

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

DAVID C. BROOKENS, )  
 ) MEC CASE NO. 5-85  
 Grievant, )  
 )  
 v. )  
 ) DECISION NO. 11-MEC  
 )  
 WASHINGTON STATE FERRIES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

David C. Brookens appeared pro se.

Kenneth Eikenberry, Attorney General, by Robert M. McIntosh, Assistant Attorney General, appeared on behalf of Washington State Ferries.

INTRODUCTION AND BACKGROUND

David C. Brookens (hereinafter Grievant) filed a grievance against Washington State Ferries (WSF) on May 22, 1985, asking for "return of plaintiff's job while awaiting jury trial for unlawful discharge by employer, in re King County Superior Court No. 85-2-04735-4." Grievant indicated on the grievance form that his grievance was not covered by procedures in a collective bargaining agreement.

On June 21, 1985, Commissioner Louis O. Stewart, as assigned hearing examiner, notified Grievant by letter that his grievance as filed was not complete and asked for more specific information, to wit:

What specific act or acts by the Washington State Ferry System are you alleging you were aggrieved by? On what date(s) did this/these acts occur? Were you a member of a collective bargaining unit at that time?

Commissioner Stewart informed Grievant that his answers would amend and be attached to his original grievance, and a hearing date would be set.

Not having received an answer, on October 8, 1985, Commissioner Stewart notified Grievant that it was Stewart's intention to return the grievance to the entire Commission on October 31, 1985, with a motion for dismissal, but also informing Grievant that if the required additional information was received on or before October 25, 1985, Stewart would proceed to set a hearing date and place and "no motion to dismiss the matter will be considered by the Commission at the October 31, 1985 meeting in the "Spike" Eikum Conference Room, Colman Dock, Seattle."

On October 28, 1985, Grievant phoned that he had just received the October 8 letter and that he would mail the additional information. He was advised by the MEC Administrative Assistant Anna Peterson to attend the October 31 Commission meeting.

On October 31, 1985, a telephone message showing a Seattle phone number was delivered to Commissioner Stewart that Grievant could not attend the commission meeting. Stewart attempted to return the call, but Grievant was not there.

In view of Grievant's October 28 telephone statement that he had only then received Stewart's letter, Commissioner Stewart did not introduce the motion to dismiss the grievance. Instead,

immediately after the October 31 Commission meeting, Stewart wrote Grievant another letter extending the time to November 15, 1985 in which to amend the original grievance.

On November 4, 1985, Grievant filed his response, thereby adding to the original grievance:

- 1) Unjust vessel discharge on April 22, 1982.
  - A) That the proper vessel log book entries were not made: Exhibits #1,2,3 and 4.
  - B) That I was fired without warning.
- 2) Unjust termination on May 7, 1982; that my prior work record medical condition and Title VII Civil Rights were not considered;
- 3) Violation of RCW 49.60.210 on September 29, 1982 by Mr. Dave Rice, WSF Personnel Manager.

Grievant further alleged that he was libeled by the Department of Transportation, that his character was defamed by the Department's "reliance upon a certain affidavit of C.J. Rowe." He said he believed his charge of defamation should be heard by a court of competent jurisdiction and by a 12 person jury, but a just monetary award by the Commission would settle the matter.

Exhibits 1, 2 and 3 were affidavits by three chief engineers aboard the M.V. Yakima that "there were no written mentions of personal reprimands, counseling or warnings to Mr. Brookens from

Mr. Rowe during the time period of February, March and through the 24<sup>th</sup> of April, 1982, in the engine room log books aboard the M.V. Yakima.

Exhibit 4 was a copy of WSF Policy Circular #03-R1, Employee Misconduct.

Also appended to Grievant's November 4, 1985 amendment was a document on a District No. 1 - Pacific Coast District, Marine Engineers Beneficial Association (MEBA), dated June 28, 1984, listing three categories of names. Grievant's name appeared in the following category:

The following applicants for membership were dropped from District No. 1 - Pacific Coast District, MEBA for failure to complete payment of their Initiation Fee on the prescribed due date and/or have been found to be one year or more delinquent in their service charge payments.

On November 13, 1985, Commissioner Stewart again wrote to Grievant asking if he was a member of MEBA at the time of the alleged actions causing the grievance, and explaining the statutory definition of "employee" (RCW 47.64.011(5)) for eligibility to have his grievance heard by the Commission. Stewart again extended the due date to December 13, 1985, before a hearing date would be set.

On November 14, 1985 Grievant filed an answer identical to that of November 4, 1985, but adding a request for a "settlement conference to be scheduled for the afternoon of December 6, 1985, or during the 2<sup>nd</sup> week of Dec., 1985."

On December 12, 1985 Grievant filed a statement that he was a member of MEBA, District #1, when the alleged cause of grievance occurred. Grievant requested that Commissioner Stewart contact U.S. Assistant Attorney Kenneth R. Parker and that Stewart take no further action without Parker's approval, but that "I retain power of attorney to myself in this matter, however."

On December 13, 1985, Commissioner Stewart set a hearing date for the grievance filed on May 22, 1985, as amended by Grievant's letters of November 9 and 14 and December 12, 1985. Hearing was set for January 27, 1986, in the "Spike" Eikum Conference Room, Colman Dock, Seattle. Stewart advised Grievant that he had not contacted U.S. Attorney Parker as Parker was neither a party nor a counsel of record. Stewart stated his intention to allow the parties time to reach a settlement, or to reach agreement on the issue and possible remedy to expedite and effectuate fair treatment of the parties.

By copy of a letter to Grievant dated December 24, 1985, Assistant U.S. Attorney Kenneth R. Parker advised that neither he nor the U.S. Attorney's Office was representing Grievant in this matter.

On January 23, 1986, WSF filed a Motion for Summary Judgment.

Commissioner Stewart convened the hearing on January 27, 1986, as scheduled. Because Grievant could have had only one business day at most after being served the Motion for Summary Judgment, which did not provide a reasonable period of time to prepare an answer to said Motion before the scheduled hearing on January 27, 1986, Commissioner Stewart, after convening said hearing,

announced that (1) he would allow Grievant to present his case at this time, (2) he would allow Grievant until February 15, 1986, to file an answer to the Motion for Summary Judgment, and (3) he would hold off hearing the WSF rebuttal until after the decision on the Motion for Summary Judgment.

The other two Commissioners did not participate in the hearing. All three Commissioners have read or heard the original grievance, the amendments as filed, the Motion for Summary Judgment and attachments, and the hearing transcript.

The Marine Employees' Commission now establishes the following positions of parties, findings of fact and conclusions of law, does not attempt to reach a decision on the merits of this case, but does reach a decision on the WSF Motion for Summary Judgment only.

#### POSITIONS OF THE PARTIES

##### GRIEVANT

The foregoing Introduction and Background lists Grievant's original grievance and subsequent amendments. At the hearing Grievant first demanded that the Court Reporter and a WSF witness not be allowed in the hearing room. He demanded a secret federal grand jury trial. He also demanded that MEC go to the King County Superior Court records to get its facts, rather than hold this hearing. In any event, according to Grievant, the entire case was before the Court of Appeals, Division I, and would be heard in about thirty days. He wanted his job of marine engineer back with back wages or else double back wages

and \$25,000 damages.

WASHINGTON STATE FERRIES

The position of WSF is described in Finding of Fact No. 3.

ISSUE(S) AND REMEDY

Although a thirty minute recess was allowed for the parties to reach agreement on the issue(s) and remedy, no agreement was reached.

FINDINGS OF FACT

1. Grievant was a marine engineer employed by WSF at the time of alleged termination.
2. There is an apparent conflict between Grievant's indication that his termination was not covered by a collective bargaining agreement and his signed statement that he is a member of MEBA. That conflict is not resolved herein.
3. Based upon documents filed by WSF with its Motion for Summary Judgment:
  - A. Mr. Brookens has previously filed the same case with the Public Employment Relations Commission (PERC), has voluntarily withdrawn it, and has been denied the opportunity to reopen it.
  - B. Mr. Brookens has previously settled a superior court case involving his dismissal for \$200, in the process releasing WSF and the State of Washington from any and

all claims arising out of his dismissal. Relying upon this release, the court has denied Mr. Brookens' efforts to file another case resulting from his dismissal.

4. On February 11, 1986, Grievant filed a response to the WSF Motion for Summary Judgment. That response only repeated prior assertions and did not reply in any way to the WSF Motion or its appended documents.
5. For the purposes of this decision on WSF's Motion for Summary Judgment, all facts pertaining to the merits of this case and/or the attempt to hold a fair hearing are omitted.

Based upon the foregoing Findings of Fact, the Marine Employees' Commission adopts the following Conclusions of Law.

#### CONCLUSIONS OF LAW

1. Despite the uncertainty as to whether Grievant meets the statutory definition of "ferry employee" under RCW 47.64.011, MEC has given Grievant the benefit of the doubt for purposes of the Motion for Summary Judgment and has assumed jurisdiction over this matter.
2. In considering the Motion for Summary Judgment, the MEC must determine whether a genuine issue of material fact exists. A material fact is one upon which the outcome of the grievance depends. Ashcraft v. Wallingford, 17 Wn. App. 853, 854; 565 P.2<sup>nd</sup> 1224 (1977).



3. Summary Judgment should not be granted to WSF unless, considering all the evidence and the reasonable inferences therefrom most favorably to Grievant, a reasonable person could only reach one conclusion. Turngren v. King Co., 104 Wn 2<sup>nd</sup> 293.
4. The uncontroverted facts presented by WSF in support of its Motion for Summary Judgment show that prior cases and settlement bar any claim grievant may have against WSF relating to his alleged improper termination.
5. There is no genuine issue of material fact in relation to WSF's Motion for Summary Judgment.
6. The Motion for Summary Judgment should be granted, and the grievance should be dismissed.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Marine Employees' Commission adopts the following Order:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that: The Motion for Summary Judgment is granted, and David C. Brookens' grievance against WSF is dismissed.

DATED at Olympia, Washington, this 12<sup>th</sup> day of March, 1986.

MARINE EMPLOYEES' COMMISSION

/s/ DAVID P. HAWORTH, Chairman

/s/ LOUIS O. STEWART, Commissioner

/s/ DONALD E. KOKJER, Commissioner