STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

KARL R. SKOGEN	)	
	)	MEC CASE NO. 6-83
Grievant,	)	
	)	DECISION NO. 6A-MEC
vs.	)	
	)	MOTION FOR
WASHINGTON STATE FERRIES	)	RECONSIDERATION
	)	DECISION AND ORDER
Respondent.	)	
	)	
	)	

Vaughn, Binns and Wilson, by Norman Brown Binns, represented the grievant.

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

INTRODUCTION AND BACKGROUND

On or about April 5, 1985, Grievant Karl R. Skogen filed a Motion for Reconsideration of Decision No. 6-83 MEC (hereinafter referred to as Decision No. 6-MEC). Washington State Ferries (WSF) suggested that oral hearing be waived and that briefs be submitted. Grievant concurred.

The hearing examiner, Commissioner Stewart, advised the parties that the Commission would rely mainly on Hall v. Seattle, 24 Wn.App. 357, 602 P.2d 366 (1979), which holds that an administrative agency may only reconsider a previous action where the order was entered through fraud, or a mistake or misconception of fact on the part of the agency.

Although Inlandboatmen's Union of the Pacific (IBU) had been a co-grievant in the original case, and had partially supported Skogen's grievance, IBU did not join in Skogen's Motion for Reconsideration.

Briefs were filed on June 6, 1985, by Grievant and on June 10, 1985, by WSF.

POSITION OF GRIEVANT

Grievant Skogen asserted that the MEC had based Decision No. 6-MEC on incorrect statements to the Examiner, and that, therefore, Finding of Fact No. 3 was incorrect. Specifically, Grievant asserted that although Finding of Fact No. 3 states that another employee (Mr. Hattrick) was "promoted to a regular year-round Oiler position on July 21, 1982," actually Hattrick was not promoted until August 15, 1984. July 21, 1982 was the date upon which Hattrick achieved his Oiler's endorsement in his Merchant Mariner's document issued by the U.S. Coast Guard and obtained the classification of Oiler.

Grievant obtained his USCG endorsement and classification of Oiler on July 20, 1982. Both Skogen and Hattrick worked as Oilers on an intermittent basis, until Hattrick did achieve permanent status as Oiler on August 15, 1984. Therefore, although Grievant Skogen appears to concede that Hattrick's permanent full-time appointment to Oiler on August 15, 1984 was in compliance with Rule 19 of the WSF/IBU collective bargaining agreement, he argued that MEC erroneously omitted ruling on Hattrick's preferential assignments to intermittent work as Oiler between July 21, 1982 and August 15, 1984 as a violation of said Rule 19.

> (NOTE: Grievant submitted a memorandum from Dave Rice, WSF Personnel Officer, to Karl Skogen, dated March 22, 1985, which appears to support Grievant's assertion that Hattrick did not achieve permanent appointment to Oiler until August 15, 1984. WSF Counsel has had no opportunity to examine or challenge this submission; therefore, it has not been admitted as evidence.)

Grievant asked that (1) his grievance regarding intermittent employment be reviewed and he be granted compensation, or (2) the hearing be reopened for additional evidence regarding temporary work seniority.

POSITION OF WASHINGTON STATE FERRIES

WSF argued that RCW 47.64.280, which provides in part that "…the orders and awards of the Commission are final and binding…," may prohibit MEC's use of Hall v. Seattle in the matter of reconsideration of its decisions. WSF also cites certain authorities to show that when a statute creates an agency and provides for judicial review, the legislature does not confer on the agency the power to rehear or reconsider its decisions. On the other hand, WSF argues that judicial review is available under the general provisions of Chapter 34.04 RCW.

Second, WSF agrees with Plaintiff that MEC did make an error in Finding of Fact No. 3. However, it's counsel argues that because the error may be partly the result of Grievant's argument, the error does not mean reconsideration under Hall v. Seattle. That case requires that the error justifying reconsideration must be made by the tribunal, and not by one of the parties.

Third, WSF asserts that the error is "harmless" and that where an error does not materially affect the merits of the controversy, it is not grounds for reversal. WSF argues that the Hall v. Seattle Court decision supports this argument.

Lastly, WSF argues that there is sufficient evidence in the record to support the MEC's conclusion. Testimony of Dave Rice, WSF, and Burrill Hatch, IBU, establishes that assignments to, and lay-off from, temporary work have been on the basis of departmental seniority, the same as for permanent assignments and lay-offs.

WSF argued that Grievant's Motion should be denied.

This Commission has carefully reviewed the entire record of Skogen and IBU v. WSF, read the arguments submitted by both parties and now enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. RCW 47.64.150 provides in part:

> Ferry system employees shall follow either the grievance procedures provided in the collective bargaining agreement, [which may provide for binding arbitration] or if no such procedures are so provided, shall submit the grievance to the Marine Employees' Commission as provided in RCW 47.46.280.

2. Rule 15.02 of the contract between WSF and IBU provides in part:

Grievances shall be pursued according to the following steps:

(1) The Union Delegate will attempt to resolve the issue immediately. If the issue is not resolved within three (3) days, it will be referred to the Union for step 2 proceeding.

(2) A conference shall be arranged as soon as reasonably possible between the Union and the employer. Each may appoint one (1) representative, with full authority to settle such controversy or dispute. The aggrieved party may attend all hearings.

(3) In the event the representatives fail to agree within thirty (30) days, it shall be their duty to refer such controversy or dispute to the …[MEC] established under RCW Chapter 47.46. The orders and awards of the [MEC] shall be binding upon any employee, or employees, or their representative, and upon the employer.

3. This arbitration hearing was held pursuant to the provisions of the contract.

4. Finding of Fact No. 3 in the Commission's original decision stated that Hattrick achieved permanent oiler status on July 21, 1982.

5. Finding of Fact No. 3 in Decision No. 6-MEC may have been in error. Although the inference may be drawn from the testimony and exhibits that James Hattrick received a regular full-time appointment as oiler on July 21, 1982, nothing in the record firmly establishes such initial date. Both parties agree in their briefs on this instant Motion that Hattrick's full-time appointment date was August 15, 1984.

6. If the date of July 21, 1982, is wrong, and August 15, 1984, is correct, the mistake is not the result of fraud or the MEC's mistake or misrepresentation of fact. Instead, it is due to the fact that neither party clearly established through the evidence Hattrick's correct permanent oiler status date.

7. Even if Finding of Fact No. 3 was in error, it was not determinative in Decision No. 6-MEC. If Finding of Fact No. 3 were amended to reflect the August 15, 1984 date for Hattrick's permanent status, the resulting decision would be the same.

8. With the exception of the August 15, 1984 date, the Commission's original findings are still correct. Both Hattrick and Grievant Skogen were on intermittent or part-time status as Oilers until August 15, 1984. Hattrick had almost a year more departmental seniority than Skogen.

9. Rule 19 is silent on the priority of employment or lay-off for those employees who have not achieved full-time or year-round assignments:

   A. Rule 19.01 establishes WSF's adherence to the principle of seniority; but
   B. Rule 19.02 establishes seniority "on the date the employee is assigned to regular year-round employment in the department"; and
   C. Rule 19.05 requires separate "supplemental lists in order of dates of hire by department and classifications of Temporary Employees who are those employees who work less than year-round or full-time assignments. These lists shall be regularly furnished to the Union."

10. James Hattrick enjoyed seniority status in the Engine Department following his hire date as Wiper on June 16, 1981.

11. Grievant Skogen had never received a full-time or year-round assignment in any classification up to the date of his grievance or of the hearing; therefore, Skogen had no seniority status by virtue of regular year-round employment in accordance with Rule 19.02.

12. Any inference that the Statement of Adherence to Seniority would extend to the "supplemental lists" specified in Rule 19.05 was directly contradicted by WSF Personnel Officer Dave Rice and IBU Regional Director Burrill Hatch who both testified that the past practice has been to assign limited work on the basis of seniority within the Engine Department even though an employee has longer service in the specific classification. (Tr. pp 64 and 76).

13. Finding of Fact No. 9 in Decision No. 6-MEC is confirmed. None of the seniority rosters admitted in evidence precisely comply with the requirements of Rules 19.04 and 19.05. If Hattrick's name had appeared on the Wiper's seniority roster in compliance with Rule 19.04 and also on the Oiler's supplemental list in accordance with Rule 19.05, any misunderstanding in Finding of Fact No. 3 might never have occurred.

Based on the foregoing findings of fact, the Marine Employees' Commission adopted the following conclusions of law.

CONCLUSIONS OF LAW

1. The MEC acted as an arbitrator pursuant to the WSF-IBU contract.

2. Once an arbitrator has declared its decision, its authority and jurisdiction is terminated. The arbitrator has no authority to recall, amend or rehear the case, although clerical mistakes or arithmetic errors of computation may be corrected. (Elkouri and Elkouri, How Arbitration Works, p. 239).

3. When acting as an arbitrator the MEC does not have authority to reconsider, amend or change its decision unless there has been a clerical or arithmetic error.

4. Under Hall v. Seattle, 24 Wn.App. 357, 602 P.2d 366 (1979), an administrative agency has a limited inherent power to reconsider a decision and to correct an order entered through fraud or the agency's own mistake or misperception of facts.

5. Even if MEC were hearing this case pursuant to its authority under RCW 47.64.280, the requirements of Hall v. Seattle, supra, have not been met.

6. Even if reconsideration were appropriate here, any misconception of fact in Finding of Fact No. 3 is de minimus and does not materially affect the merits on which Decision No. 6-MEC are based. The determinative criterion of Decision No. 6-MEC is founding Conclusion of Law No. 7.

> When the terms, conditions and applications of a collective bargaining agreement are unclear or ambiguous, the Marine Employees' Commission turn to "past practice" for interpretation. "…the labor arbitrator source of law is not confined to the express provision of the contract, as is the industrial common law – the past practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it (United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574)." This Commission concludes that the past practice of filling regular year-round positions on the basis of length of service in the Engine Department without regard to length of service in the classification of Oiler justifies the preferential appointment of James Hattrick.

7. Grievant Skogen's Motion for Reconsideration of Decision No. 6-MEC must be denied.

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

DECISION AND ORDER

The Motion for Reconsideration of Decision No. 6-MEC, filed by Karl R. Skogen, is hereby denied.

DATED at Olympia, Washington, this 23rd day of October, 1985.

MARINE EMPLOYEES' COMMISSION

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