

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION)	MEC Case No. 20-97
OF THE PACIFIC,)	
)	DECISION NO. 185 - MEC
Complainant,)	
)	
v.)	DECISION AND ORDER
)	
WASHINGTON STATE FERRIES,)	
)	
Respondent.)	
_____)	

Schwerin, Campbell and Barnard, attorneys, by Elizabeth Ford, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

Christine Gregoire, Attorney General, by Valerie Petrie, Assistant Attorney General, for and on behalf of the Washington State Ferries.

THIS MATTER came on regularly before the Marine Employees' Commission on May 13, 1997 when the Inlandboatmen's Union of the Pacific (IBU) filed an unfair labor practice against the Washington State Ferries (WSF).

IBU's complaint charged WSF with engaging in unfair labor practices within the meaning of RCW 47.64.130(1) by interfering with, restraining or coercing employees in the exercise of rights; discharging or otherwise discriminating against an employee after an employee has filed charges or given testimony concerning subjects covered by chapter 47.64 RCW; and refusing to bargain collectively with representatives of employees.

Specifically, IBU alleged that in 1993, the Washington State Legislature enacted chapter 95, Laws of 1993 which allowed union officers while on leave from their position with a state agency, to accrue benefits under the Public Employees' Retirement System Plan II ("PERS II"). IBU alleged that WSF's refusal to execute and abide by its agreement to allow union officers on leave from WSF to participate in the PERS II program was motivated by the fact that Dennis Conklin, a former WSF deckhand and now elected Business Agent for the IBU, frequently confronted Jim Yearby, WSF Director of Human Resources.

Remedy Requested

As a remedy for the alleged unfair labor practices, IBU requested an order requiring WSF to execute the agreement allowing PERS II benefits for union officers, including the provisions allowing the benefits to be provided retroactively to January 1, 1992, and such other relief as the Commission deems just and proper.

Background

Following review, the Marine Employees' Commission determined that the facts alleged by IBU may constitute an unfair labor practice if later found to be true and provable. WAC 316-45-110. Commissioner John P. Sullivan was appointed to act as Hearing Examiner pursuant to WAC 316-45-130.

A notice dated July 10, 1997 scheduled a settlement conference date of August 26, 1997 and a hearing date of September 5, 1997. The notice directed that an answer be filed on or before August 20, 1997.

A hearing commenced on September 5, 1997 and was completed on September 17, 1997. Post-hearing briefs were timely filed by the parties.

POSITIONS OF THE PARTIES

Position of the Inlandboatmen's Union of the Pacific

WSF, through its conduct, objectively manifested an intent to enter into a binding contract. WSF Director of Human Resources, Jim Yearby, and WSF Assistant Attorney General Robert McIntosh reached an agreement with IBU counsel to allow WSF employees, on leave as a result of their election or appointment to a union office, to continue to earn retirement credits in the PERS II program, pursuant to RCW 41.40.710. After the agreement was made by mutual assent, mutual intention and meeting of minds, it was to be committed to writing for the parties' signatures; the parties had reached the essential terms of the pension agreement.

The WSF's refusal to execute and abide by its agreement to allow WSF employees on leave serving as union officers to participate in the PERS II program constitutes an unfair labor practice.

As a remedy, WSF should be required to sign the agreement between the parties and reimburse Dennis Conklin for all lost moneys and benefits.

Position of Washington State Ferries

WSF, through its counsel, exchanged correspondence and proposed draft agreements with IBU regarding arrangements which would allow union officers to participate in the PERS II state pension program pursuant to RCW 41.40.710. Under PERS II, a compensation and reimbursement arrangement must be made between the public employer, WSF, and the union, IBU, in order for the union official to continue to receive state retirement service credits.

However, RCW 41.40.710 is discretionary – nothing in the statute requires public employers to agree to such an agreement.

Here, there was no “meeting of the minds,” a fundamental requisite to the formation of a binding agreement. The evidence submitted demonstrates no contractual relation was created and further action was necessary to consummate a binding agreement. The negotiations and terms of the proposed agreement were not completed, and there was no certain and definite offer.

STATEMENT OF THE ISSUE

1. Did IBU and WSF reach a “meeting of the minds” as to the essential terms of an agreement to allow union officers, on leave from WSF, to participate in PERS II, pursuant to RCW 41.140.710?
2. If there was a “meeting of the minds,” did WSF commit an unfair labor practice, pursuant to RCW 47.64.130, by refusing to execute the agreement with IBU?

If so, what is/are the remedy/remedies?

Having read and carefully considered the entire record, including the initial unfair labor practice complaint, the hearing transcript and exhibits, and the post-hearing briefs, this Commission now hereby enters the following Findings of Fact.

FINDINGS OF FACT

1. Dennis Conklin, a member of IBU, began working for WSF as a deckhand in June 1979. On February 15, 1991, he took office as the elected IBU Business

Agent. The IBU/WSF Collective Bargaining Agreement (CBA) provided that, as a union official, he “shall retain seniority status” with WSF although he left employment with WSF and became an employee of the IBU. He thus retains his seniority rights with WSF during the period of his leave as Business Agent with IBU.

2. While Dennis Conklin was employed with WSF, he participated in the state pension program which included employees hired after October 1, 1977. Public employees hired before October 1, 1977 belong to the PERS I plan.
3. Pursuant to RCW 41.40.010(4)(a), a WSF employee in PERS I who takes a leave of absence to serve as an elected or appointed IBU official, may remain in the PERS I program. Under PERS I, the union is defined as an employer. The union pays the employee on leave from WSF, and the union directly makes the appropriate payment of other deductions, including the PERS I contribution.
4. In 1993, the Public Employment Retirement Act was amended to allow PERS II employees to accrue retirement credits while on leave from a PERS II employer. Under the PERS II program, WSF is defined as the “employer” for a WSF employee on a leave of absence. However, RCW 41.40.710 requires that the parties enter into a collective bargaining agreement which allows WSF, as the “employer,” to make payments to the employee on leave of absence and payments to the PERS II program, and allows the IBU to reimburse WSF. With such an arrangement, PERS II-eligible IBU union officials, such as Dennis Conklin, continue to accrue retirement credits. Similar agreement have been negotiated between unions and PERS II employers, but WSF has not previously entered into such an agreement.
5. On November 2, 1993, IBU counsel John burns wrote to then-WSF Human Resources Director, Richard Jackson, on behalf of IBU to advise WSF that a law

now existed which would permit union officials, including Dennis Conklin, to continue PERS II coverage while on leave of absence and serving as a union officer. The letter urged Jackson and Conklin “to discuss the matter further to see if an arrangement could be worked out.”

6. On January 12, 1994, WSF AAG McIntosh advised Jackson that elected union officials could take advantage of Laws of 1993, ch. 95, “repaid leave for union official.” McIntosh did, however, express that he had several concerns.
7. On October 18, 1994, IBU counsel responded to AAG McIntosh’s concerns regarding Dennis Conklin retaining PERS II status. It was suggested that AAG McIntosh contact both the Seattle School District (which made such an arrangement in a contract with Operating Engineers, Local 609) and the State Retirement System attorney who worked on the legislation which authorized such arrangements.
8. By letter dated May 24, 1995, IBU counsel inquired whether AAG McIntosh had followed the suggestions made in IBU’s October 18 letter. IBU counsel asked for WSF’s comments.
9. AS WSF Personnel Assistant, Kathleen Flynn handled IBU members’ questions about retirement service credits. In late May 1995, Jim Yearby, WSF Director of Human Resources asked Ms. Flynn to research the question of retirement service credit for Dennis Conklin during the period he was served as an elected union official. Ms. Flynn advised Director Yearby that Dennis Conklin, as a PERS II member, could retain his retirement service credit if the union reimbursed WSF each month, following the example of the Seattle School District. Flynn noted, however, that such action would require an agreement between IBU and WSF.

10. In the summer or early fall of 1995, Jim Yearby contacted IBU counsel Cheryl French regarding Conklin's pension issue. Yearby was agreeable to the arrangement the IBU had proposed to assure Dennis Conklin would accrue service credits under PERS II. Yearby told French that AAG McIntosh would look at the language which would be needed in such an agreement with WSF.

11. In a letter dated December 14, 1995 AAG McIntosh wrote to Attorney French:

Jim Yearby informs me that WSF has completed its discussions with other employers who have applied chapter 95, Laws of 1993 (whose names you kindly gave us), and has no problem with implementing a PERS pension system arrangement consistent with the statute, for any eligible IBU employees.

This letter confirmed Jim Yearby's telephone call to Cheryl French in which he stated that WSF would enter into an agreement with IBU to provide retirement credits under PERS II program for elected officials, including Dennis Conklin.

12. In accordance with AAG McIntosh's December 14, 1995 letter, Attorney French drafted documents captioned: "Agreement Between Washington State Ferry System and the Inlandboatmen's Union of the Pacific Regarding Pension Payments of Union Officers" and "Joint Petition for Declaratory Judgment" directed to the Marine Employees' Commission. These draft agreements were sent by facsimile to AAG McIntosh.

13. By facsimile on January 18, 1996 AAG McIntosh sent Cheryl French his revised version of her pension payment agreement. McIntosh stated that the revised agreement incorporated some changes desired by WSF, but would still have to be reviewed by Jim Yearby and McIntosh's successor, AAG Anthony Keating.

14. AAG McIntosh retired from the Office of the Attorney General in January 1996. On February 16, 1996, Attorney French wrote to AAG Anthony Keating who now represented the WSF on this issue. French inquired about her previous draft agreement and requested that AAG Keating send her a copy of the agreement that included WSF's changes.
15. On April 3, 1996 AAG Keating sent by facsimile to French a copy of the revised agreement and commented: "[H]ere are the copies of the last changes Robert McIntosh made on the agreement and petition drafts. Some blank spaces still remain for discussion with Jim Yearby."
16. By facsimile on September 10, 1996, Gretchen Gale, Assistant Attorney General representing WSF, sent Jim Yearby a copy of the revised agreement AAG Keating had sent to Cheryl French on April 3, 1996. Under "Comments," AAG Gale stated:

RE: Pension Agreement for Dennis Conklin
This draft was retrieved from Robert McIntosh/Tony Keating's file on the issue.
17. On October 15, 1996 IBU counsel Elizabeth Ford contacted AAG Gale to inquire about several blanks left in the draft agreement which AAG Keating was to have Jim Yearby fill in and return to IBU counsel.
18. On March 13, 1997, Attorney Ford sent AAG Gale a draft of the agreement (with some minor changes to address WSF's concerns) and the petition.
19. AAG Geoffrey Boodell advised Dennis Conklin, after the MEC meeting on April 25, 1997, that the agreement would be taken care of and signed off within four

days. This would constitute the finalized agreement between WSF and IBU which would provide for Dennis Conklin's participation in the PERS II program.

20. In May, 1997, after IBU and WSF had held negotiations on another matter, Dennis Conklin and IBU Regional Director Scott Braymer met with Jim Yearby. Yearby and Conklin renewed a previous disagreement over the number of cases filed by the union before the Marine Employees' Commission. Yearby said he had had enough and had decided that the state would no longer settle these matters, but would take each one to a hearing before the MEC.
21. On May 13, 1997, IBU filed the instant unfair labor practice charges.

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

CONCLUSIONS OF LAW

1. MEC has jurisdiction over the subject matter and the parties' involved in this case. Chapter 47.64. RCW, especially RCW 47.64.130 and RCW 47.64.280.
2. Before he retired in January, 1996, AAG Robert McIntosh was the primary legal counsel for WSF for many years. As such, he had the agent's authority to bind his principal, WSF. In his letter of December 16, 1996 to IBU counsel, McIntosh bound WSF to enter into a PERS II agreement. An agent's authority can be actual or apparent. Actual authority may be expressed or implied. Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess. Both actual and apparent authority depend upon objective manifestation made by the principal. King v.

Riveland, 125 Wn.2d 500, 507, 886 P.2d 160 (1994); State v. O'Connell, 83 Wn.2d 797, 836-837, 523 P.2d 872 (1974).

2. On December 14, 1995 AAG McIntosh wrote the following to IBU & counsel French:

Jim Yearby informs me that WSF has completed its discussions with other employers who have applied chapter 95, Laws of 1993 (whose names you kindly gave us), and has no problem with implementing a PERS pension system arrangement consistent with that statute, for any eligible IBU employees.

After two years of reviewing, checking and researching by WSF and its legal representatives, this letter confirmed of Director Yearby's representation by phone to IBU counsel French that WSF would enter into an agreement with IBU whereby IBU officials who were on leave from WSF could accrue retirement credits.

At this time, there was a "meeting of the minds" which equates with "mutual assent" or "mutual intention." Wetherbee v. Gary, 62 Wn.2d 123,127, 318 P.2d 237, 240 (1963).

4. The actions of WSF Director of Human Resources, Jim Yearby, and WSF's legal counsel, AAG Robert McIntosh constitutes mutual assent. Washington has expressly adopted the objective manifestation theory in contract cases: "The Washington Court has long adhered to the objective manifestation theory in construing the words and acts of alleged contractual parties." Plumbing Shop Inc. v. Pitts, 67 Wn.2d 514, 517,408 P.2d 382, 384 (1965). See, Janzen v. Phillips, 73 Wn.2d 174, 437, P.2d 189 (1968); Leonard v. Washington Employers Inc., 77 Wn.2d 271, 461 P.2d 538 (1969); Alexander & Alexander, Inc. v Wohlman, 19 Wn. App. 670, 680, 578 P.2d 530 (1978).

5. In Alexander & Alexander, *supra* at 680, 681, the court states:

We impute to a person an intention corresponding to the reasonable meaning of his words and acts. Unexpressed intentions are nugatory when the problem is to ascertain the legal relations, if any between two parties. **[Citations omitted.]**

Plumbing Shop, Inc. v. Pitts, *supra*, 67 Wn. 2d 517, 408 P.2d 384.

6. The objective manifestations are subject to the reasonable person test, which is what a reasonable person in the position of the parties would have thought it meant. A reasonable person in the IBU's position had the right to conclude assent by WSF, to the agreement by December 14, 1995.
7. IBU is entitled to rely upon WSF's words and acts as objectively manifesting the other parties' intentions. A reasonable person would conclude that IBU was entitled to rely, based on WSF's words and acts, that there was an agreement which would allow the union to reimburse the state's payment of pension deductions for IBU officials while on leave from WSF.
8. The objective theory lays stress on the outward manifestation of assent made to the other party in contrast to the older idea that a contract was a true "meeting of the minds." "A party's intention will be held to be what a reasonable person in the position of the other party would conclude his (or her) manifestations to mean." J. Calamari & J. Perillo, *The Law of Contracts* § 2-2, at 24 (2d ed. 1977).
9. There was outward or objective manifestation of an agreement or contract between IBU and WSF. As noted in City of Everett v. Sumstads Estates, 95 Wn.2d 853, 855, 631 P.2d 366 (1981) the court stated:

The objective manifestation theory of contracts, which is followed in this state (Plumbing Shop, Inc. v. Pitts, 67 Wn. 2d 514, 408 P.2d 382 (1965)), lays stress on outward manifestation of assent made by each party to the other. The subjective intention of the parties is irrelevant.

The apparent mutual assent of the parties, essential to the contract must be gathered from their outward expressions and acts and not from an unexpressed intention.

10. A mutual assent or meeting of minds is necessary to reach an agreement or contract.

In IBEW Local 938, 200 NLRB 850, 852 (1972) the Board held that:

What the parties may in fact have agreed upon must be determined from what they said and did during their negotiations. If the words and acts of one of the parties have but one reasonable meaning, to which the other party has assented, a contract will be deemed concluded on that basis, for as stated in Clark on Contracts 4th ed., sect. 3, p. 4:

. . . **The law.** . . . judges of an agreement between two persons exclusively from those expressions or their intentions which are communicated between them. And if the words used, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may have been his real or unexpressed intention.

17 C.J.S. Contracts § 32, page 361; 12 Am. Jur. Contracts § 19, page 515.

There was mutual assent between IBU and WSF on December 14, 1995. EX 6.

11. There was an agreement between IBU and WSF in December 1995 to be completed, so that eligible union officials, including Dennis Conklin, could be covered by PERS II. When the agreement was reduced to writing, WSF refused to execute the agreement.

Such action is held to constitute an unfair labor practice. Pete O'Dell & Sons Steel, 177 NLRB 1358, 1368 (1985).

12. In MEC Case No. 4-94, Decision No. 123-MEC, the same parties were involved. The case likewise concerned an oral agreement that was reduced to writing, but WSF refused to sign. IN an earlier case, MEC 1-92, Decision NO. 87 – MEC, which involved the IBU and WSF, the same issue was decided by the MEC.

Both cases involved the question of “meeting of minds,” more properly identified as “mutual assent.” In both cases, the unfair labor practice complaint filed by the IBU was upheld. In Decision No. 123-MEC (1994), WSF was ordered to sign the letter of understanding.

13. MEC Decision No. 123 (1995) and MEC Decision No. 87 (1992) are precedential awards that are applicable to this case and must be given significant weight. Giving authoritative force to prior awards is proper when the same parties are opposed over essentially the same subject matter and are “on point.”

ORDER

1. The unfair labor practice complaint, filed by IBU on May 13, 1997, is hereby sustained.
2. The Washington State Ferries and its Director of Human Resources, Jim Yearby, are hereby found to be in violation of RCW 47.64.130(c) and (e), by refusing to bargain in good faith with the IBU.
3. WSF shall forthwith sign an agreement with IBU to permit the elected or appointed officers of IBU, on leave of absence pursuant to the CBA, to participate in the Public Employee Retirement System, according to Laws of 1993, ch. 95, § 2.

4. Upon the execution of said letter of agreement WSF shall give retroactive effect to the provisions thereof and make Dennis Conklin whole for any losses he may have suffered by reason of WSF's failure to sign the letter of understanding on or within a reasonable time after December 14, 1995.

DATED this 30th day of December 1997.

MARINE EMPLOYEES' COMMISSION

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

/s/ JOHN P. SULLIVAN, Commissioner

/s/ DAVID E. WILLIAMS, Commissioner