

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

EDWARD MULCAHY,	)	MEC Case No. 5-93
	)	
Grievant,	)	
	)	DECISION NO. 106 - MEC
v.	)	
	)	
WASHINGTON STATE FERRIES	)	
	)	DECISION AND ORDER
	)	
Respondent.	)	
_____	)	

Anderson and Peterson, Attorneys, by Paul Anderson, appearing for and on behalf of Edward Mulcahy.

Christine Gregoire, Attorney General, by Robert McIntosh, Assistant Attorney General, for and on behalf of Washington State Ferries.

THIS MATTER came on regularly before the Marine Employees' Commission (MEC) on May 14, 1993, when Edward Mulcahy filed a second request for grievance arbitration against Washington State Ferries (WSF) pursuant to RCW 47.64.150 and WAC 316-65-050. Mr. Mulcahy alleged that he had been disciplined without just cause in violation of the Marine Engineers Beneficial Association (MEBA) Agreement with WSF. Specifically he charged improper delay and incomplete investigation of a complaint filed against him by his immediate superior and harassment, which resulted in illness, use of sick leave and unpaid leave for which he asked MEC to order compensation. Mr. Mulcahy asked that this second grievance be heard together with Case NO. 4-93. The matter was docketed as MEC Case No. 5-93 and assigned to Chairman Dan Boyd to act as arbitrator, who later reassigned it to Commissioner Louis O. Stewart for hearing.

Please see Decision No. 105-MEC for a narration of consolidation, hearing and briefing procedures leading to separate decisions for MEC Case 4-93 and 5-93.

#### INTRODUCTION AND BACKGROUND

On January 8, 1993 Grievant Mulcahy was on watch as Chief Engineer aboard the M.V. KALEETAN. Mulcahy's direct superior officer was Staff Chief Engineer Harold Saxton. At approximately 0730 that morning, Saxton phoned the KALEETAN to inquire about the turbocharger on the No. 3 engine, because the last prior off-going watch had reported some concern about its condition. Mulcahy took the phone call, which became heated and at the end of which Mulcahy directed certain profanity to Saxton. Thereupon Saxton wrote a memorandum of complaint to Senior Port Engineer Ben Davis. After a three-months' investigation, Davis wrote Mulcahy a letter of reprimand. Mulcahy filed the instant request for arbitration of his grievance against WSF.

#### ISSUES AND REMEDIES

1. Did WSF violate the MEBA/WSF Agreement for Licensed Engineer Officers, Section 5, when it issued a letter of reprimand to Edward Mulcahy?
2. Did Edward Mulcahy suffer any loss of benefits because of said violation?
3. If the answer is "yes" to either question above, what is/are the remedy/remedies?

## POSITIONS OF THE PARTIES

### Position of Grievant Edward Mulcahy

Mr. Mulcahy describes a situation where Staff Chief Engineer Saxton called on the cellular phone when the M.V. KALEETAN was approaching a landing at Lopez Island; Assistant Engineer Gerry Burrow was at the engineroom throttles Mulcahy was monitoring the engine gauges, but Mulcahy answered the phone. At about the same time the master alerted the engineroom personnel of the impending landing.

Saxton had phoned to inquire about the condition of the turbocharger of the No. 3 engine. Mulcahy reported the turbocharger apparently was operated well; but the call had been made at an inopportune time. The conversation became heated. Mulcahy admits saying "Fuck you, Harold;" but he thinks he said it after hanging up the phone. He denies using the other profanity cited in Saxton's complaint.

Mulcahy asserts that he had every right to hang up on Saxton. Pursuant to Coast Guard regulations he was responsible for the operation of the engines during landing and he could not allow interference like that attempted by Mr. Saxton.

When Mulcahy met with Senior Port Engineer Ben Davis on January 25 regarding the alleged offenses, Mulcahy asked Davis to interview Burrow and Oilers Nick Nicolaidis and Debbie Daves. At that meeting he urged a prompt resolution of the matter, and Davis hoped that the investigation would be concluded within two weeks. But Davis did not interview Burrow by February 23, and did not talk with Debbie Daves until March, and then for only five minutes. Then "Davis felt it necessary to interview crew members of Mr. Saxton even though those crew members were not on the vessel at the time of the incident and presumably could have shed no light on the dispute."

Mulcahy voluntarily laid off work while Davis made his investigation. A month after the January 25 meeting Mulcahy, not having heard anything, assumed the investigation was concluded and returned to work. But on April 23 Davis issued his letter of reprimand.

Mulcahy charges that his disciplining letter was a violation of the MEBA/WSF Agreement. There was not sufficient cause for discipline, and the improper investigation was harassment and not in accordance with the "just cause" required by the MEBA/WSF Agreement.

Mulcahy relied upon New England Fish Co. v. Western Pioneer, 509 F. Supp. 865 (W.D. Wa. 1981), in arguing that WSF was estopped, under the doctrine of equitable estoppel, from issuing a reprimand so long after Mulcahy had been led to believe the investigation would be completed.

Mulcahy further cited Davis' assertion in his letter of reprimand that this letter was the least form of discipline he could exert under the WSF progressive discipline principal. Mulcahy argued that a "verbal" reprimand was in fact the least severe discipline; therefore Davis' letter was untrue.

Mulcahy also argues that there is a serious lack of specificity of the alleged misconduct in the letter of reprimand. Therefore, Mulcahy requests that, if WSF is not estopped from issuing said reprimand, the arbitrator should require WSF to make the charges more specific.

Finally, Mulcahy asserts a claim for used compensatory time (40.7 hours), annual leave (111.7 hours), sick leave (31.1 hours), lost wages (\$4,446.09), additional compensatory time (16 hours), travel time (\$2,200.59), and mileage (3,178 miles). This claim represents the losses to Mulcahy because of his absence from work. "If Mr. Davis would have completed his investigation within the two-week

time period as he promised, Mr. Mulcahy would not have had to use his benefits."

#### Position of Washington State Ferries

WSF asserts "just cause" existed for Mulcahy's reprimand. All persons, including Mulcahy, agree that he told his superior "Get fucked, Harold." All persons, except Mulcahy, agree that Saxton did not use profanity in the conversation, nor threaten Mulcahy. The KALEETAN coming in for a landing does not justify Mulcahy to tell Saxton to "get fucked." The phone call did not jeopardize the KALEETAN coming in for a landing.

WSF cites many arbitration cases involving profanity to show that using profanity against a superior on the job usually results in harsher discipline than a letter of reprimand.

WSF further argues that its investigation was timely, consistent and with applicable procedures, and "untainted by any improper motives."

WSF flatly denies Mulcahy's charges of harassment and/or that WSF officials are out to "get" Mulcahy.

WSF relies upon Bureau of Alcohol, Tobacco and Firearms v. National Treasury Employees Union, 93 LA 393, in arguing that the arbitrator should not exert a time limit on investigation where the parties themselves have not agreed to one. However, the arbitrators in said Bureau case, and in Furrs Supermarkets v. United Food and Commercial Workers Local 1564, 95 LA 1021, while sustaining the employers following delayed investigation, did reduce the penalties exacted because of delayed investigation.

WSF relies upon Elkouri and Elkouri, How Arbitration Works, 4<sup>th</sup> Ed., 675, n.122 & 123, to assert that "perfect compliance" with procedures in disciplinary cases is not required, so long as the employee is not prejudiced or damaged thereby. WSF argues that no loss accrued to Mulcahy because of the length of the investigation.

WSF asserts that Senior Port Engineer Davis had difficulty getting Mulcahy to attend a "Loudermill meeting" as part of the investigation. Mulcahy asked for postponements and/or had reasons why he could not attend, until Davis suspended him until such time as Mulcahy would meet with him.

WSF asserts that Mulcahy is not entitled to compensation (paid leave) pending the investigation. He did get paid by using sick leave and annual leave and now, if he were to be awarded payment for that period of time, it would amount to double compensation.

Finally, WSF argues that Mulcahy was not entitled to a transfer pending Davis' investigation. Pursuant to the MEBA/WSF Agreement, transfers can only be achieved under Section 20(e) of said agreement.

WSF asks that the letter of reprimand be affirmed, his short suspension pending the Loudermill meeting be upheld, and his requests for back pay be denied.

Having read the entire record, the Commission now enters the following findings of fact.

#### FINDINGS OF FACT

1. Because both parties were prepared with witnesses and documents to engage in character attacks and character rehabilitation of Edward Mulcahy and Harold Saxton respectively, counsel agreed to shorten the proceedings by

stipulation, which is herein paraphrased from TR 294-295, as follows:

With respect to MEC Case No. 5-93, we will confine ourselves to the circumstances that gave rise to the letter of reprimand which is at issue in this case. Counsel will not attack or rehabilitate the characters of Mr. Mulcahy nor of Mr. Saxton. We can present evidence on the investigation that surrounded the letter of reprimand. Exhibits marked Numbers 10, 11, 12, 13, 14, 15, 16, 29 and 30 will be withdrawn.

2. Edward P. Mulcahy is a licensed marine engineer employed by WSF as a Chief Engineer. He is a member of the Marine Engineers Beneficial Association.
3. On January 8, 1993 Staff Chief Engineer Harold Saxton did phone the M.V. KALEETAN engine room at about the same time that Mulcahy and the assistant engineer were also alerted by the master to prepare for a landing at Lopez Island. The purpose of the call was quickly satisfied; but Mulcahy prolonged the conversation by bringing up a different matter, viz., his resentment of being ordered to post his engineer's license.
4. The telephone conversation became heated. Despite Mulcahy's denial, Mulcahy used profanity several times; and, by his own admission, Mulcahy told Saxton to "get fucked;" witnesses testified that Mulcahy said, "Get fucked, Harold."
5. Saxton did immediately file a protest with his superior and recommended disciplinary action against Mulcahy.
6. Senior Port Engineer Ben Davis did promptly call Mulcahy (the same evening Davis received Saxton's complaint); but delays in the investigation were caused by both parties, starting with Mulcahy's reason for not attending a scheduled Loudermill hearing on January 12 (on the grounds that he wanted an

attorney present instead of his union representative). Mulcahy continued to evade such a meeting until Davis suspended him without pay until he did meet with Davis. But after telling Mulcahy that he wanted to clear the matter up within two weeks, Davis let almost two more months expire before concluding his interrogation of Mulcahy's witnesses and making his decision of discipline known to Mulcahy.

7. Neither of the two oilers which Mulcahy insisted that Davis should interview were actually eye-ball or ear-shot witnesses. Their statements regarding the phone conversation were patently based upon hearsay; but the hearsay came from Mulcahy himself when he came from the engine control room to the day room and told the oilers about his conversation and reported that he had said, "Get fucked, Harold."
8. The profanity was neither the common usage of profanity between and among members of a work crew, nor was it intended to be friendly advice.
9. Discipline of WSF licensed marine engineers is governed by Section 5 of the agreement between National Marine Engineers Beneficial Association, District 1, and Washington State Ferries, as follows:

SECTION 5 - DISCIPLINE AND DISCHARGE

The Employer shall not discharge or otherwise discipline any engineer officer without just cause.

10. Disputes arising from the interpretation of said MEBA/WSF Agreement are governed by Section 23, as follows:

SECTION 23 - DISPUTES

(a) In the event a controversy or a dispute arises resulting from the application or interpretation of any



provision of this Agreement, the aggrieved party shall present the grievance or dispute, in writing, to the other party as soon as possible, but in no event more than 60 calendar days after the aggrieved party is aware, or in the exercise of reasonable diligence should have been aware, of the events on which the grievance or dispute is based. A conference shall be held between authorized representatives of the Employer and the Union within thirty working days from the date of receipt of the grievance by the party against whom it is filed.

(b) In the event the parties fail to agree on a resolution of the matter within thirty (30) working days of the conference, either party may submit the matter to arbitration as herein provided.

(c) In the event either party decides to submit the matter to arbitration, it will notify the other party of this action and will refer the dispute to the Marine Employees Commission for a final resolution. If mutually agreed between the Employer and the Union, the matter may be referred to another independent third party instead of the Marine Employees Commission for a final resolution.

(d) The arbitrator's decision shall be final and binding on the Union, affected employee(s) and the Employer.

(e) The arbitrator shall issue his/her decision not later than thirty (30) calendar days from the date of the closing of the hearings, or, if applicable, not later than thirty (30) calendar days from the date the final statements and briefs are received by the arbitrator, whichever is the later. The decision shall be in writing, and shall set forth the arbitrator's opinion, conclusions, and decision on the issue(s) submitted.

(f) All costs, fees and expenses charged by the arbitrator will be shared equally by the Employer and the Union. All other costs incurred by a party resulting from an arbitration hearing will be paid by party incurring them.

11. The MEBA/WSF Agreement is silent as to time limits within which WSF officials must conclude investigation of engineer officer misconduct.

### CONCLUSIONS OF LAW

1. MEC has jurisdiction over the labor-management relations between and among the ferry employees, employer, labor union, and subject matter involved in this case. Chapter 47.64 RCW; especially RCW 47.64.280.
2. MEC may not change or amend the terms, conditions, or applications of the MEBA/WSF collective bargaining agreement. RCW 47.64.150.
3. Profanity spoken in anger, as opposed to common shop talk, has consistently been held by arbitrators to be sufficient cause for discipline. T.J. Maxx v. Southwest District Council, Int'l Ladies Garment Workers Union, 98 LA 952 at 957f; Lockheed Corp. v. Int'l Association of Machinists, Local Lodge 2386, 83 LA 1018, at 1022-3. Even if the personally-directed profanity had been private, as Mulcahy claimed when he thought he had spoken after hanging up the phone, Mulcahy boasted to the oilers that he had told Saxton to "Get fucked." Arkansas Louisiana Chemical Corp., 35 LA 887. MEC therefore concludes that Mulcahy's personally-directed profanity to his superior, Saxton, was clearly sufficient cause for discipline.
4. MEC has concluded in several cases that the requirement of "just cause" includes several tests, not only tests of the precipitating reason for discipline, but also the process and the recognition of a protected right to be treated fairly. In these prior decisions, MEC has borrowed heavily from Adolph M. Koven and Susan L. Smith, Just Cause: The Seven Tests, 1985. An abbreviated list of these tests includes:
  - 1) Notice - Misconduct and its Consequence
  - 2) Reasonable Rules and Orders
  - 3) Investigation and Due Process

- 4) Fairness and Objectivity
- 5) Proof
- 6) Equal Treatment
- 7) Appropriate Penalty and Remedy

See MEBA (Warren) v. WSF, MEC Case No. 13-92, Decision No. 97-MEC.

5. In the interest of brevity each test is not described herein. However, the record amply indicates that all of the tests were met, with the exception of "Investigation and Process." Concerning the "Appropriate Penalty," the letter of reprimand was the mildest discipline for angry cursing the Commissioners have encountered.
6. Regarding the "Investigation and Due Process" test, the Commission concludes that January 8 to April 24 is a very long period in which to interview four or five persons. Without doubt, much of the delay was caused by Mulcahy. However, when Davis did finally "blow the whistle," Mulcahy did respond promptly and attend his meeting. But thereafter Davis unnecessarily delayed interviewing Mulcahy's witnesses. In MEBA (Warren) v. WSF, ibid, this Commission found that these seven tests of "just cause" were almost complete, the exception being a slightly improper Loudermill meeting as part of the investigation. "Just cause" in Section 5, MEBA/WSF Agreement would become diminished if this Commission were again to waive less than vigorous investigation. Therefore, this Commission should sustain the Mulcahy grievance in part, with a mitigation of discipline. Champion Spark Plug Co. v. UAW Local 272, 393 LA 1277, at 1285; Bureau of Alcohol, Tobacco and Firearms; ibid; Furrs Supermarkets, ibid.

Having read and carefully considered the entire record and having entered its findings of fact and conclusions of law, this Commission hereby enters the following decision and order.

DECISION AND ORDER

1. The grievance filed by Edward P. Mulcahy against Washington State Ferries is hereby SUSTAINED IN PART and DENIED IN PART.
2. The letter of discipline warning Mr. Mulcahy of his unacceptable behavior on January 8, 1993 as his first step in the WSF progressive discipline policy is hereby sustained.
3. The claim for reimbursement for compensatory time, sick leave and annual leave used, lost wages, travel time and mileage is hereby denied.
4. The letter of discipline shall be retained in Mr. Mulcahy's personnel file for a period ending two years from the date of the offense. If Mr. Mulcahy has not committed any other offense resulting in discipline for just cause on or before January 7, 1995, the instant letter of reprimand shall be purged from all WSF files as if it had never existed.

DONE this 21<sup>st</sup> day of January 1994.

MARINE EMPLOYEES' COMMISSION

/s/ HENRY L. CHILES, JR., Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner