

BEFORE THE MARINE EMPLOYEES' COMMISSION  
STATE OF WASHINGTON

WILLIAM L. HARPHAM	)	
	)	
and	)	
	)	
MARINE ENGINEERS BENEFICIAL ASSOCIATION	)	
	)	
Grievants,	)	MEC Case No. 3-85
v.	)	Decision No. 10-MEC
	)	
WASHINGTON STATE FERRIES,	)	
	)	
Respondent.	)	DECISION AND ORDER
	)	

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Blanchard and Kraft, by Stephen B. Blanchard, and Allan Brotsky, Esquire, appeared on behalf of Grievant William L. Harpham and the Marine Engineers Beneficial Association.

Kenneth Eikenberry, Attorney General, by Robert B. McIntosh, appeared on behalf of Washington State Ferries.

INTRODUCTION AND BACKGROUND

On February 14, 1983, the M.V. Cathlamet entered drydock at Lockheed Shipyard for annual inspection. Certain work was accomplished by Lockheed personnel and by Washington State Ferries (WSF). U.S. Coast Guard inspections on February 15, 16, and 17, 1983, revealed certain deficiencies, four of which were noted on an official U.S.C.G. form (hereinafter CG 835).

These CG 835 deficiencies were required by U.S.C.G. to be corrected before the Cathlamet could carry passengers. But the nature of another deficiency (leaking keel cooler gaskets) was such that testing of corrections had to be accomplished before the drydock could be flooded (the Cathlamet "put back in the

water"). Alleged contradictory orders were given by WSF personnel (Shipyard Contract Manager Krizan and Alternate Staff Engineer Harpham (grievant)) to Lockheed shipyard personnel regarding movement of keel cooler test hoses before Coast Guard approval. Two of the other CG 835 deficiencies were corrected by WSF personnel while still in drydock. The remaining two deficiencies were to be corrected at the WSF shipyard at Eagle Harbor.

After being informed by his immediate supervisor (Mr. Larry Rood, WSF Staff Chief Engineer) that he, Rood, had been "raked over the coals" concerning Grievant Harpham's conduct at the Lockheed drydock, Harpham wrote a letter of complaint on February 23, 1983, to WSF General Manager, Captain Nick Tracy. Captain Tracy did not reply; but on February 28, 1983, WSF Maintenance Director Neil P. Quinn wrote a Letter of Reprimand to Harpham. On March 3, 1983, Mr. Harpham filed a grievance with his union, the Marine Engineers Beneficial Association (MEBA), requesting a Grievance Conference in accordance with the WSF/MEBA Agreement. Such Conference was held with results unsatisfactory to Harpham. Mr. Harpham sought legal assistance. His attorney (a Robert Milligan) in turn contacted the Public Employment Relations Commission (PERC) who informed Milligan that the Legislature had recently removed the ferry employees from PERC jurisdiction and that the newly created Marine Employees' Commission (MEC) now had jurisdiction in this matter. Neither PERC, nor Grievant Harpham, nor Attorney Milligan forwarded Mr. Harpham's grievance to MEC.

On or about September 2, 1983, Mr. Harpham filed a Notice of Claim of Tortious Conduct of State with the Office of Financial Management, and subsequently filed suit in the Superior Court for Snohomish County.

On October 27, 1983, WSF Port Engineer Keene "demoted" Grievant Harpham by notifying Staff Chief Engineer Rood that Harpham was

no longer acceptable to Keene as Alternate Staff Chief Engineer. On November 10, 1983, Rood expressed disagreement with Harpham's "demotion", but designated a replacement for Harpham, thus completing Harpham's "demotion" and a reduction of wages of \$1.00/hour. Rood did not file a grievance with MEBA in response to losing his preferential designee.

Also on November 10, 1983, Port Engineer Robert Keene wrote a memorandum of "justification" to Maintenance Director Quinn setting forth several events (e.g., a "hard landing" by the Cathlamet which Harpham allegedly refused to discuss with the Master; alleged indecision by Harpham over the repair of CPP pumps; and alleged failure to comply with an order to make a chart of the vessel's storage tanks). Keene did not furnish either Harpham or MEBA with a copy of the "justification" memorandum or otherwise notify them as to the cause of the "demotion."

On November 14, 1983, Grievant Harpham filed a grievance with MEBA, and asked for a Grievance Conference under the WSF/MEBA Agreement. MEBA notified him that his "demotion" was not actionable under the WSF/MEBA Agreement.

On April 10, 1985, the Superior Court for Snohomish County ordered that the Marine Employees' Commission schedule a hearing within 120 days of Mr. Harpham's subsequent filing of this matter with MEC. On April 23, 1985, Grievant Harpham and MEBA jointly filed his grievance regarding the letter of reprimand as permitted by said Court order, the "demotion" having been added during the Court proceeding.

Commissioner Louis O. Stewart as assigned hearing officer held four full days of hearings in Seattle on June 26 and 27 and August 1 and 5, plus a short special hearing at Grievant's request on July 23, 1985, in Olympia.

Before beginning to take testimony at the first hearing, Commissioner Stewart gave the parties time to agree upon the issues and the remedies.

The other two Commissioners did not participate in the hearings, but all three Commissioners have heard or read the grievances, the court order, the transcripts, exhibits and briefs, and join in this decision and order.

#### AGREEMENT ON ISSUES

The issues as agreed upon by the parties before the start of the first hearing were:

- I. Was there just cause for the Letter of Reprimand issued to William Harpham by Washington State Ferries in connection with an incident on February 17, 1983.
- II. Was there just cause for the removal of Mr. Harpham from his position of Alternate Staff Chief Engineer on the vessel Cathlamet in the fall of 1983.

No agreed-upon remedy was presented.

#### POSITIONS OF THE PARTIES

##### POSITION OF GRIEVANT HARPHAM

Grievant Harpham contends that the February 28, 1983 letter of reprimand was unjustified and contained a false statement that this is a second written reprimand. He further contends that his witnesses were not called to the Grievance Conference concerning the Letter of Reprimand and that said Conference was conducted unfairly under the WSF/MEBA Agreement. He argues that WSF Shipyard Contract Manager Krizan knowingly attempted to violate U.S.C.G. regulations, and that he, Harpham, would have jeopardized his Coast Guard Marine Engineer's License by acquiescence to Krizan's attempt to circumvent Coast Guard

inspection of the keel cooler test, before "putting the boat in the water." He claims Krizan knew of the Coast Guard inspector's explicit order that only the Coast Guard could approve the keel cooler test. He further contends that he was performing his duties properly as an Alternate Staff Chief Engineer. He argues that the real basis for the written reprimand was his letter to WSF General Manager Tracy, that it was not based on the drydock incident. He argues that said letter was a "whistle-blower's" letter for which he had a right.

Grievant further contends that the reference to the "second" written reprimand was based on a prior reprimand, which had been successfully grieved before the Public Employment Relations Commission (PERC). PERC had ordered that reprimand rescinded and purged. Grievant showed that WSF had avoided compliance with the PERC order by maintaining duplicate personnel files.

Grievant contends that WSF, having sent a copy of his letter of reprimand to U.S.C.G., has damaged his licensure records.

With regard to the alleged "demotion", Grievant contends that the charges against him were false, and that the real basis of the "demotion" on October 27, 1983, was his filing of the Notice of Claim of Tortious Conduct with the State of Washington on September 2, 1983.

He argues that the "justification" memorandum was prejudicial. He claimed that the propulsion controls had apparently been operating normally and the "hard landing" had been caused by pilot error, that he had not actually witnessed the engine room controls at the time of the "bump" but any licensed engineer with experience on the Cathlamet was qualified to answer the Master's questions regarding the operation of the controls, that it occurred at the end of Grievant's watch and he was leaving the

vessel, and that he had sent his relief, a Chief Engineer Johnson, up to the pilothouse to talk with the Master with the Master's approval.

Grievant contends that the juxtaposition of the CPP Pumps and adjacent catwalks delayed repairs only one or two hours, and that the vessel was in its normal tie-up status during repair anyway, and that no delay in its operating schedule was caused.

Grievant further contends that he and an assistant engineer had complied with the order to draw up certain storage tank capacity charts, and that the charts have been and still are in use; but that MEC should rule out failure to comply with this order, even if it were meritorious, because that order had been made after he was already "demoted."

Grievant Harpham maintained that both the letter of reprimand and the "demotion" with loss of pay were disciplinary actions under the WSF/MEBA Agreement, and that WSF was and is required to show "just cause". Grievant relied upon Just Cause: The Seven Tests, by A. Koven and S. Smith (1985), to show that neither action was justified under said Agreement.

Grievant Harpham asked MEC to order the February 28, 1983 letter of reprimand rescinded, and to order WSF to purge all files of every copy of said letter and to notify U.S.C.G. accordingly. He further asked MEC to vacate the October 27, 1983 "demotion", to reinstate Mr. Harpham and to restore the \$1.00 per hour retroactively to October 27, 1983.

He asked MEC to issue a permanent injunction against WSF from issuing letters of reprimand without investigation and a right to be heard.

He also asked for reimbursement of attorney's fees and legal costs.

POSITION OF THE MARINE ENGINEERS BENEFICIAL ASSOCIATION

Except for the following, the foregoing statement was and is the joint position of William Harpham and the Marine Engineers Beneficial Association.

"It is in the insistent position of the Union that it, and it alone, may carry forward a grievance on behalf of an employee of the Washington State Ferries, to the Commission, because of its status as exclusive bargaining representative. The reason that that is not the case here is because the Superior Court of this State has ordered that the matter be heard before the Commission. ..."

"...It is true that there was no grievance concerning (sic) which a conference (regarding the "demotion") took place between (WSF and MEBA). ...Without consulting with counsel, representatives of MEBA...erroneously concluded there was no contractual basis for grieving. ...Counsel made it clear to them that their view was incorrect; and that, while the contract as such did not have any reference to an Alternate Staff Chief, the practice was clear, that that position existed, that it was a position that was superior to that of Chief or Assistant, that the pay was higher, and therefore the action of the Ferry System was a demotion for which just cause was required, and which they could not show. ..." MEBA argued that remanding the demotion grievance to the contractual WSF/MEBA Conference "would simply exchange the same views...; and we would be unable to reach an agreement. ...By ruling that the matter should be heard by the Commission, the Court has ruled that there has been sufficient exhaustion (of remedy). ..."

POSITION OF WASHINGTON STATE FERRIES

WSF contends that both the February 28, 1983 Letter of Reprimand and the October 27, 1983 "demotion" were justified, that Grievant Harpham requests for relief should be denied and WSF upheld. WSF contends that Grievant's conduct leading to the Letter of Reprimand was insubordinate, and his performance as Alternate Staff Chief Engineer was incompetent as well as insubordinate.

With regard to the "drydock incident" leading to the Letter of Reprimand, WSF contends that the line of authority is clear, that the Shipyard Contract Manager is in full charge of work on a vessel while in a privately-owned shipyard, that Contract Manager Krizan did not violate any Coast Guard regulations by ordering the keel cooler test hoses moved prior to Coast Guard inspection, the Grievant Harpham had taken it upon himself to countermand Krizan's order. WSF charges that Grievant Harpham had not followed WSF policy about informing management immediately about the receipt of said CG 835, but had delayed informing management by (1) putting a copy in the Staff Chief Engineer's locker and (2) mailing a copy to WSF headquarters. WSF asserted that the countermanding of Krizan's instructions to Lockheed personnel constituted insubordination, and the handling of the CG 835 constituted failure to comply with WSF policy. WSF also contends that Grievant's letter to WSF General Manager Nick Tracy circumvented the published chain of command; and, therefore, Grievant again failed to comply with WSF policy. WSF asserts that the statement that this Letter of Reprimand was the second one did not refer to the letter which PERC had ordered purged from WSF files, but did refer to an earlier warning about the training of assistant engineers.

WSF further argued that sending a copy of the Letter of Reprimand to U.S.C.G. was necessary to counteract the charge in Grievant's



letter to General Manager Tracy that WSF was circumventing rules and regulations concerning safety on vessels or terminals; because Grievant had forwarded a copy of his letter to U.S.C.G.

With regard to Grievant Harpham's demotion, WSF charges that Harpham's indecisiveness regarding the CPP Pump repair had caused one change in WSF management's scheduling of ferries, and then another change to undo the first change. WSF claimed that Harpham's immediate supervisor, Staff Chief Engineer Rood, admitted that he had the same problem with Harpham's indecisiveness (a statement denied by Rood, who said he had been referring to Harpham's sending too many memoranda to WSF management.)

WSF charges that, after the Cathlamet made a "hard landing" at the Mukilteo ferry dock, the Master of the vessel, Captain Thorsen, asked Grievant Harpham, as the engineer in charge, to come up to the pilothouse to tell Captain Thorsen what happened to the controls, that the request constituted an order, and that Harpham refused and insisted on going home, thereby committing an insubordinate act.

WSF also argued that the Storage Tank charts submitted by Grievant were incomplete and did not comply with a legitimate order from management. The failure to make a complete chart supported, WSF claims, the contention that Harpham was incompetent as Alternate Staff Chief Engineer.

WSF Port Engineer Keene asserted that he wrote the letter "demoting" Grievant Harpham before Keene knew about Harpham's Claim of Tortious Conduct and, therefore, denied that said Claim was the reason for Harpham's "demotion".

Finally, WSF asserted that, in any event, the classification of Alternate Staff Chief is not covered by the WSF/MEBA Agreement,

but exists solely as a management decision and the incumbent in such a position is appointed by the Staff Chief Engineer and serves at the pleasure of said Staff Chief Engineer with the approval of management. Therefore, WSF argued, the "demotion" of Harpham is not a grievable action, and the grievance as filed should be dismissed.

WSF asks that MEC dismiss any claim for attorney's fees and costs.

If MEC should find that the "demotion" is grievable, WSF asks that MEC should not make a finding on the merits but should remand the "demotion" grievance to the Grievance Conference specified in the WSF/MEBA contractual grievance procedure in the interest of deterring grievances from being filed directly with MEC thus avoiding the Conference step of the procedure.

\* \* \* \* \*

Decision in this case has been made difficult by contradictory testimony—not only contradictions of one party by the other, but by some contradictions between witnesses on the same sides. The Commission has been put in a position of determining the values of some testimony on the basis of logical inferences from other testimony and exhibits, but additionally of determining the degree of credibility of certain witnesses presented by both parties. An additional complication was the absence of U.S.C.G. personnel who were said to be unavailable. In the latter instance, MEC was compelled to rely on U.S.C.G. documents to a greater extent than hearsay rules would generally allow, especially where such U.S.C.G. documents appeared to support one witness or another. Even using the U.S.C.G. documents admitted in evidence presented problems. For example, Grievant relied on one U.S.C.G. document to prove he had acted in accordance with

U.S.C.G. instructions, while WSF relied on a different U.S.C.G. document to support its charge of insubordination in the same incident. Had one of the U.S.C.G. inspectors been called, his testimony would have been of great value to the Commission.

Another complication resulted from the sequences of events. In one sequence, the alleged disobedience of orders and improper handling of a CG 835 document by Grievant in the drydock occurred on February 17, 1983. Grievant wrote the alleged "whistle-blower's letter" on February 23, 1983. The Letter of Reprimand was written on February 28, 1983. That sequence casts a doubt as to whether Grievant was reprimanded for the alleged incidents or if he was reprimanded because of his "whistle-blower's letter."

By the same token, the events alleged to be the basis of Grievant's "demotion" occurred over a period of more than one year. But on or about September 2, 1983, Grievant filed his Claim of Tortious Conduct against the State. Grievant was "demoted" 55 days later. In the latter instance, WSF Port Engineer Keene twice disclaimed knowing about the Claim of Tortious Conduct at the time he "demoted" Grievant, leaving MEC to question Keene's believability, or to question the lines of communication among WSF management personnel. Under cross examination, Keene did testify that "there was rumors flying rampant about who was suing who . . ." MEC was again left with a like question: Was Grievant really "demoted" because of his lack of professional abilities as a marine engineer, or was he "demoted" because of his recourse to OFM and the court to get an administrative tribunal to hear his grievance over the February incident?

Based upon the foregoing positions of parties, the testimony and evidence, oral argument and briefs, and taking into account the aforesaid complexities, the Marine Employees' Commission now makes the following Findings of Fact:

## FINDINGS OF FACT

1. William L. Harpham (Grievant) is a Licensed Marine Engineer employed by Washington State Ferries (WSF).
2. Grievant Harpham is a member of the Marine Engineers Beneficial Association (MEBA), exclusive bargaining representative of licensed engineers employed by WSF.
3. WSF Policy Circular #ER-1 sets forth the responsibilities and duties of Staff Chief Engineer and, thereby, Alternate Staff Chief Engineer. In the interest of brevity, Policy Circular #ER-1 is included in its entirety in these Findings by reference and is attached to this Decision and Order as an Appendix.
4. At the time of the drydock occurrence Grievant was serving as Alternate Staff Chief Engineer, assigned thereto by Staff Chief Engineer Larry Rood, and was acting as Staff Chief Engineer, in accordance with WSF Policy Circular #ER-1.
5. Supervision of all repair and maintenance work accomplished by WSF personnel on the MV Cathlamet at all times during the drydock incident was the responsibility of grievant during Staff Chief Engineer Rood's absence (ibid).
6. Supervision of work on said Cathlamet accomplished by Lockheed shipyard personnel was the responsibility of Shipyard Contracts Manager Donald Krizan. In Krizan's absence while the Cathlamet was in drydock, such supervision was Harpham's responsibility (ibid).
7. Compliance with U.S.C.G. regulations and inspection orders is a responsibility of the Staff Chief Engineer. While the vessel was in drydock, Coast Guard-ordered work was the responsibility of the Shipyard Contracts Manager Krizan and

Grievant Harpham, in the manner described in Finding of Fact No. 6, supra.

8. U.S.C.G. inspectors noted damaged keeler coolers on February 15, 16 and 17, 1983. At 11:30 a.m. on February 17, the inspectors notified Krizan that they were going to lunch. Krizan specifically asked the inspectors if Grievant could witness the tests of the repaired keel coolers. They answered "that would not be acceptable." The inspectors left for lunch and returned at 1:10 p.m. to witness the keel cooler tests. The record is unclear as to whether a CG 835 was actually issued regarding the defective keel coolers and/or, if so, to whom.
9. During the U.S.C.G. inspectors' absence, Krizan said that enough people had witnessed the tests and ordered the test hoses moved to the next keel cooler in order to expedite the testing and to make the Cathlamet available for a freight charter. Test hoses were connected and test pressure applied.
10. Krizan did not order Grievant to put the Cathlamet "into the water" or otherwise run the vessel. Krizan did order the test hoses removed from the first keel cooler before the U.S.C.G. performed its inspection.
11. Grievant Harpham did object to Krizan's decision and did assert that the U.S.C.G. had insisted upon inspecting the keel cooler test themselves.
12. Grievant's objection to Krizan's order to move the test hoses did not "countermand" Krizan's order to Lockheed personnel.
13. Lockheed personnel did obey Krizan's order and did move the test hoses to the next keel cooler.

14. On Rood's telephone advise, Grievant vacated the keel cooler work area during the remainder of the testing.
15. Upon return of the U.S.C.G. inspectors, tests of both keel coolers failed, and the gaskets had to be replaced on both keel coolers before the Cathlamet could be "put in the water."
16. Later during February 17, 1983, U.S.C.G. inspectors did issue a formal CG 83 to Grievant Harpham, listing four other deficiencies and stating that these would be corrected, witnessed and logged by the Chief Engineer (Grievant). None of the deficiencies listed on the only CG 835 actually in the record were to be corrected by Lockheed personnel. Therefore that work was not under Krizan's supervision.
17. WSF Policy Circular #ER-1 makes the Staff Chief Engineer responsible for "...submitting complete reports to the Port Engineer of all work accomplished...while in drydock," and, in paragraph 21, "To communicate information to the Maintenance Office at Pier 52." (emphasis in the original)
18. Staff Chief Engineer Rood instructed Grievant by telephone to put the CG 835 in Rood's locker, that Rood would "take care of it in the morning." Grievant complied, but also mailed a copy of the CG 835 to the Maintenance Office at Pier 52 that day. The record is silent as to whether Rood forwarded the original CG 835.
19. Despite Shipyard Contract Manager Krizan's assertion that he only knew of the necessity of the keel cooler deficiency repairs and tests through Grievant on February 17, after he had returned from Todd's Shipyard to Lockheed "in the afternoon, at approximately 1245, 1300, somewhere thereabouts," the evidence is clear that Krizan had earlier

on that day been informed directly by U.S.C.G. inspectors, and had in fact asked if Harpham could approve the tests, and had been told by the U.S.C.G. that only Coast Guard inspectors could approve the tests. The evidence is also clear that WSF Maintenance Director Quinn asked Harpham by telephone to be a witness that the test was satisfactory and that if Grievant had any trouble from the Coast Guard, the Coast Guard inspectors should be referred to Quinn, and that Quinn was going to call Coast Guard headquarters.

20. After being informed by Staff Chief Engineer Rood that he, Rood, had been "raked over the coals" because of Harpham's role in the February 17 drydock incident, Grievant Harpham on February 23 wrote a letter of complaint to WSF General Nick Tracy, alleging that he, Harpham, had been subjected to a "great deal of stress and pressure by management personnel to make decisions contrary to Coast Guard Rules and Regulations concerning the safety and professional operation of machinery aboard this vessel" and suggested "the refamiliarization of the following Coast Guard regulations to prevent any further misunderstanding. (46-86i, 46-239, 46-436, 46-497, 46-658.)" Grievant indicated a copy of this letter to U.S.C.G. Grievant never received a direct reply from Tracy.
21. Grievant's letter of February 23, 1983, was in the nature of disclosure of his perception of improper actions on the part of Shipyard Contract Manager Krizan and Maintenance Director Quinn to force him to disobey an order from U.S.C.G. inspectors and to put his Marine Engineer's License in jeopardy, viz. a "whistle-blower's letter."
22. The record is clear that Grievant's letter of complaint to General Manager Tracy was at least a contributing factor in the decision to reprimand Grievant about his performance in

the drydock incident earlier. There is some evidence that Tracy may have ordered the reprimand as a result of Grievant's letter.

23. RCW 42.40.010 sets forth the Washington State policy on "whistle-blowing:"

42.40.010. It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures.

24. RCW 42.40.060 establishes the duty of an employee to inform the agency ahead of intention to "blow the whistle."

42.40.060. An employee who wishes to disclose information under this chapter shall make a good faith effort to provide to the agency head the information to be disclosed before its disclosure.

25. RCW 42.40.070 establishes a duty for the employing agency concerning disclosure procedures and protections:

42.40.070 A written summary of this chapter and procedures for reporting improper governmental actions established by the auditor's office shall be made available to each employee upon entering public employment. Employees shall be notified each year of the procedures and protections under this chapter.

26. On February 28, 1983, WSF Maintenance Director Neil Quinn issued a Written Reprimand to Grievant: (1) referring to Grievant's letter to Tracy; (2) asserting that (a) a management level person is to act as on-site supervisor while a vessel is in drydock, (b) Grievant's responsibility is to abide by WSF Policy Circulars #ER-1 and ER-2, (c) Grievant had been specifically told by Quinn to let Krizan



handle the repair and coordination of U.S.C.G. inspection of defective keel coolers, (d) Grievant had the prerogative of refusing to run the vessel if ordered to, or insist on a Coast Guard re-inspection, (e) Grievant had hindered WSF efforts to expedite repairs; (3) asserting that Grievant's failure to notify proper authority of the CG 835 caused embarrassment for WSF management; (4) notifying Grievant that further violation of WSF policy would result in further disciplinary action; and (5) advised and warned Grievant "that this is the second letter to you concerning duties and responsibilities." The letter contained no charge of "insubordination." Port Engineer Keene testified that the reference to "insubordination" did not refer to conduct on the job, but to conduct during the later Grievance Conference.

27. Conflicting claims were made as to the basis of Quinn's reference to "the second letter regarding duties and responsibilities":

- (1) Grievant charged that the reference was based on a previous letter of reprimand which the Public Employment Relations Commission had ordered to be purged from Grievant's personnel file, but which had not been purged from the maintenance file.
- (2) WSF claimed the first letter was a June 25, 1982 letter from WSF Port Engineer Keene to Grievant advising Grievant that it was not WSF policy to pay overtime to train assistant engineers.

There is no reference to reprimand or warning in the June 25, 1982 letter. On the contrary, Keene testified that his June 25, 1982 letter was in answer to Grievant's letter of inquiry.

28. On March 3, 1983, Grievant filed a grievance with MEBA, protesting the letter of reprimand of February 28, 1983, and

asking for a letter of apology from Maintenance Director Quinn with copies to various management personnel, U.S.C.G., and to his personnel file; the removal of the reprimand from his records; and a Grievance Conference under the WSF/MEBA Agreement.

29. The resulting WSF/MEBA Grievant Conference was not satisfactory to Grievant, and he filed his grievance with PERC under said WSF/MEBA Agreement, as described in the Introduction and Background, supra.
30. WSF maintained personnel files in at least two places: (1) in the Personnel Office and, (2) in the Maintenance Department files.
31. On or about September 2, 1983, Grievant filed the Notice of Claim of Tortious Conduct of State, preparatory to filing suit in Superior Court.
32. On October 27, 1983, WSF Port Engineer Robert Keene notified Chief Engineer Rood that Grievant was no longer acceptable to Keene as Alternate Staff Chief Engineer and asked Rood for his preference for a replacement, effectively "demoting" Grievant.
33. On November 14, 1983, Grievant filed a grievance with MEBA against his "demotion" and the resulting reduction of wages. On the same date, MEBA notified Grievant that the position of Alternate Staff Chief Engineer is not covered by the WSF/MEBA Agreement and is not actionable. No Grievance Conference was held.
34. Grievance procedures are governed by Section XXI in the WSF/MEBA Agreement:

## SECTION XXI - Disputes

(a) In the event a controversy or a dispute arises resulting from the interpretation of this Agreement, or because an employee covered by this grievant considers himself unjustly treated, a conference shall be arranged promptly 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 a controversy or dispute. The above authorized representatives may appoint or designate any independent third party mutually agreeable to both to assist in the resolution of such controversy or dispute.

(b) In the event the representatives fail to agree within three (3) days, it shall be their duty to refer such controversy or dispute to the Public Employment Relations Commission, established under Chapter R.C.W. 7.64. The orders and awards of the Public Employment Relations Commission shall be binding upon any employee or employees or their representative and upon the Washington State Department of Transportation.

35. On November 10, 1983, Port Engineer Keene wrote a memorandum of justification for Grievant's "demotion" to Maintenance Director Quinn, charging (1) lack of decisiveness one year earlier in an incident involving repair of a CPP Pump, (2) lack of responsiveness to the Master of the Cathlamet immediately following a "hard landing" on September 10, 1983, (3) calling Chief Staff Engineer Rood in to work during Rood's time off, against Keene's instructions, and (4) "less than acceptable" completion of a chart of tanks and capacities on November 3, 1983.
36. Port Engineer Keene's memorandum of justification, supra, includes a reference to \$90,000 damages to a pier, which

happened some eleven days after the "hard landing", and following which Grievant had spent many days testing and timing propulsion controls. Mathers Control, a private contractor, had also performed testing and adjusting. Grievant was clearly not responsible for the "hard landing" or the dock damage. The alleged "less than acceptable" chart-making was subsequent to Keene's "demotion" of Grievant.

37. The WSF/MEBA Agreement is silent on the position of Alternate Staff Chief Engineer.
38. Designation of Alternate Staff Chief Engineer by the Staff Chief Engineer is established by WSF Policy Circular #ER-1. (See Finding of Fact No. 4, supra, and Appendix.)
39. WSF Policy Circular #ER-1 is silent on "demotion" or replacement of an Alternate Staff Chief Engineer, nor was any past practice cited.
40. Discipline in the WSF/MEBA bargaining unit is governed by Section V of the Agreement:

SECTION V - DISCIPLINE AND DISCHARGE

The employer shall not discharge or otherwise discipline any Licensed Engineer without just cause.

41. Grievant added his protest against the "demotion" to his grievance regarding the letter of reprimand by use of an exhibit during the Superior Court proceeding.

Based upon the foregoing Findings of Fact, the Marine Employees' Commission now arrives at the following Conclusions of Law:

## CONCLUSIONS OF LAW

1. The MEC has jurisdiction over the parties and the subject matter both by statute (RCW 47.64.150) and by Order of the Snohomish County Superior Court, No. 83-2-03749-1.
2. The 1980-83 WSF/MEBA Agreement was in effect at the times of the events leading to Grievant Harpham's original grievances and is the applicable authority under which the grievance filed with MEC on April 8, 1985 is being decided.
3. In reaching a decision in this grievance proceeding, MEC may not change or amend the terms, conditions, or applications of the WSF/MEBA Agreement (RCW 47.64.150). (Also see Acme Building Supply Company v. International Woodworkers of America, Local 5 - 315, 66-1) (ARB Para. 8361 at 4236).
4. Although the second grievance (re the "demotion" from Alternate Staff Chief) was not part of the original complaint to the Snohomish County Court, it was added to that original complaint during that proceeding and is accepted by MEC as part of said Court Order, and as part of the stipulation (See Agreement on Issues, supra).
5. Both the Letter of Reprimand and the "demotion" from Alternate Staff Chief, resulting in a pay cut of \$1.00/hour, are forms of discipline. WSF may invoke discipline only for "just cause" (WSF/MEBA Agreement, Section V).
6. Although the WSF/MEBA Agreement is silent on the position of Alternate Staff Chief Engineer, the Agreement does not limit grievances to violations only of the written provisions of said Agreement. On the contrary, the Agreement (Section XXI - DISPUTES\_ opens the grievance procedure to an employee considering "himself unjustly treated." Thus, the

discipline of "demotion" from Alternate Staff Chief Engineer is an arbitrable issue under terms of said Agreement. (See Levi Strauss and Co., 69 LA 1, 5ff (1977)).

7. The Letter of Reprimand fails to meet the "just cause" test for several reasons:
  - (A) It contains certain facts which are untrue or highly questionable.
  - (B) "Just cause" requires equal treatment of offenders. If management was dissatisfied with the transmittal of the CG 835, Staff Chief Engineer Rood's instructions to Grievant were unsatisfactory, and Rood must share culpability. Rood was "raked over the coals", but only with regard to Grievant's performance. There is no evidence of any dissatisfaction with Rood's share in the alleged failure to inform WSF higher level management.
  - (C) Since WSF did not prove any infraction of WSF rules by Grievant in the drydock incident, no discipline ensuing therefrom can be "just". (See Arizona Aluminum Co., 82-1 ARB, Para 8212 (1982), cited in Just Cause: The Seven Tests, supra.)
8. MEC must exclude consideration of all testimony and argument relating to the initiation and findings regarding the Washington State Auditor's investigation of Grievant's "whistle-blowers" action. The Auditor's investigation records are confidential, and any conclusions based on statements of either party regarding said Auditor's investigation can be highly prejudicial without cross-examination and rebuttal. However, MEC may not Grievant's statutory right as a State employee to take a "whistle-

blower" action, and the duty of WSF concerning "whistle-blowers."

9. Grievant Harpham did have a right under chapter 42.40 RCW to disclose improper actions of his immediate supervisors. Grievant Harpham did make a good faith effort to disclose information to his agency head, under RCW 42.40.060. WSF failed to provide a summary of the "Whistle-blowers statute" to Grievant, and to notify Grievant of the proper procedures, under RCW 42.40.070.
10. MEC did admit and can consider U.S.C.G. documents whose introduction may violate stricter hearsay rules of court procedure for their probative value. However, MEC has not considered any of the testimony and argument concerning U.S.C.G. investigation, which are not supported by documentary evidence or by concurring testimony from both parties.
11. MEC should order the Written Reprimand of February 28, 1983 cancelled and removed from all files, and all recipients of copies of said Reprimand notified accordingly.
12. Even if the positions of Staff Chief Engineer and Alternate Staff Chief Engineer are not specifically listed in the WSF/MEBA Agreement, nor any reference to appointment to or demotion from such positions, and even though WSF has assigned authority to designate the Alternate Staff Chief Engineer for a vessel to the Staff Chief Engineer, once such designation is made with approval of WSF, and once Grievant has served successfully as Alternate Staff Chief Engineer for a period of time past a reasonable break-in period (See Conclusion of Law No. 6, supra.), removal from that position and reduction of pay effectively constitutes a disciplinary action. To paraphrase the relevant part of Alexander's

Markets, Inc., "if WSF seeks to punish or discipline Harpham by demoting him, WSF must abide by Section V of the WSF/MEBA Agreement (51 LA 165, 168 (1968))."

13. The right to designate an Alternate Staff Chief Engineer includes approval of the management structure over the designating Staff Chief Engineer. (See WSF Policy Circular #ER-1, Appendix) The designation of the Alternate Staff Chief Engineer, absent WSF/MEBA Agreement language or past practice to the contrary, is valid only so long as higher authority approves. However, disciplinary "demotion" from such designation must only be for "just cause." (See Conclusion of Law no. 11, supra.)

14. The "demotion" of Grievant and the consequent loss of \$1/hour pay do meet the "just cause" test:

(A) The evidence is clear that Grievant lacked the decisiveness to act as Staff Chief Engineer on the Cathlamet during the absence of Staff Chief Engineer Rood.

(1) Making a decision regarding the removal and repair of CPP Pumps and then changing that decision twice, and so notifying WSF management twice, within an hour or two did display "indecision."

(2) The evidence clearly indicated a history of need for Grievant to consult with Staff Chief Engineer Rood, while Rood was off-duty, starting with the CPP pumps repair in 1982, and extended through the drydock incident in February 1983 and the propulsion control tests in the Fall of 1983.

(3) Grievant called the Staff Chief Engineer Rood to come to Mulkiteo for consultation at premium pay during Rood's time off, in spite of explicit orders from WSF Maintenance Director Quinn to the contrary.



- (B) The evidence is clear that Grievant refused to go from the propulsion control room up to the pilot house at the request of the Master.
- (1) Even though Grievant was not immediately at the controls when the "hard landing" occurred, he was in charge of the control operation at that time. Likewise, even if his relief was competent to answer the Master's questions, Grievant was not relieved of his responsibility under Policy Circular #ER-1.
  - (2) There is conflicting testimony as to whether the Master approved Grievant's sending his watch relief "topside." There is also conflicting testimony as to whether the conversation between the Master and Grievant was polite, or if Grievant was insubordinate. However, the fact remains that Grievant did not respond to the Master in accordance with WSF Policy Circular #ER-1. Instead, he insisted upon going home, even though responding personally to the Master would have cost only one hour's overtime; and Grievant admittedly had authority to approve that overtime.
15. Notwithstanding certain extraneous and prejudicial items in Port Engineer Keene's Memorandum of Justification for Grievant's "demotion" (i.e., (1) reference to sending Mathers Controls to make adjustments and repairs to the propeller pitch controls, when Grievant had conscientiously worked for days testing these controls; (2) reference to the \$90,000 damage to the Mulkiteo dock on September 21, 1983, damage which was clearly attributable to malfunctioning controls which both Grievant and Mathers Controls had attempted to correct, or to pilot error; (3) the charge that Grievant had failed to complete the chart assignment after he had already been "demoted"), the evidence outlined in Conclusion of Law No. 15 indicated both sufficient and just cause. There is no evidence that copies of the foregoing

Memorandum and Justification with the extraneous and prejudicial items were sent to U.S.C.G.; however, in view of the foregoing prejudicial items, MEC should prohibit WSF from providing U.S.C.G. with said Memorandum.

16. MEC should deny the second part of this grievance, and should sustain WSF's "demotion" of the Grievant from Alternate Staff Chief Engineer to Chief Engineer.
  
17. In the absence of a provision in the WSF/MEBA contract, a statute, or a recognized ground of equity, MEC may not award attorneys' fees and costs (See PUD #1 v. Kottsick, et al., Wn 2<sup>nd</sup> 388, 545 P2d 1 (1976)). "Equitable grounds" may include bad faith or wantonness by the losing party, preservation of a common fund, protection of constitutional principles and private attorney general actions. None of the first three grounds is present in this case. The private attorney general theory requires Grievant to (1) incur considerable economic expense, (2) to effectuate an important legislative policy, (3) which benefits a large class of people. Even assuming success or partial success in this case, no legislative policy has been effectuated, and only the Grievant receives any benefit at all, and, in fact, is not successful in the major part (the "demotion") of his grievance. (See Leonard J. Moitke, et al., v. City of Spokane, 101 Wn 2d, 307, 338-341.)

Nor can MEC award attorneys' fees and costs as an element of damages caused by fraud or malice. No fraud or malice was proven. (See State ex rel. Macri v. City of Bremerton, 111 P2nd 612, 613).

Attorneys' fees and costs should be denied.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Marine Employees' Commission adopts the following order:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. Washington State Ferries shall immediately rescind the Written Reprimand of February 28, 1983, to William L. Harpham and shall immediately remove said Reprimand from its Personnel File, its Maintenance File, and from any other files, as though it had never existed.
2. Washington State Ferries shall immediately notify the United States Coast Guard and each U.S.C.G. representative who has received a copy of said Reprimand and/or whomsoever has been involved with the investigation of the February 17, 1983 drydock incident and/or or Harpham's "whistle-blower" effort in that connection, of the rescission of said Written Reprimand.
3. Washington State Ferries is hereby sustained in its action of "demoting" William L. Harpham from Alternate Staff Chief Engineer to Chief Engineer and the resulting cut of \$1.00/hour wage; Provided that
4. Washington State Ferries is hereby prohibited from disseminating the Memorandum of Justification to U.S.C.G. or any other agency or person outside of WSF management or in any way indicating that William L. Harpham did not perform testing and/or corrective work on the propulsion controls or that he was responsible in any way for damage to the Mukilteo dock.

5. The appeal of William L. Harpham for award of attorneys fees and reimbursement of costs is hereby denied.

DATED at Olympia, Washington, this 7<sup>th</sup> day of March, 1986.

MARINE EMPLOYEES' COMMISSION

/s/ DAVID P. HAWORTH, Chairman

/s/ LOUIS O. STEWART, Commissioner

/s/ DONALD E. KOKJER, Commissioner

WASHINGTON STATE FERRIES  
SEATTLE FERRY TERMINAL  
PIER 52, SEATTLE

POLICIY CIRCULAR #ER-1  
July 17, 1981

EXHIBIT 6

TO: ALL ENGINE ROOM EMPLOYEES  
SUBJECT: RESPONSIBILITIES OF STAFF CHIEF ENGINEERS

### RESPONSIBILITIES

The Staff Chief Engineer is directly responsible to the Port Engineer for supervising and coordinating the activities of all engine room employees assigned to his vessel, and ensuring the efficient operation of all propulsion and electrical systems throughout the vessel. The Staff Chief Engineer is responsible for upholding regulations relating to safety, discipline, and performance among all engine room employees on his vessel, and initiating employee training programs in all phases of the vessel's operation, including emergency procedures. Where vessel machine and engine room employees are concerned, the Staff Chief Engineer is in complete charge.

- The Staff Chief Engineer is responsible for the physical integrity of his assigned vessel as an operational unit of the fleet. In the event of any damage to the vessel, from any cause whatever, the Staff Chief Engineer is responsible for carrying out an inspection of the vessel and advising the Master of the nature and extent of damage, and of any action taken to ensure the safety and seaworthiness of the vessel.
- The Staff Chief Engineer is responsible for the preparation and writing of detailed technical reports to the Port Engineer's office concerning damages to his vessel, and also for providing a complete monthly report on the vessel's operational performance. The Staff Chief Engineer is responsible for establishing and implementing proper preventative maintenance programs, and submitting complete reports to the Port Engineer of all work accomplished during layup periods at Eagle Harbor or while in dry dock.
- In the absence of management level supervisors during the drydocking and refit of a vessel, the Port Engineer may assign the Staff Chief Engineer to serve as the on-site supervisor representing the Maintenance offices of WSF. Should any questions arise, the Maintenance Director or Port Engineer must be consulted.

## DUTIES

The Staff Chief Engineer's duties include the following:

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RESPONSIBILITIES OF STAFF CHIEF ENGINEERS

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1. To ensure that all machine aboard the vessel, both mechanical and electrical, main propulsion units and auxiliary equipment, is properly maintained and serviced. This includes heating, ventilation and sanitary systems, pumps, steering gears, bearings, piping, blowers, fire fighting equipment, safety gear, and any other equipment requiring the attention of engine room employees.
2. To attend to the cleanliness and good condition of all watertight doors, valves, piping, wiring and machinery within the engine room, the shaft alleys, steering compartment, storerooms, workshops, all compartments and areas below floor plates, as well as voids, uptakes and casings.
3. To order and take charge of all stores, equipment, and supplies pertaining to engineering operations. The Staff Chief Engineer must therefore practice strict economy without sacrificing reasonable standards of safety and performance. Provide enough stock on hand to last 30 days. Allow 3 months of lead time when making new orders.
4. To make frequent inspections of the mechanical and electric systems throughout the vessel, and if necessary, order repairs and adjustments to keep them in their best possible working condition.
5. To notify the Master of the vessel, while underway, prior to testing or stopping machinery which could alter the trim, stability or speed of the vessel.
6. To record and properly respond to signals from the bridge. Propelling machinery must not be engaged until a proper signal is received. Signals to increase or decrease speed must be carried out according to the demands for safety as perceived by the Master - the possible harm to propelling machinery is secondary where safety of the vessel is concerned.
7. To accurately record fuel consumption and all information required by law or by WSF regulations. The Staff Chief Engineer must sign for all log book entries made during his watch.

8. To prepare the necessary requisition forms for all repairs. The Staff Chief Engineer must originate and sign all work order requests except those required by emergency repairs

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or needed during the Staff Chief Engineer's absence. Repairs and alterations to equipment systems must be properly recorded by log book entries.

9. To know and enforce all applicable U.S. Coast Guard rules and regulations. The Staff Chief Engineer is to ensure that all employees assigned to the engine room know and practice all rules and regulations set forth by the U.S.C.G., other governmental agencies and any recognized authorities. Watch, fire and boat station bills must be posted in conspicuous places.
10. To set the guidelines for regular bilge and void soundings, fuel soundings, as well as temperature and pressure readings. The Staff Chief Engineer must provide accurate instructions to see that these measurements are accurately made and properly recorded.
11. To personally supervise the opening and overhaul of main engines, auxiliary engines, major repairs and drydockings. The Staff Chief Engineer is to supervise, either personally or by report, any repairs or alterations to vessel equipment. He must be thoroughly familiar with the condition of all equipment and systems under his supervision.
12. To regularly report vessel conditions to the Port Engineer. In addition to the report required monthly, the Staff Chief Engineer must submit a detailed quarterly report on the condition of the vessel's propulsion equipment. The quarterly report may be typed or written out on the back of the monthly report.
13. To ensure that tanks are sounded and the soundings are properly recorded when receiving fuel or lube oil. The Staff Chief Engineer must see that soundings are taken and recorded before and after oil is received, and verify that the soundings agree with the amount charged by the oil company. Fuel and oil slips must be forwarded to the Maintenance office at Pier 52 with a copy of the Declaration of Inspection.
14. To maintain strict discipline among engine room employees. The Staff Chief Engineer must make certain that watch

supervisors direct the performance and behavior of engine room employees according to current WSF regulations. The Staff Chief Engineer must review all disciplinary measures resulting in written warnings or suspensions.

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RESPONSIBILITIES OF STAFF CHIEF ENGINEERS  
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15. To assign licensed and unlicensed engine room employees to whatever machinery and stations he chooses as appropriate. The Staff Chief Engineer is to determine crew assignments and ensure that the performance of engine room employees meets acceptable standards.
16. To inspect the systems and apparatus for fire prevention. The Staff Chief Engineer must confirm that any and all equipment for extinguishing fire is ready for use at all times, and that oil and grease are cleaned from bilges at regular intervals. Paints and thinners must be handled according to U.S. Coast Guard regulations. Moreover, any employee violating any rules concerning fire prevention must be appropriately disciplined.
17. To protect vessel machinery from adverse weather conditions. The Staff Chief Engineer must take precautions to ensure that operational and auxiliary systems are adequately protected against all elements of weather and environment which could adversely affect the vessel's efficiency and reliability. In cold weather, for instance, all exposed lines must be properly protected to prevent freezing.
18. To determine and evaluate the capabilities and performance of each crew member of the engine room and inform the Port Engineer of his findings. Any licensed engineer, or unlicensed employee, not satisfactory to the Staff Chief Engineer may be reprimanded, suspended or terminated according to the disciplinary provisions of WSF.
19. To designate his own replacement during absence. The Staff Chief Engineer is empowered to select a Chief Engineer of his choice to represent him when absent for any reason. The person selected assumes the same responsibilities, duties and powers as assigned to the Staff Chief Engineer when acting as his replacement.
20. To sign and approve pay orders. The Staff Chief Engineer may designate other employees to keep time records and prepare pay orders, but only the Staff Chief Engineer or his alternate is empowered to sign and approve pay orders.



21. To communicate information to the Maintenance office at Pier 52. Unless an emergency exists or management officials need immediate information of either a technical or personal nature, the Staff Chief Engineer is the only employee authorized to communicate information or make reports concerning the operations of the engine room.. For the sake

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of convenience the Staff Chief Engineer may delegate the responsibility for routine reports to any employee he chooses.

22. To follow and enforce all applicable rules and regulations, whether stated by WSF or promulgated by other recognized authorities. The Staff Chief Engineer is expected to direct his employees and accomplish operational goals in accordance with the customs established by good maritime practices and in the best interests of WSF.

N.H. Tracy  
General Manager