STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

WASHINGTON STATE FERRIES, Grievant, v. KARL J. JACOBSEN, Respondent.	)	MEC CASE NO. 20-90 DECISION NO. 70 MOTION TO DISMISS DECISION AND ORDER

Ken Eikenberry, Attorney General, by Patricia Nightingale and Robert McIntosh, Assistant Attorneys General, appearing for and on behalf of Washington State Ferries.

Hafer, Price, Rinehart and Schwerin, attorneys, by John Burns, appearing for and on behalf of the Karl J. Jacobsen.

THIS MATTER came on before the Marine Employees' Commission (MEC) on October 16, 1990 when Washington State Ferries (WSF) filed a request for grievance arbitration in accordance with chapter 316-65 WAC against Karl Jacobsen. WSF alleged that Mr. Jacobsen refused to repay to WSF approximately $17,000 in travel pay and mileage erroneously paid to Jacobsen from May 1987 through November 1988.

MEC assigned the matter to Commissioner Louis O. Stewart to act as Arbitrator pursuant to WAC 316-65-070.

Jacobsen filed a Motion to Dismiss on December 7, 1990, alleging that WSF's grievance was untimely.

WSF filed a Response on January 11, 1991, arguing that the Motion to Dismiss was inappropriate, that it should be treated as Motion for Summary Judgment. Arbitrator Stewart scheduled and held a hearing on January 30, 1991. In his hearing notice, Stewart notified the parties that the Motion to Dismiss would be heard

before the merits of the grievance, and the burden of proof would be on Respondent Jacobsen. The burden of proof on the merits would rest upon WSF.

INTRODUCTION AND BACKGROUND

Karl Jacobsen is a licensed marine engineer, employed by Washington State Ferries and a member of the Marine Engineers Beneficial Association (MEBA). Jacobsen was a Staff Chief Engineer regularly assigned to the ferry Evergreen State on the Southworth/Vashon/Fauntleroy run, when in January 1987 the Evergreen State was put into dry dock at Eagle Harbor. As Staff Chief Engineer, Jacobsen remained assigned to the Evergreen State in dry dock. Jacobsen's hours of work changed accordingly, from seven 12-hour days on duty followed by seven days off duty while afloat, to five 8-hour days every week.

In June 1987 Jacobsen was reassigned to a special "parts allowance project" located in the Colman Building in downtown Seattle, also on the five 8-hour day per week schedule. Except for a temporary assignment, aboard a ferry running out of Port Townsend in March/April 1988, Jacobsen continued to work on the "parts allowance project." Jacobsen submitted vouchers for travel time and mileage during the Eagle Harbor and the special "parts allowance project." WSF paid Jacobsen those travel claims. But in December 1988 WSF rejected Jacobsen's travel voucher on the grounds that it was excessive in terms of the travel allowance schedule in the WSF/MEBA Collective Bargaining Agreement (hereinafter MEBA Agreement). Shortly thereafter Jacobsen was assigned to a ferry sailing out of his home town, Port Townsend. As a result of a "whistleblower's" letter, the Washington State Auditor later determined that WSF had overpaid Jacobsen and recommended that WSF collect the alleged overpayment. On the advance from WSF's Assistant Attorney General that the MEBA Agreement was ambiguous

enough that some of the travel payment might be uncollectible, the State Auditor agreed to reduce the reimbursement demand to payment for those trips where the MEBA Agreement is specific, approximately $17,000.

The instant matter is part of WSF's attempt to collect that reimbursement from Jacobsen.

POSITIONS OF THE PARTIES

I. MOTION TO DISMISS

Respondent Karl Jacobsen

Mr. Jacobsen contends that the WSF grievance was filed untimely, some 23 months after the last payment at issue. He further contends that, even if WSF were unaware of overpayment at the time Jacobsen's travel voucher was rejected as excessive, WSF would have become aware when the State Auditor complained about the alleged overpayments, fifteen months before WSF filed its grievance. Jacobsen asserts that WSF made a written demand, which Jacobsen rejected on April 6,1990, over six months before filing its grievance.

Jacobsen argues that, even if pay issues can often be construed as continuing issues, in this case the alleged pay irregularities were stopped almost two years before the grievance was filed.

Jacobsen cited the MEBA Agreement, Section XXIII—DISPUTES, as setting a time limit of thirty days after conference of WSF and MEBA for filing a grievance.

Jacobsen cited WAC 316-65-020 as a requirement by MEC that grievances be filed within ninety days from the date the injured party knew or should have known of the injury or damage.

Jacobsen argued that WSF itself asserted that pay matters not filed within thirty days will not be considered. He submitted a letter from Elton Eilert, WSF Employee Relations Director, stating that WSF requires pay disputes to be addressed within thirty days "to avoid…dealing with old, stale issues…I am afraid that if we exhume your pay claims, after all this time, we will be expected the waive the time limits on future issues, and I do not want to be in that position."

Jacobsen cited both judicial and arbitral decisions that time limitations on starting collection actions begin at the time of the disputed payment or non-payment and/or when the aggrieved party knew or should have known of the disputed event. In a sales commission case, Stueckle v. Sceva Steel Bldg., Inc. 1 Wn. App. 391, 393, 461 p. 2nd 555 (1969), the court held that absent fraud or misrepresentation "the right of compensation became due immediately upon the conclusion of each sale, and the statute (of limitations) began to run at that time."

Applying Washington law, a Federal Court held that, "absent fraud or a fiduciary relationship, an action for breach of contract accrues at the date of breach and is not postponed until the date of discovery by the aggrieved party …" Ford v. International Harvester, 399 F. 2d 749, 751 (9th Circuit, 1968).

In Columbus Jack Corp. 79 LA 1059 (1982) an arbitrator rejected a grievance concerning an attempt by an employer to take unwarranted holiday pay from employees who claimed they didn't realize the significance of the elapsing time period.

Finally, Jacobsen attempts to refute WSF's reliance on Elkouri and Elkouri, How Arbitration Works, 4th Ed. 195ff, that a time limit does not start running against a party until he is actually informed as to the party's position, "…and that doubts as to the interpretation of contractual time limits. . .should be resolved against disposition of grievances by forfeiture." Jacobsen argues that the Elkouris do not support a claim that a party can revive an untimely claim by simply stating a demand and then claiming that the rejection or failure to respond raises a new time period.

Jacobsen requests that he be awarded attorney's fees and other costs resulting from this grievance.

Grievant Washington State Ferries

First, WSF asserted that MEC's rules of procedure contain no provision for a "motion to dismiss." Title 316 WAC. WSF further asserted that the only procedure which comes close is that of summary judgment. WAC 316-02-230. Therefore MEC should either deny Jacobsen's motion or recharacterize it as a motion for summary judgment. Even then MEC should deny the motion. As a corollary to characterizing Jacobsen's motion as one of summary judgment, a live hearing would be inappropriate. MEC would be required to base its decision only on "pleadings and admissions on file, together with affidavits, if any…" WAC 316-02-230.

WSF asserts that Mr. Jacobsen has the burden of proving non-compliance with contractual time limits, citing Miami Industries, 50 LA 978, 984 (1968) and Elkouri and Elkouri, supra at 194, note 187.

WSF argues that Mr. Jacobsen has waived his right to raise the issue of timeliness by failing to make timely objections earlier.

Jacobsen has "discussed, negotiated, written letters about, and held meetings about this matter from January 1990 through November of 1990—10 months—without once suggesting that WSF's request for repayment or its grievance was untimely. …" WSF further asserts that "MEBA met with WSF in a grievance conference and never suggested that the conference was late, inappropriate, or untimely. Mr. Jacobsen and MEBA processed the grievance in a normal manner without ever suggesting it was untimely."

WSF asserts that the time limit contained in the MEBA Agreement, Section XXIII(a), was complied with, that a conference between WSF and MEBA was held within thirty days from the date that MEBA became aware of the dispute, complying with the actual language of the Agreement.

WSF asserts that WSF was not actually aware of the amount of money Jacobsen owed WSF, and that Section XXIII(a) does not apply until the grievant "became aware of the grievance or dispute." "WSF had no way of knowing if a grievance or dispute even existed. There is no grievance until there is a disagreement. '[A] time limit does not start running against a party until he is actually informed as to the other party's position.'" Elkouri and Elkouri, supra, p. 197. Citing Dayton Tire and Rubber Co., 46 LA 1021, 1027 (1966), WSF asserts "A grievance arises only after an attempt is made to exercise rights and a privilege is denied."

WSF argues that the present "situation is analogous to Mr. Jacobsen's submitting an expense voucher requesting travel pay and mileage reimbursement from WSF." In that instance the time limit would not begin to run until a refusal by WSF occurred. "In this case, the time limit would not begin to run against WSF until Mr. Jacobsen refused to pay back the travel pay sought by WSF." Finally, after a meeting between Assistant Attorney General McIntosh and Jacobsen held on May 31, 1990, and, no definitive

response forthcoming, WSF requested a grievance conference on June 27 (within thirty days of the meeting with Jacobsen), complying with Section XXIII(a) of the MEBA Agreement.

WSF further argues that the 90-day time limit in WAC 316-65-020 does not apply in this case: viz., "Unless otherwise specified in the agreement … grievance arbitration must be filed not more than 90 days after the party…knew or should have known of the alleged injury, …" WSF argues that Section XXIII, MEBA Agreement, does provide a clear set of time limits: viz., 30 working days from the date of the union's awareness of the grievance. (both emphases supplied)

Finally, WSF relies on Elkouri and Elkouri, supra, p 194, and In re Julliard & Co., Inc., 15 LA 934, 935 (1951) to argue that "even if time limits [WAC 316-65-020] are clear, later filing will not result in dismissal if the circumstances are such that it would be unreasonable to require strict compliance with the time limits…" WSF asserts that Jacobsen's refusal to commit repayment or non-payment, and his asking for more data and more time should not be used to penalize WSF. On that basis WSF argues that MEBA could win every case simply by refusing to respond until the 90 days in WAC 316-65-020 had run. WSF argues that only after the August 24, 1990 grievance conference (1) did an injury actually exist, (2) MEBA was not delaying a grievance conference, and (3) the parties had entered a time period not governed by time limitations in the MEBA Agreement.

WSF urges MEC to dismiss the Jacobsen Motion to Dismiss.

ISSUES

1. May MEC hold a hearing on, consider, and decide upon a Motion to Dismiss?

2. If the answer to Issue No. 1 is "yes," did WSF timely file its Request for Grievance Arbitration against Karl Jacobsen?

3. If the answer to Issue No. 2 is "yes," is Karl Jacobsen obligated to repay approximately $17,000 of travel time and mileage allegedly overpaid to Jacobsen by WSF?

4. If the answer to Issue No. 1 is "No," has either the grievant or the respondent been damaged by MEC's having held the hearing on January 30, 1991?

5. If the answer to Issue No. 2 is "No," what disposal should MEC make of the WSF v. Jacobsen grievance?

Having read the entire record, carefully considered the positions of the parties, and defined the issues, the Marine Employees' Commission now enters the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Karl J. Jacobsen is a licensed marine engineer and is employed by WSF as a Staff Chief Engineer.

2. Jacobsen is a member of MEBA, representative of WSF marine engineers pursuant to RCW 47.64.011.

3. By agreement of the parties, the 1983-1985 Agreement between WSF and MEBA, as extended by the 1985-1987 Agreement signed by MEBA on March 10, 1988 and by WSF on March 16, 1988 are the governing agreements in this case. (Because provisions applicable herein are identical, both agreement are cited as MEBA Agreement.)

4. The settling of disputes between WSF and its marine engineers is governed by Section XXIII of the MEBA Agreement, as follows:

SECTION XXIIII - DISPUTES

(a) In the event a controversy or a dispute arises resulting from the application or interpretation of any provision of this Agreement or because an employee covered by this Agreement feels grieved, a conference shall be held between a duly authorized representative of the Employer and a duly authorized representative of the Union, both of the aforementioned representatives having full authority to settle the controversy or dispute, within thirty (30) working days from the date the Union became aware of the grievance or dispute.

(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 proofs are received by the arbitrator, whichever is the latter. 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 the party incurring them. (emphasis supplied)

5. The record is silent regarding the date the Union became aware of the grievance or dispute. The record is also silent regarding any failure of WSF and MEBA to agree on the resolution of the WSF/Jacobsen dispute at the WSF/MEBA conference as required by Section XXIII(a) and (b) before submission of the dispute to an arbitrator. On the contrary, evidence is clear that MEBA representatives agreed with WSF that Jacobsen should repay excessive travel moneys. MEBA was neither a party in the case, nor did MEBA represent Jacobsen in the MEC hearing or any other part of the arbitration procedure.

6. Time limitations for filing requests for grievance arbitration by MEC are governed by WAC 316-65-020, as follows:

> WAC 316-65-020 GRIEVANCES—ARBITRATION REQUEST—LIMITATIONS Unless another purpose is stated by the party filing a statement of grievance, it shall be construed as a request for grievance arbitration by the commission in accordance with RCW 47.64.150. The commission shall consider such a request for arbitration valid only after any applicable dispute remedies in the pertinent collective bargaining agreement have been exhausted, and within the time limits specified in such agreement. If the collective bargaining agreement does not contain a remedial procedure for disputes, or upon showing good cause for not exhausting prearbitration remedies, a party may file the original

> request for arbitration directly with the commission. Unless otherwise specified in the agreement, a request for grievance arbitration must be filed not more than ninety days after the party filing such grievance knew or should have known of the alleged injury, injustice, or violation. (emphasis supplied)

7. Prior to the time period involved in this case, Jacobsen was assigned as Staff Chief Engineer on the WSF ferry "Evergreen State." His duty hours consisted of seven 12-hour days on duty followed by seven days off duty in accordance with Section IX of the MEBA Agreement. The Evergreen State was on the Fauntleroy-Vashon-Southworth route, and his "relieving terminal" was Fauntleroy in accordance with Section X, MEBA Agreement. During the seven-day periods he was on watch twelve hours per day, Jacobsen lived aboard the Evergreen State in order to reduce his commuting to and from his home in or near Port Townsend to one round-trip for each week of work.

8. In January 1988 the Evergreen State was put in dry-dock at Eagle Harbor for refurbishment. As Staff Chief Engineer, Jacobsen remained assigned to the vessel, but his hours of work changed to five 8-hour days per week. He commuted to Eagle Harbor from his home daily.

9. Travel pay and expense in this case is governed by Section XII (a), (c) and (e), MEBA Agreement as follows:

> SECTION XII - MILEAGE AND TRAVEL TIME
>
> (a) When travel pay is authorized under any rule of this Agreement, it shall be paid at the straight time rate of pay for the appropriate travel time indicated in Schedule A, attached hereto. If the employee furnishes transportation under such circumstances he shall be reimbursed for the appropriate number of miles only for travel actually performed as

> indicated in Schedule A, attached hereto. The mileage rate for such time shall be that allowed by the State Office of Program planning and Fiscal Management for use of private automobiles.
> …
>
> (c) In the event vessels and/or employees are assigned to other than regular routes on a temporary basis and the regularly assigned Engineer Officers are retained with the vessel or individually assigned to another vessel they shall be paid mileage and travel time pay only for travel actually performed both ways from their regular relieving terminal to the temporary relieving terminal, according to the schedule shown on Exhibit "A" attached hereto.
>
> …
>
> (e) Payment will be made for travel and mileage actually performed from the terminal closest to the employee's residence to the temporary relieving terminal, or from the normal relieving terminal to the temporary relieving terminal whichever is less.

10. When the Evergreen State was put into dry-dock Jacobsen entered into an oral agreement with WSF Port Engineer Bud Brazeau that Jacobsen would be paid travel time from Port Townsend (the terminal closest to his home) to Eagle Harbor instead of Fauntleroy to Eagle Harbor as specified in Section XII(e), supra. His request was based on his added cost resulting from the daily round trip, Port Townsend to Eagle Harbor, instead of living aboard the Evergreen State and only one round trip each work week. He submitted notation(s) to that effect in an effort to obtain Brazeau's written authorization, but Brazeau did not respond. Jacobsen submitted travel vouchers in accordance with said oral agreement anyway, "to see what happens." His travel vouchers were approved and paid on that basis from January 1988 through November 1989.

11. Because all equipment was stripped from the Evergreen State at Eagle Harbor (there no longer being work for a marine engineer), Jacobsen was then assigned to a special "parts allowance project" in the Colman Building in downtown Seattle. The Colman Building is not listed in Section X or in Schedule A of the MEBA Agreement. Jacobsen continued to submit travel vouchers for daily round trips, now Port Townsend to Seattle.

12. After WSF abolished the position of Port Engineer during this period, WSF General Manager Armand Tiberio continued to approve Jacobsen's travel vouchers and/or forward them to the payroll section for payment. In July, 1987, Jacobsen sought and secured an oral agreement with Tiberio for his travel vouchers as he had with Brazeau. The record is silent as to whether Jacobsen also sought written affirmation as he had with Brazeau.

13. In December 1988 Tiberio disapproved payment of Jacobsen's travel voucher after Tiberio was advised by WSF "internal auditors" that the amount shown exceeded the amount authorized by the MEBA Agreement.

14. The record is silent as to whether the internal auditors raised a question of possible prior excessive vouchers or whether Tiberio compared the disapproved voucher with prior approved vouchers.

15. Shortly after Jacobsen's travel voucher was disapproved, he contacted Tiberio to demand payment. He dropped his demand on the grounds that he would now be assigned to a ferry regularly sailing out of Port Townsend. On December 16, 1988, Operations Superintendent, Captain D.R. Schwartzman, notified Jacobsen by letter that on January 1, 1989, Jacobsen would be Staff Chief Engineer on the M.V. Klickitat.

16. As a result of a "whistleblower's" complaint, and a resulting audit, the State Auditor notified WSF on or about June 19, 1989, that during 1987 and 1988 Karl Jacobsen was overpaid in the amount of $36,956.70. In that notice the State Auditor recommended that the overpayment be collected.

17. Assistant Attorney General Robert McIntosh conferred with the State Auditor and pointed out the Eagle Harbor and downtown Seattle are not listed among watch relieving terminals in Section X, nor are they listed for allowable time and mileage in Schedule A, MEBA Agreement. Therefore, the MEBA Agreement might be considered to be ambiguous in this case and collection of overpayment might be uncollectible.

18. On October 19, 1989, the State Auditor again notified WSF of the $36,956.70 overpayment, but inserted the parenthetical observation, to wit: "$17,199.94 attributable to travel between locations listed on Schedule A of the MEBA contract." The State Auditor again recommended collection of the alleged overpayment.

19. On April 6, 1990, AAG Robert McIntosh notified Jacobsen by letter of a summary of the State Auditor's findings and demanded a written agreement to a schedule for repayment of $17,199.94. McIntosh wrote, "…If such a written agreement is not signed on or before April 30, 1990, we will take legal action to recover the full amount of excess travel pay which you received, plus interest. …

20. On or about August 24, 1990, WSF met with representative(s) of MEBA. No documentary evidence was put in the record regarding that meeting. During his testimony Jacobsen admitted that MEBA representatives had advised him to repay the excessive travel money. Neither WSF nor Jacobsen called a MEBA

representative to testify as to MEBA's interpretation of the MEBA Agreement as it pertains to this matter.

21. Jacobsen did call Larry Mitchell, representative of the Inlandboatmen's Union of the Pacific, to testify about his opinion of WSF contractual statutes of limitation on pay disputes. Mitchell testified that he was not familiar with the MEBA Agreement.

The Marine Employees' Commission, having entered the foregoing background, positions of the parties, statement of issues, and findings of fact, now enters the following conclusions of law.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission (MEC) has jurisdiction over this matter. Chapter 47.64 RCW; particularly RCW 47.4.150 and 47.64.280.

2. MEC may not change or amend the terms, conditions, or applications of the MEBA Agreement. RCW 47.64.150.

3. Regarding the WSF assertion that MEC's rules contain no provision for a "motion to dismiss," MEC concludes that Arbitrator Stewart's interpretation of WAC 316-65-515(3)(f) was correct, viz:

> WAC 316-65-515 CONDUCT OF GRIEVANCE ARBITRATION PROCEEDINGS
> (1) …
> (2) …
> (3) The arbitrator shall have the authority:
> (a) …

(b) …
(c) …
(d) …
(e) …
(f) To dispose of procedural requests and other similar matters; …

Arbitrator Stewart properly construed the Motion for Dismissal as a procedural request. He also properly decided to notify the parties that the Motion would be heard first before the merits. The actual decision for final disposition rests with the entire Commission.

4. Holding a hearing on the Motion to Dismiss enabled the parties to make their pro and con input in precisely the same manner as other affirmative defenses are put before the arbitrator as presiding officer. No harm has resulted to either party as a result of the hearing. On the contrary, MEC believes the procedure to be more fair to the parties than deciding the Motion on the basis of the pleadings only.

5. Because the record is silent as to when MEBA representatives first became aware of the alleged WSF overpayment to Jacobsen and/or its attempt to recover said overpayment, MEC may conclude that the WSF/MEBA conference was timely pursuant to Section XXIII(a), of the MEBA Agreement. MEC interprets Section XXIII(b) to pertain only to instances where WSF and MEBA are in disagreement, or at least to instances where MEBA is representing a member in a dispute with WSF. Neither was the case herein. MEC further concludes that the parties referred to in Section XXIII are not the parties in the issue before the MEC. "The parties" in the Agreement are WSF and MEBA. Section XXIII(b) provides for submission of a matter to arbitration in the event the parties fail to agree on resolution of the matter, but the parties to the WSF/MEBA Agreement did not fail to agree. Therefore, MEC concludes

that Section XXIII(b) of the MEBA Agreement does not apply to WSF v. Jacobsen.

6. MEC also concludes, therefore, that the timeliness requirement of WAC 316-65-020 does apply in this instance. See Finding of Fact No. 6, supra.

7. In order to apply the timeliness requirement of WAC 310-65-020 to this case, the question arises, viz., when WSF "first knew or should have known of the alleged injury, injustice or violation." Several possible dates are logical candidates for MEC consideration, as follows:

   A. WSF General Manager Armand Tiberio disallowed Jacobsen's travel voucher for period 12/1/88 to 12/15/88 for travel between Port Townsend and Eagle Harbor, with the notation "Not Allowed—Home Port is Seattle." Yet that travel voucher was not essentially different from Jacobsen's travel vouchers submitted from 1/1/87 up to 12/1/88. Tiberio had been approving them or forwarding them to payroll since the 5/16/87 to 5/31/87 voucher. Tiberio testified that he disapproved the 12/1/88 to 12/15/88 voucher on the advice of WSF "internal auditors." If that voucher was excessive according to Section X and Schedule A, MEBA Agreement, WSF would appear to have become aware of prior excessive payments. The record is silent as to the date of the "internal auditors'" awareness. However, it was logically on or about 12/15/88.

B. The State Auditor's letter to Duane Berentson, Secretary of Transportation, informing him that the audit revealed $36,956.70 alleged overpayment was dated June 19, 1989.

C. Following AAG McIntosh's negotiation with the State Auditor, the State Auditor's amended letter recognizing that some of the $36,956.70 might be uncollectible, but recommending collection of $17,199.94 from Jacobsen, was dated October 19, 1989.

D. The letter from Assistant Attorney General Robert McIntosh to Jacobsen demanding repayment of $17,199.94 was dated April 6, 1990.

Whether December 1988, June 19, 1989, October 19, 1989, or April 6, 1990 is the appropriate date, it is clear that filing the instant grievance on October 16, 1990 was untimely under WAC 316-65-020. See Finding of Fact No. 6, supra.

8. Regarding WSF assertions that Jacobsen discussed and negotiated with WSF for ten months without once suggesting that WSF's request or its grievance was untimely, and that, therefore, no grievance per se existed until October 16, 1990, must be disregarded. MEC must conclude, according to the same assertions, that the WSF grievance was filed too late to be considered pursuant to chapter 316-65 WAC.

9. Even if Section XXIII(b) did apply, the time limitation for filing the grievance would not await a belated conference between WSF and MEBA pursuant to Section XXIII, MEBA Agreement. The start of the clock is not delayed "because the union did not know" about the grievance. Ekco Prods. Co., 40 LA 1339, 1341 (1963), cited in Elkouri and Elkouri, supra, at 196. See also Columbus Jack Corp., 79 LA 1058, 1963 (1982).

10. MEC recognizes the principles set forth by the Supreme Court of Washington that if payments to a State employee exceeded the amounts permitted by law (in this case, permitted by the WSF/MEBA Agreement), the payments were ultra vires and void, and the State has the right to recover such payments. State v. Adams, Wn. 2d 611, 614, 732 P.2d 149 (1967), citing State v. Continental Baking Co., 72 Wn. 2d 138, 141-42, 143 P.2d 993 (1967), and three other precedents. The Court went on to say, "Indeed, it has a duty to do so." Adams, supra, referring to Tacoma v. Peterson, 165 Wash. 461, 5 P.2d 1022 (1931) and State ex rel. Pratt v. Seattle, 73 Wash. 396, 132 P. 45 (1913) However, MEC appears to be barred by its own rules (WAC 316-65-020) from determining whether the travel payments made by WSF to Jacobsen did or did not exceed payments permitted by contract, whether they were ultra vires and void, or whether MEC may order Jacobsen to repay said moneys. In its post-hearing brief, WSF cited State v. Adams, supra, in support of its claim against Jacobsen, by pointing out that in Adams the State programmed its overtime payments for employees twenty cents an hour too high and did not claim reimbursement until the State detected the error two years later. In the instant case, the State allegedly overpaid Jacobsen for almost two years, but then waited (for the reasons stated) almost two years more before filing its grievance with MEC.

11. In Ford v. Chesapeake and Ohio Railway Co., 432 F. Supp. 1285, 1288 note (1977) the Court recognized, in a case where the railroad was attempting to recover alleged overpayment of wages, certain differences between the employees' collective bargaining agreement and the requirements imposed by the "Amtrak Act." In the bargaining agreement, resolution would

result from arbitral action. The protective provisions in the "Amtrak Act" were enforceable judicially. In that case, "both forums, arbitral and judicial [were] suited for the adjudication of questions arising thereunder." In the case at hand, MEC must conclude that the arbitral remedies available to WSF have been exhausted as of this decision. In concluding that the WSF request for arbitration was untimely, MEC must then grant Jacobsen's Motion to Dismiss. MEC, therefore, cannot reach the merits of the case. MEC concludes that, if WSF wants to invoke State sovereignty under State v. Adams, supra, after its arbitral remedies have expired, it must seek a judicial forum. Ford v. Chesapeake and Ohio Railway Co., supra.

12. MEC has consistently declined to award attorney's fees when there is no evidence of premeditated, malicious or evil intention. None was shown in this case. In any event, Section XXIII(f), MEBA Agreement, provides that each party pay its own cost for arbitration. See Finding of Fact No. 4, supra. Therefore MEC should deny Jacobsen's claim for attorneys' fees.

Having read the entire record and having entered the foregoing background of the case, positions of the parties, statement of issues, findings of fact and conclusions of law, the Marine Employees' Commission now enters the following decision and order.

DECISION AND ORDER

1. The request for grievance arbitration, filed on October 16, 1990 against Karl Jacobsen, is hereby dismissed.

2. Respondent Jacobsen's claim for attorneys' fees and other costs is hereby denied.

DONE this 25th day of April, 1991.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD, Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner