STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES COMMISSION

In Arbitration
Before Commissioner David E. Williams

In the Matter of:	)	MEC Case No. 5-99
INLANDBOATMEN'S UNION OF	)	
THE PACIFIC on behalf of LARRY	)	
DUNLAP,	)	DECISION NO. 215–MEC
	)	
Grievant,	)	DECISION AND ORDER
	)	
v.	)	
	)	
WASHINGTON STATE FERRIES,	)	
	)	
Respondent.	)	
	)	

Schwerin, Campbell and Barnard, attorneys, by Elizabeth Ford, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

Christine Gregoire, Attorney General, by David Slown, Assistant Attorney General, appearing for and on behalf of the Washington State Ferries.

This matter came on regularly before David E. Williams, of the Marine Employees' Commission (MEC), arbitrator, on June 7, 1999, when the Inlandboatmen's Union of the Pacific (IBU) filed a grievance arbitration request on behalf of Larry Dunlap. Commissioner Williams, with agreement of the parties, was assigned to act as arbitrator, to hear and decide a dispute between the parties relative to the discharge by the employer (WSF) of employee Larry Dunlap.

IBU certified that the grievance procedures in the IBU/WSF collective bargaining agreements (CBA) were utilized and exhausted.

The arbitrator conducted a hearing on August 23 and 24, 1999.

THE ISSUES

There is no disagreement between the WSF and IBU as to the questions to be resolved by these proceedings before the designated arbitrator. Thus, IBU notes, in its brief, that the issues for decisions are:

> Did the WSF have just cause to discharge Larry Dunlap on December 7, 1998? If not, what is the appropriate remedy?

In exact agreement with the IBU, WSF's brief specifies the instant question as follows:

> Whether the discharge of Larry Dunlap, on December 7, 1998, was for just cause, and if not, what is the appropriate remedy?

Additionally, as to the inquiries here, the stenographic transcript, whereby the hearing in this matter was recorded, includes the parties' spoken verification that, "The issue subject to the briefs will be whether the discharge was for just cause and if not what remedy is appropriate."

The parties' agreement as to the perimeters of the dispute to be resolved by said arbitrator is binding on them and on him. Such agreement is accepted, therefore, as the test for determining the rights, in the material circumstances of the parties here, including those of Mr. Dunlap.

POSITIONS OF THE PARTIES

Position of WSF

The employer's position, stated succinctly, is that the grievant, Mr. Dunlap, was bound appropriately and with the concurrence of the union, to a "last chance agreement" relative to his serious problem with alcohol and that he broke that agreement in a "a dramatic and significant way" and although, as demonstrated by his work history, he was an excellent

employee, it was necessary for the employer to discharge him with regret, when consideration was accorded to its long-term interest and the "whole viability of the last chance agreement concept."

Position of IBU

The union's view is that, in fact, there is no last chance agreement at the base of this case and that the familiar "just cause" standard is the applicable test for judging the rights of the parties under all of the material circumstances. In accord with that standard, a contractual basis for the discharge and the attendant economic and other adversity to Larry Dunlap, has not been shown by the employer, which is to say that he ought to be reinstated with back pay.

DISCUSSION

At the outset, it is observed that clearly, Mr. Dunlap had a serious problem with excessive consumption of alcohol, which on occasion posed interference or potential interference with his ability to perform his functions as a seller of tickets to patrons of WSF. Naturally, that problem generated concern on the part of the management involved as well as a realistic prospect for substantial detriment to Mr. Dunlap. Under such circumstances, in December of 1997, to its credit, WSF with the IBU's express and formal concurrence, fashioned a written "continuation of work" agreement with Mr. Dunlap, whereby a course of conduct and treatment for him was prescribed in, a praiseworthy effort to help him do and keep his job and deal appropriately and effectively with his affliction. While such agreement contemplated explicitly that in consideration thereof, for its duration, Mr. Dunlap was to "remain drug and alcohol free," it did not annul with certainty or otherwise, his access to the contractual grievance procedure nor deprive him of recourse to the "just cause" standard as a basis on which to contest a discharge. Actually, with regard to the subject of discipline, the continuation of work agreement provides:

> Failure of an individual to adhere to the program . . . will be considered failure to comply with this contract and MAY subject the employee to disciplinary action by WSF, up to and including discharge.

Emphasis added.

The incident resultant in the discharge of Mr. Dunlap commenced when he was "off duty" on October 29, 1998, and participated with colleagues from his union in drinking intoxicants. He came to work on time the next day, October 30, and performed his duties in serving the public directly, during his normal afternoon shift, for some two hours or so without arousing complaint of any description from any source.

Then, while on his "break," two WSF terminal agents, determined that he smelled of intoxicants and so reported to their superiors. In consequence, after discussion with Mr. Dave Rice, WSF's Personnel Manager and Mr. Perez, its Safety Officer, Mr. Dunlap voluntarily submitted to a breath alcohol test administered by troopers from the Washington State Patrol. That test, done with portable equipment, presented a reading of .044. No additional test was done by the troopers or by any other agency. The union contends, with explicit citation to the formalized and highly detailed WSF "drug and alcohol policy" that, expressly, Mr. Dunlap was entitled to a second breath test as "confirmation" of the .044 reading returned from the first, but that specified measure for assurance and credibility was not accorded to him, nor to WSF, by the State Patrol or by any other person or party.

As noted, on October 30, after receipt of the report from the terminal agents, the employer's Personnel Manager, Mr. Rice, was a participant in ensuing and material events, wherein, according to the union, that executive purportedly advised Mr. Dunlap that, although Dunlap's job was not in jeopardy, he should undergo additional and more intense treatment for his underlying problem with alcohol. Mr. Rice offered testimony whereby he denied telling the union and Mr. Dunlap, on or after October 30, that Dunlap's job was not in danger. However, it is noted that Mr. Rice attributed the ultimate decision to discharge Dunlap, not to himself, but to some anonymous WSF executive,

who did not appear to offer explanatory or other testimony at the hearing and whose role was not related clearly then, with respect to a particular managerial province, nor was it explained fully in terms of the relative powers involved. Presumably however, whoever the holder of the decisive control may have been, he or she had standing and rank higher than that of Mr. Rice, which constitutes a legitimate point for reference, in assessing particular testimonial credibility, in the context of "an interest to protect." See Koven and Smith, Just Cause: The Seven Tests 272-73 (2d ed. 1992). Moreover, in considering the argument advanced in this case by the employer that, at the material times, Mr. Rice was not empowered by WSF to inform the IBU or Mr. Dunlap that there would be no firing in the premises, it is appropriate to refer to the enacted and time-honored principle well understood in the labor relations community, which is embodied in the National Labor Relations Act, *viz.*

> In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

NLRA § 152 (13).

On the evidence here, adduced at the hearing, there is little reason to doubt, indeed, it is acknowledged by all concerned, that, over some 16 years with WSF, Larry Dunlap was a "very good" employee, who by extraordinary engagement and interaction with passengers using the ferries, deserved and received special and numerous letters of gratitude and commendation from that group, to his undeniable credit and to the significant advantage of the employer, WSF.

Additionally, given the content and tone of his testimony and his demeanor generally, it appeared that Mr. Rice was concerned especially and unusually about the discharge of Mr. Dunlap. Although as noted, Mr. Rice did not acknowledge in the course of his testimony that he told Mr. Dunlap that Dunlap's job was not at risk following the incident of October 30, he did affirm the conclusion that during the interval, from that date until

the discharge was effected on December 7, he did not, at any juncture, tell Mr. Dunlap that he was to be fired; actually, that disposition of the case, on the basis of the most extreme penalty available, was not communicated to Mr. Dunlap, nor to the union, for some 40 days, a period of extraordinary and perhaps especially informative length, under the circumstances.

Testimony was given for the record here by Mr. Paul Tribble, a highly credentialed and experienced professional, who serves as counselor to persons seeking to recover from addiction to alcohol and cope with the resultant profound and complicated problems in their lives. In Mr. Tribble's view, grounded on post-discharge and sustained contact and communication with Larry Dunlap, Larry has made authentic, impressive, continual and reliable progress toward freeing himself clearly from that disease. The informed opinion of Mr. Tribble, in these particulars, is, or ought to be, an encouraging assessment for all concerned with this case constituting as it does, realization of definite progress toward a common objective.

HOLDINGS AS TO JUST CAUSE

1. Notwithstanding the referenced "continuation of work agreement," the essential questions remain, *viz*., was Mr. Dunlap's termination for just cause and, if not what remedy is available? (CBA: Rule 4, 4.01; Rule 21, 20.10.)

2. As a fundamental aspect of the instant situation, it ought to be noted especially that Dunlap's job with WSF is not and was not "safety sensitive" with respect to the ferries afloat and on their runs.

3. Such continuation of work agreement was not a classical and undeniable "last chance" accord because it did not straightforwardly advise the union and the employee, "that violation of any of the terms WILL [not "may"] result in immediate discharge." Brand, Discipline and Discharge in Arbitration 218. (Emphasis added.) Certainly that accord does not deprive the union and its

member of the right, in this context, to invoke the contractual grievance procedure and the "just cause" standard. The fact is that such continuation of work agreement described an area, within which the just cause test can and should operate, when it said, ". . . failure to comply with this contract may subject the employee to disciplinary action by WSF, up to and including discharge." That quotation, and the parties' precise stipulation here as to the issues in arbitration, mean necessarily that any such discharge action must be just under the relevant circumstances, absent some authoritative absolute to the contrary.

4. This case does not present a situation where an employee came to work drunk, nor does it concern drinking while on-the-job, by the person fired. In fact, the situation did not bring about complaint, of any description, from the passengers or other third parties, nor did Mr. Dunlap cause the employer embarrassment or concrete harm, before the public or in any other way. *Inter alia*, the record includes verification that, on October 30, following the discussions with Mr. Rice and others including troopers from the Washington State Patrol, Mr. Dunlap was permitted to go to his home, driving his automobile midst the urban traffic.

5. By his sustained standing as a "very good employee," in the justified judgment of representative passengers, WSF managers and terminal agents, Mr. Dunlap must be regarded as having earned and accumulated, over a relatively long term, equity in his job, in a highly unusual quantity, which in fairness ought to be and therefore is considered and recognized here in his favor.

6. Whether or not it was administered by a state trooper, with the essential certification, the breath test of October 30 should not be used against Mr. Dunlap because the results thereof were not verified by an independent second reading complementary to the salutary requisite posed by the employer's own published and purposeful policy.

7. The apparent, and therefore binding authority of Mr. Rice to act for WSF, in the overall context presented by the record, seems plain. This authority was at the base of the Rice communication with the IBU and Mr. Dunlap in the meetings on and after October 30, but before December 7. Mr. Rice affirms willingly that, at no time during such meetings or on some other occasion, did he give notice to Mr. Dunlap that Dunlap was to be fired, although apparently judging from Mr. Rice's own notes, additional and more concentrated "inpatient" treatment for the problem with alcohol was discussed in the course of at least one of those conferences. It is Mr. Dunlap's own sworn recollection that during his very first interview with Mr. Rice on October 30, Rice told him that his job was not in jeopardy and, as a WSF manager, made arrangements for him to talk to Jan Paul, a counselor with an outside agency, who in turn on the Monday following, recommended that Mr. Dunlap avail himself of the inpatient treatment, which he actually completed before he was fired. In sum, whatever Mr. Rice may have intended in his communications with Mr. Dunlap, it is clear that Dunlap had a basis therefrom for concluding reasonably that his job was secured when he fulfilled the arrangements, intended by Mr. Rice, for intensified treatment as an inpatient.

8. The opinion of the seasoned counselor and practitioner, Mr. Tribble, accords WSF a sound basis for concluding that, in a serious, conscientious and reliable manner, Mr. Dunlap has demonstrated that he is willing and able to return to his old job, and over a substantial continuous period has been in that recovering state.

9. None of the foregoing commentary is intended to absolve Mr. Dunlap from a share of the responsibility for the situation which generated the underlying grievance and these arbitral proceedings. However, the record supports the conclusion that really he was not fired so much for what <u>he</u> did; rather the termination was in response to worry about precedent, i.e., concern about what some other less worthy employee might do at a later time. Judging from the testimony of Mr. Rice, that preoccupation, perhaps a product of managerial controversy, accounts for the extraordinary interval between time of the offense

> and the discharge effected by WSF, when in response to the thrust of the "instructions" advanced earlier by Mr. Rice, Dunlap had accepted, undergone and finished treatment for his illness on an "inpatient basis." Regarding this aspect of the situation, on the facts, it seems appropriate to quote from a treatise long favored as an, if not "the," authoritative reference, by the Marine Employees' Commission, *viz.*
>
> > [C]ommon sense requires a reasonably speedy connection between an offense and the discipline imposed thereafter. Otherwise, the memory of the offender and those around him will become dim with regard to the event, AND THE PUNISHMENT WILL INEVITABLY BECOME LESS LOGICAL WITH THE PASSAGE OF TIME. Inland Tool and Mfg. Co., 65 LA 697, 700 (1986).

Emphasis added. Quote and citation, Coven and Smith, Just Cause: The Seven Tests 428-29 (2d ed. 1992).

> In any case, Dunlap followed the course for treatment specified and arranged by the employer's personnel manager, without being told that, notwithstanding such therapy, he had been or was about to be fired. These aspects of the situation, as a matter of fundamental fair play, construct a powerful inference that such a drastic penalty was not, to be expected by the employee. Apart from the actual verbiage between Mr. Rice and Mr.Dunlap, the referenced inference amounted to practical assurance that discharge was not to be effected in the premises.

10. In consideration of the foregoing points, it is concluded that the discharge here was not for just cause.

REMEDY

As mentioned hereinabove, although he was not fired for just cause, Mr. Dunlap cannot avoid the fact that he contributed to the situation that resulted in his separation from employment. Understandably and commendably, under the circumstances, Mr. Rice, acting for WSF, thought it appropriate that Mr. Dunlap receive treatment as an inpatient

and so advised him. Mr. Dunlap, believes, and it has been found here, that he undertook the inpatient treatment with the understanding with Mr. Rice that, following its successful completion, he would be returned to the job that he had held and admirably fulfilled over a substantial span of years. Considering the case from its four corners, WSF was entitled to assurance, not only that the inpatient therapy had been finished, but also that it had been effective and supplemented appropriately over a period of months, with due fidelity from Mr. Dunlap. Mr. Dunlap has made that demonstration as stated by a well-qualified witness, for a year or more. In that context, it is regarded as consistent with equity and justice that Mr. Dunlap be reinstated conditionally without loss of seniority, standing or status and that upon his accepting the conditional reinstatement, that he be paid by WSF, 50 percent of the wages he lost since October 30, 1998.

DECISION AND AWARD

In reliance on particular evidence adduced at the hearing in this case, as summarized briefly with the foregoing paragraphs, and finding supportive foundation in the material facts and the "authorities" cited above and in the argument submitted, it is concluded that the discharge of Mr. Dunlap from WSF service on December 7, 1998, was excessive and not for just cause.

By way of remedy for the discharge effected contrary to the contractual standard:

1. Mr. Dunlap shall forthwith be reinstated to the job he held with WSF on October 30, 1998, without loss of seniority standing or status.

2. Such reinstatement shall be regarded by all concerned as conditioned on Mr. Dunlap's remaining free of alcohol for the year next ensuing; any authentic departure by him from that specified condition may be considered as just cause for his immediate discharge by WSF, which conclusion may not be challenged by him or by the union.

3. Upon acceptance by the union and Mr. Dunlap of the foregoing conditional reinstatement to his job, WSF shall grant and pay him 50 percent of the pay he would have received had he worked on his regular job during the interval from October 30, 1998, until such reinstatement is effected.

DATED this ____ day of November 1999.

MARINE EMPLOYEES' COMMISSION

_____
DAVID E. WILLIAMS, Arbitrator

Approved By:

_____
HENRY L. CHILES, JR., Chairman

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JOHN P. SULLIVAN, Commissioner