Moser to the

position of on call terminal supervisor. This meant that Ms. Moser performed the terminal attendant responsibilities on some occasions and the terminal supervisor responsibilities on other occasions.

On October 10, 2003, Ms. Moser was scheduled to work as a traffic attendant starting at 3:30 pm. On her way in to work, Ms. Moser's car broke down and, as the result, she was 45 minutes late. As the result, Jenny Buswell, Ms. Moser's supervisor, issued her a verbal warning. (G. Ex.11) In an effort to persuade the Ferry System to reduce the discipline, Ms. Moser provided Steve Rodgers, the South Region Terminal Manager, with evidence of the car repair. Mr. Rodgers did not agree to reduce the discipline. There is no evidence in the record to indicate that Ms. Moser grieved or otherwise challenged this discipline further.

On December 12, 2003, Ms. Moser was scheduled to work at the Edmonds Ferry Terminal starting at 3:30 pm. Ms. Moser candidly admitted that "she did not leave enough time to get to work" and was seven minutes late. (Tr. 237) Fred White, Ms. Moser's supervisor, issued Ms. Moser a written warning. (G. Ex.13) There is no evidence in the record to indicate that Ms. Moser grieved or otherwise challenged this discipline.

On January 7, 2004, Ms. Moser was four minutes late for her shift at the Edmonds Ferry Terminal. Upon her arrival at work, Ms. Moser explained to her supervisor, Mr. White, that she had been caught in the day's ice storm, and she was happy to have only been four minutes late. Nonetheless, Mr. White issued Ms. Moser a written warning which included the following text:

> On Wednesday January 7th you were 4 minutes later for work. Your shift start time was 14:25 but you did not arrive on the dock until 14:29. You wished for the tardiness to be mitigated due to road obstructions caused by the weather. The city streets were fairly clear of snow and you had ample notice to get to work, therefore, this situation appears to be a planning issue rather than a weather issue. You were previously warned about your dependability on October 10, 2003 and December 12, 2003. Rather than request immediate disciplinary action I will

> forward this document to Steve Rodgers as a second written warning so that he may determine the proper course of action.

(Jt. Ex. 17) On January 9, in an effort to explain the situation, Ms. Moser forwarded to Mr. Rodgers a memo enclosing additional information regarding this tardiness. (G. Ex.19) On January 29, Mr. Rodgers sent Ms. Moser a letter informing her that, as the result of her late arrivals to work, she was to be "removed from the Terminal Supervisors Reserve list." (Jt. Ex 20) On February 9, Ms. Moser met with Mr. Rodgers and Shelley Burnett, another WSF supervisor, to explain the situation and argue that she should not be demoted. On February 13, Mr. Rodgers sent Ms. Moser a letter confirming the original decision but saying, "[n]otwithstanding the above, you have exhibited other fine qualities. We hope to see you continue to grow as a future leader within WSF." (Jt. Ex. 22)

On August 2, 2005, Ms. Moser filed this request for arbitration; this hearing followed.

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ISSUE

Because the parties did not agree on a statement of the issue to be decided, the Arbitrator will decide the appropriate statement of the issue. [1] The Arbitrator will decide the following issues:

> Does the Commission have jurisdiction over Ms. Moser's claim?
>
> If so, did the WSF violate the contract or RCW 41.56 by removing Ms. Moser from the probationary position of Terminal Supervisor on February 9, 2006?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Prior to hearing, the parties stipulated as follows as to the contract to be applied in this arbitration.

> The parties have agreed that the 1999-2001 IBU/WSF CBA, as modified by the Letter of understanding dated January 9, 2002, between the WSF and the IBU, governs all questions regarding Sue Moser's rights as a Terminal Agent/Terminal Supervisor in this case.

(Jt. Ex. 4) (emphasis in original) Therefore, the arbitrator finds the following contract sections to be relevant:

IBU/WSF 1999-2001 Collective Bargaining Agreement: General Rules (Terminal Agents)

> **31.01** Newly hired employees shall serve a probationary period equal to one thousand forty (1040) compensated hours. Such employees may be terminated during the probationary period or at the end of a probationary period for a bona

[1] The Charging Party stated the issue as follows:

> On February 9, 2006, Ms. Moser was demoted from her position as probationary terminal supervisor, for a reason that was not a bona fide reason, in violation of Article 14.01 of the '99-'01 contract.

The Ferry System stated the issue as follows:

Was the action removing Ms. Moser from her probationary status as a terminal supervisor based on a bona fide reason?

fide reason(s) relating to the business operation and said employee shall not have recourse through the grievance procedure.

31.02 An employee promoted to a position within the bargaining unit shall serve a probationary period equal to one thousand forty (1040) straight-time hours and shall receive the appropriate rate of pay for the position during such probationary period. An employee determined to be unqualified for the positions during or at the end of the probationary period shall be returned to the employee's previously held position, at the former rate of pay, with no loss of seniority in the previously held position. It is further agreed that during the probationary period the employee may choose to return to the employee's previously held position, at the former rate of pay, with no loss of seniority in the previously held position.

Letter of Understanding Regarding Hiring of new Agents, 1/9/02:

New agents selected in 2002 are subject to the terms and decisions of the new 2001-2003 Contract Terms.

IBU/WSF 2001-2003 Contract: Terminal Supervisors Rules

14.01 Terminal Manager(s) shall evaluate probationary Supervisors a minimum of twice a. A new Terminal Supervisor shall serve a probationary period of eight thousand three hundred twenty (8,320) hours. New Terminal Supervisors may be demoted from said position for any bona fide reason(s) at any time up to, or at the end of eight thousand three hundred twenty (8,320) hours, and the employee shall not have recourse through the grievance procedure. However, an employee who has worked in a single year around position for more than two thousand eighty (2,080) hours, or in a combination of six (6) month assignments to get to two thousand eighty (2,080) hours but has not yet reached eight thousand three hundred twenty (8,320) hours, may not be subject to demotion without concurrence from the Peer Review Committee. On summary discharge type offences, which may require immediate management action, Management's decisions are subject to Just Cause Review.

14.02 An employee selected to a position within this bargaining unit shall serve the probationary period specified in Section 14.01. An employee determined to be unqualified for the position during or at the end of the probationary period shall be returned to the employee's previously held position, at the former rated of pay, with no loss of seniority in the previously held position. It is further agreed that during the probationary period the employee may choose to return to the employee's previously held position, at the former rate of pay, with no loss of seniority in the previously held position.

DISCUSSION

1. Does the Commission have jurisdiction over Ms. Moser's claim?

While acknowledging the precedent supporting the Commission's assertion of jurisdiction in this matter, the WSF invites the Commission to revisit its rule allowing probationary employees access to MEC arbitration in circumstances where the collective bargaining agreement denies such access. For the reasons given below, the Commission does not accept the WSF's invitation.

RCW 47.64.280 instructs the Commission to "adjust all complaints grievance, and disputes between labor and management arising out of the operation of the ferry systems as provided in RCW 47.64.150." RCW 47.64.150 governs the Commission's role in grievance arbitration and cautions that an arbitrator's decision on a grievance "shall not change or amend the terms, conditions, or applications of the collective bargaining agreement." This section also contains the statutory language at issue here:

> Ferry System employees shall follow either the grievance procedures provided in a collective bargaining agreement of *if no such procedures are so provided*, shall submit the grievance to the marine employee's commission as provided in RCW 47.64.280."

Id. (emphasis added). The question arises, then, whether the parties' agreement to exclude a class of disputes from the grievance procedure allows affected employees to submit their grievances directly to the Commission.

Twenty years ago, in *Marine Employees Beneficial Association v. WSF (Fay),* Dec. No. 26-MEC (1986), the Commission answered this question for, what appears to have been, the first time. There, the parties' agreement was "the first in their history to contain provisions for a 'probationary' period." *Fay* at 4. The probationary language, imposed in interest arbitration, read in relevant part as follows, "[t]he Employer retains the right to terminate employees at any

time during their probationary period, and this decision will not be subject to [the grievance/arbitration provisions]." *Id*. Fay was discharged during his probationary period and, as here, the Ferry System contended that the Commission lacked jurisdiction to hear the arbitration.

The Commission rejected the Ferry System's argument as follows:

> The Examiner concludes that the MEC has the authority in the instant case to adjust Fay's grievance . . . Fay does not have access to the contractual mechanism for the resolution of this dispute because of this specific provisions of the labor agreement which prohibit the arbitration of the discharge of the probationary employee. The grievant can proceed under the statute directly to the MEC.

Fay at 13. In its rationale, the Commission addressed the Ferry System's contention that the assertion of jurisdiction was at odds with the contract language, "[t]he Employer did not present evidence demonstrating that the interest arbitrator imposed such a limitation on the rights of individual employees or that the employees, acting through their union, knowingly accepted such a waiver." *Fay* at 12. Since the Fay decision, the Commission has revisited this issue on at least three occasions, in every case continuing to assert jurisdiction. *See Arroyo v. Washington State Ferries*, Dec. 172-MEC (1997); *Olwell v. Washington State Ferries*, Dec. 50-MEC (1990); *Gage v. Washington State Ferries*, Dec. 362-MEC (2003).

The Ferry System urges us to reverse this line of cases based on two, related, arguments. First, the Ferry System contends that to assert jurisdiction is to change the language of Section 14.01 of the Terminal Supervisor's contract which provides, "[n]ew Terminal Supervisors may be demoted from said position for any bona fide reason(s) at any time up to, or at the end of eight thousand three hundred twenty (8,320) hours, *and the employee shall not have recourse through the grievance procedure.*" Second, the Ferry System argues that, to hold that this case

is arbitrable, is to prevent the parties from ever agreeing to forego arbitration of a particular claim.

The principal problem with the first argument is that it appears to be at odds with the contract language. Along with the limitation on contract arbitration, the parties negotiated substantive protection for the probationary employees: the employer must have a "bone fide reason" for their demotion. It is unlikely that the parties intended to create this substantive protection with no means to enforce it. Instead, the parties negotiated this provision in the shadow of the long line of MEC precedent permitting individual probationary employees to bring their claims before the MEC. Thus, the parties had the reasonable expectation that the individual probationary employee would have the means to enforce the protections negotiated. To change that basic assumption at this juncture would do more damage to their contractual intention than would interpreting this provision as WSF urges.

As suggested by the Commission in *Fay*, a different situation might be presented where there is evidence that the parties intended "such a limitation on the rights of individual employees or that the employees, acting through their union, knowingly accepted such a waiver." *Fay* at 7. That situation, however, is not presented here.

As to the Ferry System's second argument, there can be no question that the Union and Ferry System can agree to resolve a particular grievance and, thereby, foreclose an individual's ability to have his or her issue heard in arbitration. *See Gage* at 8. Again no such specific agreement is presented here; the contract language negotiated by the parties does not indicate that the parties intended probationary employees to no longer have the ability to seek arbitration with the Commission. While such a provision may theoretically exist, it is not contained in this contract.

2. Did the WSF violate the contract by removing Ms. Moser from the probationary position of Terminal Supervisor on February 9, 2006?

I find that the contract section relevant to Ms. Moser's demotion is governed by Rule 14.01 and 14.02 of the IBU 2001-2003, Terminal Supervisor's Rules, (Jt. Ex. 2). That language provides, in relevant part, as follows:

> A new Terminal Supervisor shall serve a probationary period of eight thousand three hundred twenty (8,320) hours. *New Terminal Supervisors may be demoted from said position for any bona fide reason(s)* at any time up to, or at the end of eight thousand three hundred twenty (8,320) hours, and the employee shall not have recourse through the grievance procedure. However, an employee who has worked in a single you around position for more than two thousand eighty (2,080) hours, or in a combination of six (6) month assignments to get to two thousand eighty (2,080) hors but has not yet reached eight thousand three hundred twenty (8,320) hours, may not be subject to demotion without concurrence from the Peer Review Committee.

(Jt. Ex. 2) (emphasis added).[2] There is no dispute that Ms. Moser was within her initial 2080 hour period. Thus, the question is whether the Ferry System had any bona fide reason for her demotion. Both parties agreed that the standard I ought to apply here is essentially a *Wright Line* burden shifting formula. In other words, I may conclude that the Ferry System lacked a bone fide reason for the demotion if I find that the charging party has established that the Ferry System acted discriminatorily. (Tr. 166-167) Although, through this stipulation the charging party appears to have conceded the point, I will first address whether, in the absence of a discriminatory motive, the Ferry System's reason for the demotion could be considered bona fide.

To be a bona fide reason, the Ferry System's decision need not be the best decision, the right decision or a decision the arbitrator would have made. The decision to remove an employee from a probationary position will be found bona fide unless it is arbitrary, capricious

[2] The parties' stipulation is not entirely clear as to which contract they intend to govern. In any case, the two sets of rules are nearly identical and precisely the same analysis would be applicable under either contract.

or violative of a management rule or policy. Here, the Ferry System chose to end a probationary period over a well-documented – if not particularly dramatic – issue of tardiness. While this would certainly not meet the threshold applicable to a "just cause" termination, such proof is not required here.[3] The pattern of discipline was sufficient to establish that the action was neither arbitrary nor capricious.

Although the charging party does not present the argument on brief, Ms. Moser contended at hearing that it was significant that the tardinesses occurred while she was acting as traffic attendant and not a terminal supervisor. The arbitrator disagrees. Again, if the question were whether the Ferry System had just cause for its actions, this distinction would raise the question of whether her conduct was sufficiently related to her work as a supervisor to create the necessary nexus to justify punishment. However, to establish a bona fide reason, all the Ferry System must show is that the decision was not capricious; the connection between Ms. Moser's tardiness as a traffic attendant and her role as a supervisor is sufficient to meet this standard.

Thus, the only question remaining is whether the charging party proved her allegation of discriminatory treatment. In *Wrightline*, 251 NLRB 1083 (1980), the Board set the burden-shifting test to determine whether an employer has acted discriminatorily. There, the Board held that the party alleging discrimination based on union activities must first show such activities were a substantial motivating factor in the employer's decision. *Id*. Then, the burden

[3] The Charging Party argues that Ms. Moser's discipline violated the contract because the incidences of tardiness would not, in the normal course, form the basis for the discipline of a Terminal Supervisor or other terminal worker. This argument misses the point. The issue before the arbitrator is not whether the underlying disciplines met the just cause standard; indeed, these disciplines were never themselves grieved. The issue that the arbitrator must decide is whether Ms. Moser's removal from the position of Terminal Supervisor during her probationary period met the exceedingly low standard of being based on a "bona fide reason." It did.

shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the adverse action. *Id*.

Here, the charging party has not established that Ms. Moser's protected activities were a substantial motivating factor in the Ferry System's decision to demote her. Ms. Moser adduced evidence from a former Ferry System employee, Scott Francis, to the effect that Mr. Schlief told Mr. Francis – and here we must infer that Mr. Rodgers told Mr. Schlief – that one of the reasons for Ms. Moser's removal from the supervisor position was her opposition to the election of FASPAA as the representative of the supervisors. Beyond this being several layers of hearsay, and beyond the fact that it was denied by Mr. Schlief, it does not add up with the rest of the testimony. First, the underlying discipline was not issued by Mr. Rodgers, but rather by other supervisors about whose union affiliation we know nothing. Second, by Ms. Moser's own testimony, while she supported the IBU, she was not particularly active in the campaign for or against FASPAA as the representative of the supervisors. Rather, Phil Olwell appears to have been among the most visible IBU supporters; Mr. Olwell received no negative treatment. (Tr. 193)[4]

Even if the charging party established a dual motivation for this demotion, the Ferry System has, for the reasons laid out above, demonstrated a legitimate, non-discriminatory reason for the demotion.

[4] Ironically, the testimony which came the closest to establishing a dual motive for the demotion came from Mr. Rodgers. During the period of time immediately surrounding Ms. Moser's demotion, Mr. Rodgers appears to have been moving from a position within the bargaining unit – albeit on a special project within management – to his current management position. As a bargaining unit employee Mr. Rodgers was very active in the campaign to replace the IBU with FASPAA. In his role as a manager, however, Mr. Rodgers continued to express strong, negative views toward the IBU. See Tr. 85 ("I believe that [the union leaders] break the back of the employer and not only does that hurt the members because it loses them opportunitites, but it also destroys the union.") While, given his history, Mr. Rodgers has every reason to feel some ownership in the unions that represent WSF employees, the Arbitrator is troubled by the extent to which Mr. Rodgers continues to express these views as a visible and important member of the management team.

Thus, the Ferry System did not violate the contract by removing Ms. Moser from the probationary position of on call Terminal Supervisor.

ORDER

Thus, for the reasons given above, the Arbitrator issues the following ruling:

1. The Commission has jurisdiction to hear this matter; and
2. The grievance is denied and no award of damages is made.

DATED this 18th day of October 2006.

MARINE EMPLOYEES' COMMISSION

/s/ ELIZABETH FORD, Arbitrator

Approved By:

/s/ JOHN SWANSON, Chairman

/s/ JOHN SULLIVAN, Commissioner