

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

THEODORE MYERS,	)	MEC Case No. 17-96
	)	
Complainant,	)	
	)	DECISION NO. 169-MEC
	)	
v.	)	
	)	
INT'L ASSOCIATION OF	)	DECISION AND ORDER
MACHINISTS, DISTRICT	)	
LODGE 160, LOCAL 79 and	)	
WASHINGTON STATE FERRIES,	)	
	)	
Respondents.	)	
_____	)	

Mitchell Riese, attorney at law, appearing for and on behalf of Theodore Myers.

M. Lee Price, attorney at law, appearing for an on behalf of the International Association of Machinists, Local 79.

Christine Gregoire, Attorney General, by Gretchen Gale, Assistant Attorney General, appearing for and on behalf of Washington State Ferries.

THIS MATTER came on regularly before the Marine Employees' Commission (MEC) on November 18, 1996, when Theodore Myers charged the Washington State Ferries (WSF) with engaging in unfair labor practices within the meaning of RCW 47.64.130(1) by interfering with, restraining or coercing employees in the exercise of rights. Mr. Myers also charged the International Order of Machinists, District Lodge 160,

Local 79 (IAM) with restraining or coercing employees in the exercise of rights guaranteed by RCW 47.64.130 and with causing or attempting to cause the employer to discriminate against an employee in violation of WAC 316-45-003(1)(c).

Specifically, Theodore Myers alleges that he began the application process for employment with WSF approximately three years earlier. He has been employed at Foss Maritime for the last several years and is a member of IAM Local 79. Since submitting an application and resume to WSF and Dave Volkmann at IAM three years ago, Myers has regularly checked in with Volkmann and the foreman of the WSF maintenance shop at Eagle Harbor. About the middle of September, 1996, Myers spoke with David Volkmann about a possible machinist opening at WSF. On September 30, 1996, Mr. Myers learned that another Foss employee, with less experience and fewer qualifications, had been hired for the machinist position. Myers alleges that apparently, the union never forwarded his application and resume to WSF for consideration.

#### Remedy Sought

Mr. Myers seeks an order instating him to the machinist position for which he was not considered by WSF, and back pay from the date that should have been his initial employment, as well as attorney fees and costs incurred in pursuing this complaint.

### Background

On December 4, 1996, the Marine Employees' Commission determined that the facts alleged by Theodore Myers may constitute an unfair labor practice, if later found to be true and provable. WAC 316-45-110. Chairman Henry L. Chiles, Jr. was appointed to act as hearing examiner pursuant to WAC 316-45-130.

On December 18, 1996 MEC received a Motion to Dismiss Respondent WSF and Declaration of David Rice in Support of Motion. The Motion stated that the facts as alleged did not support the charge that WSF may have violated employee rights. WSF asserted that it had received five resumes from IAM and had one filed directly with the employer. WSF conducted interviews with each candidate, and one individual was hired from those candidates. WSF asserted that it did not receive a resume from Myers. WSF stated that it had followed the collective bargaining agreement and had not violated the Act.

A prehearing conference was held on February 13, 1997. All parties were present. Mr. Myers' counsel attended on his behalf. The issues were discussed. On March 5, 1997, MEC served a Prehearing Order and Denying WSF's Motion to Dismiss. MEC denied the employer's motion, stating that because of the remedy requested in the complaint, dismissal of the employer from the case would be inappropriate at that stage of the proceeding. The respondents filed timely answers.

A hearing was convened on April 22, 1997, by Hearing Examiner Henry L. Chiles. The parties agreed to sequester the witnesses. Transcripts were timely received. Post-hearing briefs were timely filed by the parties. The MEC carefully considered the hearing record, hearing transcript and post-hearing briefs.

#### POSITIONS OF THE PARTIES

##### Position of Complainant, Theodore Myers

Theodore Myers is a journeyman outside machinist and a member of Machinists Local 79. He is currently employed at Foss Maritime.

Mr. Myers wanted to obtain a job at the WSF shipyard at Eagle Harbor. In the past, he had worked with several mechanics who had gone to work for WSF. He visited with the Eagle Harbor Machine Shop Foreman a number of times and left a copy of his resume with Dave Volkmann, the representatives of Machinists Lodge 79 in 1994.

Mr. Myers felt he had extensive experience as an outside machinist and would be a leading candidate for a job in the WSF shop.

In September of 1996, WSF notified IAM that there was an opening at Eagle Harbor. Sometime during the first week of September, 1996, Mr. Myers met with Dave Volkmann about job openings, but Mr. Volkmann did not indicate that there were any

jobs available. Later, Mr. Myers heard that another machinist at Foss had obtained a job at WSF.

Mr. Myers and Mr. Volkmann had subsequent conversations. Volkmann requested another resume from Mr. Myers. This is the first time that Myers learned that his resume had not been submitted to WSF. The resume was provided to Dave Rice of WSF on October 7, 1996. This was the first time that WSF had a copy of Mr. Myers' resume in their possession.

When Myers then spoke again with Volkmann, he learned that his resume was not available, and therefore not among the five which were submitted to WSF.

Mr. Myers alleges that there was a pre-existing, close relationship between the successful candidate, Doug Easterday, and Coe Morgan, President of Local 79. As a result of this close relationship, there was a prearranged plan to have Doug Easterday placed in the job at WSF. Dave Volkmann failed to present Mr. Myers' resume to WSF, as he had for Doug Easterday, in spite of the fact that Myers had greater qualifications for the position. By failing to dispatch Mr. Myers to WSF for consideration of employment, IAM has breached its duty of fair representation. Mr. Myers requests that he be instated to the job at WSF and have his wages made whole, and seeks attorney's fees and costs.

Position of IAM Local 79

The respondents deny that any unfair labor practice was committed. The complainant, Theodore Myers, is a member of IAM Local 79 and employed at Foss Maritime. Myers wanted a job at WSF. He was not a member of the bargaining unit covered by the IAM/WSF collective bargaining agreement.

Myers began to visit the Eagle Harbor Shop of WSF to let the foreman know that he was interested in employment. He also talked with Business Representative Dave Volkmann of Local 979 and left a resume with him.

On September 10, 1996, Volkmann was contacted by Dave Rice of WSF, who indicated that there were one or two openings at Eagle Harbor. Rice asked him to send resumes he had. The collective bargaining agreement required WSF to give notice to Local 79 of any openings. However, WSF was not precluded from considering anyone they chose, union or non-union.

As a result of Rice's request, Volkmann located a file which contained the resumes of qualified individuals. He found resumes of five individuals, but Theodore Myers' resume was not among them. He looked further, but did not find it. Volkmann was in the process of moving his offices and his files were in some disarray. On September 11, 1996, he took five resumes to Dave Rice. Volkmann told Rice he had one more to

Submit. He was not, however, aware of any time restrictions on the selection of a new machinist for Eagle Harbor.

Mr. Volkmann attended a Machinists' Convention in Chicago from September 18 to September 29, 1996. While he was out of town, interviews for the WSF machinists position had taken place on September 27, 1996. Myers called Volkmann on September 30 and informed him that Doug Easterday had been hired for the position. Mr. Volkmann was not aware of the hire. Volkmann asked Myers for another resume, which was delivered to Dave Rice; but by that time, the selection process had been finalized.

Volkmann did not have any conversations with Rice about who to select. Myers alleged that Coe Morgan, President of IAM Local 79, had some input into the decision to hire Easterday. Morgan did not have any contact with WSF about the job. Only WSF personnel had any input in the hiring process.

IAM contends that the complainant has failed to sustain his burden of proof that an unfair labor practice was committed. Myers failed to establish discrimination. Myers tried, but failed to establish some collusion between IAM and WSF.

The only established proof is that Volkmann misplaced Myers' resume and provided it to WSF after a hiring decision had been made. This act does not rise to the level of breach of the duty of fair representation.

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Myers was not a member of the bargaining unit and the duty of fair representation does not apply to him in these circumstances. The union was neither arbitrary nor discriminatory. Volkmann may have made an error in judgment about not asking for another resume earlier and submitting it for consideration, but his conduct was not arbitrary.

The complainant has failed to establish the burden of proof against IAM. IAM's actions were neither arbitrary or discriminatory or in reckless disregard of the rights of Myers.

