STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

ERIC HANSEN,	)	CASE NO. 4-83
	)	
Grievant,	)	DECISION NO. 7 - MEC
	)	
v.	)	
	)	
WASHINGTON STATE FERRIES,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
_____	)	

This matter came on for hearing before David Haworth, Chairman of the Marine Employees' Commission. The hearing was held on May 10, 1984, May 22, 1984 and May 30, 1984. The Grievant, Eric Hansen, appeared with his attorney, John Rinehart, and Washington State Ferries was represented by Robert McIntosh, Assistant Attorney General. Commissioner Stewart and Commissioner Kokjer read the transcript of the hearing, the exhibits entered as evidence and the briefs of the parties. The Commission, having reviewed the files and records herein and being fully advised in the premises now enters the following:

FINDINGS OF FACT

1. Grievant Eric Hansen began employment with Washington State Ferries (WSF) on May 22, 1977 as a journeyman electrician.

2. He was assigned to the Eagle Harbor repair facility. The employees assigned there do repair and maintenance work on ferries, terminals and docks used and operated by Washington State Ferries.

3. There are several different craft groups stationed at Eagle Harbor including electricians, pipefitters, machinists and carpenters. There are ten full-time and four temporary employees in the electric shop.

4. The work performed by Eagle Harbor employees is widely varied and employees must perform their work without direct supervision about 80% of the time.

5. During his employment, Mr. Hansen was supervised by a number of people. Originally his foreman was Bob Welch and the leadman was Bill Scrafford. In January 1982, Welch retired. Scrafford became foreman and Don Gragg became leadman. In July 1982, Gragg became foreman and Morris Komedal became the leadman.

6. Several employees, after working with Mr. Hansen for five or six months, asked the foreman not to assign them to work with Mr. Hansen anymore because they felt he evidenced a lack of concern for safety and was not competent in his work. It is not clear from the record whether those concerns were discussed with Mr. Hansen during the time that the first complaints were made.

7. Mr. Welch and Mr. Scrafford complained about his work performance. Mr. Bonnie Love, the repair facility manager at Eagle Harbor also complained to the personnel officer.

8. The parties agreed that the ultimate issue in this hearing is whether Eric Hansen was terminated for cause.

9. The parties also agreed that Washington State Ferries Policy Circular 02-R1 sets forth the appropriate procedures to be used in disciplining Washington State Ferries' employees. That policy provides in part:

> Except in cases of serious offenses demanding immediate suspension or termination (see Policy Circular #03-R1), or in cases where an initial offense is of sufficient magnitude to justify a written warning, disciplinary actions will progress as following:

1. Verbal warning
2. Written warning.
3. Suspension with or without pay.
4. Termination.

10. In 1980, Hansen attended a meeting with Bonnie Love, Bill Scrafford, Don Gragg and Jim Will, a co-worker. Hansen was told his performance was not what it should be. Hansen and Will were taking too long to complete their work and other workers in the shop felt they were not doing their job. The meeting was documented by memo dated 11-18-80 and a copy of the memo was given to Mr. Hansen. The memo specifically indicated that a copy of it would be placed in Hansen's personnel file. Thereafter, problems with Hansen's performance have been brought up in discussions between Gragg and Hansen. The meeting constituted a verbal warning documented by the 11-18-80 memo. It was not a written warning.

11. Mr. Gragg, when he held the position of leadman during January-June 1982, discussed with Mr. Hansen getting along with others in the shop at least three times. He told Mr. Scrafford, the foreman, about this discussions but made no written record of them. After July of 1982, Gragg met four or five times with Hansen and gave him what Gragg described as verbal warnings concerning getting along, job performance, and excessive breaks. Gragg told his superior, Stan Bibby, about the warnings but did not make a written record of them. On one or two occasions, Gragg told Hansen there would be problems down the road and something would have to be done although he did not say Hansen would be fired.

12. Morris Komedal had six to seven discussions with Hansen when he told him his performance was unsatisfactory. Three or four of these occasions were not related to the incidents which led to Hansen's termination. Komedal testified that if a supervisor advises that he is not happy with your performance, he considers that a warning to correct his actions.

13. Verbal warnings may be recorded at the supervisor's discretion in a "verbal warning notebook". The Washington State Ferries' Policy Circular does not require that

verbal warnings must be recorded in order to comply with the disciplinary procedures at Washington State Ferries.

14. Because of all the events discussed in Findings 6, 7, 10, 11, 12, it is obvious that well before December 13, 1982, Hansen was aware that his supervisors considered his job performance inadequate and that he could encounter further discipline if his performance did not improve.

15. As indicated by the Washington State Ferries Policy Circular #02-R1, the next disciplinary step after a verbal warning is a written warning. The policy provides:

> WRITTEN WARNING – PROCEDURE
>
> Where one or more verbal warnings fail to correct an employee's unacceptable performance, or behavior, the supervisor must issue a written warning by "econogram". The warning must state, in detail, all of the relevant information incidental to the action and must refer to any verbal warnings previously. It must contain the full signature of the supervisor, the supervisor's departmental position, and date.
>
> The original of the econogram is to be submitted to the Personnel Office at Pier 52, for insertion in the employee's file. The employee is to receive a copy, and the supervisor is to retain a copy in the same notebook established for verbal warnings. The Personnel office will keep such warnings on active file for a period of three years, and will be responsible for routing a copy of such a warning to the employee's appropriate departmental manager at Pier 52.

16. The letter from Dave Rice to Hansen dated December 13, 1982, although it summarizes the agenda for a meeting, also sets out those areas of job performance which Washington State Ferries considered inadequate and it advises that he is "required" "to demonstrate visible improvement in each…area within ninety days". Mr. Hansen received a copy of the letter. Although the letter is not explicit, it is clear from the tone and content of it that it constitutes a written warning to improve performance or face disciplinary consequences. The requirements that it be on an econogram and be kept in the verbal warning notebook are not mandatory. Since

the personnel manager issued the written warning, the signature requirement of Hansen's supervisor was met by Rice's signature. Therefore, WSF management substantially complied with the requirements of Policy Circular #02-R1.

17. The next day, December 14, 1982, Hansen, Gragg, Stan Bibby (yard manager), Dave Rice, and William Carpine (Mr. Hansen's union representative) all attended a meeting where Mr. Hansen's job performance was discussed in detail. Mr. Hansen was told his performance was not adequate, that his attitude was poor and that he must improve both. He was placed on a 90-day probation and told that his supervisor would evaluate him. WSF Management, Hansen and his union representative would get back together at the end of the 90 days to go over his performance. Mr. Hansen requested feedback concerning how he was doing during this 90-day period but did not specify any particular form of feedback. There was no indication that Mr. Hansen would see the evaluations nor did Hansen request to see them. This subsequent meeting and the probationary period further underscored the written warning given to him the day before that he must improve his performance or face discipline.

18. During this 90-day probation period, Morris Komedal, (leadman in Hansen's shop), did a written evaluation on Mr. Hansen's performance every 30 days. These three evaluations were not shown to Mr. Hansen, a normal WSF practice, until March 18, 1983, the end of the 90-day period. They indicated that his performance remained unsatisfactory. Hansen, however, continued to receive oral feedback from his supervisors during the 90-day probation period indicating that his performance remained unsatisfactory.

19. Following the meeting of March 18, 1983, Hansen was suspended for 40 hours without pay for failure to improve his performance. His suspension was confirmed by letter dated March 18th which included a warning that continued failure to perform duties could result in termination.

20. On Mach 22, 1983, Hansen filed a grievance challenging his suspension with William Carpine, the union representative. By letter dated April 21, 1983, Tom Hardcastle, the Labor Relations Director for Washington State Ferries, advised Hansen that his grievance of the 40 hour suspension was at an impasse, which required petitioning the Marine Employees' Commission for arbitration if Hansen and IBEW desired. Hardcastle and Carpine agreed that they would submit the 40-hour suspension grievance to the Marine Employees' Commission.

21. The 40-hour suspension in March was justified and a valid action.

22. Hansen was subsequently suspended without prejudice pending a meeting with Mr. Carpine, the union representative. The second suspension was rescinded by WSF management and Hansen was reinstated with full pay. The suspension and its subsequent rescission was not an issue in this hearing.

23. Hansen's job performance did not improve after the meeting of March 18th and his first suspension. He was working too slowly and performed inadequately on several jobs.

24. Hansen was terminated on July 24, 1983. His termination notice listed the following causes:

> ,,, continued inadequate and unacceptable work performance and quality, poor work habits, lack of cooperation and dependability, inadequate job knowledge, and violation of working standards, including but not limited to:
>
> (a) inadequate performance on the following jobs
>
> (1) 4/21/83 and 4/22/83 – changing the hub oil pump motors on the Cathlamet;
>
> (2) 5/25/83 to 6/2/83 – repairing equalizer connections on the Yakima drive motors;
>
> (3) 6/3/83 – Repair of line fuse problem on Yakima compressor;
>
> (4) 6/16/82 – Relocation of rigid conduit at Kingston;

(5) 6/26/82 to 7/1/82 – Repair of drive motor commutator on Yakima;

(6) 7/5/82 – Failure to properly document materials used on repair job on Quinalt;

(b) excessive delay in returning to the job after breaks, etc./ and

(c) 7/6/82 to 7/12/82 – Failure to comply with employee absenteeism procedures.

Exhibit 6

25. Hansen complied with Washington State Ferries' sick leave procedures.

26. Hansen violated Washington State Ferries' procedures concerning vacation scheduling when he failed to notify Gragg that he was taking his vacation one week early when he had scheduled it for another time.

27. Hansen used his Washington State Ferries pass and one-half price meal privileges when he knew he was no longer entitled to them.

28. Jim Will and Hansen worked together on the equalizer connection job. The evidence does not indicate who dropped the copper solder into the motor housing nor who soldered the connectors together so that they were inflexible. Inadequate job performance solely by Hansen was therefore not established in this instance.

29. Jim Will and Hansen also worked together on the Yakima line fuse problem. Hansen checked the fuses and neglected to consider checking the setting on the oil pressure device which an electrician with his years of experience should be expected to do. Mr. Hansen testified that both he and Will were responsible for breaking the coupling. Inadequate performance by Hansen was established in this instance.

30. Hansen, working by himself, cut conduit at Kingston instead of pulling it out. Pulling it would have taken three more minutes than cutting t, and would have alleviated the

necessity for further work. As a result, Hansen had to return the next day to repair the conduit which took five to six additional hours. Inadequate job performance by Hansen was established in this instance.

31. Hansen took 16 hours to change the hub oil pump on the Cathlamet. That was substantially longer than the norm, even for a less experienced electrician. Although the circumstances may have justified some extra time, up to 1 ½ to 2 hours, the eight extra hours Hansen took to do the job was not justified. Inadequate job performance was established in this instance.

32. Hansen and Sunde worked on the Yakima drive commutator problem together. Sunde was substantially less experienced than Hansen. They received both written and oral instructions. Hansen indicated he knew what he was doing and resisted advice. The job took too long, at least in part, because Hansen refused to admit his lack of knowledge and refused to follow instructions. Inadequate job performance was established in this instance.

33. Various witnesses testified to the fact that Hansen took long coffee breaks. The evidence is sufficient to establish that Hansen took excessive breaks without good reason.

34. The evidence is insufficient to establish that Hansen failed to document materials used on the Quinault job.

35. The Commission does not find Hansen's testimony credible as evidenced in part by his misuse of employee's privileges after his termination.

36. Neither Komedal, Gragg, Bibby or anyone in WSF management had a personal vendetta against Hansen nor were they out to get him.

37. The consistent and continuous pattern of substandard results on projects to which Mr. Hansen was assigned, together with numerous indications of lack of willingness or ability to modify his work methods as requested by his supervisors, provides

sufficient cause for the course of progressive disciplinary action undertaken by Washington State Ferries in this matter.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction over the parties and the subject matter.

2. The employer has the burden of proving by a preponderance of credible evidence that Hansen was discharged for cause.

3. The grievance proceedings before the MEC properly include review of the propriety of the 40-hour suspension.

4. WSF's disciplinary procedures as described in the Policy Circular #02-R1 were substantially complied with.

5. There is no contractual, statutory or procedural requirement that the written evaluations prepared by Mr. Komedal during the grievant's 90-day probationary period be reviewed with the grievant.

6. According to Policy Circular #03-R1, authority for suspension or termination of Ferry System employees may be delegated to other management officials.

7. Eric Hansen was properly discharged for cause based on the extended period of documented job performance problems, the communication of these problems to the grievant over a reasonable period of time, the failure of the grievant to improve performance, and the existence of a series of progressive disciplinary actions in substantial compliance with Washington State Ferries' policy.

Based on the foregoing findings of fact and conclusions of law, the Marine Employees' Commission enters the following

ORDER

The termination of Eric Hansen is affirmed and his request for reinstatement and award of full back pay, seniority accrual and all other contract benefits for both the suspension and past termination periods is accordingly denied.

DATED this 7th day of March, 1985.

MARINE EMPLOYEES' COMMISSION

/s/ DAVID P. HAWORTH, Chairman
/s/ DONALD E. KOKJER, Commissioner

STATE OF WASHINGTON

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and	)	MEC CASE NO. 4-83
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Grievant,	)	DECISION NO. 7 - MEC
	)	
v.	)	
	)	**DISSENTING OPINION:**
WASHINGTON STATE FERRIES,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
_____	)	

INTRODUCTION

This dissenting opinion recognizes that direction of the work force, its expansion or reduction, as well as the control of production methods, are well recognized powers of management.

This dissent also recognizes that the principle of justice and fair play has become firmly imbedded in employer-employee relations as it is in all our institutions, laws, and Constitution. Collective bargaining has introduced into American industry the philosophy of our government. The rule of law has replaced industrial autocracy. Underlying all this is, without abridging management's normal prerogatives concerning the hiring and firing of employees, that these prerogatives be exercised in a manner consistent with the commonly accepted standard of procedural due process especially when the parties have provided for grievance procedures in collective bargaining agreements, and where such bargaining agreements provide for discipline only for "just cause." (See: Safeway Trails, Inc., 38 LA 218, 225 (1962)).

The majority's Conclusion of Law No. 5 would establish a precedent that written evaluations during a probationary period do not need to be shared with the probationary employee—even worse, with an employee serving a disciplined-based probation. Worse yet, where the majority has sustained a termination of that employee who has "just cause" protection in his collective bargaining agreement. This Marine Employees' Commission now becomes one of the few labor relations boards, if not the only such tribunal, in the country with that posture.

Having reviewed the entire record, including the grievance as filed, hearing transcript, post-hearing briefs, and the Background, Positions of Parties, Findings of Fact, Conclusions of Law, and Order as entered by the majority members of the Marine Employees' Commission, I now find the following additional facts to be relevant, disagree with certain of the majority's conclusions of law, arrive at additional conclusions of law, and reach a dissenting opinion as to the appropriate order:

FINDINGS OF FACT

1. The collective bargaining agreement between Washington State Ferries (WSF) and the seven unions constituting the Metal Trades Council (hereafter referred to as "WSF/IBEW contract") is silent on the matter of termination, except for new employees (Ex. 10). Article IV, Section 3, states in part:

> ARTICLE IV
> HIRING OF NEW EMPLOYEES
>
> Section 3 … The Employer may discharge any employee for just and sufficient cause (Emphasis added.).

2. The WSF/IBEW contract is also silent on suspensions as a form of discipline. The language on any disciplinary action is something less than clear and unambiguous. Article XII, Section 3, states, in part:

> Section 3. It is understood that no disciplinary action by the Employer shall be considered cause for a grievance unless it is specifically alleged that such action represents an incorrect application of the terms of this Agreement. In no event shall this Agreement alter or interfere with disciplinary procedures heretofore followed by the Employer … (Emphasis supplied.)

The meaning of the foregoing contract language is made obscure by the fact that the only WSF past practices submitted to the Commission were the grievant's two suspensions, and here the WSF practices were contradictory. In neither instance was grievant aware of his evaluations, nor was he warned about the consequences of continuing alleged misconduct. However, the second suspension must be considered the prevailing practice, because it was withdrawn by top management on the grounds that the grievant should have been made "fully aware of all the things that were being put down against him (Tr 61)." (see also Tr 255f.) If the ruling by top WSF management is that an employee must be informed and warned before suspension, this Commission has no recourse but to conclude that the correct "disciplinary procedure heretofore followed by the Employer" phrase in Article XII, Section 3, of the WSF/IBEW contract includes notification to the employee of less than satisfactory performance and warning about the consequences thereof.

3. The WSF/IBEU contract again is silent on probationary periods, and/or WSF obligations to probationers and/or evaluations thereof. No past practices were cited by either party. Therefore the Commission is left with relying upon standard and customary practice. Personnel administration texts have recommended sharing employee ratings for many years. For example:

> Formal employee-rating plans have been developed to reduce the element of favoritism and snap judgment in personnel decisions. They are widely used by governmental agencies and in private industry where management is vitally interested in building a loyal and efficient group of employees. The principal advantages of a good employee-rating plan may be outlined as follows:

1. …

2. It gives supervisors a record of progress or difficulties, which they can discuss with each employee, commending good work, pointing out deficiencies, and suggesting possibilities for improvement … (Emphasis supplied) Pigors and Myers, Personnel Administration, 3rd Ed., 1956, pp. 233.

In the instant case, grievant never received any feedback on his performance for which he had asked and which WSF had acknowledged. He did not even see Exhibits 13, 14 and 15 (monthly evaluations) until the day of his suspension (Tr 303). The personnel officer testified to the purpose of the evaluations "Hopefully in this case it was to improve the work habits (Tr 51)." Foreman Gragg testified that the evaluations were used as "warnings" (Tr 140ff); but, instead of being shown to the grievant either as assistance toward improvement or as warnings, they were forwarded to the Personnel Office. In fact, leadman Komedal, who actually made the evaluations, testified that he had instructions from the personnel officer not to show the evaluations to grievant (Tr 230, 241f). The personnel officer testified that the evaluations were not "written warnings" (Tr 55f); but the WSF Employment Suspension/Termination Advice (Ex 6) states that grievant had been warning in writing on the dates of those evaluations. (See also Tr 245-247; 263). The evaluations were not reviewed by Manager Bibby of the WSF Repair Facility (Tr 88). The Commission can only conclude that the written evaluations were used only as a catalog of "charges" without transmittal in any way to grievant until after suspension was predetermined.

4. For the first five years of grievant's employment, the record made by WSF supervision regarding the quality of his job performance, his work habits, his cooperation and dependability, and his job knowledge consisted in large member of memoranda from Eagle Harbor supervisory personnel to the Personnel Office in Seattle, of hearsay, and of notes between supervisors at Eagle Harbor. Very little of this "record", if any, was communicated to grievant during that period.

   (a) Only one document (Ex 19), a memorandum from the Repair Facility Manager to the Personnel Office, July 1980, was in evidence.

Exhibit 19 was hearsay evidence; the person who wrote it was not called to testify; and statements by unnamed persons were cited in the document (Tr 267-271). Hearsay evidence is admissible under the broader rules of labor law, but this was the only document representing WSF's recorded "concern" regarding grievant in the first five years of his employment.

(b) More hearsay evidence was presented indicating supervisory "concern" regarding grievant during this period of time. Ostensibly, former Foreman Welch told then Shop Stewart Gragg (later Leadman and then Foreman) that he, Welch, was receiving complaints about grievant's work, while commuting on the ferry. Welch was not called to testify to identify the sources of the complaints.

(c) Even if the hearsay of Foreman Welch's statements to Gragg is admissible, the meeting described in Exhibit 19 covered the period described in the ferry-ride discussions. The meeting and its included reprimand to grievant constituted one step in WSF's progressive discipline patter. But Welch's statements were used in the disciplinary meeting of July 1980 and used again in the March 1983 suspension and again in the July 1983 termination, raising a question of double jeopardy, and each disciplinary action based upon the same hearsay.

(d) Shortly after grievant's initial employment by WSF, and while Messrs. Gragg and Komedal were still employed as journeymen electricians, they did complain to Foremen Scrafford and Welch in those years about grievant's work. No evidence of limitations of either time, or the number of times the same charges can be used, was evident.

5. After July 1, 1982 when Mr. Gragg was promoted to foreman and Mr. Komedal was promoted to leadman succeeding Gragg, unquestionably a closer, more concerted

effort was maintained in supervising grievant. A memorandum from Komedal to Gragg, dated November 30, 1982, states that Komedal had "spoken to" grievant "on several occasions" about grievant's job performance and complaints of other workers (Ex 12). Mr. Komedal testified that he had only "talked with" grievant, and he specifically testified that he did not tell grievant that future disciplinary action would be taken if grievant's performance did not improve (Tr 263 et passim).

6. On December 13, 1982, grievant received one day's notice to appear at a meeting to discuss grievant's "1. Inadequate work performance, 2. Work habits, (and) 3. Interaction with and attitude toward coo-workers (Ex 4)." These subjects for "discussion" actually constituted charges and predetermined findings, because the decision that grievant must "demonstrate visible improvements in each of the listed areas, within 90 days, followed by continued satisfactory performance," was stated in the notice even before said meeting took place. These charges had no specificity against which grievant could defend himself. Nor had grievant been given opportunity "to tell his side."

7. The following day, December 14, 1982, the meeting did take place, during which grievant was formally put on "probationary status" for ninety days, with an evaluation of grievant's performance to be made every thirty days. Grievant specifically asked for "feedback" on his progress during the probationary period (Ex 9; Tr 302), which WSF acknowledged (Ex 4), but which grievant never received (Tr 152ff, 256, 303, et passim).

8. Grievant's first suspension ended on Friday, March 25th. He returned to work on Monday, March 27 (sic) (Tr 64). The following Friday, April 1, 1983, he was suspended again. The latter suspension was withdrawn by higher level management on the grounds that grievant should have been notified and warned (Tr 61, 64; Ex 3). No cause was shown for the second suspension in the record of the hearing, as it should not have been if it were overruled and the grievant made

whole. In spite of withdrawal of that second suspension, it is still presented to this Commission as a warning justifying the eventual termination (Ex 6 Addendum).

9. Three of the charges against grievant, listed as reasons for his termination (Ex 6 Addendum (a)(2), (3) and (5)), were for grievant's performance on jobs where two journeyman electricians were assigned, where either man or both men could have been at fault. There was no way to tell which electrician actually was at fault. Leadman Komedal testified that "there were two people involved in this job, and I'd have to fire both of them without knowing for sure that I was firing the right one (Tr 238f)." But grievant was terminated, the other man received no discipline so far as the record shows.

10. Two other charges against grievant were based on the exercise of independent judgment about how to proceed with given assignments, which led to different decisions than Leadman Komedal would have exercised (Ex 6, Addendum (a)(1) and (4)).

(1) 4/21/83 and 4/22/83 – changing the hub oil pump motors on the Cathlamet; and

(4) 6/16/02 – Relocation of rigid conduit at Kingston.

In the first instance grievant opted, after consultation with a machinist, to modify a motor mount that did not fit its base, so that the same trouble may not be experienced in future changes. This took longer to accomplish than simply elongating the holes in the motor mount, as the leadman said later that he would have done.

In the second instance, relocating the rigid conduit required removal of the electrical conductor, which could have been accomplished in either of two ways: (1) cutting it, or (2) removal of condulet covers, disconnecting the conductor, fishing it out of

the conduit. Because it was at night and during a driving rainstorm with a crew of shipwrights standing and waiting, grievant chose to cut the conductor to save initial time. That decision caused a longer time for completion the following day, after the shiprights had finished their work. Under totally different circumstances and in a different place, Leadman Komedal asserted that he would have done it the other way. (NOTE: The Majority Finding of Fact No. 30 asserts that the alleged three minute differential in time paved the grievant's decision to cut the conduit instead of pulling it out caused additional work the following day is a two-fold misunderstanding. First, the time saved by cutting the conduit instead of attempting to remove it intact had to be a far greater period of time. Three minutes would hardly allow time for locating and disconnecting the conductors at the first condulet, and that would barely be a start. Second, the re-assembly work the following day had to be performed regardless of the method of removal, so the shipwrights would work. This notation is important. It illustrates that the majority appears to have lent a far greater adverse weight to the grievant's independent judgment than was warranted in the actual case, even if the grievant had been "wrong". And no evidence that grievant was "wrong" was presented.)

WSF requires that its journeyman electricians be able to exercise independent judgment and, indeed, agrees to pay more than the going shipyard scale because these journeymen often work in remote locations, as in the foregoing instances, and cannot be closely supervised (Tr 103). Yet the two foregoing instances of alleged "inadequate performance" appear to be nothing more than the exercise of independent judgment which happened not to coincide with that of the leadman under different circumstances. Neither instance was labeled as "wrong". No allegations of hazard or endangerment were connected with either instance.

11. Even if the exercise of independent judgment cited above had been "wrong," the 6/16/82 instance was used as a cause in reducing grievant to "probationary status" in December 1982, and then used again in the termination of the grievant on July

18, 1983, clearly a case of double jeopardy.

12. The "absenteeism" listed as another basis for termination was dated July 6 to 12, 1982 (Ex 6, Addendum (c)). However, said absenteeism was not documented by Foreman Gragg until July 25, 19883, thirteen days after grievant was terminated. Mr. Gragg was unable to explain the discrepancy (Tr 122r, 169).

13. The "absenteeism" charged against grievant was based on grievant's taking his vacation one week earlier than he had scheduled it. Testimony is conflicting as to whether or not grievant's early vacation was duly authorized within the very informal way in which the electricians schedule their vacations in that shop, and the even more informal call-in procedure when an electrician is not coming in to work.

The record is silent as to whether or not WSF paid grievant for the alleged unauthorized vacation time. If so, that was a management decision or lack of decision. Had WSF not paid grievant for the alleged unauthorized absence, grievant may or may not have filed a grievance on that issue, in which case it could have been resolved separately through the grievance procedure. Under the present circumstances, this Commission must find it difficult to determine that that "absenteeism" was egregious enough to warrant termination.

14. After grievant's first suspension, he was notified by WSF Labor Relations Director T.D. Hardcastle that:

> WSF Management and your Foreman and Leadman will not in any way single you out from your co-workers as someone who will be watched and criticized over and above that which would normally be practiced in properly performing their jobs as Supervisors over all Electrical Shop personnel (Ex 5).

Despite that assurance, grievant was in fact singled out for discipline three times

after working with another journeyman electrician on assignments, and even when the leadman admittedly did not know which journeyman was at fault. (See paragraph 9, supra.)

15. WSF relied upon the State of Washington Office of Administrative Hearings decision in In Re Eric E. Hansen (Docket No. 3-14132), which in turn relied upon a Wisconsin Supreme Court Case (Boynton Cab Co v. Neubeck, 296 N. W. 636: 237 Wis. 249) for a definition of "misconduct" (Ex 1, 2):

> ,,, the intended meaning of the term "misconduct"…is limited to conduct evincing such willful and wanton disregard of the employer's interests as is found in deliberative violations or disregard of standards of behavior which the employer has a right to expect of his employee, or in the carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show n intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapability, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not deemed "misconduct" within the meaning of the statute.

WSF did not prove "willful or wanton disregard" or "carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or … an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer," which would constitute "misconduct" by its own documentation.

WSF did present some evidence tending to show that there may have been some degree of "mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapability, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion." This Commission can not substitute its judgment for that of WSF technical supervisors in these matters. However, even assuming "mere inefficiency," "failure in good performance," "good faith errors," etc., which may have been true despite conflicting testimony in this

proceeding, the WSF/IBEW contract requires "just and sufficient cause" for termination of grievant, which was not demonstrated.

16. The majority took notice that grievant had not requested that he be shown his performance evaluations forms (finding of fact no. 17). But the record is abundantly clear that grievant did not even know of the existence of such forms. Hence, apparently the majority expects an employee to request access to an unknown item.

17. WSF did shown interest in assisting grievant to improve his performance. WSF did arrange for personal counseling. Grievant testified that the first counselor did help him. WSF also encouraged grievant to take advantage of an IBEW-sponsored electrician's refresher or upgrading course. The record is not clear as to the reason for grievant not participating in said course.

Based on the foregoing additional findings of fact, I find that the following conclusions of law should have been considered in the Majority Decision:

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction in this matter under the provisions of Chapter 47.64 RCW and WAC 316-65-010. The reference to the Public Employment Relations Commission in Article XII, Step 3, in the WSF/IBEW contract should be read Marine Employees' Commission, under Chapter 47.64 RCW.

2. The words "The Employer may discharge any employee for just and sufficient cause" should be read literally to apply to all members of the WSF/IBEW bargaining unit, even out of the context of Article IV, Hiring of New Employees. To do otherwise would leave all but new employees without protection of the contract, including the grievant.

3. The WSF/IBEW contract contains no definition of "just and sufficient cause" to be applied to the facts of a given discharge case in order to determine the existence or non-existence of "just and sufficient cause" herein. No past practices were cited in the hearings. Therefore this Commission will have to apply the "common law" standards developed by arbitrators for such purpose (Moore's Seafood Products, 50 LA 83 1968)).

4. The view that this Commission must sustain the penalty assessed by WSF as a management right if employee is found guilty as charged is rejected, since the "just and sufficient cause" required by the WSF/IBEW contract requires weighing both the degree of guilt and the propriety of the penalty (Micro Precision Gear and Machine Corp., 31 LA 575 (1958)).

5. Generally accepted criteria for evaluating "justness" of discipline are described as follows: (1) equal treatment; i.e., all employees must be judged by the same standards, as such, and rules must apply equally to all; (2) rule of reason; i.e., even in the absence of specific provision protecting employees against unjust discipline, the contract as a whole may be held to afford that protection and to permit the challenge of any procedure that threatens to deprive employees unjustly of rights and privileges under the contract; (3) test of internal consistency; i.e., pattern of enforcement must be consistent; and (4) personal guilt; i.e., the fact that two or more employees are involved in the same act does not necessarily justify the same penalty for all, but such things are prior disciplinary records of individuals may be considered (Electric Hose and Rubber Co., 47 LA 1104 (1967)).

6. In disciplinary cases, and especially in discharge cases, the burden is on management to prove the guilt or wrongdoing, particularly where the contract requires "just and sufficient cause" for discharge (Chemical Leaman Tank Lines, Inc., 55 LA 435 (1970); G. Heileman Brewing Co., Inc., 54 LA 1 (1969); Velsicol

Chemical Corp., 52 LA 1164, 1169 (1969); Holland Die Casting and Plating Co., Inc., 48 LA 567 (1967).

7. Past infractions may not be used to support a discharge where the employee was not reprimanded for the alleged infractions. Where the employer administers not even a reprimand to the employee, a strong interference arises that the employer accepted the employee's explanation or regarded the offense as being insubstantial (Western Air Lines., Inc., 37 LA 130, 133 (1961)).

8. There are limitations in the consideration of past offenses. A distinction should be made between infractions that have been proved and mere past "charges." Thus, in this case where the contract is silent on the filing of allegations of misbehavior or lack of competence in employee personnel files, the failure of WSF to notify grievant at the time of occurrence precludes WSF from using such alleged misbehavior or incompetence to support discipline at a substantially later date. Grievant should not be required to disprove stale "charges" of which he had not even been aware. Nor should this Commission consider past infractions for which the grievant was not even reprimanded, or of past warnings which had not been put in such form as to make them subject to a grievance. If grievant had been given notice of adverse entries in his personnel file and he had not filed a timely grievance, this Commission could now accept those records on their fact without considering their merits (Elkouri and Elkouri, How Arbitration Works, Rev. Ed., BNA, 639 (1960)).

9. The repeated and lengthy delays in imposing discipline almost throughout grievant's employment made the application of discipline inappropriate. It has been held that even a two-week delay in imposing a three-day suspension was inappropriate (Gibson Refrigerator Division, 52 LA 663, 666 (1969)).

10. Past incidents, for which no formal disciplinary action was taken and no official records maintained, and which cannot at a later date be adequately investigated, cannot be accepted to support a discharge (Carnation Co., 42 LA 568, 570f (1964)). In the present case, the "talking with" grievant by Leadman Komedal (Tr 263 et passim) clearly constituted constructive warning of discipline by inference only, and should not be accepted by this Commission as either a step in the "progressive discipline" procedure nor as adequate warning of consequences required by "just and sufficient cause" even if such "talking with" had been proper discipline. (Safeway Trails, Inc., 38 LA 218, 224 (1962)).

11. An employee is entitled to expect full discipline within a reasonable time after the employer has convincing knowledge of an infraction and to assume that the penalty he receives within that time, if any, is the complete one. In the instant case, grievant clearly was disciplined by suspension for alleged infractions and/or charges of incompetence of which WSF did not prove he had knowledge; and worse, that discipline was not complete. Grievant was charged again with the same infractions/incompetence in the termination, clearly a case of double jeopardy. The alternative to not informing grievant nor warning him of consequences was that grievant did not know at any given time how great a burden of unexercised discipline for old allegations, or even actually punished behavior, might be hanging over him (Aluminum Co. of America, 8 LA 234, 245 (1945).

12. Once WSF assessed a disciplinary action, even if grievant had accepted the action without filing a grievance, WSF would not have a right, in the absence of additional facts pertaining to the same offenses for which grievant was suspended, to increase the severity of the discipline for the same acts. Grievant was placed in double jeopardy by WSF's repeating some of the same charges in (1) reducing him to probationary status, (2) the first suspension which is appealed herein, (3) the second suspension which was actually withdrawn (hence, the misconduct allegations were also withdrawn), and finally (4) the termination. (See: Hub City

Co., 43 LA 907, 910 (1964)). Even if the majority of this Commission prevails, and WSF's first suspension of grievant is sustained, surely this Commission cannot find anything but double jeopardy in a termination based in major part on a suspension which WSF withdrew. (Clark Grave Co., 37 LA 960, 961f (1961)).

13. Even if grievant had been warned of his perceived shortcomings, grievant was not given opportunity to present "his side" before the December 1982 reduction of grievant to probationary status. The summons to the conference actually included part of the preconceived penalty. Valid notice and warning includes opportunity to present the "employee's side of the story." (Wolf Machine Co., 72 LA 510 (1969)).

14. Where the testimony of WSF and IBEW witnesses flatly contradict each other, this Commission must either reject both sides of conflicting testimony; or, if this Commission recognizes signs other than evidence that tend to lend weight to evidence presented by one side of the dispute, this Commission is obligated to recognize such signs from the other side. In the instant case the majority of this Commission rejected post-employment use of a ferry pass and discounted meals as evidence, and acknowledged such presented facts by denying grievant's credibility. However, the majority appears not to have noticed ex post facto documentation, inconsistent testimony and other symptoms of unreliability of some WSF evidence. (See: Permanente Medical Group, 52 LA 217, 220 (1968)).

15. Because the "progressive discipline" used by WSF is not covered by the WSF/IBEW contract, WSF is obligated to establish other means to inform its employees of the terms, meaning and procedures used in "progressive discipline." (e.g., see Electric Hose and Rubber Co., supra.)

16. While it is not this Commission's responsibility to go behind the State of Washington Administrative Law Judge's Decision in grievant's prior Employment Security hearing (Docket No. 3-14132), the "just and sufficient cause" required by the

WSF/IBEW contract requires that this Commission determine not only whether there was "sufficient cause" but also whether there was "just cause", before taking notice of the ES Decision and Order. As cited hereinabove, WSF did not prove "misconduct."

17. All allegations of creating imminent damage or of slow or incompetent work, whereof WSF supervisory personnel do not know who was responsible because additional persons may be culpable, should be stricken from all records, and not considered by this Commission. Freedom from a shotgun approach to charges and penalties is so fundamental that no specific authority needs to be cited.

18. Once having found any part of the grounds for termination of grievant to be invalid by reason of not meeting the "just cause" tests, this Commission is then limited to consideration of the remaining grounds in order to determine if they meet the "sufficiency" test. If all the remaining offenses taken together fail to comprise a body of wrongdoing of sufficient weight, gravity or mass to so sustain a penalty of discharge, then the Commission must order the dismissal overturned. One of the crucial tests in evaluating disciplinary action is to ascertain whether the penalty is commensurate with the misconduct (Wilson Paper Co., 73 LA 1167, 1169 (1979)).

19. Although the WSF/IBEW contract is silent on requiring "cause" for any kind of discipline other than discharge, and although ESSB 3108, Section 6, provides that "an arbitrator's decision on a grievance shall not change or amend the terms, conditions, or applications of the collective bargaining agreement," this Commission must interpret the contract to intend the imposition of "justice and sufficiency" to all disciplinary matters subject to arbitration by the Commission. To interpret Article XII of said contract otherwise would render the entire grievance procedure meaningless.

20. Where the Commission finds that discipline of an employee does not meet the "just and sufficient cause" required by contract, the Commission, in addition to ordering adjustments or rescission of the penalty which had been imposed, may order the removal of or amendment to, items in the employee's personnel file which are relevant to the discipline in dispute (Dural Corp., 43 LA 102, 106 (1964)).

Based on the foregoing additional findings of fact, and additional and/or differing conclusions of law, I now dissent from the Decision and Order entered by the majority members of the Marine Employees' Commission and enter a minority opinion of a fair and equitable order in this case:

DISSENTING OPINION AND PROPOSED ALTERNATIVE ORDER

The Washington State Ferry System (WSF) should immediately:

1. Reinstate Eric E. Hansen in his former position of journeyman electrician.

2. Pay Eric E. Hansen an amount he would have earned had he not been suspended during the week of March 12 through March 25, 1983 and had he not been terminated on July 18, 1983, minus any ways earned from any source and any unemployment compensation he may have been paid following the denial of his claim for unemployment compensation by the Office of Administrative Hearings, mailed September 28, 1983, (Docket No. 3-14132); provided that no back pay should be allowed for time taken off by Eric E. Hansen for any injuries or illness or any similar reason unless Eric E. Hansen would have received WSF compensation during such leave; and provided further that WSF could withhold the sum of $500.00 until Eric E. Hansen has satisfactorily completed an electrician's refresher/upgrading course mutually agreed to by WSF and IBEW.

3. Reimburse the Washington State Unemployment Compensation Fund for any unemployment compensation Eric E. Hansen may have received after reestablishing his eligibility through other employment.

4. Restore to Eric E.Hansen full seniority and all other rights and benefits he would have earned during his suspension and following his termination, including but not limited to the health, welfare and dental benefits received by members of his bargaining unit.

5. Remove from Eric E. Hansen's personnel file and any other pertinent records any notion of his creating the possibility of imminent danger or equipment damage or of slow or incompetent work where other employees besides Mr. Hansen may have been culpable, including but not limited to the following items:

   (a) 5/25/83 to 6/2/83 – repairing equalizer connections on the Yakima drive motors;

   (b) 6/3/83 – Repair of line fuse problem on Yakima compressor;

   (c) 6/28/83 to 7/1/82 (sic) – Repair of drive motor commutator on Yakima.

6. Continue to cooperate with Eric E. Hansen by assisting him in participating in a personal counseling program and in attending a refresher and/or upgrading school mutually agreed to by WSF/IBEW.

7. Furnish to the IBEW and the members of the bargaining unit a definition, terms and principles of the WSF "progressive discipline" procedures.

8. Establish time limits ("statute of limitations") for different classes of severity of infractions in conjunction with IBEW, post or otherwise inform members of the bargaining unit of those time limits, and regularly purge personnel files of materials pertaining to infractions at the expiration of said time limits.

9. Eric E. Hansen should, as a condition of his reinstatement, satisfactorily complete at least one full school-year of refresher/upgrading course(s) mutually agreed to by WSF and IBEW.

Dated at Olympia, Washington, this 4th day of March, 1985.

MARINE EMPLOYEES' COMMISSION
/s/ LOUIS O. STEWART, Commissioner