

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION	)	MEC Case No. 21-97
OF THE PACIFIC,	)	
	)	DECISION NO. 183 - MEC
Complainant,	)	
	)	
v.	)	DECISION AND ORDER
	)	
WASHINGTON STATE FERRIES,	)	
	)	
Respondent.	)	
	)	

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

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

THIS MATTER came on regularly before the Marine Employees' Commission on June 19, 1997, when the Inlandboatmen's Union of the Pacific (IBU) filed an unfair labor practice against the Washington State Ferries (WSF).

IBU's complaint charged WSF with engaging in unfair labor practices within the meaning of RCW 47.64.130(1) by refusing to bargain collectively with representatives of employees and encouraging or discouraging membership in the employee organization by discrimination in regard to: hiring, tenure, any term or condition of employment.

Specifically, IBU alleged that WSF has committed an unfair labor practice by unilaterally changing the contractually agreed-upon selection procedure for new bargaining unit employees (contained in Appendix C of the IBU/WSF contract). IBU alleged that Eric

Conklin, Mildred Stanley, Judy Siliven and Jeff Simmons all successfully completed the steps required by Appendix C. When Dennis Conklin, IBU, asked WSF the reason for these individuals not being hired, WSF responded that Eric Conklin could not be hired because he was seventeen. IBU alleged that WSF's actions were motivated by the fact that Eric's father is IBU Business Agent Dennis Conklin. WSF offered no explanation for its decision not to hire the other three individuals. As a remedy, IBU requested that WSF be ordered to hire the four named individuals and compensate them for the wages they lost due to WSF's failure to hire them, and such other relief as the Commission deems just and proper.

### Background

On August 5, 1997 the Commission determined that the facts alleged by the complaint may constitute an unfair labor practice if later found to be true and provable. The hearing was scheduled for September 24, 1997. Commissioner John P. Sullivan was assigned as Hearing Examiner.

When the hearing convened on September 24, 1997 at 9:30 a.m., counsel representing both parties presented the hearing examiner with a partial settlement of the case pertaining to Millard Standley, Jeff Simmons and Judy Siliven; that agreement was read into the hearing record. The parties also agreed that from the date of the agreement forward, applicants for employment at WSF must be 18 years old at the time of their orientation or hire, whichever is first.

In the partial settlement as to Eric Conklin, the parties agreed that WSF will offer Eric Conklin the first available orientation in 1998 and will place him in the next available deck position according to seniority. The parties further agreed that the question of Eric Conklin's seniority number, whether it is to be

532 or 544 (which numbers correspond with the deck interim list dated 9/23/97), and any additional requested remedy, was to be decided by the MEC.

The hearing proceeded as to the charges concerning Eric Conklin.

#### POSITIONS OF THE PARTIES

##### Position of Inlandboatmen's Union

Erick Conklin was born on December 6, 1979. In May, 1996, at age 16, he received his United States Coast Guard Merchant Mariners Document. In 1996, Eric stood in line with other individuals to have his name placed on a referral list from which new deck department employees at the Washington State Ferries would be hired.

On May 15, 1997, at age 17, Eric Conklin was contacted by the WSF for an interview. Prior to the interview, he filled out his application; he was interviewed and tested, and he successfully completed all the steps required by Appendix C of the CBA. He was not, however, hired by the Washington State Ferries, ostensibly because of an unwritten WSF policy which required hirees to be 18 years of age.

By refusing to hire Eric Conklin, WSF has unilaterally changed the terms and conditions of the contractual hiring procedures, in violation of RCW 47.64.130(1). Eric Conklin is entitled to a seniority date which corresponds with the date on which he should have been given a conditional offer of employment, and is entitled to back pay.

Position of Washington State Ferries

As a hiring prerogative, WSF has the ability to turn down applicants who are under 18 years age. WSF has a longstanding, although unwritten policy of not hiring individuals who are under the age of 18. Mr. Conklin was under 18 at the Time he was interviewed for employment, and therefore he was not hired.

STATEMENT OF THE ISSUE

1. Did WSF commit an unfair labor practice within the meaning of RCW 47.64.130(1)(e), by unilaterally changing the hiring procedures negotiated between the parties to include a minimum age requirement of 18 years?
2. If the answer is yes, what is/are the remedies?

