STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

PAUL ARROYO,	)	MEC Case No. 9-96
	)	
Grievant,	)	DECISION NO. 161 - MEC
	)	
v.	)	
	)	ARBITRATOR'S ORDER
WASHINGTON STATE FERRIES,	)	DENYING MOTION FOR LEAVE
	)	TO PRESENT EVIDENCE OF
Respondent.	)	DISCHARGE CONTRARY TO
	)	PUBLIC POLICY

THIS MATTER came before the Marine Employees' Commission (MEC) on August 12, 1996 when Paul Arroyo filed a Request for Grievance Arbitration with the MEC. The grievance arbitration request alleges wrongful discharge of Mr. Arroyo by the Washington State Ferries.

Commissioner John P. Sullivan was assigned as arbitrator. A prehearing conference was scheduled for October 23, 1996 and a hearing was scheduled for November 5, 1996. At the prehearing conference, Paul Arroyo appeared without counsel. At that time, Arbitrator Sullivan informed the parties that the issues of the hearing in this matter would be limited to those stated in the Request for Grievance Arbitration, to-wit, whether pursuant to the WSF/Dist. No. 1 MEBA Unlicensed Engineroom Employees' contract, the WSF had a bona fide reason to discharge Mr. Arroyo.

Prior to the scheduled hearing date, Mr. Arroyo retained legal counsel. On November 4, 1996, Attorney Lawrence Delay filed a

Notice of Appearance and a Motion to Continue Hearing and Declaration of Lawrence Curt Delay. The hearing was subsequently continued to March 19 and 20, 1997. On November 5, 1996, Lawrence Delay filed a Motion to Present Evidence of Discharge Contrary to Public Policy and Declaration of Paul Arroyo.

BACKGROUND

The grievant, Paul Carlos Arroyo, was employed by Marriott Corporation from March 1994 to January 1996 in the food concession operations aboard WSF vessels.

On January 11, 1996, WSF announced an opening for a wiper. Paul Arroyo was dispatched by District No. 1, Marine Engineers Beneficial Association (MEBA) to the Washington State Ferries as an engine room wiper. Mr. Arroyo was hired by WSF and assigned to a state ferry. He worked as a wiper on a variety of vessels from January 11, 1996 until May 14, 1996. On that date, Mr. Arroyo was discharged as a wiper while he was still in his probationary period.

THE CONTRACT PROVISIONS

The WSF/MEBA Unlicensed Engineroom Employees' collective bargaining agreement under which Mr. Arroyo was working as a wiper states as follows:

> ### RULE 33 - PROBATIONARY PERIODS
>
> 33.01 Newly hired employees shall serve a probationary period of five (5) calendar months. 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.

Mr. Arroyo's statement of facts included under item 6 of his Request for Grievance Arbitration stated:

> Wrongfully discharged (by letter from Ben Davis, Senior Port Engineer date 14 May 1996) for "… poor job performance…"

GRIEVANT'S EVIDENCE OF DISCHARGE CONTRARY TO PUBLIC POLICY

Mr. Arroyo's Motion for Leave to Present Evidence of Discharge Contrary to Public Policy and Declaration of Paul Arroyo alleges that WSF's discharge of Arroyo was pretextual and retaliatory, based upon an alleged incident on July 10, 1994 when Mr. Arroyo was working for the Marriott Corporation. The grievant alleges that on that date he was assaulted by Jon Tegnell, a WSF deck officer. The motion and Mr. Arroyo's declaration state that Paul Arroyo reported the incident on July 10, 1994 to various law enforcement and other agencies, including: the San Juan County Sheriff's Department; the Marriott Corporation; the Washington State Police; Washington State Ferries; the Office of the Governor, Washington State; the United States Coast Guard; and the Anacortes Police Department. The motion and declaration assert that Mr. Tegnell had a different political view from Mr. Arroyo, resulting in several encounters between the two men, culminating in the encounter of July 10, 1994.

Mr. Arroyo's Request for Grievance Arbitration filed August 12, 1996, did not include alleged violations by WSF of public policy or the "Whistleblower Acts," Chapter 42.40 RCW—State Employee Whistleblower Protection, or Chapter 42.41 RCW—Local Government Whistleblower Protection. At the prehearing conference, Mr. Arroyo first suggested that he was terminated for reasons other

than stated by the WSF. The alleged violations of public policy or the Whistleblower Acts were not mentioned at the prehearing conference on October 23, 1996.

The issue of conduct in relation to public policy, freedom of speech, whistleblower and retaliatory firing did not surface until Mr. Arroyo's counsel filed a motion on November 5, 1996 seeking to present evidence of this nature at the hearing.

Mr. Arroyo is now attempting to connect the incident of July 10, 1994 when he was employed by Marriott with his discharge as a wiper for "poor job performance" two years later while employed by WSF on May 14, 1996. He is alleging that he was fired by WSF from his engine room position in May, 1996 for reporting to law enforcement and other agencies an assault by a WSF deck officer in July, 1994.

VIOLATIONS OF PUBLIC POLICY

Chapter 7.69 RCW—CRIME VICTIMS, SURVIVORS, AND WITNESSES

Mr. Arroyo asserts that he was discharged in violation of the rights afforded "witnesses of crimes" pursuant to Chapter 7.69 RCW. RCW 7.60.020(5) defines "witness" as

> …a person who has been or is expected to be summoned to testify for the prosecution in a criminal action, or who by reason of having relevant information is subject to call or likely to be called as a witness for the prosecution, whether or not an action or proceeding has been commenced.

However, in his declaration, Mr. Arroyo makes no such assertions that he is a "witness" pursuant to the definition stated above.

Freedom of Speech

Mr. Arroyo asserts that his right to free speech was violated by the employer. However, other than to state that he and Mr. Tegnell had political differences which may have led to the alleged assault in 1994, his motion fails to state facts upon which his claim would be substantiated at hearing that WSF violated his right to speak.

The "Whistleblower Acts"—Chapters 42.40 and 42.41 RCW

Mr. Arroyo claims his "whistleblower actions" fall within Chapter 42.41—Local Government Whistleblower Protection, which pertains to "any governmental entity other than the state, federal agencies, or an operating system established under chapter 43.52 RCW." Chapter 42.40—State Employee Whistleblower Protection, which may be the applicable statute here, defines a "whistleblower" as

> ... any [state] employee who in good faith reports alleged improper governmental action to the auditor, initiating an investigation under RCW 42.40.040…[and] [A]n employee who in good faith provides information to the auditor in connection with an investigation pursuant to RCW 42.40.040…

RCW 42.40.040 provides for the reporting of improper governmental action to and investigation of such reported action to the state auditor within specified time periods.

There is no evidence that within statutory time limits or at any time, Mr. Arroyo registered with the Office of the State Auditor a written charge against WSF of alleged retaliatory discharge resultant from "blowing of a whistle" to police, pursuant to Chapters 42.40 or 42.41 RCW. Under familiar rules of

administrative law, his complaint with respect to that dismissal is before the wrong agency. Wright v. Woodward, 83 Wn.2d 378 (1974; and Wheaton v. DLI, 40 Wn.2d 56 (1952).

Mr. Arroyo's new position, as advanced for him by counsel, is additionally grounded on violation of "public policy" by WSF, as distinguished from "whistle blowing." However, there are no facts or evidence proffered which erect such a foundation. By the statute cited by Arroyo himself (RCW 42.41), initial jurisdiction to determine if a timely, procedurally sound, and meritorious claim has been presented in the given case is assigned legislatively to a special administrative law judge, not to MEC. Here, this "primary jurisdiction" should not be disregarded by MEC, where, under the law, even a court would be superseded. Thus,

> When both a court and an agency have jurisdiction over a matter, the doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision. The court will usually defer to agency jurisdiction, if enforcement of a private claim involves a factual question requiring expertise or involves an area where uniform determination is desirable.

(Emphasis added.) Vogt v. Seafirst, 117 Wn.2d 541, 554 (1991).

Certainly, MEC has the legal obligation to determine the questions raised initially by Arroyo in his formal grievance request. That determination ought to be made pursuant to Chapter 47.64 RCW, at the conclusion of an adjudicatory hearing, based upon the hearing record.

There is no genuine evidence embodied in Paul Arroyo's declaration as required by Dicomes v. State, 113 Wn.2d 612, 782 P.2d 1002 (1989) and Gardner v. Loomis Armored, 128 Wn.2d 931

(1996) that he was fired by WSF because he was a crime "witness," or that he "blew a whistle," i.e. reported to appropriate state or law enforcement officials about his scuffle with John Tegnell. In sum, there is no proof, or prospect of proof that some causative "employer misconduct" took place, as distinguished from allegations that a transitory hassle took place, between individual employees.

Mr. Arroyo was a probationary employee when terminated. Under the contract, just cause and progressive discipline are not required. The language of the collective bargaining agreement (Rule 33.01) clearly established a different standard for probationary employees which provides for termination during or at the end of the probationary period for a "bona fide reason relating to the business operation of the ferry system."

CONCLUSION

Mr. Arroyo's grievance will be heard based upon the grievance originally filed with the MEC.

The motion filed by counsel on behalf of Paul Arroyo is denied because it raises issues selected and reserved for treatment, within time and procedural limitations, by administrative authority separate and apart from MEC.

PETITION FOR REVIEW OF COMMISSIONER DECISION

Pursuant to WAC 316-65-550, a commissioner's decision shall be subject to review by the entire commission on the petition of any party made within twenty days following the date of the decision entered by the commissioner. If no timely petition for review is filed, and no action is taken by the commission, on its own

motion, within thirty days following the commissioner's order, the order shall automatically become final and binding.

DATED this 7th day of January, 1997.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN P. SULLIVAN, Arbitrator