

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

DISTRICT NO. 1 MARINE	)	MEC Case No. 2-95
ENGINEERS BENEFICIAL	)	
ASSOCIATION on behalf of	)	
THOMAS W. LITTLE,	)	
	)	
Grievants,	)	DECISION NO. 140 - MEC
	)	
v.	)	DECISION AND ORDER
	)	
WASHINGTON STATE FERRIES,	)	
	)	
Respondent.	)	
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Davies, Roberts and Reid, attorneys, by Kenneth J. Pedersen, attorney at law, appearing for and on behalf of District No. 1 Marine Engineers Beneficial Association.

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

THIS MATTER came on regularly before the Marine Employees' Commission (MEC) on January 26, 1995, when District No. 1 Marine Engineers Beneficial Association (MEBA) filed a request for grievance arbitration against Washington State Ferries (WSF) on behalf of Thomas W. Little.

In its grievance arbitration request, MEBA asserted that WSF demoted Thomas Little from the position of Alternate Staff Chief Engineer (ASCE) to Chief Engineer (CE) without just cause in violation of Section 5 of the MEBA/WSF Collective Bargaining Agreement for Licensed Engineer Officers. Specifically, MEBA alleged that in April 1994, Staff Chief Engineer (SCE) Bob Ellis

informed Thomas Little that he was appointed Alternate Staff Chief Engineer on the M.V. HYAK. Little began performing the duties of that position. He submitted work and class codes for the Alternate Staff Chief position which were paid by WSF at the appropriate rate for the Alternate Staff Chief position. On or about September 6, 1994, Little was notified by Port Engineer Mark Nitchman that his pay order for August 1-5, 1995 was disapproved: "You have not been designed the Alternate Staff Chief Engineer by the Staff Chief or been approved for this position by the Port Engineer's Office." WSF refused to reinstate Little to the Alternate Staff Chief position without justification and in a manner contrary to accepted practice.

MEBA requested that WSF reinstate Thomas Little to the position of Alternate Staff Chief Engineer and that he be made whole by an award including, but not limited to: "Back pay for the difference between the Alternate Staff Chief Engineer rate of pay and the Chief Engineer's rate actually paid to Little for the period of August 1, 1994 through the present date and on a continuing basis until the matter is finally resolved."

MEBA certified that the grievance procedures in the MEBA/WSF collective bargaining agreement have been utilized and exhausted. MEBA also certified that the arbitrator's decision shall not change or amend the terms, conditions or applications of said collective bargaining agreement and that the arbitrators' award shall be final and binding.

The request for grievance arbitration was docketed as MEC Case No. 2-95 and assigned to Chairman Henry L. Chiles, Jr. to act as arbitrator pursuant to WAC 316-65-070 or -090.

A prehearing conference was scheduled pursuant to WAC 316-02-210 and held on Friday, April 14, 1995.

A hearing was scheduled pursuant to RCW 47.64.150 and 47.64.280 and chapters 316-02 and 316-65 WAC on May 3, 1995, then continued to May 31, 1995, and then continued to June 12, 1995, and Commissioner John P. Sullivan was substituted as arbitrator.

Grievance arbitration hearings were held on Monday, June 12, 1995; Monday, June 19, 1995; Thursday, June 29, 1995 and Monday, July 10, 1995.

Briefs were filed on Wednesday, September 19, 1995 and have been carefully considered by the MEC.

#### POSITIONS OF THE PARTIES

##### Position of MEBA

Pursuant to the Vessel Operating Procedures, Section 4, ¶ 19, Staff Chief Engineer Ellis has the exclusive authority to appoint Mr. Little to Alternate Staff Chief Engineer on the HYAK. Ellis is the best qualified person to designate the Alternate Staff Chief Engineer.

On April 27, 1994, Mr. Ellis did in fact appoint Little as the Alternate Staff Chief Engineer and directed him to start submitting time sheets as the Alternate Staff Chief Engineer. Mr. Little started submitting pay time sheets with the pay code "405" in two places under class section, worked "405" and paid "405" as noted on Exhibit 9, page 3. Starting with April 27, 1994 he was paid at that rate and class until mid-August 1994. Mr. Davis, the Senior Port Engineer, audited and reviewed this time sheet and deleted four (4) hours of overtime or penalty time and signed his name.

Armand Tiberio, WSF Director of Operations, delegated to Senior Port Engineer Ben Davis the right to approve the position of

Alternate Staff Chief Engineer and to review and approve pay orders. This review and approval for time submitted in April, May, June and July constituted approval of Mr. Little as Alternate Staff Chief Engineer by the managerial office that had the authority for approval, thus there is not tacit approval or unspoken approval, but implicit approval by Mr. Davis.

Mr. Little has no disciplinary comments in his personnel file. Senior Port Engineer Davis had no basis for demoting Little from Alternate Staff Chief Engineer to Chief Engineer.

Nor did WSF have any reason to claim it had "just cause" to deny Mr. Little a promotional opportunity. Senior Port Engineer Davis's action in withholding approval, if required of Mr. Little, was arbitrary and capricious and in violation of the Personnel Manual.

Mr. Little was unjustly demoted.

#### Position of WSF

It is WSF's position that the appointment of the Alternate Staff Chief Engineer is a multi-step procedure:

1. The appointee must be serving as Chief Engineer on the alternate week than the Staff Chief Engineer.
2. The Staff Chief Engineer must appoint a Chief Engineer as Alternate Staff Chief Engineer.
3. The Staff Chief is to advise the Port Engineer's Office of the appointment which must be approved by the Director of Vessel Operations and/or the Senior Port Engineer.

WSF maintains that the third step was not complete; there was no approval, therefore, the appointment fails.

The submission of pay time sheets by Little with the Alternate Staff Chief Engineer position indicated by the "405" pay class is not a valid request for approval by Staff Chief Engineer Ellis.

The removal of Mr. Little from the Alternate Staff Chief Engineer position cannot be a demotion as he was never confirmed or approved by management for that position.

Even if Little had been appointed as Alternate Staff Chief Engineer, which he was not, he did not serve the required probationary period and could therefore be removed without just cause. In fact, WSF had just cause for demoting Mr. Little for earlier incidents as well as justification for not approving the appointment had the appointment been properly submitted for approval.

#### ISSUE

1. Was Thomas Little appointed by Staff Chief Engineer Ellis to be the Alternate Staff Chief Engineer? If so, did his appointment receive approval from WSF?
2. If Mr. Little was approved, did WSF have just cause to demote him to Chief Engineer?

Having read and carefully considered the entire record, including the request for arbitration, the hearing transcript, the exhibits and the briefs, the Marine Employees' Commission now hereby enters the following findings of fact.

## FINDINGS OF FACT

1. The grievant has been licensed as a Chief Engineer by the United States Coast Guard and is qualified and certified to sail as Chief Engineer on the vessels operated by WSF.
2. The grievant has been serving as Chief Engineer on the HYAK since June 1993.
3. SCE Ellis has served on the M/V HYAK since the grievant has been on that vessel.
4. Pursuant to Vessel Operating Procedures, Sec. 4, ¶ 19, SCE Ellis has the authority to appoint a Chief Engineer to the position of Alternate Staff Chief Engineer.
5. The Alternate Staff Chief Engineer is in charge of the Engine Department the alternate week from the Staff Chief Engineer.
6. The Staff Chief Engineer's duties include the assignment of licensed engine room employees to whatever machinery and stations he deems appropriate, the determination of crew assignments, and ensuring that the performance of engine room employees meets acceptable safety standards. Policy Circular #ER-1-R1, January 24, 1994, revised May 1, 1984; Vessel Operating Procedures, p. 1.27, ¶ 15, May, 1992.
7. There are no written descriptions of standards or qualifications required of an Alternate Staff Chief Engineer, nor any written method of appointing an Alternate Staff Chief Engineer in the applicable 1991-1993 CBA, Policy Circulars, Vessel Operating Procedures or Personnel Manual.
8. The only notation about Alternate Staff Chief Engineers is noted in the CBA, Section 6 - Wages and Overtime; it

indicates that the rate of straight time and overtime paid to Alternate Staff Chief Engineers is between the Staff Chief Engineer and a Chief Engineer. Under Section 6, as of January 1, 1993, the Alternate Staff Chief Engineer earned \$0.78 per hour less than the Staff Chief Engineer and \$0.56 per hour more than the Chief Engineer.

9. It has been the custom and practice for the Staff Chief Engineer to advise the Vessel Operations Director and/or the Port Engineer's Office for approval by management.
10. On January 12, 1993, SCE Ellis designated CE Roger Hargraves as Acting Staff Chief Engineer during his absence for any reason; by this action Hargraves became the replacement Staff Chief Engineer. AT the same time, SCE Ellis designated CE Andy DeGraaf as the Alternate Staff Chief Engineer. Ellis asked for the approval of Senior Port Engineer Ben Davis. That approval was granted on January 21, 1993.
11. Upon ASCE Andy DeGraaf's departure from the HYAK, SCE Ellis appointed CE Little to the position of Alternate Staff Chief Engineer as of April 27, 1994 and directed him to start submitting pay time sheets paid under Code "405," "Alternate Staff Chief Engineer."
12. The head of the Port Engineer's Office is the Senior Port Engineer, Ben E. Davis. He has two assistants: Port Engineer Mark Nitchman and Port Engineer John Christensen.
13. CE Little's first pay time sheet as Alternate Staff Chief Engineer was submitted on April 30, 1994 with the proper work code of "405". Senior Port Engineer Davis reviewed this time sheet, noted in his own handwriting that he was deleting four hours of claimed overtime, and signed the time sheet.

14. The Personnel Manual, Section 8 - Payroll Time Sheets, states that before the payroll time sheets go to the Port Engineer's Office, they are to "be reviewed and certified" by the Fleet Coordinator for the Engine Room, who is Mary Liuska, the Engine Department Dispatcher. Her initials "ML" appear on Mr. Little's April 30, 1994 time sheets, indicating her review and certification.
15. In January 1992, Armand Tiberio, WSF Director of Operations, assigned Senior Port Engineer Ben Davis the duty of approving Engine Department Personnel appointments, including Alternate Staff Chief Engineer. Since that time, the Port Engineer's Office has had the authority and responsibility to review time sheets and to do a final audit and review pursuant to the WSF Personnel Manual.
16. A review and audit of the time sheets means a consideration for purposes of correcting any errors and verifying all the information on the time sheets. Random House Dictionary of the English Language, 2d Ed., Unabridged. 1987. To certify means to bear witness and to attest as being true. Black's Law Dictionary, 5<sup>th</sup> Ed., 1979.
17. ASCE Little continued to submit payroll time sheets as Alternate Staff Chief Engineer (code "405") from April to August 1994. For seven pay periods, each payroll time sheet was reviewed and certified by the Fleet Coordinator, and went through a final audit and review by the Port Engineer's Office.
18. On August 30, 1994, ASCE Little submitted his time sheets for the pay period ending August 15, 1994. While on vacation early in September, Little received his paycheck with a copy of the pay order on which Port Engineer Mark Nitchman



indicated that Mr. Little was not the Alternate Staff Chief Engineer.

19. Upon his return to work in September 1994, Little was assured by SCE Ellis that Ellis still considered Mr. Little as Alternate Staff Chief Engineer.
20. Little was appointed by the Staff Chief Engineer to Alternate Staff Chief Engineer. He served in and was paid for that position from April to August 1994 without any uttered or spoken opposition to that position and pay. By its actions, the WSF Port Engineer's Office gave its tacit approval of Mr. Little's appointment to Alternate Staff Chief Engineer on the HYAK.
21. SCE Ellis did not advise the Port Engineer's Office of Mr. Little's appointment, nor did he otherwise seek their approval. This was clearly Ellis' responsibility, not Mr. Little's.
22. On September 28, 1994, Little asked Senior Port Engineer Davis why he had been demoted from Alternate Staff Chief Engineer after serving for 3 ½ months without a complaint. Mr. Davis advised Little that he had not been demoted; rather he had never been approved to serve as Alternate Staff Chief Engineer.
23. Davis gave no reason for failing to approve ASCE Little's appointment. However, Davis referred to two incidents about which he was concerned, but which had not resulted in disciplinary action against Mr. Little.
24. In January 1994, when the grievant was serving as Chief Engineer on the HYAK on the Edmonds-Kingston run, there was a general alarm bell and wiring failure incident. He followed

the standard procedure: notify the Captain, start troubleshooting, telephone the U.S. Coast Guard, telephone the Port Engineer's Office and follow the directions of the Coast Guard.

25. The failure of the general alarm system was a serious problem. Before Little was relieved by Senior Port Engineer Davis, there was a 29 minute delay of the vessel in Kingston as Little commenced trouble shooting. Subsequently, CE Hargraves, who relieved Little, had a 2 hour and 11 minute delay in Kingston. Finally, WSF electricians from Eagle Harbor worked on the problem from 1300 (1:00 p.m.) to 2240 (10:40 p.m.) at after which the general alarm bells were in good working condition.
26. The work on the general alarm bell and wiring problem and the movement of the vessel was under the general overall direction of the Coast Guard.
27. Little was relieved of his watch as Chief Engineer and ordered to report to the Senior Port Engineer's Office in the Colman Building in Seattle. Following this conference there was no disciplinary action taken toward Little or noted in his personnel file.
28. In April 1994, the HYAK was scheduled to go into dry dock. The grievant was concerned about the vessel arriving late in the dry dock, thus reducing his crew's rest period between watches and resulting in the necessity of paying triple time.
29. Little attempted to avoid the triple time during the trip to the dry dock. He made five (5) telephone calls to WSF Engine Dispatcher's Office, three (3) telephone calls to Port Engineer Nitchman and two (2) telephone calls to SCE Ellis to

alert them to this potential. This attempt to avoid the triple time proved unsuccessful.

30. The work schedules for the HYAK engineroom personnel are determined by SCE Ellis. Scheduling is critical to avoid the necessity of paying premium rates. In this incident, Staff Chief Engineer Ellis failed to adjust the schedule.
31. Five months' after this incident, on October 4, 1994, Mr. Davis issued a letter documenting Mr. Little's handling of the incident which required payment of triple time to the crew of the HYAK. At hearing, Mr. Davis testified that it was "highly probable" that his mailing of the letter to Mr. Little regarding the "triple time" incident was triggered by Little's filing of a grievance. No disciplinary action was taken by Mr. Davis.
32. Based upon the testimony of witnesses testifying herein, each of whom was an experienced Staff Chief Engineer, Little in fact performed his duties properly, in a positive and decisive manner, in each of these incidents.
33. Mr. Little served 3½ months as Alternate Staff Chief Engineer on the HYAK. A "reasonable break-in period" as defined in the 1991-1993 WSF/MEBA Collective Bargaining Agreement, Section 20, is eighty (80) hours.

In Harpham and MEBA vs. WSF, Decision #10, MEC Case No. 3-85, CL #12, MEC decided that "once [grievant] has served successfully as Alternate Staff Chief Engineer for a period of time past a reasonable break-in period . . . , removal from that position and reduction of pay effectively constitutes a disciplinary action." (Emphasis added.) Here, ASCE Little served well in excess of 80 hours as Alternate Staff Chief

Engineer on the HYAK, thus completing a break-in period in that position.

34. Mr. Little continued to submit pay orders as Alternate Staff Chief Engineer in spite of Mr. Davis's order to stop because he believed he must do so to protect his grievance claim. No disciplinary action has resulted from this.
35. Section 5 of the MEBA/WSF Collective Bargaining Agreement reads as follows:

#### SECTION 5 - DISCIPLINE AND DISCHARGE

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

36. Mr. Little was a candid, truthful and creditable witness. Mr. Little's testimony as to his appointment by SCE Ellis to serve as the Alternate Staff Chief Engineer on the HYAK was not disputed.

The Commission having entered the foregoing findings of fact now hereby enters the following conclusions of law.

#### CONCLUSIONS OF LAW

1. MEC has jurisdiction over the parties and subject matter in this case. Chapter 47.64.RCW; specifically, RCW 47.64.150 and 47.64.280.
2. MEC may not change or amend the terms or applications of the collective bargaining agreement by and between the WSF and the MEBA. RCW 47.64.150.

3. Ben Davis, Senior Port Engineer, directs the vessel engine department manning and operation. In reviewing and auditing time sheets as directed by Director of Operations, Armand Tiberio, Davis is acting in a managerial capacity; he has the authority of management and the responsibility of management.
4. Mr. Davis's approval of Mr. Little's time sheets over seven pay periods, over three and a half months, amounts to constructive knowledge, which equates to tacit approval or unspoken approval of Little's appointment to the position of Alternate Staff Chief Engineer on the HYAK. Johnson v. Misericordia Community Hospital, 301 N.W.2d 156 at 173 (1981).
5. An equitable estoppel may arise under certain circumstances from silence or inaction. To give rise to an estoppel by silence or inaction there must be a right and opportunity to speak and an obligation or duty to do so. Here, if Mr. Davis did not approve Mr. Little's claims on time sheets, he should have objected immediately.
6. WSF and its Port Engineer's Office are estopped by their own action from claiming a right to demote Mr. Little, to his detriment, after he was entitled to rely on the conduct of WSF and its managerial officer in approving his pay time sheets for over three months. An estoppel arises when one is prevented and forbidden by law to speak against his own act or deed. Thomas v. Harlan, 27 Wn.2d 512 (1947), cited with approval, Burkey v. Baker, 6 Wn. App 248 (1970); Tjosevig v. Butler, 180 Wash. 151 (1935), cited with approval, Enterprise Timber Inc. v. Washington Title Ins. Co., 76 Wn.2d 479 (1969).
7. Mr. Little was appointed as Alternate Staff Chief Engineer by SCE Ellis and served in that position for 3½ months. He was demoted to Chief Engineer by Ben Davis, with a loss of pay. A demotion is a disciplinary action that requires WSF to

answer affirmatively to each of seven key "just cause" tests: (1) notice; (2) reasonable rule or order; (3) investigation; (4) fair investigation; (5) proof; (6) equal treatment; and (7) penalty. Just Cause: The Seven Tests, Koven and Smith, Kendall/Hunt Publishing Company (1985).

8. No disciplinary charges were brought against Thomas Little in any of the incidents cited by the State as cause for demotion. "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.
9. Having concluded that no disciplinary charges have been brought against Mr. Little as a result of incidents cited by the State, the MEC need not evaluate whether each of the standards seven tests of "just cause" is met in this matter. *How Arbitration Works*, 4<sup>th</sup> Ed. (1988).
10. Mr. Little's demotion does not meet the seven "just cause" tests, in violation of the 1991-1993 MEBA/WSF collective bargaining agreement, Section 5, which requires discipline for "just cause."

Having entered the foregoing findings of fact and conclusions of law, the Marine Employees' Commission hereby enters the following order.

DECISION AND ORDER

1. The grievance of Thomas W. Little brought by District No. 1 MEBA is hereby sustained.
  
2. Washington State Ferries is ordered to immediately reinstate Thomas W. Little to the position of Alternate Staff Chief Engineer on the M/V HYAK. MEC further orders that Mr. Little be paid at the rate of an Alternate Staff Chief Engineer for the hours he has worked as Chief Engineer on the HYAK since August 1, 1994 until the date of his reinstatement to the position of Alternate Staff Chief Engineer.

DATED this 10<sup>th</sup> day of October 1995.

MARINE EMPLOYEES' COMMISSION

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

/s/ JOHN P. SULLIVAN, Commissioner

/s/ DAVID E. WILLIAMS, Commissioner