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

FINDINGS OF FACT

1. Eric J. Conklin was born on December 6, 1979. In early 1996, at age 16, Eric obtained a U.S. Merchant Mariners' Document, issued by the U.S. Coast Guard. This document entitled him to sail as an ordinary seaman, wiper or steward's department food handler.

2. In the spring of 1996, Eric Conklin waited in line with others for a change to have his name placed on an IBU referral list for individuals who wished to work for the Washington State Ferries. With limited experience, Eric's name was placed on the "C" list of referrals. He was not called by WSF for a job interview in 1996.
3. On approximately May 14, 1997, Eric Conklin was called by a secretary at WSF to schedule an appointment for an employment interview and testing, as required by Rule 2.01, Appendix C of the collective bargaining agreement. On May 16, 1997, Eric went to WSF and filled out the appropriate papers. He was interviewed and tested - a prelude to being hired.
4. Prior to his interview, Eric accurately noted his date of birth on the following documents:
  - a. WSF Personnel Questionnaire, DOB 12-06-79.
  - b. Department of Justice, Employment Eligibility Verification, DOB 12-06-79.
  - c. Authorization for Release of Personal Record Information, DOB 12-06-79.

In addition, Eric noted he was in the 11<sup>th</sup> grade and would graduate from high school in 1998.

5. WSF requested and received Eric Conklin's drivers license and U.S. Merchant Mariners' Document for review and copying. On both documents Eric's date of birth was indicated to be 12-06-79.
6. At all times, on every document he filled out or that he produced for reviewing and copying, Eric Conklin indicated to WSF he was 17 years old. All of the aforementioned

documents were reviewed by David Rice, WSF Personnel Manager, and Captain Ty Anderson just prior to the interview.

7. Rule 2.01, Appendix C of the IBU/WSF collective bargaining agreement states:

2.01 The Employer will contact the Union to obtain referrals whenever it has need of additional employees for positions covered by this agreement. The employer will then contact the applicants referred by the Union by telephone.

The following procedures will be used as a basis to determine whether to hire an applicant referred by the Union. All elements of these procedures must be job-related, and only job-related facts will be considered in making employment decisions. No single element other than failure of the drug test, will be used as the sole criterion in the hiring process absent extraordinary circumstances:

- Completion of a WSF application form;
- Completion of a background assessment questionnaire;
- A check of an applicant's references including criminal history checks, if applicable;
- A customer service skills assessment, which may include administration of a test or video test;
- A physical assessment;
- A structured oral interview;
- A drug test.

WSF will provide information to the Union regarding all modifications of selection standards prior to implementation. If requested by the Union to do so, WSF will meet with the Union to explain and discuss such modifications. The Union may request and review all documentation generated during the hiring process. Information regarding individual applicants will be kept confidential by the Union.

Applicants who successfully complete the above selection steps will be given a conditional offer of employment, subject to satisfactory completion of the WSF orientation program. WSF must have a bona fide job-related reason for determining an applicant has not satisfactorily completed the orientation program.

Those applicants who complete the orientation and are

assigned a position will receive the pay rate for the job classification specified in the labor agreement.

8. Pursuant to the contractual language, Eric Conklin successfully completed the requirements as stated in Appendix C of the CBA. There was no language regarding a minimum age requirement.
  
10. Despite fulfilling all of the bulleted items in Rule 2.01, Appendix C of the contract, Eric Conklin was not hired by WSF. According to David Rice, Eric was not hired because of a longstanding, unwritten WSF policy requiring employees to be at least 18 years of age.
  
11. Dennis Conklin is the Business Agent for the Inlandboatmen's Union and is Erick Conklin's father. Dennis worked for WSF from June, 1979 until February 15, 1991, when he became IBU's Business Agent. He was unaware of the WSF minimum age policy until May or June, 1997, when Eric Conklin was turned down for employment.
  
12. WSF employee Dave McKinsey began working for the state ferry system while he was 17 years old. In January, 1980, prior to his employment at WSF, McKinsey worked for Saga Foods, the ferry system concessionaire, in the Stewards Department. One month prior to his 18<sup>th</sup> birthday, in an emergency, McKinsey was hired by the ferry system as an ordinary seaman in order to allow the ferry to sail fully manned. Thereafter, McKinsey filed a grievance with his union. The grievance concerned his seniority date, and had nothing to do with his age at the date of his hiring. Therefore, the IBU had no knowledge at that time of WSF's unwritten minimum age policy.

13. In negotiating the 1995-1997 IBU/WSF collective bargaining agreement in 1994, in particular Appendix C, Rule 2.01, neither party discussed a minimum age requirement.
14. David Rice has had knowledge of WSF's minimum age policy since he became Personnel Manager in 1979. Rice believes that the unwritten policy originated with the Department of Transportation's unwritten minimum age policy. However, he has never told applicants that they have to be 18 years old and there is nothing in the material given to the applicants that states they must be 18 years old. Further, he has never told the IBU not to send referrals to WSF if they were under the age of 18.
15. Captain Ty Anderson has been employed by WSF since 1984 and has worked in the hiring process at WSF for 12 years. Captain Anderson first heard of WSF's unwritten minimum age policy around May 1, 1997.
16. After interviewing Eric Conklin, Captain Anderson noticed that Eric was not 18 years old and brought it to Rice's attention.
17. Jim Yearby has been the WSF Director of Human Resources since 1994. At some point, David Rice informed Mr. Yearby that Eric Conklin was not offered a job at WSF due to his age. Prior to that time, Yearby had a vague awareness of the existence of an unwritten minimum age policy, but never notified the IBU of that policy. Likewise, he had never negotiated with the IBU to change the collective bargaining agreement to include the minimum age-18 requirement in the contractual hiring procedures.



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

#### CONCLUSIONS OF LAW

1. MEC has jurisdiction over this matter pursuant to chapter 46.64 RCW generally and specifically, RCW 47.64.130 and RCW 47.64.280.
2. In the absence of a written agreement or policy, in order for past practice to be binding on both parties, it must be (1) unequivocal, (2) clearly enunciated and acted upon, (3) readily ascertainable over a reasonable period of time as a fixed practice or policy accepted by both parties. Celanese Corp. of America, 24 LA 168, 172 (Justin 1954); How Arbitration Works, Elkouri and Elkouri, 4<sup>th</sup> Ed. 1985.
3. The objective standards regarding past practice are set forth in Great Atlantic and Pacific Tea Co., 46 LA 372, 374 (1966), where Arbitrator Scheiber wrote: "Just as the proverbial solitary swallow does not make a spring or summer, so a past practice to be binding must be long continued, well understood and mutually concurred in by the parties." If there is an unwritten WSF minimum age policy, the reported basis for denying Eric Conklin employment in June, 1997, that policy has not been long continued, well understood and certainly not mutually agreed to by WSF and the IBU.
4. Evidence presented herein proves that there was no past practice that was "mutually agreeable and accepted" by the parties that limited hiring to only hose applicants who are 18 years old. Waverly Community School, 86 LA 161, 163 (Daniel 1986).

5. The IBU/WSF collective bargaining agreement is completely silent with respect to an age requirement for applicants or hirees. Because WSF's minimum age policy was both unwritten and unknown to the union until Eric Conklin, who was otherwise well qualified, was turned down for employment because of his age, the IBU could not object to this unknown policy, nor could the parties negotiate a new hiring requirement.
6. WSF's minimum age policy was not expressly or tacitly known to both parties, nor did it have the expression or tacit agreement of both parties. There can be no mutual agreement since this age policy of WSF was completely unknown to the union prior to May or June, 1997. Texas Utility Generating Div., 92 LA 1308, 1312 (McDermott 1989).
7. MEC must conclude on the basis of a preponderance of credible evidence presented at the hearing, that by its enforcement of an unwritten and unknown minimum age hiring policy, WSF has unilaterally changed the negotiated hiring requirements and thereby failed to bargain in good faith with IBU, and has committed an unfair labor practice within the meaning of RCW 47.64.130(1)(e).

ORDER

1. The complaint is sustained in part and denied in part.
2. Eric Conklin shall be awarded his seniority number of 532 as of September 23, 1997. He is entitled to a smaller or lower number if those whose seniority is lower than 532 drop out, retire or if any give up their seniority number, after September 23, 1997.

3. Eric Conklin is not entitled to any back pay.

DATED this 30<sup>th</sup> day of December 1997.

MARINE EMPLOYEES' COMMISSION

/s/ Henry L. Chiles, Jr., Chairman

/s/ John P. Sullivan, Commissioner

/s/ David E. Williams, Commissioner