

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

MARINE ENGINEERS BENEFICIAL )  
ASSOCIATION, DIST. No. 1 )  
ON BEHALF OF ED CASPERS and )  
ALBERT GALLAGHER, )  
 )  
Grievants, )  
 )  
v. )  
 )  
WASHINGTON STATE FERRIES, )  
 )  
Respondent. )  
 )  
 )  
 )

MEC Case No. 8-93  
DECISION NO. 119 - MEC  
DECISION AND ORDER

Christine Gregoire, Attorney General, by Bryce E. Brown, Assistant Attorney General, appearing for and on behalf of Washington State Ferries.

Davies, Roberts and Reid, attorneys, by Kenneth J. Pedersen, attorney at law, appearing for and on behalf of the Marine Engineers Beneficial Association, Dist. No. 1.

THIS matter came on regularly before the Marine Employees' Commission (MEC) on September 24, 1993 when District No. 1 Marine Engineers Beneficial Association (MEBA) filed a request for grievance arbitration against Washington State Ferries (WSF) on behalf of Ed Caspers and Al Gallagher, pursuant to chapter 316-65 WAC. MEBA alleged that Messrs. Caspers and Gallagher had been notified of certain WSF disciplinary actions against them by letters on June 24, 1993 and that the statements of causes for the discipline were unclear, therefore unfair. MEBA further charged undue delay between the actual dates of the alleged misconduct and the date of the disciplinary action, "and, the conduct of the Employer's investigation; [and] other mitigating circumstances worthy of review by an arbitrator in assessing our claim of unfair discipline."

MEBA asserted that Sections 5, 12, 30 and Schedule A of the (MEBA/WSF Licensed Engineer) collective bargaining agreement are applicable.

MEBA certified that the grievance procedures in the pertinent collective bargaining agreement have been utilized and exhausted.

The request for grievance arbitration was assigned to Commissioner Donald E. Kokjer to act as arbitrator pursuant to WAC 316-65-070. A notice of hearing was served on the parties pursuant to WAC 316-65-080 on November 16, 1993, and hearings were held on February 10 and 11 and March 21 and 22, 1994. The transcripts were received on May 3, 1994, and briefs were timely filed on June 2 and 3, 1994.

#### INTRODUCTION AND BACKGROUND

Messrs. Caspers and Gallagher are each licensed marine engineers, are members of MEBA, and have been employed by WSF for more than twenty years. At the time of discipline, Caspers was Alternate Staff Chief Engineer and Gallagher was Assistant Engineer, both on the M/V Yakima. Mr. Alan Brazeau has worked for WSF since 1972, and John Acton has worked for WSF for 21 years. Both Brazeau and Acton are Oilers. In August 1992 Messrs. Acton and Brazeau filed certain charges of sexual harassment with WSF management against Caspers. The harassment complaint was based on a series of lewd actions and speech. When Acton and Brazeau made their charges, Caspers was "beached" (put on administrative leave with pay) from September 28, 1992 through June 24, 1993, during which time the WSF Office of Equal Employment Opportunity investigated said complaints, "ultimately issuing a report finding the two oilers complaints of 'sexual harassment' to be without merit. But the OEO Report did refer to "inappropriate behavior and ...inappropriate remarks while on duty."

Thereupon Mr. Ben Davis, WSF Senior Port Engineer, conducted further investigation on the activities of the Caspers-Gallagher-Acton-Brazeau watches. On the basis of the OEO report and his follow-up investigation, on June 24, 1993 Davis notified Caspers he was being disciplined for

- Bringing guns aboard the vessel.
- Allowing pornographic movie to be viewed on watch.
- The constant use of profanities, vulgarities, and inappropriate sexual references.
- Pulling up deck plates while oilers John Acton and Alan Brazeau were changing lube oil filters on the main engines.
- Working in the presence of asbestos without taking proper precautions.
- Contacting and/or attempting to intimidate the complainant(s) after having been told to avoid contact with them.
- Receiving and/or taking commuter cups belonging to Marriott Corporation, WSF's food service concessionaire.

These incidents of misconduct violate the following WSF/WSDOT policies as set forth in the current WSF Personnel Manual: discourtesy to fellow employees; conduct which endangers or harms persons or property; wasting time or loafing during work hours; violation of health and safety rules or regulations; unsatisfactory work performance; theft or unauthorized use of state or private property; possession of firearms while on duty (see Personnel Manual, Section 12, page 2-7); use of obscene language; and failure to observe ferry system regulations.

Davis' notice to Caspers listed the following disciplinary decision:

- (1) You are suspended without pay for one work week (80 hours).
- (2) You are demoted to Assistant Engineer for a period of six (6) months.
- (3) You are relieved as Alternate Staff Chief and will be eligible for reconsideration for this position

upon your return as Chief Engineer only if recommended by the Staff Chief Engineer.

- (4) You will be required to attend training courses, selected by management and designed to improve your supervisory skills.

followed by certain implementation details.

On the same date Davis notified Gallagher that Gallagher too was being disciplined for

- Bringing guns aboard the vessel.
- Viewing or allowing pornographic movie to be viewed on watch.
- Receiving and/or taking commuter cups belonging to Marriott Corporation, WSF's food service concessionaire.
- Working in the presence of asbestos without taking proper precautions.

All of which violated the same Personnel Manual, Section 12, pp. 2-7. Gallagher was suspended without pay for three days (36 hours).

Oiler Alan Brazeau was also suspended for three days for the following conduct:

- (1) Bringing guns aboard the vessel.
- (2) Viewing and/or bringing pornographic movie to be viewed on watch.
- (3) Receiving and/or taking commuter cups belonging to Marriott Corporation, WSF's food service concessionaire.

Oiler John Acton did not receive any discipline.

Caspers and Gallagher timely filed grievances protesting their discipline. Brazeau did not file a grievance.

## ISSUES

1. Did WSF violate Section 5 of the WSF/MEBA Collective Bargaining Agreement in disciplining Marine Engineers Ed Casper and Albert Gallagher?
2. If so, what is/are the appropriate remedy(ies)?

## POSITIONS OF THE PARTIES

### Position of Grievant MEBA

After pointing out the competence and satisfactory service given WSF by both Caspers and Gallagher for more than twenty years with no discipline of any kind, MEBA contends that WSF subjected Caspers and Gallagher to "extraordinary punitive actions" on the basis of "dubious complaints of sexual harassment" tendered by Oilers Brazeau and Acton. After the Department of Transportation OEO investigator found those complaints to be without merit, WSF began its own second investigation, resulting in these disciplinary actions.

Taking alleged examples of misconduct one by one, MEBA claimed there was no basis for disciplining Caspers and Gallagher for bringing guns aboard the vessel. MEBA admits Caspers had brought firearms to the vessel, "but did so at the request of Captain Jerry Boyle (Master of M/V Yakima), a firearm enthusiast and licensed gun dealer." Gallagher never brought guns aboard, but did accept delivery of a shotgun and a handgun from Captain Boyle in their original boxes. Neither Caspers nor Gallagher had ammunition for said weapons aboard the vessel, and there was no testimony that the weapons were brandished or handled inappropriately.

MEBA argues that Brazeau's and Acton's viewing a pornographic movie during their lunch break does not provide a basis for disciplining

Caspers and Gallagher. Brazeau brought the videotapes aboard. He and Acton watched them together on their lunch break while the vessel was tied up. Caspers walked through that room and saw that "the tape was of the 'X-rated variety.'" Gallagher did see part of the tape as he prepared his lunch. He did not join Brazeau and Acton in their viewing, but instead left and ate his lunch in the dayroom. Caspers defended himself as lacking authority to impose corrective action and cited instances where he had tried to make corrections but was either ignored or his corrections were "directly contravened" by management.

MEBA argues that punishing Caspers for using salty language is "hypocritical, at best." WSF has charged Caspers with "constant use of profanities, vulgarities and inappropriate sexual references" after more than twenty years with WSF with no complaints, but on the basis of the two oilers' charges, one of which has a pecuniary interest in his suit against the State of Washington for \$200,000 for the "sexual harassment" he claims to have endured, but which the OEO has found to be without merit. The Union observes that "[i]f Caspers was as offensive as these two claim, a reasonable person might ask why none of Caspers' other co-workers complained." MEBA asserts that "off-color remarks and jokes are common in the WSF, at all levels of employment," including administrative personnel. MEBA relies on Elkouri and Elkouri, How Arbitration Works, 643 (3<sup>rd</sup> ed. 1933) to argue that selective enforcement of rules of conduct preclude a "just cause" for discipline. No one, including the two complaining oilers, had ever complained to Caspers that they objected to his language. MEBA points out that the two complaining oilers made the same derogatory remarks about WSF management, made the same demeaning remarks about the female mate aboard the Yakima, "enjoyed the pornography Brazeau brought aboard the Yakima, and both appreciated the occasional off-color story."

MEBA argues that there is no credible evidence that Caspers and Gallagher stole cups from the Marriott Corporation. That accusation was made by Brazeau more than seven months after the alleged theft and only after Brazeau's accusation of sexual harassment was found to be without merit. MEBA alleges that Brazeau's credibility as a witness was destroyed when he lied to an investigator about bringing an X-rated movie aboard the M/V Yakima. Yet Brazeau's testimony was the only evidence produced in support of the claimed theft. "Given Brazeau's failure to raise the cup issue in a timely manner, his demonstrated lack of credibility, the Marriott Corporation's denial that it was missing any cups, the disciplinary action against Caspers and Gallagher for theft should be overruled."

MEBA asserted that the allegation that Caspers and Gallagher willfully exposed themselves to asbestos is baseless. Brazeau didn't raise the issue until after the sexual harassment charge was found to be without merit and Caspers was returning to work; no specific dates, times or locations were identified; no other witnesses had any recollection of the event; and there is no safety man at the WSF Eagle Harbor Shipyard as Brazeau alleges. MEBA argues that Caspers has followed accepted practice in dealing with asbestos; he noted two separate asbestos problems by "Work Requisition" forms seeking repair by the asbestos crew during vessel "lay up." When the crew ran out of asbestos filters during "lay up", Caspers drove out to the warehouse to pick up filters for his crew to use. MEBA pointed out Davis' testimony that

offered any of its employees any training in the detection and avoidance of asbestos." Caspers' concern for protection of the crew from asbestos came, not from WSF, but from MEBA publications.

MEBA asserts that "the discipline of Caspers for the 'oil filter' incident is without merit." Although Oilers Acton and Brazeau stated they had left their assigned job of working on a large fuel oil filter, because of a hazard created by Caspers and Gallagher

having removed nearby deck plates for other work, the photographs of said deck and plates submitted in evidence by WSF do not support Acton's drawing; and Acton testified that his prior description was in error. Staff Chief Engineer Jacobsen testified that Caspers' removal of said deck plates still provided "sufficient distance around the filter to permit the two oilers to work upon it safely. . . . Notwithstanding Davis' claim to the contrary, engineroom employees are regularly required to work in the immediate area of open floor plates. It is grossly unfair to punish Caspers for workplace practices which occur on a monthly basis on every vessel in the fleet."

MEBA also claimed that the allegation that Caspers "hollered 'blow job'" at Brazeau while driving off the ferry is without merit. Of the two witnesses named by Brazeau (Gallagher and WSF Chief Engineer Rob Frye), Frye testified he had heard the expression, but could not provide specific statements of time of day, time of year, or whether or not he was relieving Caspers, and that Brazeau did not seem upset by the incident. MEBA asserts that at the period the alleging hollering occurred, Caspers was actually on administrative leave; therefore, if the incident actually happened, Caspers was driving off the ferry "on his own time."

Finally, MEBA relies on Michigan Seamless Tube Co., 24 LA 132, 133-134 (1955) to contend that these disciplinary actions are without "just cause," because "just cause" requires discipline to be both corrective and progressive in nature. MEBA insists that "none of the bases for disciplining Caspers and Gallagher are meritorious." Their accusers "sleep on the job, shirk responsibility, bring guns aboard without authorization, indulge their appetites for hard core pornography, swear, and make derogatory references to management officials," but if someone else does these things he finds himself accused of sexual harassment. "If that accusation does not do the trick, Acton and Brazeau invent new charges, such as their complaints about asbestos and "Marriott cups." Even Senior Port



Engineer Davis testified they lied under oath when they denied bringing the pornographic film aboard the M/V Yakima.

MEBA asks that MEC order restoration to Caspers and Gallagher of their loss of income, which in Caspers' case exceeds \$11,000 as a result of this discipline. The union further asks that all references to the alleged misconduct and resulting discipline be purged from all WSF files.

#### Position of Washington State Ferries

In September 1990 Oilers Acton and Brazeau were assigned to the M/V Yakima, where they worked under supervision of Alternate Staff Chief Ed Caspers. In August 1992 Acton attended a WSF sponsored diversity training program conducted by InnoVisions. During said training, harassment issues were discussed. Acton discussed with his instructor Jeff Hunter the possibility that he, Acton, was experiencing sexual harassment on the job. Brazeau also met with Hunter. In turn, Acton and Brazeau in company with representatives of InnoVisions met with top WSF management. Thereupon WSF management requested the Department of Transportation Office of Equal Opportunity to conduct an investigation. Pending completion of the OEO investigation, "Caspers was placed on paid administrative leave and advised not to make any contacts with the crew members of the Yakima."

After the assigned OEO investigator interviewed seven persons, he assisted Acton and Brazeau in filing a formal complaint containing fourteen allegations of misbehavior against Caspers, most of them accusing Caspers of crude, lewd and prurient language and actions on the job.<sup>1</sup> After assisting in the formulation of said

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<sup>1</sup> Although the fourteen specific charges by Acton and Brazeau against Caspers were admitted in evidence and repeated in the WSF post-hearing brief, MEC believes they need not be reproduced herein. The pertinent offenses are repeated elsewhere herein; but

allegations, the OEO investigator continued his interrogation and concluded that "although the four elements of sexual harassment were not met in this case, "Caspers, Acton and Brazeau had all "used inappropriate behavior and made inappropriate remarks while on duty. Therefore, their conduct violated the Department of Transportation's Directive on Equal Opportunity. ..."

After the OEO conclusion, WSF Senior Port Engineer Ben Davis conducted his own investigation, and as a result he issued disciplinary actions against Caspers, Brazeau and Gallagher as detailed in the Introduction and Background, supra.

WSF asserts that the Personnel Manual, under which these disciplinary actions were taken, was "adopted under the authority granted by the Management Rights Clause of the [WSF/MEBA] Collective Bargaining Agreement (Section 30)." As veteran WSF employees Caspers and Gallagher cannot claim ignorance of the rules in said manual. As a supervisor, Caspers should not have to be forewarned about "the constant use of profanities, vulgarities and inappropriate sexual references, along with pulling up the deck plates and yelling 'blow job'."

WSF argues that WSF was not required to impose progressive discipline on Caspers and Gallagher. WSF relies on Union Carbide Corp., 46 LA 195, 196-7 (1966) in asserting that MEC should not impose a progressive discipline requirement in the absence of such provision in the bargaining agreement. Citing Elkouri and Elkouri, How Arbitration Works 672, (4<sup>th</sup> ed. 1985), "formalization of progressive discipline is a matter of negotiation between the parties, not for the arbitrator."

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most importantly the earlier statement of charges of sexual harassment in its entirety is overly lurid or sensational. The attempts to make a sexual harassment case tends to overshadow the eventual bases of the discipline.

Secondly, the same WSF Personnel Manual under which Caspers and Gallagher were disciplined requires progressive discipline only for minor infractions, and serious violations may result in more serious discipline, Section 17, p. 1.11. No progressive discipline is required "where the misconduct includes theft, endangerment to the crew, intimidation of Mr. Brazeau, and the constant use of vulgarities, profanities and inappropriate sexual references." Kroger Co., 50 LA 1194, 1198 (1968); How Arbitration Works, ibid, at 682-83.

WSF describes a concerted effort, before imposing discipline, to determine whether Caspers and Gallagher had violated WSF policies. WSF asserts that its "investigation was fair and objective, timely, and untainted by any improper motives." First WSF used an outside investigator, viz., OEO, from September 18, 1992 until March 2, 1993. Caspers and Gallagher "were allowed to present their sides of the story" during each of the two investigations. Davis made his decision and issued the discipline notices on June 24, 1994.

WSF argues that an arbitrator should not impose a time limit on investigations "where the parties have not seen fit to establish one themselves," citing Bureau of Alcohol, Tobacco and Firearms, 93 LA 393(1989) wherein a 21-month investigatory delay only reduced termination to a suspension, and on Furrs Supermarkets, 95 LA 1021 (1990) wherein unnecessarily prolonged investigation only resulted in reducing a suspension from 17 to 5 days.

WSF denies that Port Engineers Davis and Nitchman were biased against Caspers and out to "get" him. WSF believes that their testimony squarely met and overcame accusation. In addition, WSF claims, the fact that Davis decided to put Caspers on paid administrative leave from September 1992 through June 1993, when neither the Agreement nor WSF's procedures provide for any such leave, is indicating of lack of ill will toward Caspers.

WSF argues that the OEO finding of "No Cause" for sexual harassment is irrelevant to Davis' decision to discipline Caspers. Not only was sexual harassment not found by the OEO investigator, but the OEO Commission itself affirmed the investigator's finding when it was appealed to said Commission by Acton and Brazeau. The OEO investigator had referred to other irregular job behavior; so Davis had investigated the references to guns on the vessel, constant use of profanity, etc.

WSF cites a definition of just cause in Baldwin v. Sisters of Providence, 112 Wn.2d 127, 139 (1989), to wit: a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. . .which is not for any arbitrary, capricious, or illegal and which is based on facts (1) supported by substantive evidence, and (2) reasonably believed by the employer to be true. WSF cites How Arbitration Works, ibid, at 662: Just cause for discipline involves two elements, the conduct giving rise to the discipline and the appropriateness of the penalty involved. WSF concedes that the burden of proof of just cause is on the employer by a preponderance of evidence. Id. At 662; Kruger Co., 25 LA 906, 908 (1955). Caspers' and Gallagher's behavior did "give rise to the discipline." They did bring guns aboard the Yakima. They did allow and/or watch pornographic movies on watch. They failed to take safety precautions while working in the presence of asbestos. They did receive and/or take Marriott cups. In addition, Caspers constantly used profanities, vulgarities, and inappropriate sexual references. Caspers pulled up deck plates close to where Acton and Brazeau were already working in and around a deck plate opening. Finally, Caspers yelled "Blow Job" at Brazeau when he had been ordered to have no contact with Brazeau. Gallagher violated the WSF "Regulations Designed to Maintain an Orderly, Safe and Efficient Operation", thus "giving rise" to the discipline. Further, WSF asserts that Caspers conduct was

particularly intolerable, given that he was in a supervisory position.

WSF contends that it imposed a proper level of discipline against Caspers. Davis had considered termination for Caspers; but, because of Caspers' long record as a hard working marine engineer with no prior serious infractions, Davis decided on this discipline to give Caspers a "second chance." WSF argues that MEC should not reduce the level of discipline imposed by SF. It was proper "considering the scope and gravity of his offenses, and there are no proper grounds for doing so."

Having read and carefully considered the entire record, the Marine Employees' Commission now hereby enters the following findings of fact.

#### FINDINGS OF FACT

1. Messrs. Caspers and Gallagher are licensed marine engineers who are engineer officers in the employ of Washington State Ferries. At the time of the instant incidents Caspers was the Alternate Staff Chief Engineer on the M/V Yakima. Gallagher was employed as Assistant Engineer and worked the same watch as Caspers. Neither man had incurred prior serious infractions.
2. Discipline of WSF Engineer Officers is governed by Section 5 of the Agreement between Washington State Ferries and National Marine Engineer Beneficial Association; District 1 - MEBA/NMU (1989-1991), as extended by an Addendum dated February 28, 1992, as follows:

#### SECTION 5 - DISCIPLINE AND DISCHARGE

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

"Just cause" is not defined in said Agreement.

3. Caspers did bring guns aboard the Yakima on several occasions. In a sworn statement, Captain James Boyle, retired Master of the Yakima, said that Caspers brought the guns aboard at Boyle's request each time. In all instances the guns were in their original packing/crates. The guns were not loaded, and no ammunition was present with the guns. On a separate occasion Caspers brought a box of home-loaded .357 ammunition, and gave it to Brazeau. The .357 weapon was not on board.
4. With reference to the charge that Gallagher brought guns aboard, the evidence is that Gallagher did not bring guns aboard. Captain Boyle delivered guns twice, a handgun and a shotgun, to Gallagher aboard the Yakima. In both instances Gallagher took possession at the end of his watch and removed the guns from the vessel. In both instances, the guns remained in their original boxes, unloaded.
5. Both Caspers and Gallagher did allow Acton and Brazeau to watch a movie while on watch. The movie may have been pornographic. But the record is clear that Caspers refused to allow a movie to be shown while the vessel was under weigh. Acton and Brazeau were watching the movie while the vessel was tied up. Gallagher did not watch the movie. When his lunch was ready he left to eat it in the day room.
6. Caspers did continually use profanities, vulgarities, and sexual references. The evidence is clear that profanities and sexual references are common at all levels in WSF up to and including administrative personnel. However, the evidence is also clear that Caspers went beyond the common "salty language" when he used fruit, vegetables and sausage as mock genitalia. MEC notes that no one had ever complained except the two oilers who brought and watched an X-rated movie

aboard. MEC also notes that inappropriate vulgar references were made by Caspers, Acton and Brazeau about specific female crew members, but Acton received no discipline.

7. Caspers did pull up deck plates near the deck openings in and through which Acton and Brazeau were working. There is convincing evidence that several deck plates are commonly removed when more than one maintenance job is being done at the same time. The polaroid prints in evidence are too small to be convincing as to whether or not the situation was hazardous for the oilers.
8. WSF presented no credible evidence that either Caspers or Gallagher "work[ed] in the presence of asbestos without taking proper precautions." The testimony of Acton and Brazeau was particularly not convincing. The evidence was preponderant that Caspers has a record of being safety conscious and of having insisted on safety precautions.
9. Whether or not Caspers violated Davis' admonition to have no contact with Acton or Brazeau is mystifying. If in fact someone did "holler 'blow job'" at Brazeau from a moving car at the ferry slip, the record is contradictory as to whether the person who "hollered" was Caspers. Even granting that such tasteless behavior and language fits with Caspers reputation, the evidence is not clear that it happened or, if so, that Caspers did it.
10. The testimony regarding the alleged theft of commuter cups from the Marriott food concession is also contradictory. The record is clear the Marriott employees gave gratuities (coffee, doughnuts, food, cards, Frisbees) to WSF engineroom employees as thanks for their assistance in repairing Marriott equipment and other favors. Marriott disclaimed any missing cups.

11. Not only were Acton and Brazeau not convincing as witnesses, but also the written record is clear that they lacked credibility in the hearing. The record is clear that they lied when they denied bringing the X-rated film aboard. Acton has filed a \$200,000 suit against WSF for harassment, which is pending. MEC gave little credence to their testimony. See Conclusion of Law No. 3, infra.

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

#### CONCLUSIONS OF LAW

1. MEC has jurisdiction over the subject matter and the parties in this case. Chapter 47.64 RCW, especially RCW 47.64.150 and 47.64.280.
2. The burden of proof where "just cause" for discipline is required now lies with WSF. Elkouri and Elkouri, How Arbitration Works, at 661 (4<sup>th</sup> ed.) Two areas of proof are required. First, proof of wrongdoing, i.e. sufficient cause; second, if wrongdoing is provable, just cause, i.e., whether or not the discipline should be upheld or modified. Ibid.
3. Because of the lack of credibility of Acton and Brazeau as witnesses, and because of Acton's self interest in attempting to prove harassment by his superiors in his suit against WSF, MEC was justified in making a negative assessment of their testimony. Parsons Contractors v. Int'l. Union of Operating Engineers, 91 LA 73, at 76 (1988).
4. Where "just cause" is not defined in the applicable bargaining agreement, MEC has repeatedly paraphrased Koven and Smith, Just Cause: The Seven Tests, (Kendall/Hunt Publishing, 1985,



passim), requiring affirmative answers to the following questions:

- 1) Did the employer give to the employee the forewarning or foreknowledge of the possible or probable disciplinary consequences of the employees' conduct?
  - 2) Was the employer's rule reasonably related to (A) the orderly, efficient, and safe operation of the employer's business, and (B) the performance that the employer might reasonably expect of the employee?
  - 3) Did the employer before administering discipline to the employee make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
  - 4) Was the employer's investigation conducted fairly and objectively?
  - 5) At the investigation did the employer decision maker obtain substantial and compelling evidence or proof that the employee was guilty as charged?
  - 6) Has the employer applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
  - 7) Was the degree of discipline in a particular case reasonably related to (A) the seriousness of the employee's proven offense and (B) the service record of the employee in his service with the employer?
5. The burden of proving the validity of the defense or excuse asserted in justification of their conduct lies with the grievants. Mississippi Lime Co., 29 LA 559, 561 (1957).

6. The quantum or level of proof required is the preponderance of credible evidence. How Arbitration Works, ibid, at 661-663.
7. MEC has consistently and conscientiously attempted not to substitute its judgment in discipline cases for that of management, unless the required tests of "just cause" are not met. Seven Tests, ibid; see also Franz Food Products, 28 LA 543, 548 (1957).
8. Because WSF failed to prove that Gallagher brought firearms aboard the ferry, and in fact Captain Boyle brought them to him. The proof of wrong-doing was not met. Therefore the firearms charge against Gallagher should be dismissed and the penalty revised. How Arbitration Works, ibid.
9. WSF did prove that Caspers brought guns aboard and did breach the letter of the rule. However, because they were never brandished and remained in their original packing boxes, and because they were brought aboard at the request of the Master of the Yakima, who was the top authority for rule enforcement aboard his vessel, when he was aboard, it is a borderline call at best as to whether the intent of the rule was breached. Seven Tests, ibid, item 2. In attempting to evaluate the question, "Has WSF applied the gun rule and penalty evenhandedly and without discrimination to all employees?", WSF stressed the danger of having firearms in the control room, but made no mention of the danger of firearms on deck where the passengers are present. MEC should ask, "Was Captain Boyle disciplined?" But Captain Boyle has retired. Then the question arises, is this a stale case? But the record is silent as to the dates of these occurrences, and the Agreement contains no statute of limitations or timeliness of discipline. Pursuant to RCW 47.64.150, MEC may not impose such a timeliness criterion of its own absent an overwhelming cause. In summary, MEC should sustain the firearms charge

against Caspers, but order a reduction of the penalty for this particular alleged firearm violation and suggest a prominent notice for both deck and engineroom crews on all WSF vessels and terminals regarding firearms.

10. MEC must conclude that the proof of wrongdoing required under "just cause" was not met in the discipline of Caspers and/or Gallagher in the case of watching a movie during a lunch break. Seven Tests, item 2, and especially 7(A), supra. MEC should disallow the discipline for the "movies charge" against both Caspers and Gallagher and adjust the penalties accordingly. How Arbitration Works, ibid. at 661.
11. After finding that WSF did provide conclusively that Caspers did constantly use "profanities, vulgarities and inappropriate sexual references," and that those acts went far beyond use of "salty language," MEC reluctantly concludes that WSF went beyond Just Cause, item 7(A) and (B) in determining the severity of penalty for this continual behavior. As distasteful as it is, MEC believes the penalty assigned to Caspers should be adjusted accordingly.
12. As pointed out in FF 7 supra, the evidence regarding the alleged hazard created by Caspers' removal of deck plates is less than convincing. Likewise, without some criteria comparing degree of hazard to distance in feet or inches, or other objective standard, MEC is unable to determine whether the threshold of hazard to Acton and Brazeau was reached. By the same token, MEC is unable to conclude that WSF did not have "sufficient cause" for discipline. How Arbitration Works, ibid. at 661. .Therefore, MEC must decline to substitute its judgment for that of management in the "deck plate" instance.

13. MEC must conclude that WSF did not provide "sufficient cause" for discipline in the asbestos charge against Caspers and/or Gallagher. How Arbitration Works, ibid. Therefore WSF could not provide "just cause" for that portion of the discipline based on the asbestos charge in either instance (ibid.) and the penalty should be adjusted.
14. Because WSF did not prove that Caspers did contact Brazeau by yelling at him from a moving car (and thereby allegedly intimidating him), the WSF did not provide "sufficient cause." Therefore WSF could not prove "just cause." Ibid. The penalty should be adjusted accordingly.
15. Because WSF failed to prove that Caspers and/or Gallagher took or received Marriott commuter cups improperly, again the penalties should be adjusted. Ibid.
16. Also, as concluded in CL 11, supra, MEC may not substitute its judgment for that of WSF management evaluating the deck plate proximity issue. Until WSF establishes some better criteria by which this kind of incident may be evaluated, the deck plate removal charge against Caspers should be sustained; but the penalty should be minimal; and the total penalty adjusted accordingly.
17. In summary, because WSF failed to prove "just cause" in its discipline of Caspers for (a) allowing a pornographic move to be watched, (b) working in the presence of asbestos without taking proper precautions, (c) contacting or attempting to contact Brazeau, and (d) receiving or taking commuter cups belonging to the Marriott Corporation, those charges should all be dismissed and the penalty reduced accordingly. The severity of the penalty should be further reduced for bringing guns aboard in violation of the little-noticed regulation but at the suggestion of the Master. The penalty should be

retained for excessive profanity, vulgarities and inappropriate sexual references, but reduced because WSF administrators also commonly used profanities which include inappropriate sexual references.

18. In summary, MEC must find that WSF did violate Section 5 of the WSF/MEBA Collective Bargaining Agreement in the discipline of Albert Gallagher. His notice of discipline should be vacated; Gallagher should be made whole from financial loss; and all records of the Gallagher charges and discipline should be purged from all WSF records, except for one copy of this decision in his personnel file.

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

#### ORDER

1. The three-day suspension of Assistant Engineer Albert Gallagher is hereby found to be without "just cause," and a violation of Section 5 of the WSF/MEBA Collective Bargaining Agreement, and is therefore ordered vacated.
2. WSF shall immediately make Albert Gallagher whole (a) by compensating him for any lost wages and other benefits; (b) by restoring any lost time on his seniority record; (c) by purging his personnel record and any other WSF files of any references to Gallagher's alleged offenses and discipline; and (d) rescinding any notation of Gallagher's alleged offenses and discipline which may have been forwarded to the U.S. Coast Guard.

3. Those portions of the grievance filed on behalf of Alternate Staff Chief Ed Caspers are hereby deemed partly to be in violation of Section 5 of the WSF/MEBA Collective Bargaining Agreement and partly sustained.
4. Those portions of Caspers' discipline based on (a) allowing a pornographic movie to be watched, (b) working in the presence of asbestos without taking proper precautions, (c) contacting or attempting to contact personnel against orders, and (d) taking or receiving commuter cups belonging to the Marriott Corporation are hereby deemed to be without just cause and in violation of Section 5 of the WSF/MEBA Collective Bargaining Agreement. Therefore, WSF shall immediately purge all such references in Caspers' personnel file and any other WSF records.
5. That portion of Caspers' discipline based on bringing guns aboard the M/V Yakima is deemed to be with sufficient cause for discipline, but the excessive discipline is without just cause.
6. That portion of Caspers' discipline based upon alleged vulgarities and inappropriate sexual references is also hereby deemed to be with sufficient cause, but the excessive discipline is deemed to be without just cause.
7. That portion of Caspers' discipline based upon alleged hazard caused by removal of deck plates is hereby sustained.
8. WSF shall immediately adjust Caspers' discipline as follows:
  - (a) You are hereby suspended for thirty-six (36) hours without pay;

- (b) Your demotion from Alternate Staff Chief Engineer to Assistant Engineer is hereby amended, to read: You are hereby demoted to Chief Engineer for a period of six (6) months; after the expiration of the foregoing suspension you may be reappointed as Alternate Staff Chief, but only if recommended by the Staff Chief Engineer;
- (c) You will be required to attend training courses, selected by management and designed to improve your supervisory skills, a maximum of twenty (20) clock hours of which shall be on your own time.
9. WSF shall immediately compensate Caspers for all wages and other benefits lost by his 3-day suspension instead of one week and shall correct his seniority record accordingly. WSF shall also compensate Caspers for the difference between any wages and benefits paid to Caspers while reduced to the pay level of Assistant Engineer and the pay level of Chief Engineer for such period of time as Caspers was reduced to Assistant Engineer pursuant to this discipline and shall correct his seniority record accordingly.
10. WSF shall amend any notice to the U.S. Coast Guard which may have been previously provided to the U.S. Coast Guard in accordance with this order.
11. For a period of two years from the date on which this order was entered, WSF may cite one or more of the foregoing proven offenses in a disciplinary action against Caspers, provided that the offense cited has relevance to any future misconduct. However, if after two years, WSF has not proven good cause for any discipline of Caspers, WSF shall purge all references to this instant matter from Caspers' personnel file and all other WSF records.

12. MEBA shall review, approve and monitor the adjustments required by this order.

DONE THIS 6<sup>th</sup> day of July 1994.

MARINE EMPLOYEES' COMMISSION

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

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner