

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

PAUL C. ARROYO,	)	MEC Case No. 9-96
	)	
Grievant,	)	DECISION NO. 172 - MEC
	)	
v.	)	
	)	DECISION AND ORDER
WASHINGTON STATE FERRIES,	)	
	)	
Respondent.	)	
_____	)	

Lawrence Curt Delay, attorney at law, appearing for and on behalf of Paul Carlos Arroyo, Grievant.

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

THIS MATTER came before the Marine Employees' Commission (MEC) on August 12, 1996 when Paul C. Arroyo (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 (WSF).

Mr. Arroyo has certified that the grievance process in the Washington State Ferries and Marine Engineers Beneficial Association Unlicensed Engineerroom Employees' (MEBA) Collective Bargaining Agreement (CBA) have been utilized and exhausted. He noted that the contract provides that probationary employees re not entitled to utilize the grievance process through the Union. Mr. Arroyo has 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 Arbitrator's award shall be final and binding.

This matter was docketed as MEC Case No. 9-96 and assigned to Commissioner John P. Sullivan to act as arbitrator pursuant to WAC 316-65-090.

A prehearing conference was scheduled on October 23, 1996 and the hearing was scheduled for November 5, 1996. Mr. Arroyo appeared pro se at the prehearing conference. On November 4, 1996, the MEC received a Notice of Appearance and Motion to Continue Hearing from Attorney Lawrence Curt Delay on behalf of Mr. Arroyo. The Arbitrator, Commissioner John P. Sullivan, granted the continuance and the hearing was rescheduled for March 19, 1997.

The hearing was convened on March 19, 1997. Post-hearing briefs were timely filed by the parties and have been carefully considered by the MEC.

## POSITION OF THE PARTIES

### Position of Grievant, Paul Arroyo

Mr. Arroyo went to work for the Marriott Corporation on the Washington State Ferries, in the food department on March 7, 1994. He continued to work in that department until January 1996, when he learned there was going to be an opening for a wiper in the engineroom of the Ferries.

Mr. Arroyo was dispatched to WSF through the Dist. No. 1 MEBA hiring hall January 11, 1996, as an engineroom wiper. He later became a member of MEBA, working under the WSF/MEBA Unlicensed Engineroom Employees' Contract.

As a wiper, he was a probationary employee for five calendar months commencing January 11, 1996, pursuant to Rule 33.01. He worked on several different vessels.

Mr. Arroyo's Request for Grievance Arbitration asserts that he was "Wrongfully discharged (by letter from Ben Davis, Senior Port Engineer date 14 May 1996) for "... poor job performance..."

Mr. Arroyo was terminated on May 14, 1996, a few days past four (4) calendar months. He received the letter on May 15, 1996.

Mr. Arroyo asserts he was never counseled concerning his job performance, nor was he provided any substantiation of written reports concerning his job performance, or any other information regarding the reasons for his discharge.

Arroyo further argues that by its actions, WSF violated his due process right to be given notice of the grounds for termination of his probationary employment, and that WSF had failed to fulfill the due process requirement of adopting at least general standards which govern the exercise of its discretion in terminating him.

#### Position of Washington State Ferries

WSF is in business to provide safe marine mass transportation linkage for people and goods throughout the greater Puget Sound regions and Vancouver Island.

WSF claims that Mr. Arroyo came to work on the Ferries as a wiper under the Unlicensed Engineroom Employees' CBA between WSF and MEBA. As such, he was on probation for the first five months, pursuant to the applicable contract, the Probationary Rule 33.01.

Within the five-month probation period, Mr. Arroyo was discharged for documented instances of inadequate job performance in accordance with Rule 33.01 of the CBA. As a probationary employee, Mr. Arroyo was not a permanent employee of WSF and therefore did not have a protectable property interest in his employment as a wiper.

WSF asserts that Rule 33.01 of the CBA, which governs probationary employees, was clearly and fully negotiated by the parties and the contract language accurately reflects that Agreement. The bargaining process resulted in contract language that is plain and clear on its face and unambiguously provides for the termination of probationary employees for a bona fide reason(s) relating to the business operation of WSF.

WSF submits that Mr. Arroyo, a probationary employee, was properly separated from his employment with WSF during his period of probation in accordance with Rule 33.01 of the CBA, and that this termination was not arbitrary, capricious, retaliatory or discriminatory.

#### STATEMENT OF THE ISSUE

Did WSF terminate Mr. Arroyo for bona fide reasons relating to the business operation pursuant to Rule 33.01 of the MEBA/WSF Unlicensed Engineerroom Employees' Collective Bargaining Agreement?

If not, what is the remedy?

Having read and carefully considered the entire record, including the initial request for grievance arbitration complaint, the hearing transcripts and exhibits, and the post-hearing briefs, this Commission now hereby enters the following Findings of Fact.

## FINDINGS OF FACT

1. Paul Arroyo worked for the Marriott Corporation food concession on board WSF vessels beginning in March, 1994. Mr. Arroyo had been employed in various capacities prior to working aboard state ferry vessels, including as a smog mechanic, apprentice mechanic, a police officer, a captain in the U.S. Army Special Forces, and a parachute rigger and operator of up to five-ton trucks while in the military, as well as training with firearms in the military and police work.
2. In January 1996, Mr. Arroyo learned that WSF was going to hire an unlicensed engine person through the MEBA union hall. He went to the union hall and was dispatched as a wiper to WSF. On January 11, 1996, he was hired as a probationary wiper under the terms of the 1991-1993 MEBA/WSF collective bargaining agreement.
3. Rule 33 of the Unlicensed Engineroom Employees' contract requires probationary period of five months. Rule 33.01, under which Mr. Arroyo began working as a wiper, reads 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 the probationary period for a bona fide reason(s) relating to the business operation and said employee shall not have recourse through the grievance procedure.

4. Paul Arroyo was aware that as a newly hired engineroom wiper, he would be on probation.

5. The engineroom crew on the MV EVERGREEN STATE consists of one Chief Engineer and two unlicensed engineroom crew members (two Oilers or an Oiler and a Wiper.)
6. Chief Engineer George Hamlin, a 13-year WSF employee, works the “D” watch on board the MV EVERGREEN STATE. Hamlin is a graduate of the United States Merchant Marine Academy as a licensed engineer, and additionally served 26 years in the U.S. Navy, including management experience in squadrons and detachments.

As Chief Engineer on board the EVERGREEN STATE, it is his job to see that the ferry’s engines and power plants operate properly, and to supervise the people who work for him. He describes the duties of a wiper as “very minimal and really are cleaning and housekeeping to start with...and becoming familiar with the plant so they can become useful.” Wipers generally do not come into the job with a great deal of experience in engineering, “but almost always they come with a drive towards learning and a mechanical aptitude. That’s one of the things we look for when they come.”

CE Hamlin worked several times with Wiper Arroyo during his probation period. During one watch, Hamlin had to instruct Mr. Arroyo several times on how to clean a toilet. While standing a subsequent watch, Hamlin specifically instructed Arroyo for safety reasons not to bring a floor buffer down the elevator on board the vessel while passengers were still present; Arroyo did so in spite of Hamlin’s orders. Based on these and other observations of Mr. Arroyo’s work as a wiper, and upon his professional experience and standards, Hamlin believed that wiper Arroyo either did not understand the orders and the work of a wiper or did not care to do the assigned work. In Hamlin’s opinion, Arroyo lacked mechanical aptitude for pursuing a career in marine engineering, and he recommended that

“procedures be commenced with which will terminate him [Arroyo] as a candidate for permanent Engine Department employment.”

7. As a Chief Engineer on board the MV EVERGREEN, it was not within Hamlin’s authority to hire or fire Paul Arroyo. CE Hamlin wrote the memorandum to evaluate Mr. Arroyo as a result of his observations as Mr. Arroyo’s supervisor.
8. Chief Engineer Douglass Craig has been employed by WSF as Chief Engineer on the MV EVERGREEN STATE since 1980. Over the course of his career, he has supervised hundreds of unlicensed engineroom employees, including the oilers and wipers. In this capacity, he supervised Paul Arroyo.

Douglass Craig was asked to prepare a written evaluation of Paul Arroyo’s abilities as a probationary wiper. His observations of Mr. Arroyo’s work led him to conclude that Mr. Arroyo was interested in being employed, but that he did not seem interested in remaining at his duty post. Arroyo asked frequently for permission to leave the engineroom and go above the car deck. On at least one occasion, after 45 minutes, CE Craig had to send his only other crew member to retrieve Arroyo from the galley. CE Craig considers this a safety issue. If a crew member is not at his duty station, he’s not making his required rounds but is putting the lives of others in jeopardy in case a fire breaks out or some other emergency. CE Hamlin additionally did not believe Arroyo had the basic mechanical aptitude required to advance as a marine engineer, and required direct instruction and close supervision with such things as sweeping, mopping, and other housecleaning tasks. Craig based his evaluation upon his 30 years of experience as a marine officer, including his knowledge of U.S. Coast Guard and WSF regulations. In his opinion, Paul Arroyo did not care for the environment of his work position.

9. As a Chief Engineer on board the MV EVERGREEN STATE, it was not within Craig's authority to hire or fire Mr. Arroyo. CE Craig wrote the memorandum to evaluate Mr. Arroyo at the request of his superior.
10. Beecher Snipes is a WSF Staff Chief Engineer on board the MV EVERGREEN STATE. He has been employed by WSF for almost 19 years. He started as an oiler and worked his way up to staff chief engineer.

As a Staff Chief Engineer, Snipes has worked with hundreds of wipers. SCE Snipes supervises three Chief Engineers and eight Oilers assigned to the EVERGREEN STATE. He worked three or four watches with Wiper Arroyo, some of which encompassed an entire workweek.

Upon Arroyo's dispatch to his vessel, Snipes held an introductory talk with him. They discussed safety and the SCE's expectations of his work. Arroyo's duties included conducting rounds. Thereafter, Snipes carried out his responsibility as a supervisor to observe engineroom crew members by assessing Mr. Arroyo's capabilities, including the degree to which Snipes could trust his work. He observed that Paul Arroyo was a willing and congenial person, but lacked mechanical aptitude. Snipes noted several worrisome incidents, including the mishandling of a tachometer aboard the vessel during the time he served on the EVERGREEN STATE. The potential danger if the tachometer was disturbed or damaged would be that the vessel would go to full power, and could cause extensive damage. Mr. Arroyo additionally failed to master the important sequence of pumping sewage from the car deck, although given on-going oral and written instructions from Snipes and the second Oiler. Snipes noted other less than satisfying attempts at educating Mr. Arroyo about the vessel's boiler and training him on how to assist on a pipe repair job. These observations led him to recommend that Arroyo not be retained as an employee of the Department of Transportation Marine Division.



11. Ben Davis has been Senior Port Engineer with WSF since January 1992. He started with the WSF in 1970 as an ordinary seaman, then as a wiper in July 1971 through December 1971 and then worked his way up through various positions in the Engine Department to his present position. Based upon his job experience, he is familiar with the duties of a wiper.
12. As the Senior Port Engineer, Ben Davis has the authority to terminate probationary employees. Before making a decision on whether to retain Paul Arroyo past his probationary period, Port Engineer Davis considered the written evaluations of three senior Chief Engineers. The evaluations of Chief Engineer Hamlin, Chief Engineer Craig, and Chief Engineer Snipes that were furnished to him indicated that Wiper Arroyo could be a potential risk to the safety of the ferries and the business operation of WSF.
13. Mr. Arroyo produced no testimony or documents about his ability or qualifications to rebut the witnesses who testified about his lack of qualifications as a wiper. The only testimony about his qualifications came from Arroyo himself.
14. Wiper Arroyo was given oral counseling, instruction and direction concerning his job performance by three of the Chief Engineers for whom he worked. On May 14, 1996, he was notified of his termination in writing, by Senior Port Engineer Davis. The letter notifying him of his termination indicated that the reason for his termination was poor job performance, as reported by three Chief Engineers for whom he worked during his probationary term. Davis noticed that all three recommended that Arroyo's employment at WSF not be continued. The May 14, 1996 letter also notified Mr. Arroyo that he was terminated pursuant to the provisions of Rule 33 of the MEBA/WSF Unlicensed Engineroom Employees contract, for "bona fide reason(s)", and that probationary employees "shall not have recourse through the grievance procedure." He noted that the decision was a

difficult one, but that it was done “in the best interest of the Washington State Ferries.”

15. Rule 33.01 does not require that a probationary employee be provided any written reports concerning job performance during the probationary period. Nor does it require that a probationary employee be terminated for “cause”.
16. Senior Port Engineer Ben Davis reasonably defined the business operation of the Washington State Ferries is to “transport people and cargo across Puget Sound in a safe and efficient manner.” Davis further noted” [T]he failure of a wiper not performing his job adequately could have a serious impact on the business operation of the WSF.
17. Black’s Law Dictionary, 5<sup>th</sup> Ed. 1979, defines the term bona fide as follows:

**Bona fide** In or with good faith; honestly, openly, and sincerely; without deceit or fraud. *Merrill v. Dept. of Motor Vehicles*, 71 Cal.1<sup>st</sup> 907, 80 Cal. Rptr. 89, 458 P.2d 33. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine, and not feigned. *Bridgeport Mortgage & Realty Corporation v. Whitlock*, 128 Conn. 57, 20 A.2d 414, 416. See also **Good faith**.

**Good faith** Good faith is an intangible and abstract quality with no technical meaning or statutory definition and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual’s personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259, 260. Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even though technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. In common usage, this term is

ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation. *Efron v. Kalmanovitz*, 249 Ca.App. 187, 57 Ca.Rptr. 248, 251. See **Bona fide**.

18. The reasons for termination provided by the three Chief Engineers, pursuant to their own observations, to Senior Port Engineer Ben Davis, and under oath at hearing, all related to the safe operation of the vessel. Their observations were made honestly and in good faith, and in the course of their own responsibilities as supervisors of WSF engineroom employees.
19. WSF had ample bona fide reasons relating to the business operation of the ferry system for its actions in terminating Paul Arroyo. Therefore, MEC should deny the grievance on the grounds that Arroyo was terminated for a bona fide business reasons, and as a probationer has no right to file a grievance.

Having entered the foregoing findings of fact, the Commission now 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 MEBA representing unlicensed engineroom employees. RCW 47.64.150.

3. The burden of proof by a preponderance of evidence lives with Grievant Paul C. Arroyo.
4. Mr. Arroyo, as a probationary employee, has no property right or interest in his job or continued employment. State ex. Rel. Swartout v. Civil Service Comm'n, 25 Wn. App. 174, 605 P.2d. 796, cert denied 449 U.S. 992 (1980). Jordan v. Oakville, 106 Wn.2d 122, 720 P.2d 824 (1986).
5. Probationary employees are foreclosed the normal protections according permanent bargaining unit employees due to constraining provisions found in CBA Probationary Period Rule 33.01.
6. Mr. Arroyo was not a tenured employee and therefore had no property right in continued employment. Grievant's federal constitutional claim depends on his having a property right in continued employment which he did not have. Cleveland Bd. Of Educ. V. Loudermill, 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487.
7. Mr. Arroyo had no property interest in his probationary job as a wiper, and WSF acted in accord with CBA Probationary Period Rule 33.01 in terminating him within the five months probationary period.
8. The termination was based on solid evidence furnished by three senior chief engineers who had observed, supervised and instructed Mr. Arroyo in his job as a wiper. Senior Port Engineer, Ben Davis, was the only one who could terminate Mr. Arroyo, and did so based upon the evidence he received from the chief engineers.
9. Mr. Arroyo was terminated "for a bona fide reason(s) relating to the business

operation” of the ferry system. WSF produced evidence that its reasons for termination were based upon its perception of the needs of its business operation and that such termination was not arbitrary, capricious, retaliatory or discriminatory.

10. This Commission has attempted to maintain “preponderance of evidence” as a standard for the quantum of proof. Based upon the evidentiary record and the supporting arguments brought forth, it is held that the Grievant, Mr. Arroyo has failed to meet the well established burden of a preponderance of the evidence that WSF wrongly terminated him, while a probationary employee.
11. Our decision in this matter is in accord with and conforms to the MEC decision No. 50-MEC, Nancy More Olwell v. Washington State Ferries, (MEC Case No. 5-89).
12. The discharge/termination of Grievant, Paul C. Arroyo during his probationary period did not violate the CBA Rule 33.01 in effect between the Union, employee and WSF.

Having read and carefully considered the entire record and having entered its Findings of Fact and Conclusions of Law, this Commission now hereby enters the following Order:

#### ORDER

1. The Request for Grievance Arbitration, filed by Paul C. Arroyo on August 12, 1996 against Washington State Ferries and docketed as MEC Case No. 9-96 is without merit and is hereby dismissed.

2. Having failed to prove the facts as alleged in his Request for Grievance Arbitration by a preponderance of evidence, the Grievant's request for lost wages, and attorney's fees, costs and interest is hereby denied.

DATED this 14<sup>th</sup> day of July, 1997.

MARINE EMPLOYEES' COMMISSION

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

/s/ JOHN P. SULLIVAN, Commissioner