Position of Washington State Ferries

It is the position of WSF that the complainant failed to demonstrate any wrongdoing by WSF. Instatement is therefore not a valid remedy. WSF filled the vacant position lawfully, and in harmony with the agreement with the union.

WSF complied with the collective bargaining agreement and made its selection lawfully. WSF did not engage in unfair labor practices and is not responsible for any alleged injuries by the complainant. WSF renews its request for dismissal of all claims against WSF.



## STATEMENT OF THE ISSUE

- (1) Did IAM Local 79 breach its duty of fair representation to its member Theodore Myers by failing to submit his resume to WSF when, pursuant to the collective bargaining agreement, the employer notified IAM of an open position at the WSF Eagle Harbor shipyard facility and requested that the Union forward resumes of qualified candidates? If so, what is the proper remedy?
- (2) Did the Washington State Ferries commit unfair labor practices by its actions in hiring a machinist for an open position at its Eagle Harbor shipyard facility? If so, what is the proper remedy?

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. Theodore Myers is a journeyman outside machinist employed by Foss Maritime. He is a member of the International Association of Machinists, Local 79. In September, 1996, he was an applicant for employment at WSF.
2. IAM and WSF are parties to a collective bargaining agreement. In Article IV, Hiring of New Employees:

Section 1. The employer agrees that, when additional employees are required, the Union will be given twenty-four (24) hours notice in advance so that the Union may have a reasonable opportunity to refer applicants for employment. Such notice shall specify the number and qualifications of the employees required and the Union agrees that it will refer experienced applicants when available, to the Employer.

3. The union refers, but does not “dispatch” members to WSF, and thus does not operate an exclusive hiring hall. Individual candidates are free to file resumes directly with WSF.
4. Since 1994, Myers visited with the WSF Shop Foreman at Eagle Harbor several times to inquire about employment. He left a resume. He also submitted a completed WSF application and resume to Dave Volkmann, Business Representative of IAM Local 79. On some unspecified date, Mr. Myers also attempted to leave a resume at the WSF receptionists desk. He was erroneously told by the receptionist that WSF did not keep resumes on file.
5. On September 10, 1996, WSF notified IAM Local 79 that it had a vacancy in the Eagle Harbor Machinist Shop. At that time, WSF had one resume on file which had been submitted to WSF directly.
6. As a result of this notice, Dave Volkmann searched his files and found five resumes. He realized Mr. Myers’ resume was not among them. Volkmann was in the process of moving out of one office and into two different locations due to the retirement of two other business representatives; his files were in disarray. He searched his office, but was unable to locate Myers’ resume. He brought the five resumes to Mr. Rice at WSF and told him he intended to submit one more resume. Thereafter, he searched his Seattle and Everett offices again, but did not locate Myers’ resume. From September 18 through 29, 1996, Volkmann attended an out-of-town union convention. Volkmann was not aware of any time restrictions on the submission of resumes. He intended to locate and submit Mr. Myers’ resume to WSF when he returned from the convention. Volkmann did not ask Mr. Myers for another resume because he believed that when he returned from the convention he would have time to search for the resume. He additionally was embarrassed by the fact that he was unable to locate Myers’ resume.

7. On September 27, 1996, a WSF management panel consisting of Eagle Harbor Yard Superintendent Paul Kressin, Assistant Yard Superintendent Harold Hix, Machine Shop Lead Jeff Thompson, and WSF Personnel Manager Dave Rice interviewed all five of the applicants referred by the Union, and the one applicant whose resume had been submitted directly to the employer. Thereafter, WSF selected an individual for the opening in the Eagle Harbor Machine Shop, subject to the person passing a drug test.
8. Sometime thereafter, Theodore Myers was informed that Doug Easterday had been hired for the Eagle Harbor position. On September 30, Myers informed Dave Volkmann that a selection had been made. Volkmann, having just returned from his Union convention, was not aware of the selection. Volkmann asked for and received another resume from Myers the following day. Volkmann delivered the resume in person to Dave Rice's office at WSF.
9. WSF did not see Theodore Myers' resume before interviewing six candidates and ultimately selecting Doug Easterday for the machine shop position. The WSF management panel considered the candidates on the basis of their applications, resumes and interviews, and made their selection without input from union officials.
10. Five Foss Maritime employees who had witnessed the relationship between Coe Morgan and Doug Easterday testified about the content of off the record, "shop talk" conversations, consisting primarily of how Coe Morgan used his influence to secure the WSF position on Mr. Easterday's behalf. Their testimony, offered as evidence of collusion between the Union and the ferry system, was vague "shop talk" and not substantial enough to be given any serious weight.
11. Doug Easterday did not hide his desire to work at the WSF shipyard facility. Like Mr. Myers, he had on several occasions visited the Eagle Harbor shipyard

and spoken to the shop foreman. He had submitted a resume to Dave Volkmann as well. When he understood from other WSF shipyard employees that an opening was imminent, he sought and received a letter of recommendation from Coe Morgan, with whom he worked at Foss. After receiving Mr. Easterday's resume, Dave Volkmann made an effort to speak with him at Foss Maritime about potential employment at the ferry system shipyard because of his youth and because he had only recently completed his apprenticeship. Volkmann wanted to assure himself that Easterday was a qualified candidate for a position at WSF.

12. Easterday's request for a letter of recommendation from Coe Morgan was standard, inasmuch as he had been the local president for fourteen years, and often provided "generic" recommendation letters when asked. Easterday had not otherwise sought Morgan's assistance in obtaining a job at WSF because Morgan "didn't know anybody at the ferries." Morgan had no conversations with Dave Volkmann about Easterday's or Myers' interest in the WSF position. He did not recall any conversations in which he indicated he knew in advance that Easterday would be the successful candidate.

Having entered the foregoing findings of fact, the Commission now enters the following Conclusions of Law.

#### CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction over the parties and subject matter in this case. Chapter 47.64 RCW; especially RCW 47.64.130 and 47.64.280.
2. WSF fulfilled its contractual obligation to notify the Union of an opening at the Eagle Harbor shipyard facility. Article IV, Hiring of New Employees, Section 1.

Thereafter, WSF management acted properly. It did not violate any rights guaranteed under the RCW 47.64.130, nor did it discriminate against Mr. Myers by its actions in hiring Doug Easterday.

3. IAM Local 79's action in processing Myers' resume may have been mere negligence, but it was not done in bad faith. The union's action was not arbitrary, capricious or discriminatory. Mere negligence alone is not enough to find a violation. Great Western Unifreight System, 209 NLRB NO. 446 (1974).
4. The off the record, "shop talk" statements offered by the complainant as proof of collusion between the Union and the Washington State Ferries were also insufficient to support a finding that IAM Local 79 breached its duty of fair representation or that WSF by its actions in hiring Mr. Easterday, had discriminated against Mr. Myers. The WSF management panel made their decision to hire Mr. Easterday on the basis of their interviews and criteria established by WSF management.
5. The complainant has failed to establish by a preponderance of the evidence that Washington State Ferries' management acted under the influence of IAM Local 79 or its union officials when it sought, considered and selected candidates for the position of an Eagle Harbor Machine Shop position.
6. The complainant has failed to establish by a preponderance of the evidence that IAM Local 79 union officials' failure to submit Theodore Myers' resume to the Washington State Ferries, was done in order to control or influence the final selection of machine shop vacancy, in violation of RCW 47.64.130.

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

ORDER

1. The unfair labor practice charges filed by Theodore Myers on November 18, 1996 against the Washington State Ferries and docketed as MEC Case No. 17-96, are without merit and are hereby dismissed.
2. The unfair labor practice charges filed by Theodore Myers on November 18, 1996 against the International Association of Machinists, Local 79 and docketed as MEC Case No. 17-96, are without merit and are hereby dismissed.
3. Having failed to prove the facts as alleged in his unfair labor practice complaint by a preponderance of the evidence, the complainant's request for back pay and attorney's fees and costs are hereby denied.

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

MARINE EMPLOYEES' COMMISSION

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

/s/ JOHN P. SULLIVAN, Commissioner

/s/ DAVID E. WILLIAMS, Commissioner