

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

DISTRICT NO. 1 PACIFIC COAST	)	MEC Case No. 8-92
DISTRICT, MARINE ENGINEERS'	)	
BENEFICIAL ASSOCIATION on	)	
Behalf of Demetrios Mitalas	)	
	)	DECISION NO. 93 - MEC
Grievant,	)	
	)	
v.	)	DECISION AND ORDER
	)	
WASHINGTON STATE FERRIES,	)	
	)	
Respondent.	)	
	)	

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Davies, Roberts and Reid, attorneys, by Kenneth J. Pedersen, Attorney, appearing for and on behalf of District No. 1 Pacific Coast District, Marine Engineers Beneficial Association.

Christine Gregoire, Attorney General, by Anne L. Spangler, Assistant Attorney General, appearing for and on behalf of Washington State Ferries.

THIS matter came on regularly before the Marine Employees' Commission (MEC) on July 22, 1992 when the District No. 1 Pacific Coast District, Marine Engineers Beneficial Association (MEBA) filed a request for grievance arbitration against Washington State Ferries (WSF) on behalf of Demetrios Mitalas, an Alternate Staff Chief Engineer. MEBA alleged that WSF had violated Sections 5 and 30 of the MEBA/WSF collective bargaining. Specifically, MEBA alleged that WSF improperly suspended Mitalas for three days without pay for alleged insubordination without just cause based on a refusal to obey a direct order from WSF Port Engineer John Christensen. MEBA certified that the grievance procedures in the MEBA/WSF Collective Bargaining Agreement have been utilized and exhausted.

The request for grievance arbitration was assigned to Commissioner Donald E. Kokjer to act as arbitrator pursuant to WAC 316-65-090. A Notice of Hearing was served on the parties pursuant to WAC 316-65-080 on December 22, 1992, and the hearing was convened accordingly on February 5, 1993.

Arbitrator Kokjer conducted the hearing. When he was notified that some of the testimony was expected to be conflicting, Kokjer agreed to sequester the witnesses.

MEC Chairman Boyd and Commissioner Stewart did not attend and participate in the hearing, but have read the entire record.

#### INTRODUCTION AND BACKGROUND

Demetrios Mitalas was first employed by WSF in 1962 and, except for seven years' service in the U.S. Navy, has been continuously employed in the WSF Engineering Department to the present. He served on various vessels, including seven years on the M/V HIYU. In 1990 he was appointed Alternate Staff Chief Engineer on the M/V HIYU and had been paid accordingly ever since. For a short time Mitalas had been temporarily assigned to the M/V Rhododendron. The day in question, March 17, 1992 was his first day back to work after his normal days off duty.

In early afternoon on that day, Mitalas came to the WSF terminal in Anacortes to board a ferry which would get him to Friday Harbor at 5:55 p.m. so that he could relieve Chief Engineer Alan Hansen and begin his own watch at 8:00 p.m. However, the Anacortes port agent and WSF Assistant Port Captain Black (by telephone from Seattle) notified him that the No. 2 engine on the M/V HIYU had lost oil and was shut down. He was subsequently notified that the passengers and cars aboard the HIYU had been disembarked and the vessel would proceed to Anacortes on one engine (without the steering engine) to

tie up for trouble-shooting and/or repair. The M/V HIYU arrived in Anacortes at 8:05 p.m.

In addition to notifying the Port Captain office in Seattle, Chief Engineer Hansen had also asked that the machinists' crew from the WSF shipyard at Eagle Harbor be sent to Anacortes to assist with trouble-shooting and/or repair of the No. 2 engine.

Staff Chief Randy Markus was also notified at his home in Ellensburg regarding the situation.

When Mitalas went aboard the HIYU, Chief Engineer Hansen informed him pointedly that he (Hansen) was still on duty in accordance with instructions from Seattle, even though, as Alternate Staff Chief, Mitalas was his nominal superior, and he was scheduled to relieve Hansen at 8:00 p.m. to begin his own watch. Mitalas noted that the oil level was low in the sight-glass for Engine No. 2 as it had been when he had finished his last prior watch on the HIYU, and as he had reported it to Hansen at that time.

Almost immediately differences of opinion occurred. For example, Mitalas stated that, while the oil level was low, the magnetic plug and the oil strainer should be inspected for evidence of engine damage and before the addition of new oil would wash away evidence, if any. On the other hand, Hansen intended to, and did, add new engine oil for the purpose of running the engine fast to show where the leak was. The differences of opinion intensified because Mitalas was Alternate Staff chief Engineer and nominally Hansen's superior, but Hansen stated he had authority from the WSF Port Engineer that he (Hansen) would take charge of the trouble-shooting. Also, there was only space for one person to work on the engine, but there were two chief engineers present to do the work.

When Mitalas called Port Engineer Christensen for clarification, Christensen verified that Hansen would proceed with Hansen's plan

of action. After Mitalas raised a question about his own authority as Alternate Staff Chief Engineer, Christensen told him that he could leave the vessel if he cared to. Mitalas remained on the job, but he did insist that this procedure would be the correct one, and he did urge Hansen to wait for the Eagle Harbor machinists before proceeding with Hansen's plan.

Later, the machinists from Eagle Harbor arrived, as did Staff Chief Markus. Mitalas was asked to go to another vessel to borrow a tool (come-along chain). That errand required time to go to two ferries and back to the HIYU. No other requests for Mitalas' assistance were made. Finally, after a replacement "O" ring was delivered from Seattle and the No. 2 engine was re-started; Chief Hansen and Staff Chief Markus department; and Mitalas took the watch until he was relieved at the regular time, 8:00 a.m., March 18.

Later that day Port Engineer Christensen reported to Senior Port Engineer Ben Davis that a dispute had arisen during the tie-up of the HIYU. After discuss with and written statements from Christensen, Markus and Hansen and later discussion with Mitalas and his MEBA representative Mark Austin, on April 22, 1992 Davis issued the disciplinary letter at issue in this case, suspending Mitalas for three 12-hour days without pay for "unacceptable and insubordinate conduct," disobeying a direct order and unnecessarily delaying the trouble-shooting.

Mitalas sought assistance from MEBA, who in turn sought to overturn the disciplinary order by filing a grievance in accordance with the dispute procedures in the MEBA/WSF collective bargaining agreement. After failure at the lower steps of those procedures, MEBA filed the instant request for arbitration by MEC.

## POSITIONS OF THE PARTIES

### Position of Washington State Ferries

WSF denies any violation of Rules No. 5 and 30 of the MEBA/WSF Agreement.

WSF contends that by the time the M/V HIYU had returned to Anacortes powered only by Engine No. 1 and without a steering engine, Chief Engineer Hansen had been in contact with WSF Port Engineer Christensen in Seattle, and Staff Chief Engineer Markus in Ellensburg. They had agreed to Hansen's plan for trouble-shooting the cause for such severe oil loss and that he was to proceed with said troubleshooting.

WSF argues that from the time that the M/V HIYU returned to Anacortes until Engine No. 2 was running again, approximately six hours, Alternate Staff Chief Mitalas insisted he was not on watch, did not assist in troubleshooting or repair in any way( except for getting one tool for those who were working), and was not even in the engine room for more than one-half or one hour. WSF witnesses testified that they did request Mitalas to help them, but he did not. WSF witnesses did not support Mitalas' statements about precautions to protect the engine or other differences in the way the work should be done, but only insisted that Mitalas did not do anything except to retrieve one tool. Senior Port Engineer Davis suspended Mitalas "based on the verbal and written statements of the witnesses, the credibility of the witnesses, . . . and the emergency circumstances in which the incident took place,"

WSF argues that Section 5 of the MEBA/WSF Agreement was not violated, because WSF did have "just cause" for the discipline. Neither did WSF violate Section 30, the Management Clause," because Section 30 "gives WSF authority to adopt regulations directing the work force that are reasonable necessary to maintain

safety, efficiency, quality of service . . .," and WSF did adopt and use the Vessel Operating Procedures accordingly, including imposition of discipline for unsatisfactory work performance and subordination.

WSF argues that Mitalas was insubordinate: his instructions were clear; he understood them to be an order, not merely a request; he understood a penalty might be imposed for being insubordinate.

Apart from the usual interpretation of insubordination, involving a willful refusal to carry out an order, WSF relies on Federal Corrections Institution, 75 LA 295, 297 (1980) in pointing out that insubordination may also "be manifested by an attitude or course of conduct consistently and systematically pursued to the extent of open defiance," and argued that Mitalas' "conduct went beyond a mere failure to carry out an order, and constituted a refusal." "The refusal is all the more serious because it occurred in the context of a serious emergency that put the HIYU out of service."

WSF asserts that even if Mitalas disagreed with Hansen's troubleshooting procedure, and Christensen's support of that procedure, the "obey now-grieve later" rule is an established principle in labor law. WSF further claims that the emergency nature of the situation made it all the more important to comply with instructions and register his complaint later. WSF argues that Mitalas' can not reasonably claim he was not insubordinate because he refused the order for safety reasons. WSF relies on Hercules, Inc., 48 LA 788, 793 (1967) in pointing out that the safety exemption from "obey now-grieve later" refers only to personal health or safety.

WSF argues that Mitalas can not rely on the rank of Alternate Staff Chief Engineer as being superior to that of Chief Engineer Hansen. Even if the evidence regarding Alternate Staff Chief rank is contradictory, Mitalas had direct instruction from Port Engineer

Christensen that the troubleshooting procedure would be that which Hansen intended to follow.

WSF asserts that MEC should not disturb the WSF action, because it was not arbitrary, capricious, excessive, or unreasonable; nor did WSF abuse its discretion. Also MEC should not mitigate the penalty on the basis of Mitalas' history of good behavior. WSF has already taken Mitalas' work history into account in affixing the three 12-hour days suspension. It could have been dismissal. Further, mitigating would weaken the additional purpose of warning other employees what will happen in the case of insubordination.

WSF asks that the grievance be denied and dismissed.

#### Position of Marine Engineers' Beneficial Association

MEBA asserts that Mitalas is not chargeable with the insubordination. He did not intentionally and deliberately refuse to obey a lawful order. WSF did not identify any express "order." MEBA argues that Mitalas was attempting to obey instruction from Port Engineer Christensen to trouble-shoot the problem, but was unable to do so because Hansen had other, conflicting ideas as to how to proceed, and because compliance was impossible in the cramped engine space. Only one person could work, and Hansen was occupying that space. MEBA points out that Mitalas did accomplish the only specific task anyone (Hansen, or Staff Chief Markus, or the Eagle Harbor machinists) asked him to do, viz., search for a tool on another ferry.

MEBA argues that, even if Mitalas was somehow shown to have disobeyed an order because of his differences with Hansen and before the arrival of the Staff Chief or the machinists, the charge of insubordination is improper if his alleged refusal was based on a strong belief that the on-going cause of action might constitute

an unsafe practice, i.e., the exception to the "obey now—grieve later" principle.

MEBA argues that, as the Alternate Staff Chief Engineer, Mitalas is by extension the equivalent of the Staff Chief in the latter's absence, pursuant to the WSF Vessel Operating Procedures. Being told how to proceed by a subordinate engineer was frustrating and did upset Mitalas.

MEBA asserts that the disciplinary letter and three-day suspension are violations of Sections 5 and 30 of the MEBA/WSF collective bargaining agreement. Section 5 requires "just cause" for any discipline of an engineering officer.

MEBA requests that MEC sustain the grievance, reverse Mitalas' suspension, order that any reference to the instant discipline be purged from Mitalas' personnel file, and make Mitalas whole by an award of back pay and benefits.

#### ISSUE AND REMEDY

- I. Did WSF violate Sections 5 and 30 of the MEBA/WSF collective bargaining agreement?
- II. If so, what is the appropriate remedy?

Having read the grievance request, the hearing transcript, and the parties' briefs, the Marine Employees' Commission now turns to the findings of fact. The Commission finds that, taken as a whole, most of the statements of fact and arguments based thereon tend to be persuasive. Without question, it was an emotionally charged situation. Also, without question, each participant has made an attempt to do what he deems best for the ferry system. There are certain inconsistencies and contradictions. The Commission is



forced to rely on its estimate of credibility for certain of the following findings of fact.

FINDINGS OF FACT

1. The record is silent as to Alternate Staff Chief Engineer Mitalas disobeying any direct order on the evening of March 17, 1992.
  - a. Port Engineer Christensen did tell Mitalas that trouble-shooting the oil loss in engine No. 2 would proceed as indicated by Chief Engineer Hansen. It did proceed in that manner. Christensen told Mitalas directly that if he did not like Hansen's proposed procedure, Mitalas was free to leave the vessel.
  - b. Mitalas did comply with the only specific request for assistance made to him by Hansen, Staff Chief Engineer Markus or the Eagle Harbor machinists, viz., borrowing a come-along chain from another ferry.
  - c. Except for searching for the requested come-along chain, there is no evidence that Mitalas ever left the HIYU from the time it docked in Anacortes at 8:05 p.m., March 17, 1992 until he was relieved at 8:00 a.m., March 18, 1992.
2. The record is silent as to any action by Mitalas which unnecessarily delayed the trouble-shooting. Mitalas did propose an inspection of the magnetic plug and the oil screen for metallic particles before adding new oil. He also proposed waiting for the arrival of the Eagle Harbor machinists to verify his procedure. He was overruled by Hansen in both instances and the trouble-shooting did proceed.

3. No contemporaneous engine room log entries appear in the record to whether trouble-shooting or repair followed the previous report of low engine oil; nor are there any such entries signed by the principals in this matter in the record.
4. The Commission is mindful of the "obey now-grieve later" principle argued by the parties. However, the record fails to disclose any order which was disobeyed; and Mitalas did fulfill the only specific request he was given. Therefore the "obey now-grieve later" positions do not appear to be relevant to this case.
5. Staff Chief Engineer Markus appointed Demetrios Mitalas as Alternate Staff Chief Engineer pursuant to his authority in Section 4, WSF Vessel Operating Procedures, pp 1.28-1.32, as follows:

**Section 4. Staff Chief Engineer's Authority and Responsibility**

. . .

**Duties**

The Staff Chief Engineer's duties include, but are not limited to, the following:

. . .

19. **To designate a replacement during an absence with the approval of the Director of Vessel Operations.** The Staff Chief Engineer is empowered to select a Chief Engineer to represent him/her when absent for any reason. The person selected assumes the same responsibilities, duties, and powers as assigned to the Staff Chief Engineer when acting as the replacement.
20. **To sign and approve pay orders.** The Staff Chief Engineer may designate other employees to keep time records and prepare pay orders, but only the Staff Chief Engineer or alternate is empowered to sign and approve pay orders.

6. Although Staff Chief Engineer Markus had appointed a different Alternate Staff Chief Engineer during Mitalas' assignment on the Rhododendron, that person had left the HIYU before Mitalas had returned. Mitalas had never been informed as to any change in his status. Mitalas was still being paid by WSF at the pay rate of Alternate Staff Chief Engineer.
7. Section 5 of the MEBA/WSF bargaining agreement reads as follows:

SECTION 5 - DISCIPLINE AND DISCHARGE

The Employer shall not discharge or otherwise discipline any Engineer Officer without just cause.

8. Section 30 of the MEBA/WSF bargaining agreements reads as follows:

SECTION 30 - MANAGEMENT CLAUSE

Subject to the terms and conditions of this Agreement, the Employer retains the right and duty to manage its business, including the right to adopt regulations governing the appearance, dress, conduct, and work procedures of its employees as are reasonably required to maintain safety, efficiency, quality of service and the confidence of the traveling public. The Union reserves the right to intercede on behalf of any employee who feels aggrieved because of the exercise of this right and to process a grievance in accordance with Section 23. the existence of this clause shall not preclude the resolution of any such grievance on its merits.

The Marine Employees' Commission, having considered the entire record including the request for arbitration, the hearing and hearing transcript, the post-hearing briefs, and the foregoing findings of fact, now hereby enters the following conclusions of law.

## CONCLUSIONS OF LAW

1. MEC has jurisdiction over the parties and the subject matter in this case. Chapter 47.64 RCW; especially RCW 47.64.150 and 47.64.280.
2. MEC may not change or amend the terms, conditions, or applications of the MEBA/WSF Agreement. RCW 47.64.150.
3. Decision in this case requires two areas of proof. First is the question of wrongdoing which warrants discipline. Second is the question of "just cause" for discipline. Rule 5, MEBA/WSF Agreement. See Elkouri and Elkouri, How Arbitration Works, 3<sup>rd</sup> Ed., 621 (1983). The burden of proof in this disciplinary case lies with the employer, WSF. Koven and Smith, Just Cause: The Seven Tests, 217-219, 293 (1985).
4. This Commission has attempted to maintain "preponderance of evidence" as a standard for the quantum of proof. How Arbitration Works, *ibid.* Just Cause: The Seven Tests, 218 f. However, in this case only two witnesses (the grievant and one management witness who was involved with the grievant) were aboard the M/V HIYU during the emotionally laden scene. Their testimony taken individually and separately, is plausible; but combined it fails to provide the Commission with a "preponderance of evidence," and does not even meet a "clear and convincing" standard in support of the suspension.
5. Regarding the second proof required under the "just cause" principle, this Commission, having concluded that Mitalas did not disobey a direct order and did not unnecessarily delay the trouble-shooting process, need not evaluate whether or not each of the standard seven tests of "just cause" is met in the instant disciplinary procedures. How Arbitration Works, *ibid.* "In order to penalize someone for something, he must be

charged with a specific kind of misconduct. Without specific misconduct, there can be no violation and, obviously, no punishment; and proof from here to breakfast, even if provided, is entirely beside the point. 'If no infraction has been proved, then no penalty is just.'" Just Cause: The Seven Tests, *ibid*, 219, citing Arizona Aluminum Co., 82-1 ARB ¶8212, 3975.

6. This Commission is cognizant of the restraint required against substituting its judgment for that of WSF officers and/or administrators in evaluating evidence, not only in investigating alleged misbehavior, but also in the exercise of management rights. But this Commission must conclude that WSF did violate Rule 5 by an improper discipline of Demetrios Mitalas. MEC should order the MEBA grievance to be sustained and order that Mitalas be made whole.
7. This Commission finds no evidence that WSF violated Rule 30 of the Agreement, and that charge should be dismissed.

Having read the entire record, including the original request for arbitration, the pleadings, and hearing transcript, and having considered the findings of fact and conclusions of law, the Marine Employees' Commission now hereby enters the following decision and order.

#### DECISION AND ORDER

1. The Marine Employees' Commission hereby sustains the grievance filed by Pacific Coast District 1, Marine Engineers Beneficial Association and determines that Washington State Ferries did violate Rule 5 of the MEBA/WSF Agreement.

2. The Marine Employees' Commission hereby determines that Washington State Ferries did not violate Rule 30 of the MEBA/WSF Agreement. That charge is hereby dismissed.
3. The three 12-hour days suspension without pay of Alternate Staff Chief Demetrios Mitalas was in violation of said MEBA/WSF Agreement and should be and is hereby declared null and void.
4. Washington State Ferries shall immediately make Demetrios Mitalas whole by payment of the three 12-hour days' withheld wages and all related monetary benefits.
5. Washington State Ferries shall immediately rescind and retract any notice provided to any WSF officer or other personnel or to any other agency outside of WSF regarding the event or discipline described in this case.
6. Washington State Ferries shall immediately purge from the personnel files of Demetrios Mitalas, and any other WSF records, any copies of Mitalas' disciplinary letter and/or any other records referring in any way to his suspension and/or any other references to the incident involved in this present case; provided that one copy of this decision shall be filed in Mitalas' personnel file; and provided further that in no way shall this decision be construed as evidence of any non-performance, faulty performance, or anything other than his full and competent performance.

7. The suspension and the incident described herein shall not be used in any manner in any future disciplinary procedure.

DONE this 10<sup>th</sup> day of May 1993.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD, Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner