STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

NANCY MORE OLWELL,	)	
	)	MEC CASE NO. 5-89
Grievant,	)	
	)	DECISION NO. 50-MEC
v.	)	
	)	FINDINGS OF FACT,
WASHINGTON STATE FERRIES,	)	CONCLUSIONS OF LAW
	)	AND ORDER
Employer.	)	
	)	

Ned Olwell, Attorney at Law, appeared for the grievant.

Kenneth O. Eikenberry, Attorney General, by Robert M. McIntosh, Assistant Attorney General, appearing for the employer.

INTRODUCTION

Nancy More Olwell filed a request for grievance arbitration with the Marine Employees' Commission on August 28, 1989 alleging that employer violated Rule 33.01 of the 1985-1987 Collective Bargaining Agreement between WSF and IBU by terminating her employment. Olwell asserted in her request for a grievance hearing that she was not given sufficient nor fair opportunity to defend against employer's untrue allegations and that employer's allegations were insupportable.

Upon receipt of the request for grievance arbitration and following a preliminary investigation by MEC, the parties were advised that a hearing would be scheduled in the matter for October 26, 1989 before Chairman Dan E. Boyd, the designated arbitrator.

Before convening the hearing, Arbitrator Boyd provided the parties an opportunity to reach a settlement or to agree on a definition of the issue(s). The parties did not agree on settlement, but did agree to specify the issue. Thereupon the arbitrator proceeded

with the hearing. Transcripts were available on or about November 21 and post-hearing briefs were postmarked on December 29, 1989.

BACKGROUND

The Grievant

Nancy Olwell, the grievant, was first offered employment by Washington State Ferries to work in its terminal department sometime in April 1988. Olwell was expecting the birth of her child and she requested a delay in reporting to work. The baby was born on May 31, 1988 and she began work on July 6 or 7, 1988.

Olwell was employed as a traffic attendant and ticket taker primarily at the Fauntleroy and Vashon terminals of WSF. Her work consisted of directing traffic, taking tickets at Fauntleroy and answering questions from the public, maintaining some traffic statistics, and cleaning the terminal. Cleaning duties included sweeping, mopping, cleaning and maintaining restrooms, emptying trash, washing windows, and general maintenance.

Olwell missed the normal orientation session for new employees because of her later reporting date and received on the job training for a total of 56 hours. New employees normally receive training amounting to 50 to 60 hours. There is no assertion that grievant's training was not adequate in quality or quantity.

On September 11, 1988, Olwell was placed on layoff status when the fall schedule changed because of her lack of seniority. She had worked approximately 200 hours in the period July 6—September 28, 1988.

In accordance with normal employer practice, an evaluation was made of Olwell's job performance by the two terminal agents who regularly supervised her work. Agents Al Walker and Melvin Phelps

in their appraisals both recommended that Olwell not be retained as an employee. One or both terminal agents cited in their evaluations, that Olwell had failed to develop acceptable traffic direction skills, that she did not perform a reasonable amount of cleanup duties and had unsatisfactory attendance.

After review of the evaluations, WSF Terminal Manager Lien advised Olwell by letter that employer had scheduled a hearing for 3:00 p.m. October 17, 1988 at employer's Colman Dock, Pier 52 offices in Seattle, that the purpose of the hearing was to consider Olwell's work record and to enable her to respond to charges of unsatisfactory performance. Olwell was advised that if she wished she might attend the hearing and have a representative present. Olwell was further advised that the outcome of the review at the hearing might be termination of employment.

Olwell thereafter informed employer that she would be unable to attend the meeting as she would be in eastern Washington at that time. Terminal Manager Lien advised employer's personnel manager, Dave Rice, of the above and Rice thereafter scheduled a new conference with Olwell for November 2, 1988.

Inlandboatmen's Union, the bargaining representative was represented by its agent, Dave Freiboth at the conference. Olwell was given an opportunity to explain the complains concerning her job performance. Following the conference, employer representatives Kiesser and Lien discussed Olwell's work record and concluded that employer would not retain Olwell as an employee.

After the decision to terminate Olwell was made by employer, a letter was sent to Olwell on November 4, 1988, advising that her skills and performance levels were not suitable for terminal positions and that her employment with the ferry system was terminated.

Upon receipt of the letter of termination Olwell requested assistance from her union, IBU, in appealing the termination. IBU thereafter investigated the circumstances of Olwell's termination and advised Olwell in a letter dated November 29, 1988, that the union had completed its investigation and was not able to find grounds to refute the bonafide reason that employer had used in terminating her. Olwell was further advised that the labor agreement between the employer and IBU restricted the union's ability to pursue the matter any further, and that the union could not accept a grievance.

IBU informed the Marine Employees' Commission by letter of October 6, 1989 that it would not be a party to the proceeding in this matter.

ISSUES

The parties agreed that the primary issue was whether Nancy Olwell was properly terminated under Rule 33.01 of the collective bargaining agreement.

Employer raised a second issue, that the matter was not properly before the Marine Employees' Commission because it was not filed in a timely manner. Employer relied on the collective bargaining agreement language that requires the filing of a grievance within a 30 day time period.

RELEVANT CONTRACT PROVISIONS

The July 1, 1985 collective bargaining agreement expired on June 30, 1987. At the time of the filing of request for grievance arbitration the parties had not entered into a successor agreement. Pursuant to RCW 47.64.170(7) the terms and conditions of the 1985-1987 collective bargaining agreement remain in effect until a successor agreement is concluded.

Rule 33.01 of the contract in effect between employer and the union at the time of the termination of Olwell provides:

> RULE 33 – PROBATIONARY PERIODS
>
> 33.01 Newly hired employee shall serve a probationary period equal to 700 compensated hours. The employee may be terminated during the probationary period or at the end of the probationary period for a bonafide reason(s) relating to the business operation and said employee shall not have recourse through the grievance procedure.

Rule 16.04 Step I provides that

> RULE 16.04
>
> STEP 1 – INFORMAL
>
> 1. In the event of a dispute arising out of the interpretation of this Agreement, the aggrieved employee, the Union or the Union steward shall as soon as possible, but in no event more than thirty (30) calendar days after the facts and circumstances actually become known, or in the exercise of reasonable care should have become known, orally present the grievance to the employee's supervisor or his designee.

RELEVANT STATUTORY PROVISIONS

> **RCW 47.64.150 Grievance Procedures.** An agreement with a ferry employee organization that is the exclusive representative of ferry employees in an appropriate unit may provide procedures for the consideration of ferry

employee grievances and of disputes over the interpretation and application of agreements. Negotiated procedures may provide for binding arbitration of ferry employee grievances and of disputes over the interpretation and application of existing agreements. An arbitrator's decision on a grievance shall not change or amend the terms, conditions or applications of the collective bargaining agreement. The procedures shall provide for the invoking of arbitration only with the approval of the employee organization. The costs of arbitrators shall be shared equally by the parties.

Ferry system employees shall follow either the grievance procedures provided in a collective bargaining agreement, or if no such procedures are provided, shall submit the grievances to the marine employees' commission as provided in RCW 47.64.280.

RCW 47.64.280(2) The marine employees' commission shall: (a) Adjust all complaints, grievances, and disputes between labor and management arising out of the operation of the ferry system as provided in RCW 47.64.150 . . . . .

> (3) In adjudicating all complaints, grievances, and disputes, the party claiming labor disputes, shall, in writing, notify the marine employees' commission which shall make careful inquiry into the cause thereof and issue an order advising the ferry employee or the ferry employee organization representing him or her and the department of transportation as to the decision of the commission.
>
> The parties are entitled to offer evidence relating to disputes at all hearings conducted by the commission. The orders and awards of the Commission are final and binding on any ferry employee or employees or their representative affected thereby and upon the department.

RELEVANT ADMINISTRATIVE CODE PROVISIONS

> WAC 316-02-003 POLICY – CONSTRUCTION – WAIVER. The policy of the state being primarily to promote peace in labor relations in the Washington state ferry system, these rules and all other rules adopted by the agency shall be liberally construed to effectuate the purposes and provisions of the statutes administered by the marine employees' commission and nothing in any rule shall be construed to prevent the commission and its authorized agents from using their best efforts to adjust any labor dispute. The commission and its authorized agents may waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver.

POSITIONS OF THE PARTIES

Position of Grievant

Grievant agrees that the primary issue concerns whether Olwell was properly terminated under Rule 33.01 of the collective bargaining agreement.

Grievant notes in reference to the issue raised by employer of timely filing of its grievance that Rule 33.01 of the collective bargaining agreement precludes a probationary employee from using the grievance procedure and therefore is not bound by the time constraints in the filing of grievances on which the employer relies to challenge timeliness. In view of the above, grievant argues that since she could not use the grievance procedure, Rule 16.04 does not apply in this case.

Grievant argues that since she is prohibited from invoking the grievance procedure under Rule 16 of the collective bargaining agreement, she is not bound by the time constraints within Rule 16 nor is she attempting to change or amend the terms (time

restraints) of Rule 16 because she is in any event prohibited from proceeding under the rules.

Grievant argues that her request for grievance arbitration was timely filed under RCW 4.16.130 which provides that

> An action for relief not herein before provided for, shall be commenced within two years after the cause of the action shall have accrued.

In her argument that grievant was not properly terminated pursuant to Rule 33.01 which requires "bonafide reasons," grievant states that she sees no distinction between "just cause" and "bonafide" reasons as Webster's 9th New Collegiate dictionary states that "reason" and "cause" are synonyms and "just" and "bonafide" both encompass "good faith, authenticity and genuineness."

Grievant argues that employer failed to establish bonafide, i.e. good faith in support of its three charges, individually or collectively, as required.

Finally, grievant states in her proposed conclusions of law that at the time of grievant's discharge, employer did not have bonafide reasons to substantiate any one of the three allegations against grievant, and that the Commission should reinstate grievant to her employee status without loss of seniority as to the date of hire. Further, grievant should be awarded the amount of wages lost from the state of her wrongful and unjust discharge including lost benefits and taxable costs.

Position of the Employer

Employer agrees that the first issue in this case concerns whether Nancy Olwell was properly terminated under 33.01 of the collective bargaining agreement.

Employer raises a threshold issue as to the timeliness of the filing of the grievance. Employer argues that the matter is not properly before the MEC because it was not filed in a timely manner. Employer's position is based on the fact that the collective bargaining agreement contains language which requires the filing of a grievance within a 30 day time period.

Employer agrees that the Commission has a right to hear direct complaints of employees even outside the collective bargaining agreement grievance process. However, employer notes the Commission has made it clear in prior cases before it that its decisions or decisions on a grievance shall not change or amend the terms, conditions or application of the collective bargaining agreement.

Employer argues in reference to the termination of Olwell, that under the contract just cause and progressive discipline are not required. It states that the language of the collective bargaining agreement (Rule 33.01) clearly established a different standard for probationary employees and that the record developed in the hearing will show that the termination of Olwell meets the only standard that applies in this case. Rule 33.01 provides for the termination at the end of a probationary period for a "bonafide reason relating to the business operation of the ferry system."

Employer's position is that it had three bonafide reasons relating to the business operation of the ferry system:

1) Employee Olwell's failure to show up for a work assignment on the appropriate day, after having been specifically directed to do so;

2) Olwell's problems in completing assignment to clean up tasks;

3) Olwell had problems with traffic direction and difficulty in performing this fairly important aspect of her job.

Employer sums up its reasons for the termination of Olwell as follows:

> Three items of inadequate job performance, perhaps not of great significance each of themselves, but when taken together and applied to the situation of a probationary employee who was basically on trial, subject to discharge for reasons far less substantial Than just cause, taken together, all these things fully justified the employer and the decision that was made to terminate Olwell.

In its proposed Conclusion of Law, employer argues that the requirement of a bonafide reason relating to the business operation for termination of a probationary employee under Rule 33.01 does not require a showing of just cause. It requires only that a demonstration by employer that its reason for termination was based on its perception of the needs of its business operation and that such termination was not arbitrary, capricious or retaliatory or discriminatory.

In conclusion employer urges the Commission to find that the discharge of Nancy Olwell by employer was for bonafide reasons relating to the business operations of WSF and did not violate Rule 33.01 of the collective bargaining agreement.

The Inlandboatmen's Union

IBU notified the MEC that after the review of the allegations raised in the request for grievance arbitration, it appeared that there was no allegation raised against the IBU and that the union was not a necessary party to the case. The union further advised

the MEC that it would not appear at the hearing nor would it take part in the case.

In his appearance and testimony before the Commission at the hearing in this matter, union representative Larry Mitchell stated that he was present because of a subpoena issued by grievant and not on behalf of the IBU.

Mitchell stated that IBU made an investigation of the termination of Nancy Olwell in response to her request and after the investigation advised Olwell that the union was not going to pursue the case in arbitration or through grievances. Mitchell agreed, in response to a question from employer's counsel, that under the collective bargaining agreement the union had no recourse as far as challenging employers's decision.

DISCUSSION

Timeliness of Filing of Grievance

At the time of filing of Nancy Olwell's request for grievance arbitration, the MEC's rules and/or procedures did not contain any time limits in reference to the filing of complaints before the Commission.[1]

The history of Chapter 47.64 RCW indicates that the legislature intended that individual employee rights be maintained so as to allow individual employees to bring grievances and appeals before the statutory body charged with administration of the law. At the

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[1] In a revision of its rules adopted by MEC on 9/27/89, (after the filing of this request for grievance arbitration) Chapter 316-65-02 WAC was revised to state, in part, "Unless otherwise specified in the agreement, a request for grievance arbitration must be filed not more than ninety days after the party filing such grievance knew or should have known of the alleged injury, injustice or violation."

time it administered Chapter 47.64 RCW the Public Employment Relations Commission also ruled that parties to a collective bargaining agreement could not deprive an individual employee of their rights conferred by essentially similar statutory language. See WSF, Decision 1228 (MRNE, 1981); WSF Decision 1370 (MRNE, 1982)

The Probationary Period

The purpose of the probationary employment period is to allow the employer opportunity to observe an employee's overall job knowledge, performance and contribution on a trial basis without an initial commitment of continued employment.

The employee/employer relationship changes once an employee completes the probationary period and obtains permanent status. From that point on, the employer is required to recognize the principle of seniority, must demonstrate just cause as a basis for termination, and must submit any disputes in reference to a termination for determination under the grievance procedure of the contract.

Probationary Period Evaluation Procedure

Carol Lien, employer's terminal's manager for the south area of the ferry system stated that one of her duties included the evaluation of probationary employees near or at the end of the probationary period. Lien received appraisals, recommending termination of Olwell from Supervisors Walker and Phelps at the end of the 1988 work period. Thereafter she met with Olwell to discuss her work performance.

The record provides no evidence of any departure from WSF probationary review procedure in its treatment of Olwell.

According to Lien, during the summer of 1988 WSF hired 39 probationary employees from the hiring list maintained by IBU. By the end of the probationary period WSF had terminated 13 of the new hires.

The Decision to Discharge

Employer representative Lien, after consultation with other supervisory personnel, made the decision to terminate Olwell. Lien concedes, in reference to her reliance on the appraisals by first line supervisors Phelps and Walker, that employer relied on both direct and hearsay evidence in reference to shortcomings in the work habits of employee Olwell.

Grievant argues that employer is required to treat probationary employees in a fair and equitable manner, and that termination of an employee must be based on bonafide reasons of good faith, and upon an objective, thoughtful and thorough evaluation process. Grievant argues further that the WSF has not met the requirements listed above in its termination of Nancy Olwell.

The MEC has held in a prior case (MEC Case 6-86, Dec. #26-MEC) that if the MEC were to reverse a discharge the decision would in effect render the employer's bargained for right to terminate a probationary employee at any time meaningless and would amount to a modification of the terms of the parties collective bargaining agreement. Such an order would be inconsistent with the intent of the statute which states in RCW 47.64.150 that a decision on a grievance shall not change or amend the terms, conditions, or applications of a collective bargaining agreement.

MEC held, in the above case, that the omission of better evidence does not negate the fact the employer has only to meet a lesser standard for the discharge of a probationary employee.

On the basis of review of the entire record the Commission concludes that WSF has established that its discharge of Nancy Olwell was the result of a reasoned decision based on facts actually reported to it.

A review of the hearsay evidence relied on by WSF (in part) in its decision to terminate Olwell suggests that employer, in the future, might be well advised to require a more thorough investigation of the work record of an employee prior to termination of employment.

However, the Commission concludes, in agreement with employer, that all that is required here is a demonstration by the employer that its reason for termination was based on its perception of the needs of the business operation and that such decision was not arbitrary, capricious, retaliatory or discriminatory.

FINDINGS OF FACT

1. Washington State Ferries, a department of the Washington State Department of Transportation, is an employer under RCW 47.64.

2. Inlandboatmen's Union of the Pacific is the collective bargaining representative under RCW 47.64 for employees such as grievant.

3. WSF and IBU are parties to a collective bargaining agreement which provides, in part (under Rule 33.01) that the employee may be terminated during the probationary period or at the end of the probationary period for a bonafide reason relating to the business operation and that said employee shall not have recourse to the grievance procedure.

4. The MEC has the authority to adjust Olwell's grievance which clearly arises from the operation of the ferry system, pursuant to RCW 47.64.150 and 47.64.280 (2). Olwell did not

have access to a contractual mechanism for the resolution of this dispute, because of the provisions of the collective bargaining agreement which prohibit the arbitration of the discharge of a probationary employee. Therefore, the grievant is not bound by Rule 16.04 of the IBU-WSF Contract and can proceed under the statute directly to the MEC.

5. The Marine Employees' Commission, in its decision on this grievance, has not changed or amended the terms, conditions or application of the collective bargaining agreement.

6. Grievant Olwell's termination was based on bonafide reasons relating to the business operation and does not require a showing of just cause.

CONCLUSIONS OF LAW

1. Nancy Olwell was a probationary employee according to the terms of the collective bargaining agreement (33.01). Therefore the contractual grievance and arbitration procedures of the contract within the meaning of RCW 47.64.150 were not applicable to Olwell with respect to her discharge.

2. The MEC has jurisdiction in this matter pursuant to RCW 47.64.280 (2).

3. The discharge of Nancy Olwell by WSF during her probationary period was not arbitrary or capricious and did not violate Rule 33.01 of the contract in effect between employer and union.

ORDER

The grievance of Nancy Olwell is hereby dismissed.

Dated this 22nd day of February, 1990 at Tacoma, Washington.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD, Chairman

/s/ DONALD E. KOKJER, Commissioner

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

NANCY MORE OLWELL, Grievant, v. WASHINGTON STATE FERRIES, Employer.	)	MEC CASE NO. 5-89 DECISION NO. 50-MEC CONCURRING OPINION

This concurring opinion agrees with the Order in Decision No. 50-MEC as drafted by the majority of the Marine Employees' Commission (MEC), but disagrees with certain "facts" as stated and with certain "conclusions of law" as reached by the majority.

This concurrence recognizes that MEC must ask and answer two questions correctly before it can reach a valid arbitration decision. First, the arbitrator, whether in private industry or in the public domain, must ask "What does the collective bargaining agreement say on this matter?" "If the words are plain and clear conveying a distinct idea, there is no reason to resort to technical rules of interpretation. . . ." (Elkouri and Elkouri, How Arbitration Works, 4th Ed., p342 (1985)) "The primary goal of the 'rights' arbitrator is to determine and carry out the material intent of the parties." (ibid, p343)"In determining the intent of the parties, inquiry is made as to what the language meant to the parties when the agreement was written (ibid, p348), citing Globe Newspaper Co., 74 LA 1261, 1268 (1980), in which Arbitrator Samuel S. Kates stated that "to determine the material intention of the parties from the language they used, that language should be construed in the light of the purpose clearly sought to be accomplished, giving consideration to the negotiations leading to the adoption of that language.") The Elkouris continue, citing

Autocar Co., 10 LA 61, 63 (1948),"It is this meaning that governs, not the meaning that can be possibly read into the language. "In understanding the intent of the parties, "The usual and ordinary definition of terms as defined by a reliable dictionary should govern." (Arbitrator Hayes in 72 LA 788, 794 et al, as cited in Elkouri, ibid, p352.)

Second, MEC is a creature of the Washington State Legislature (Ch 47.64 RCW). In arbitrating "rights" disputes, not only must MEC observe and comply with the powers and responsibilities in Chapter 47.64 RCW, but also the constraints and limitations. In addition, MEC must comply with any other acts of the legislature pertaining to administrative tribunals (e.g., Ch 34.05 RCW, the Administrative Procedures Act), unless specifically exempted from such act.

In my opinion, the majority of MEC has violated the requirement to arbitrate the instant case in accordance with clear with plain language in the collective bargaining agreement; and they have violated RCW 47.64.150 and have not complied with RCW 34.05.461 in the entry of their decision and order.

In my opinion, the majority decision in the instant case has ignored clear and plain language in the WSF/IBU collective bargaining agreement, has violated RCW 47.64.150 by changing or amending the terms of said agreement, has misapplied a prior MEC decision based upon a different collective bargaining agreement, and tends to establish a "rule" that probationary employees have no rights no matter what the collective bargaining agreement specifies.

For whatever reason, the majority having assumed jurisdiction to arbitrate the grievance in spite of RCW 47.64.150, and then having noted the grounds in Rule 33.01 for terminating probationary employees, show no evidence of having tested the stated reasons for the termination being protested in this case.

For all of the foregoing reasons, I have not signed the majority opinion; and I am herein spelling out my reasoning therefore in the hopes of renewing consideration of MEC cases on their individual merits.

Accordingly, I have hereinbelow attempted to identify what I believe to be the findings of fact either overlooked or misstated by the majority and conclusions of law which I believe Decision No. 50-MEC should contain. Because the citations of fact and law and conclusions of law were not enumerated in such as manner as to indicate precisely which were relied upon in reaching their decision in accordance with RCW 34.05.461 and WAC 10-08-210, I have found it necessary to repeat some, but I have tried to keep repetition to a minimum.

FINDINGS OF FACT

1. Probationary periods for newly hired WSF employees in the Terminal Division are governed by Rule 33.01, WSF/IBU 1985–1987 Agreement, as follows:

> RULE 33 – PROBATIONARY PERIODS
>
> 33.01 Newly hired employees shall serve a probationary period equal to seven hundred (700) compensated hours. The employee may be terminated during the probationary period or at the end of a probationary period for a bona fide reason(s) relating to the business operation and said employee shall not have recourse through the grievance procedure. (Emphasis added.)

2. Black's Law Dictionary, 5th Ed., 1979 defines the term bona fide as follows:

> **Bona fide** In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Merrill v. Dept. of Motor Vehicles, 71

Cal.1d 907, 80 Ca.Rptr. 89, 458 P.2d 33. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine, and not feigned. Bridgeport Mortgage & Realty Corporation v. Whitlock, 128 Conn. 57, 20 A.2d 414, 416. See also **Good faith**.

Good faith. Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. Doyle v. Gordon, 158 N.Y.S.2d 248, 259, 260. Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. Efron v. Kalmanovitz, 249 Cal.App. 187, 57 Cal.Rptr. 248, 251. See **Bona fide.**

3. Rule 33.01 in the 1983—1985 WSF/IBU Agreement is identical to Rule 33.01 cited in Finding of Fact No. 1, supra. However, the 1980—1983 Agreement is silent regarding probationary periods and/or limitations on the access of new hired employees to grievance procedures.

4. RCW 47.64.150 governs grievance procedures for ferry employees, as follows:

47.64.150 Grievance Procedures. An agreement

> with a ferry employee organization that is the exclusive representative of ferry employees in an appropriate unit may provide procedures for the consideration of ferry employee grievances and of disputes over the interpretation and application of agreements. Negotiated procedures may provide for binding arbitration of ferry employee grievances and of disputes over the interpretation and application of existing agreements. An arbitrator's decision on a grievance shall not change or amend the terms, conditions or applications of the collective bargaining agreement. The procedures shall provide for the invoking of arbitration only with the approval of the employee organization. The costs of arbitrators shall be shared equally by the parties.
>
> Ferry system employees shall follow either the grievance procedures provided in a collective bargaining agreement, or if no such procedures are provided, shall submit the grievances to the marine employees' commission as provided in RCW 47.64.280. (Emphasis added.)

5. The record reveals little evidence of any actual supervision of Olwell during her employment. Although much of her work, including all of her ticket taking, was at Fauntleroy (TR 96), and her supervisors' (Terminal Agents) offices were at Fauntleroy (TR 34, 35, 36, 59, 60), Olwell had very little contact with either one of them. The only contact with Terminal Agent Phelps was one telephone call assigning her to work at Vashon at 12:10 a.m., July 21, 1988. (TR 72) The only specific evidence of actual "eye ball" supervision or instruction from Terminal Agent Walker, other than work assignments, was his observation of her timidity with her hand signals to drivers. "I watched her up to that point . . . hoping that maybe she would catch on. But after that, I don't have any recollection of really paying attention to her." (TR 40, 41) Walker's expressed concern was that "she was standing out in the heat too long" and he wanted her to "sit down and

relax a little bit." (TR 55) and "on this particular day. . . I was more concerned about the heat on her. . . ." (TR 57) Walker asked one person with whom Olwell worked "how she thought (Olwell) was doing. And she gave me kind of a negative input ... that she was lax on her clean-up duties." (TR 42) And in answer to a direct question as to whether anything ever came to Walker's "attention that something wasn't cleaned up, that you went back and determined that was based on Nancy (Olwell's) fault, did you?" Walker's answer was, "No." (TR 50) Neither Walker nor Phelps stated they ever looked at the condition or cleanliness of the terminals, nor that either had spoken with Olwell about the complaint. Olwell asserted that no complaint was ever made to her. (TR 216) Walker could not call Olwell immediately that he knew she missed coming to work, because he had forgotten his on-call list. He agreed in the hearing that, had he called Olwell promptly, there might not have been a grievance complaint. (TR 46) Walker had no recollection of telling Olwell that the misunderstanding regarding the date of her graveyard shift was a common occurrence and "Don't worry about it."(TR 39—40, 213)He said they "had a slight discussion about it and I left it." (TR 38)

6. WSF Terminals Manager—South Carol Lien asserted that "these types of problems . . . do not tend to correct themselves." (TR 112)

7.. Both Terminal Managers are occupied with matters other than direct supervision of terminal personnel. Walker "was generally busy with the duties in my office or had been -- I'd have to go to Vashon for something or Southworth taking care of the other terminals. So I couldn't follow her around all day." (TR 43) Phelps has "problems with respect to supervising people . . . It's hard to get to all the docks every day, especially when you have banking commitments to

make daily. . . . We gather up all the revenue at the docks at Southworth and Fauntleroy, consolidate that information and make a deposit to the bank." (TR 61) Phelps had little opportunity to observe Olwell, because she tended to be assigned at the end of the week, and Phelps worked the first part of the week. (TR 64)

Having enumerated the findings of fact necessary to determine whether or not Olwell was properly terminated for "bonafide business reasons" under Rule 33.01, I believe that the majority entered certain "conclusions of law" in error, and should have entered the following conclusions of law.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission (MEC) has general jurisdiction over disputes between ferry employees and Washington State Ferries. (Ch 47.64 RCW, especially RCW 47.64.280)

2. However, MEC must recognize that ferry employee may submit a grievance directly to MEC only if the employee's collective bargaining agreement so provides or does not provide any other grievance procedure. (RCW 47.64.150; see Finding of Fact No. 4, supra.)

3. Even if MEC did assume jurisdiction of the instant case on the grounds that the WSF/IBU Agreement did not provide a grievance procedure for a probationary employee, MEC is prohibited from changing or amending the terms, conditions, or applications of the WSF/IBU Agreement. (RCW 47.64.150; see Finding of Fact No. 4, supra.) Therefore MEC must recognize two clauses in Rule 33.01 of the WSF/IBU Agreement as material, to wit: First,"the employee may be terminated during the probationary period or at the end of a probationary period for a bona fide

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

When the majority concludes that probationary employees have recourse to some grievance procedure other than the one provided in the WSF/IBU Agreement, such a conclusion is tantamount to changing or amending the terms of said collective bargaining agreement, patently a violation of RCW 47.64.150.

4. Even if the majority of MEC does conclude that it can change the terms of the WSF/IBU Agreement, such a change should not be illogical. (See "Avoidance of Harsh, Absurd or Nonsensical Results" in Elkouri, ibid, p354; see also Arbitrator Nathan in 76 LA 1017, 1022 and Sembower in 76 LA 909, 911, et al, as cited by the Elkouris.) It is patently illogical for MEC to recognize that the WSF/IBU grievance procedure requires <u>regular employees who have completed their probations</u> to file a request for the first step of the arbitration procedure under Rule 16, WSF/IBU Agreement, within thirty days, but then to conclude that <u>probationary</u> employees have two years or 720 days under RCW 4.16.130 as Olwell proposes, or some other rationale.

5. The majority should have taken official notice of the advent of Rule 33 – Probationary Periods in the 1983-85 WSF/IBU Agreement. Because the 1980-1983 Agreement did not contain any rule pertaining to probationary periods or the termination of probationary employees, the present Rule 33 is clear evidence that the parties specifically intended to provide a different standard for probationary employees than for more senior employees.

6. Where an agreement contains a "just cause" requirement for discharge and makes no reference to a difference for probationary employees, the "just cause" requirement should be applied fully to new employees. (Arbitrator Howlett in 28 LA 633, 637, cited in Elkouri and Elkouri, How Arbitration Works, 4th Ed., p654 (1985)) Where the agreement deals expressly with the discharge of probationary employees, by requiring "cause," the language of that agreement must be honored. (Ford Motor Co., 48 LA 1213, 1214-1215 (1967)), cited in Elkouri, ibid, p655.) Rule 33.01 in the instant agreement requires "a bona fide reason(s) relating to the business operation. . . ." In view of the emphasis on these two principles, MEC should distinguish between "just cause" and "bona fide reason."

7. Although the doctrine of "just cause" has had innumerable definitions, most of them include a synthesis consisting of notice of misconduct, opportunity for improvement, progressive discipline, reasonable rules and orders reasonably applied, fair investigation and proof, equal treatment, and equally applied penalty. Koven and Smith, Just Cause: The Seven Tests, Kendall/Hunt, 1985.

8. The term "bona fide reason(s)" contains only part of the "just cause" doctrine. MEC, then, has the simpler questions: did Olwell violate reasonable rules or orders reasonably applied (the reason) and, if so, was it a bona fide violation; i.e., was it real, actual, genuine, and charged in good faith? (See Finding of Fact No. 2.) The majority was correct in rejecting Olwell's demand for application of "just cause."

9. Even if MEC does agree that the three charges stated for Olwell's termination were reasons related to WSF business, WSF did not provide evidence that the first two charges (See Finding of Fact No. 2) were "bona fide." WSF did not show

that Olwell failed to perform her clean-up duties. Although hearsay evidence may be admissible in arbitration cases for whatever probative value it may have, "eye-ball" witnesses were readily available to WSF. The one actual instance of Olwell's alleged timidity in directing traffic appeared to be so insignificant that Terminal Agent Walker just "let it go" and added he was more concerned about her willingness to work out on a hot pier.

10. The evidence supporting the third "reason," viz., Olwell's failure to report for work and relieve another Traffic Attendant, really strains the credibility of the prime witness. On the other hand, Olwell's quoting Walker that this is a "common occurrence" and "don't worry about it," is uncontradicted. Walker couldn't remember saying that, but he did say they "had a slight discussion about it, and I left it. (Finding of Fact No. 18)," following which he used the incident to recommend her termination. However, MEC must recognize that her failure to appear for work is an agreed-upon fact. And MEC must recognize that her failure cost WSF $112.80 – ten hours pay at double-time instead of straight-time. (WSF/IBU Rule 19, and Appendix C) That reason falls far short of meeting a "just cause" test, but MEC must assume Terminal Agent Phelps gave her correct information. To that extent it is a "bona fide" reason, and appears to meet the requirements of Rule 33.01. Therefore MEC should dismiss the complaint, on the grounds that she was terminated for a bona fide business reason, and as a probationer has no right to file a grievance. (Rule 33.01)

11. Although both parties and the majority appeared to rely heavily on Arbitrator Fred Rosenberry's Conclusion of Law (MEBA (on behalf of James Fay) v. WSF, MEC Case No. 6-86, Decision No. 26-MEC) concluding that Fay had "no contractual grievance and arbitration procedures within the meaning of RCW

47.64.150 . . . ," Rosenberry's decision was not a blanket MEC precedent for all probationary termination cases. Rosenberry's decision was properly based upon the WSF/MEBA Agreement, as RCW 47.64.150 requires. The MEBA contractual language was different from the WSF/IBU Agreement in the instant case even if the result is the same. WSF's reliance on the State Personnel Board rules is equally misplaced. Washington State Merit System employees do not enjoy the benefits of collective bargaining under chapter 41.06 RCW, but work under rules promulgated by an administrative body, the Washington State Personnel Board. (Ch 41.06 RCW) MEC must consider each probationer's case upon its own merits or lack thereof.

12. Whether it is correct or incorrect, Finding of Fact No. 4 in the majority decision is actually a conclusion of law, ostensibly determining the authority of MEC.

13. The majority's statement in Finding of Fact No. 5 that:

> The Marine Employees' Commission, in its decision on this grievance, has not changed or amended the terms, conditions or application of the collective bargaining agreement

is anything but a Finding of Fact, and even as a Conclusion of Law it should only be entered by an appellate tribunal as a result of a review of their decision.

Having based my refusal to sign the majority Decision No. 50-MEC on the foregoing reasons, I do conclude under Conclusion of Law No. 10, supra, that WSF did properly terminate Grievant Olwell for a "bona fide reason" relating to the operation of the ferry system; and, as a probationary employee, Olwell therefore has no "right" to file a grievance under the WSF/IBU Agreement.

Now, therefore, I hereby concur with the majority in their Order in Decision No. 50-MEC.

Dated this 23rd day of February, 1990.

MARINE EMPLOYEES' COMMISSION

/s/ Louis O. Stewart, Commissioner