

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

ROBERT S. O'HARA,	)	
	)	
Complainant,	)	MEC Case. NO. 2-90
	)	
v.	)	DECISION NO. 58
	)	
WASHINGTON STATE FERRIES	)	ORDER REMANDING THE
and INLANDBOATMEN'S UNION	)	CASE FOR FURTHER
OF THE PACIFIC,	)	HEARING
	)	
Respondents.	)	
_____	)	

On July 13, 1990, Louis O. Stewart, acting as Hearing Examiner on behalf of the Marine Employees' Commission, issued a Decision and Order, Decision No. 53, in the above-referenced case. The order dismissed the Unfair Labor Practice Complaint charged by Robert S. O'Hara against the Washington State Ferries and the Inlandboatmen's Union of the Pacific.

The Decision and Order, at page 18, paragraph 2, states:

Pursuant to WAC 316-45-350 the foregoing findings of fact, conclusions of law, and order is subject to review by MEC on its own motion, or at the request of any party made within twenty days following the date of entry of this order. In the event no timely petition for review is filed, and no action is taken by the commission on its own motion within thirty days following the date of entry of this order, the foregoing findings of fact, conclusions of law, and order shall automatically become the findings of fact, conclusions of law and order of MEC and shall have the same force and effect as if issued by that Commission.

The Complainant filed a Petition for Review which was received at the MEC office in Olympia on August 7, 1990. Because the

petition, in letter form, did not indicate whether respondents had been served a copy of his Petition for Review, the MEC notified O'Hara by letter dated August 9, 1990, that pursuant to WAC 316-45-350, he must serve a copy of the petition on the respondents. The MEC was thereafter notified by Mr. O'Hara that Patricia Nightingale, on behalf of WSF, was served by mail with a copy of the petition on August 16, 1990; John Burns, on behalf of IBU, was served by mail on August 15, 1990. On August 21, 1990, the MEC sent letters to the parties to remind them of their right to respond in writing to Mr. O'Hara's petition within fourteen days of the date each was served with the petition (WAC 316-452-350).

#### Timeliness

WAC 316-02-100 provides that in computing any period of time prescribed by notice, the prescribed period of time shall commence on the date of receipt of such notice. Robert O'Hara signed the postal return receipt indicating receipt of the Decision and Order on July 14, 1990. Computing the 20-day time period from July 15, 1990, a Sunday, Mr. O'Hara's Petition for Review would have been timely filed any time on or before August 3, 1990. Mr. O'Hara's petition was filed August 7, 1990, pursuant to WAC 31-02-150.

WAC 316-02-103 - Service of Process-Additional Time after r Service by Mail - adds three days to any prescribed time period when a "notice or other paper" is served by a party. WAC 316-02-100 further states that when any time prescribed is less than seven days, intermediate Saturdays, Sundays and holidays shall be

excluded. This language in WAC 316-02-100 clearly would make Mr. O'Hara's petition timely if it was filed August 6, August 7 or August 8.

The MEC finds that the application of the three-day extension of time within which to file a paper served by mail (WAC 316-02-103) is not satisfactorily clear with regard to the provision in WAC 316-02-100 which would exclude Saturdays, Sundays and holidays when computing a time prescribed time period of less than seven days. Therefore, the MEC grants, upon its own motion, an extension of time to Mr. O'Hara, pursuant to WAC 316-02-105, for "good cause shown" (the lack of clarity of the application of WAC 316-02-100 and 316-02-103) and rule that the Petition for Review was timely filed.

#### Standing of the IBU

##### 1. Background

At the hearing of this matter before Hearing Examiner Stewart, the IBU moved for dismissal of the unfair labor practices charges brought by Mr. O'Hara against them, stating that (1) the IBU had not violated the statutory sections cited on the complaint form; (2) the IBU had reviewed O'Hara's plea of "extreme hardship" pursuant to Rule 21.15 in good faith and in a non-arbitrary fashion and made the determination that no showing of "extreme hardship" had been made; and (3) the decision, made in good faith, could not be the basis of an unfair labor practice. (Examiner's Decision and Order, page 7.) Hearing Examiner Stewart deferred ruling on the

IBU's motion to dismiss until the complainant concluded the presentation of his case. At the end of the complainant's presentation, the hearing examiner dismissed the Inlandboatmen's Union as respondents in the case. Transcript, page 78. Likewise, the Washington State Ferries moved for dismissal during the hearing. At the end of the ferry system's presentation, Hearing Examiner Stewart "grant[ed] the Ferry System their motion to dismiss." Transcript, page 144. Before the end of the hearing, Examiner Stewart explained that he was "inclined to grant the motion of the Ferry System," but would still "ask the Court Reporter for a transcript"; he inferred that the final decision must be made by the Commission. Transcript, page 148.

## 2. MEC Decision

Pursuant to RCW 47.64.280(3), orders of the Commission are "final and binding upon a ferry employee . . . or their representative . . . and upon the department." In this case, the hearing examiner alone, not the Commission, issued a decision and order. Had no petition for review been filed within 20 days, the Hearing Examiner's Decision would have become "final and binding" upon the parties. In this case, however, a petition for review was timely filed pursuant to WAC 316-45-350, and therefore the Examiner's Decision and Order is subject to review by the Commission. The decision of the hearing examiner to dismiss the IBU as a respondent (Conclusion of Law #8) is equally reviewable, and therefore the Marine Employees' Commission finds that the IBU remains a respondent in the case until a final decision is issued.

Four of Five Points Raised by Complainant's  
Petition for Review Do Not Merit Review

The MEC has carefully considered the five points raised by Complainant in his petition, as well as the arguments raised by respondent WSF in its written response. The Commission rules as follows:

1. Point #1 - Regarding Finding #1 and #9

The Washington State Ferries in its response to the Petition for Review correctly argues that evidence which could have been discovered and produced at the time of hearing with reasonable diligence cannot be considered grounds for reconsideration of a new hearing. Civil Rule of Evidence 59. By his own words in Point #1, Mr. O'Hara had opportunity to "re-examine" the actual requests for transfer (discussed in Finding of Fact #1 and #9). If Mr. O'Hara knew of the existence of the requests for transfer and had previously examined them, he neglected to produce them at the hearing. The MEC must therefore find that because Mr. O'Hara failed to produce the requests for transfer as evidence at the hearing he may not after the fact claim that their admission would alter the hearing examiner's Findings in this case.

Point #3 - Regarding Finding of Fact #14

Similarly, the Commission will not consider the new evidence which Mr. O'Hara suggests in Point #3 would alter the hearing examiner's Finding of Fact #14. A 1988 seniority list was in evidence (Exhibit 3) at the hearing. However, when testifying

Mr. O'Hara could not identify examples of full time employees transferring to "C"-Watch Port Townsend/Keystone subsequent to the signing of the IBU/WSF contract. It is likely that Mr. O'Hara, acting on his own behalf, did not anticipate having to identify such other individuals from that roster. Nevertheless, pursuant to Civil Rule of Evidence 59, he cannot after the fact request that the Commission consider evidence which with due diligence could have been discovered and produced at the hearing.

Point #4 - Regarding Finding #21

Based upon the hearing record, the Commission agrees with the hearing examiner's Finding #21 that the actions of the WSF in restoring Mr. O'Hara to his former position on the Winslow-Seattle route did not constitute a demotion.

Point #5 - Request for Leave to Amend Complaint

Mr. O'Hara also asks the Commission for leave to amend his complaint to include an additional charge against the IBU. He alleges that the IBU's absence at the remainder of the hearing following the hearing examiner's dismissal of the unfair labor practice charge against them, prevented him from obtaining the new evidence which forms the basis of Points #1 and #3.

At pages 78-79 of the Reporter's Transcript, the hearing examiner did excuse the IBU from further participation in the hearing. Mr. O'Hara made no objection. It is unfortunate that at the time the complainant did not foresee a need to further examine the IBU representative who was present. However, the fact that the

IBU chose to leave the hearing upon their dismissal as a respondent is not reviewable in this petition.

The hearing examiner dismissed the case against the IBU on the grounds that, in his opinion, the facts alleged in the complaint, incorporated into the hearing notice, were not proven. TR 78. Conclusion of Law #8. The complainant had the right to amend the complaint, incorporated into the hearing notice, before the close of the hearing, pursuant to WAC 316-45-170. Mr. O'Hara had the opportunity to call and examine union representatives at the time of the hearing. He may not now ask the Commission to amend the complaint to include his assertion that had the IBU remained, he could have met his burden of proof. Complainant's request to amend his complaint is therefore denied.

#### Basis for Review

##### Point #2 - Regarding Finding #6

Specifically regarding Point #2, regarding Finding of Fact number 6, however, we find that the MEC must examine the adequacy of the Record concerning the coverage of the labor contract between WSF and IBU. Petitioner points out, and we agree, that the record is silent, or at best unclear, as to when the "Agreement became a legal contract between the IBU and the WSF."

Since WSF and IBU based their removal of Robert O'Hara from the "C"-watch-Port Townsend on Rule 21.15, a rule new to the 1987-1989 labor contract, it is vital to establish that the contract had been legally executed (RCW 47.64.190(1)) prior to October 6, 1989, the date on which WSF Port Captain Jerry Meecham

approved Robert O'Hara's request for transfer.

The Hearing Examiner's Findings were based in large part on the belief that the contract could be relied upon by WSF and IBU in their application of the "hardship rule."

We are convinced that the issue raised in Point #2 of the Petition for Review can only be resolved by remanding the case to the Hearing Examiner to re-open the hearing solely for the purpose of taking further testimony on this particular issue.

Based upon the foregoing, the MEC hereby orders the Hearing Examiner to re-open the hearing for testimony which will resolve the issue raised in Point #2 of the Petition for Review.

DONE this 11<sup>th</sup> day of September, 1990.

/s/ Dan E. Boyd, Chairman

/s/ Donald E. Kokjer, Commissioner



