

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

EDWARD MULCAHY,	)	MEC Case No. 4-93
	)	
Grievant,	)	
	)	DECISION NO. 105 - MEC
v.	)	
	)	
WASHINGTON STATE FERRIES	)	
	)	DECISION AND ORDER
	)	
Respondent.	)	
_____	)	

Anderson and Peterson, Attorneys, by Paul Anderson, appearing for and on behalf of Edward Mulcahy.

Christine Gregoire, Attorney General, by Robert McIntosh, Assistant Attorney General, for and on behalf of Washington State Ferries.

THIS MATTER came on regularly before the Marine Employees' Commission (MEC) on April 27, 1993, when Edward Mulcahy filed a request for grievance arbitration against Washington State Ferries (WSF) pursuant to RCW 47.64.150 and WAC 316-65-050. Mr. Mulcahy charted that WSF had violated Section 20 of the collective bargaining agreement between WSF and the Marine Engineers Beneficial Association (MEBA) when WSF appointed a Mr. Duffy, not so entitled, to a position of Relief Engineer. Mulcahy claimed he was entitled to that appointment. Mulcahy asked that the appointment be awarded to himself, and that he be compensated \$52,871.63, the difference between the pay he has received since said improper appointment was made and the pay to which he would have been entitled if he had been appointed to said Relief chief position.

Mr. Mulcahy certified that his remedies under the WSF/MEBA agreement had been exhausted, and that the MEC award would be final and binding. The matter was docketed as MEC Case No. 4-93 and

assigned to Chairman Dan Boyd to act as arbitrator pursuant to WAC 316-65-070.

On May 14, 1993 Mulcahy filed a second request for grievance arbitration, alleging improperly delayed and incomplete investigation of the first grievance and harassment, which resulted in illness, use of sick leave and unpaid leave for which he asked MEC to order compensation. Mr. Mulcahy asked that this second grievance be heard together with MEC Case No. 4-93. The matter was docketed as MEC Case No. 5-93 and also assigned to Chairman Dan Boyd to act as arbitrator.

Arbitrator Boyd scheduled and held a prehearing conference on June 17, 1993 pursuant to WAC 316-02-210, following which MEC found the facts and principles of law appeared to be sufficiently related to consolidate the two cases pursuant to WAC 316-65-510(3).

Hearing on the consolidated grievances was scheduled for August 12 and 13, 1993. However, counsel for Mulcahy repeatedly requested Arbitrator Boyd to subpoena certain witnesses and data in preparation for the hearing. Arbitrator Boyd insisted that MEC has limited its issuance of subpoenas, authorized by RCW 47.64.280 and WAC 316-02-300, to requiring appearance of witnesses and production of records at hearings, and has not issued subpoenas for discovery purposes. Boyd also insisted that MEC has further restricted its issuance of subpoenas to those requested by parties not represented by counsel. Pursuant to Civil Court Rules 26 through 36, counsel can be responsible for their own subpoenas or discover procedures. Because of the repeated delays based on repeated requests and denials, on August 5, 1993 Mulcahy asked for a continuance until August 26, 1993.

On August 10, 1993 counsel for both parties discussed the continuance with MEC Administrative Assistant Janis Lien by telephone. In that conference, WSF counsel agreed to a continuance

to September 22 and 23, 1993, provided that Mulcahy waive any back pay claim to which he would otherwise be entitled for the period between August 19 and September 22, 1993. There would be one witness unavailable on September 22 and 23, and testimony from that witness would have to be taken later. Counsel for Mulcahy agreed. Therefore, on August 10, 1993 Commissioner Louis O. Stewart notified the parties of his substitution for Chairman Boyd as arbitrator and set the hearing for September 22 and 23, 1993. Hearing was held on those dates, plus continuations on September 29 and October 20, 1993.

Post-hearing briefs were timely filed by both parties on December 17, 1993.

Although Grievant Mulcahy's request for consolidation of MEC Case No. 4-93 and 5-93 was granted, hearing on the two issues was held consecutively, and the briefs contain separate discussions and argument. In the interest of simplification, decisions on the two matters are also entered separately.

#### INTRODUCTION AND BACKGROUND

The grievant, Edward P. Mulcahy, has been employed by WSF in the engineering crew since 1980. He has been a Chief Engineer since February 1992. He applied for transfer to the position of "Relief Chief" by means of filing an "econogram" with Mary Liuska, WSF Dispatcher. A vacancy of Relief Chief was anticipated, a position with substantially higher take-home pay over and above the regular chief engineer salary scale, based on a great deal of travel time. Mulcahy understood that he was the most senior of the applicants and therefore would get the job pursuant to Rule 20 of the MEBA/WSF Agreement. But another person, Chief Engineer Duffy, was appointed Relief Chief, whereupon Mulcahy attempted to file a grievance with MEBA. However, a MEBA agent refused the grievance and affirmed the

WSF selection procedure. Thereupon Mulcahy filed the request for arbitration directly with MEC pursuant to RCW 47.64.150.

### ISSUES

1. Did WSF improperly assign someone other than Edward P. Mulcahy to a position of Relief Chief Engineer in violation of Rule 20 of the MEBA/WSF collective bargaining agreement?
2. If so, what is/are the remedy/remedies?

### POSITIONS OF THE PARTIES

#### Position of Grievant Mulcahy

Mulcahy asserts that when he learned of the vacancy to be created by the transfer of the incumbent Relief Chief Engineer, who was transferring to the M/V RHODODENDRON, he also learned that only one other transfer econogram on file was from a chief engineer with more seniority than he had, and that person would not be interested in the Relief Chief job. He also asserted that there had been at least one "big meeting" at WSF headquarters, and that Sr. Port Engineer Ben Davis had decided that he, Mulcahy, would not get the Relief Chief job. He alleged that WSF Dispatcher Mary Liuska had solicited an econogram from a Chief Engineer Tom Duffy who had more seniority than Mulcahy, when Mulcahy already had a right to the open Relief Chief position. Mulcahy alleged that Duffy's appointment was a violation of Rule 20 of the MEBA/WSF Agreement.

Mulcahy argues that the position of Relief Chief became "open" at the time Mary Liuska "received the Smith transfer request [to the RHODODENDRON] during the first week in April. [She knew] she would have to find a replacement. . . . at the moment Smith advised her of the request for job change his old position became 'open.'"

Inasmuch as Mulcahy had the senior econogram on file for those persons interested in job transfers at the time the job was open, he should have been awarded the position.

Because he was not awarded the position, Mulcahy suffered a loss of some \$52,871.63 for travel time he didn't get to do. Mulcahy requests MEC to order WSF to assign him to a Relief Chief Engineer position and to pay Mulcahy \$52,871.63 for the "lost" travel time.

#### Position of Washington State Ferries

WSF asserts that the Dispatcher's handling of the selection of the Relief Chief Engineer was precisely in accordance with MEBA/WSF Rule 20; i.e. Duffy's appointment was based upon the most senior chief engineer with an econogram on file at the time the relief chief position became open. WSF argues that the word open must be given its "ordinary and ... accepted" meaning, and further argued that the "accepted" meaning of an "open" position is a job that has been physically vacated by its former occupant.

WSF further asserts that MEBA indicated approval of the process, and that a MEBA official had so informed Mulcahy.

WSF requests MEC to dismiss this grievance.

Having read the entire record including the request for arbitration, the statement of grievances, the assertion of and the calculation of alleged lost opportunity to earn travel pay, the hearing transcript, and the post-hearing briefs, the Commission now enters its findings of fact.

#### FINDINGS OF FACT

1. Chief Engineer Mulcahy filed an "econogram" (application for transfer or reassignment) with WSF Dispatcher Mary Liuska

indicating interest in "all open chief engineer jobs" on February 8, 1992. At that time only Chief Engineer Glenn E. Bressler had more seniority than Mulcahy's had an econogram on file, but Bressler wanted another position outside the scope of this case.

2. On April 15, 1992 Chief Engineer Tom Duffy also filed an econogram for transfer.
3. The WSF Chief Engineer Seniority List, March 1992, indicates Thomas R. Duffy as No. 51, Glenn E. Bressler as No. 106, and Edward P. Mulcahy as No. 110.
4. Having heard that Tom Duffy might be considering reassignment to Relief Chief Engineer, WSF Mary Liuska did call Duffy, to ask if he intended to apply. It was undisputed that Dispatcher Liuska usually contacts all possible aspirants in order to preclude last-minute disruption of transfers or assignments and the consequent refilling of other positions each time a transfer or reassignment is made. It was also undisputed that she has been following this practice for the entire thirteen years she has been a dispatcher, as she was trained to do so by her predecessor.
5. The prior incumbent Relief Chief Smith vacated the Relief chief position on April 28, 1992.
6. Duffy was offered the position and did start work as Relief Chief on May 15, 1992, after he returned from vacation.
7. When Mulcahy complained to MEBA Port Agent Mark Austin and attempted to file a grievance through MEBA, Austin advised him that the assignment as made was proper and that Mulcahy "had no grievance." Austin testified that he "generally had three discussions a week for about three months" with Mulcahy.

8. Chief Engineer transfers and reassignments are governed by MEBA/WSF Agreement, Seniority Rule 20(e), as follows:

SECTION 20 -SENIORITY

(e) Open positions for each of the seniority classifications due to retirement, termination, and separation will be filled by using the seniority rosters and on-file applications for transfer and reassignment. All Employee requests will be retained on file for a period of one (1) year unless a written extension is received to extend the request for an additional year. If no applications are on file, the opening will be posted with the Union and the Employer and permanently filled within thirty (30) days.

9. The Agreement is silent with regard to the point in time at which a position is "open."
10. Black's Law Dictionary (5<sup>th</sup> rev. ed. 1979) defines the adjective open as follows:

**open**, *adj.* Patent; visible; apparent; notorious; not clandestine; not closed, settled, fixed, or terminated.

Each of the fifteen uses of the adjective open listed in Black is clearly not appropriate to define an "open" position.

11. Webster's II New Riverside University Dictionary lists seventeen definitions of the adjective open. The definition most likely to be considered appropriate to an "open position" is the following:

**open** *adj.* . . . **9.a.** Unoccupied; unengaged <an open telephone line>**b.** Not yet resolved or decided. . . .

Having entered its findings of fact, the Commission now hereby enters its conclusions of law, as follows:

### CONCLUSIONS OF LAW

1. The Marine Employees' Commission (MEC) has jurisdiction over this matter. Ch 47.64 RCW, particularly RCW 47.64.150 and 47.64.280.
2. MEC may not change or amend the terms, conditions, or application of the MEBA/WSF Agreement, which is the governing instrument in this matter. RCW 47.64.150.
3. Regarding the interpretation of the time at which this position was actually "open", pursuant to said Rule 20(e), this Commission concludes that it became "open" immediately when it was vacated by Chief Engineer Smith on April 28, 1992 and remained "open" until it was refilled by the assignment of Chief Engineer Duffy on May 15, 1992. Therefore, the position was still "open" at the time Duffy was so assigned.
4. It is clear that Dispatcher Liuska used both the seniority roster and the on-file applications for transfer and reassignment in making this Relief Chief assignment, as specified in Rule 20(e), MEBA/WSF Agreement.
5. With regard to the assertions questioning Dispatcher Liuska's canvassing of interested applicants for transfer after she already has a qualified applicant, her undisputed testimony regarding her practices of thirteen years and the reasons therefore was convincing, and her past practice eliminates any question about ambiguity of "open positions" in Rule 20(e). The Commission concludes that Liuska's canvassing has been and is a normal and effective practice, and not a violation of Rule 20(e).
6. Having concluded that the assignment of Chief Engineer Duffy to the Relief Engineer job was normal, the Commission



must conclude that Grievant Mulcahy failed to prove that WSF violated MEBA/WSF Rule 20(e), and the grievance should be dismissed.

Having read the entire record and having entered its findings of fact and conclusions of law, this Commission now hereby enters the following order.

ORDER

The request for grievance arbitration, filed by Edward P. Mulcahy against Washington State Ferries on April 27, 1993 and docketed as MEC Case No. 4-93, is hereby dismissed.

DONE this 21<sup>st</sup> day of January 1994.

MARINE EMPLOYEES' COMMISSION

/s/ HENRY L. CHILES, JR. Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner